A CHRONOLOGICAL AND SUBJECT ANALYSIS OF SOUTH AFRICA'S MULTILATERAL AND BILATERAL TREATIES, 1806-1979

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ABSTRACT

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This dissertation attempts to place South Africa's treaty-making powers in both constitutional and historical perspective for the period 1806-1979. It also provides a chronological list of its treaties and an index which aims to ensure easy retrieval. Section I comprises four chapters, in which the constitutional development and treaty-making powers of the British Colonies, the Boer Republics, the Union of South Africa, the Republic of South Africa and the 'independent' national states of Transkei, Bophuthatswana and Venda are traced. In Section II, a chronological index is presented comprising the date of signature, date of entry into force, ratifications (if any), place of signature, signatory country (or multilateral status), title of treaty and source(s) where the text may be located. Section III provides a detailed index to both the subject and the bilateral partner. In this way a comprehensive picture of South Africa's international relations for the period under review may be ascertained.

DECLARATION

I declare that this dissertation is my own, unaided work. It is being submitted for the degree of Master of Arts in the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in any other University.

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_____ day of _____, 19___.

For my Parents Harold and Eve, and Paul with love

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PREFACE

This dissertation arose out of a librarian's desire for order and to facilitate ease of access to the texts of South Africa's treaties, formerly a formidable task. Until the publication by the South African Institute of International Affairs in 1978 and 1980 respectively, of my Index to the Union of South Africa Treaty Series, 1926-1960 and Index to the Republic of South Africa Treaty Series 1961-1979, there was no easy access to South Africa's treaties for the scholar, lawyer or historian. As these indexes pertain only to the published South African Treaty Series, and not to all of its multilateral or bilateral treaties, it was decided to embark upon a more comprehensive study to encompass the period 1806-1979.

As a complement to the chronological listing of treaties and its index, an analytical component is also provided. For the first time, South Africa's treaties are drawn together and placed, where possible, in both historical and constitutional perspective. As this work commences in 1806, it traces the development of British colonial treaty-making powers, and those of the two Boer Republics, the Orange Free State and the South African Republic prior to the development of South Africa's treaty-making powers, 1910-1979.

I should like to acknowledge with deep gratitude, the supervision and encouragement given to me in this work by Professor John Dugard, Director of the Centre for Applied Legal Studies at the University of the Witwatersrand. I wish also to extend my thanks to Professor Reuben Musiker, University Librarian, for his helpful advice; to those numerous librarians at both the University of the Witwatersrand and the Johannesburg Public Library, and in particular Shelagh de Wet and Carol Leigh, who have patiently assisted me;

to Professor John Barratt, Professor Peter Vale and Dr. Paul Rich for their support; to Cathy Viljoen and Kathy Kovacevich for typing the manuscript so efficiently; and to the Department of Foreign Affairs, in particular Mr. Olivier, for allowing me to ascertain the current status of many of the treaties.

I sincerely thank my friends, Lenna Janicki who graciously gave up many of her weekends to proofread the manuscript with me, and Elna Schoeman, International Organizations Librarian at Jan Smuts House, who assisted me generously with both checking and proofreading. Special thanks are due to my parents, without whose encouragement this work would have remained but an idea.

EXPLANATORY NOTES

I Chronological Index

Treaties and international agreements, as well as select state papers relevant to extra-territorial matters, are listed in the order of the dates on which they were signed. Each item has been allocated a specific number for ease of reference, together with its relevant code, i.e.:

B	-	Bophuthatswana
C	-	Cape
N	-	Natal
O	-	Orange Free State
RSA	-	Republic of South Africa
SA	-	Union of South Africa
T	-	Transkei
V	-	Venda
Z	-	South African Republic

The Chronological Index includes the following information:-

a) Date - year, day, month

(i) Two dates divided by a stroke indicate an exchange of notes on the two days specified.

e.g. 1932

2 Mar/16 Mar

(ii) Two dates joined by a hyphen indicate the first and last dates in a series of exchange of notes.

e.g. 1956

1-15 Dec

b) If South Africa signed or acceded to a treaty on a date different to the original date of signature, this is designated by the letters SA followed by the date of signature by South Africa.

e.g. 1926

24 Apr
SA: 31 Dec 1932

c) Date of entry into force is indicated by the second date, unless South Africa signed or acceded to a treaty on a date different to the original date of signature (see b) above), in which case the date of entry into force will take third place.

e.g. 1930

12 Apr
11 Oct 1937

or 1930

12 Apr
SA: 9 Oct 1935
25 May 1937

d) Ratifications (if any) are indicated by an R followed by the date.

e.g. 1926

24 Apr
SA: 31 Dec 1932
31 Dec 1933
R: 31 Dec 1932

The term P/R has been used in the early Cape treaties to indicate provisional ratification.

e) Place of signature

(i) Two places divided by a stroke indicate two places of signing.

e.g. Pretoria/Washington

(ii) If places relate to one date only, the treaty was signed in two places on the same date. If two places relate to two dates, the treaty was signed on the first date in the first place, and on the second date in the second place.

e.g. 1942

16 Mar/4 Nov
1 Jan 1943
Dublin/Pretoria

f) It is understood that South Africa is party to all the treaties listed. The other party is expressly mentioned, or multilateral in character.

g) Title of treaty.

h) Reference(s) where treaty can be located.

i) Amendments, extensions, addenda, etc. (if any).
For the user's convenience, the tracing of the South African Treaty Series is indicated in brackets to the same aspect of the treaty. In the case of unnumbered treaties, the date of the treaty is given.

e.g. 2/1931 (23 Sept 1928; 5/1943).

j) The status of treaties between 1910 and 1979 have been checked against the holdings of the Department of Foreign Affairs and termination has been indicated. Should the word terminated not appear, the treaty should be considered valid as of the compilation date of this index.

Examples:

a) 2 Dec
c) 10 Nov 1948
d) R: 5 May 1948
e) Washington
f) Multilateral
g) International Convention for the Regulation of Whaling.
h) South African Treaty Series, 6/1949.
i) (2/1957).
j) Still current.

1946

a) 22 July
b) SA: 19 Mar 1948
c) 22 July
e) New York
f) Multilateral
g) Arrangement concluded by the Governments represented at the International Health Conference.
h) South African Treaty Series, 25/1947.

1949

a) 21 Jan/4 Feb
c) 1 Jan
e) Salisbury/Cape Town
f) Southern Rhodesia
g) Exchange of notes between the Government of the Union of South Africa and the Government of Rhodesia providing for reciprocity in matters relating to compensation for workmen.
h) South African Treaty Series, 12/1949.
i) (11/1958).
j) Terminated.

II Subject Index

This detailed index follows an alphabetical arrangement and consists of two types of main headings arranged in one sequence:-

a) Names of countries party to treaties with South Africa, qualified by subject and relevant treaty number.

e.g. AUSTRALIA
Aviation SA 837

b) Subject of the treaties, qualified by the country party to the treaty with South Africa.

e.g. AVIATION
Australia SA 837

c) In the case of pre-1910 treaties, it is advisable to look first under the British colony, Boer republic or territory concerned, as these contain more detailed entries. Slashes denote identical texts.

d) It is understood that Great Britain was involved in many aspects of treaty-making until 1926. This aspect has not, therefore, been separately indexed apart from extradition treaties.

Note:

The following numbers from the South African Treaty Series are not available from the University of the Witwatersrand, the Johannesburg Public Library, the Department of Foreign Affairs, the State Library or the Library of Parliament, and thus they have been deemed not published for the purpose of this work:-

8/1931; 2/1934; 3/1934; 17/1935; 8/1936; 1/1940; 2/1940; 3/1941; 25/1950; 28/1950; 29/1950; 31/1950; 6/1952; 7/1952; 10/1952; 14/1952; 5/1954; 6/1954; 9/1954; 10/1954; 2/1960; 3/1961; 7/1963; 1/1967; 9/1967; 2/1975.

LIST OF ABBREVIATIONS

Abbreviation	Reference
B	Bophuthatswana
Basutoland Records	Theal, George McCall, comp. Basutoland Records.
Bevans	United States. Dept of State Treaties and Other International Agreements of the United States of America.
Bird	Bird, John The Annals of Natal, 1495-1845.
British and Foreign State Papers	Great Britain. Foreign and Commonwealth Office British and Foreign State Papers.
Brownlie	Brownlie, Ian African Boundaries: A Legal and Diplomatic Encyclopaedia.
C	Cape
Cape Colony Records	Theal, George McCall, comp. Cape Colony Records.
Consolidated Treaty Series	Parry, Clive, ed. Consolidated Treaty Series.
Executive Agreement Series	United States. Dept of State Executive Agreement Series.
Eybers	Eybers, G.W. Select Constitutional Documents Illustrating South African History, 1795-1910.
Handbook of Commercial Treaties	Great Britain. Foreign Office Handbook of Commercial Treaties, etc. with Foreign Powers.
Hertslet's Commercial Treaties Hertslet's Treaties	Hertslet's Commercial Treaties. A Collection of Treaties and Conventions Petween Great Britain and Foreign Powers, and of the Laws, Decrees, Orders in Council, &c., Concerning the Same, So Far as they Relate to Commerce and Navigation, Slavery, Extradition, Nationality, Copyright, Postal Matters, &c., and to the Privileges and Interests of the Subjects of the High Contracting Parties. Compiled from Authentic Documents...
Kock	Kock, Antonius Francois, comp. Verdragen der Zuid-Afrikaansche Republiek.
Kruger	Kruger, Hendrik Johannes Philippus Lubbe Customs Unions in South Africa.
Leyds	Leyds, W.J. The Transvaal Surrounded.
N	Natal

Nouveau Recueil Général de Traités	Martens, G.F. von, ed. Nouveau Recueil Général de Traités.
O	Orange Free State
P/R	Provisional Ratification
R	Ratified
Rev	Revised
RSA	Republic of South Africa
SA	Union of South Africa
SA:	Date of South Africa's accession
South African Treaties, Conventions, Agreements and State Papers	Cape of Good Hope (Colony) South African Treaties, Conventions, Agreements and State Papers Subsisting on the 1st day of September, 1898.
Suppl	Supplement
T	Transkei
Treaties between Cape Governors and Native Chieftains	Cape of Good Hope (Colony) Treaties Entered Into by Governors of the Colony of the Cape of Good Hope and Other British Authorities with Native Chieftains, and Others Beyond the Border of the Colony Between the Years 1803 and 1854.
United Kingdom Treaty Series	Great Britain Treaty Series
V	Venda
Z	South African Republic

LIST OF TABLES

1 : BRITISH COLONIES

1.1 Colonial Constitutional Development Prior to 1910 and Implications for Treaty-Making Powers

The development of self-government in the British colonies proved to be a protracted issue, and one which may conveniently be divided into various stages. Restriction of colonial rights and the minute supervision by Great Britain over colonial affairs were gradually eroded, until the colonies achieved a large measure of self-government culminating in independence.

In the early phase of colonial administration, Crown Colony rule was implemented over newly acquired or ceded possessions. Although Sir Kenneth Roberts-Wray regards this term as vague and to be avoided, he defines Crown Colony rule as one in which the authority of the Crown was unimpaired.[1] The appointed Governor, while bearing responsibility for daily administration, was answerable to the British Government in matters both legislative and executive. He initially ruled by proclamation and was empowered to enter into treaties with native tribes. Lord Charles Somerset was a governor with such autocratic powers.

The British Government included the British overseas possessions in conventions negotiated for the United Kingdom. This was particularly evident in the many extradition treaties, and also in those of trade and commerce, where most-favoured-nation treatment was extended to the

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1. Roberts-Wray, Sir Kenneth. Commonwealth and Colonial Law. London: Stevens, 1966, p. 45.

colonies unless otherwise specified.

Inter-colonial relations were regulated by the inter-se doctrine which was propounded in order to secure imperial unity. It meant that all agreements concluded between the self-governing colonies, and later Commonwealth countries, were not regarded as international treaties governed by international law.

Representative government clearly did not satisfy the desire of the people for self-government, and a new era in the relationship between Great Britain and her colonies was heralded by the introduction of responsible government. The executive, formerly in the hands of the Imperial Government, was now controlled by the chosen representatives of the people. Colonies upon which this sytem of government was conferred, enjoyed greater liberty of legislation, but were still subject in certain instances, to the Imperial Government.

Responsible government was the product of the Durham Report of 1839, which proved to be a landmark in British imperial history. Lord Durham was sent to Canada with the express task of formulating proposals for the future government of the country, as a result of the rebellions of 1837 over the operation of representative institutions. Lord Durham's investigations revealed a constant conflict between the executive and the legislature and for this reason he proposed that the Governor should chose ministers who had the confidence of their legislatures. He did not envisage that these ministers should accept responsibility for matters of Imperial concern such as constitutional amendments, external affairs, external trade, defence and the like, but he considered they should be responsible

in all local matters. As a consequence of this Report, the North American colonies received self-government. This was later extended to Australia, New Zealand and South Africa.

According to Strong,[2] this method of solving the problem of continued connection between Britain and her colonies went much further than its originators intended. As mentioned previously, the Imperial Government did not immediately relinquish all control over the colonies by the granting of self-government. This was regulated by the Colonial Laws Validity Act of 1865 which 'was passed to make clear the exact force of the vague rule imposed from the beginning of colonial legislation on legislatures that their legislation was to be in accord with the principles of English law.'[3] As this proved difficult to enforce, the British Government clarified the issue 'by making it clear that repugnance of colonial legislation was to be confined to repugnance to statutory enactments, including orders, rules, and regulations made under such measures which were explicitly or by necessary intendment applicable to the colonies.'[4] The Imperial Government reserved the right to legislate for the whole Empire and the colonies were placed under restrictions concerning judicial appeals, and executive action in foreign affairs. This reinforced the controlling influence of the Imperial Government and the establishment of uniformity in Colonial policy. Declarations of peace and war similarly rested with the Imperial Government.

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2. Strong, C.F. Modern Political Constitutions, 6th Ed. London: Sidgwick and Jackson, 1963, p. 243.
3. Keith, A. The Dominions as Sovereign States. London: Macmillan, 1938, p. 73.
4. Keith, A. op. cit. p. 73.

The colonies were thus forbidden to pass laws with extra-territorial effect. These included extradition, bankruptcy, naturalization, foreign enlistment, merchant shipping and copyright. Assistance in these matters was required from the Imperial Parliament by legislating for the whole Empire, or by coming to the help of specific colonial legislatures.[5] The Imperial Parliament retained exclusive control over foreign relations of a political nature. All treaties of this nature concluded by the Crown, on the advice of the Imperial Ministry, were binding on the colonies. The right of separate adherence by certain colonies only was recognized in certain treaties, but this was not always adopted. Co-operation with colonial governments however, was imperative where it entailed an alteration in the law of the land, or in issues concerning British citizens. Such treaties necessitated legislation, either in the form of the Imperial Parliament providing for the entire Empire, or by legislation enacted by the colony concerned.

A greater degree of autonomy developed in respect of commercial and technical treaties. Canada again proved to be the forerunner. In the so-called Reciprocity Treaty, a trade agreement was concluded between Canada and the United States in 1854. Lord Elgin, Canadian Governor-General acted essentially as requested by his ministry, in accordance with the system of responsible government. The treaty was British in form '... but it recognized that each part of the Empire was distinct in interests and it definitely established the doctrine that it was proper that special treaties should be negotiated for colonies which required them.'[6]

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5. Lewis, M. The International Status of the British Self-Governing Dominions. British Yearbook of International Law, vol. 3, 1922/23, p. 22.

6. Keith, A. op. cit. p. 38.

In 1859 the Canadian Government proposed to establish a general all-round protective tariff against imported goods. This tariff was to apply not only to goods from foreign countries but also goods from other British colonies, and even from Great Britain itself. This Tariff Act was approved, after some demur, by Great Britain and proved to be an important victory in the control of international trade.

In 1870, an address was introduced in the Canadian House of Commons urging the necessity of obtaining from the Imperial Government, powers which would enable the Canadian Government to enter into direct communication with other British possessions, and with foreign powers over trade and commercial issues. An amendment was carried emphasizing the need 'for concurrent action of the Imperial and Canadian Governments.'[7]

In 1871, Sir John Macdonald, Canada's Prime Minister was appointed to serve as a British delegate on a Joint High Commission with the United States of America. This was concerned, inter alia with the Atlantic fisheries of Canada. Macdonald obtained results for Canada in the so-called Treaty of Washington (1872) which would not have been obtained had he not been present. In the period 1871 to 1873 Australia also expressed its desire to see the treaty-making power modified, to allow the Colonies to make reciprocal trade agreements. In 1877 an agreement was reached between Canada and the Imperial Government, that commercial treaties concluded by Great Britain would not automatically apply to Canada. This agreement was immediately extended to all British self-governing colonies.

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7. Tupper, Sir Charles. Treaty-Making Power of the Dominions. Society of Comparative Legislation. Journal, January 1917, p.6.

All such treaties thereafter contained a clause providing for separate adherence within a period of two years. This right was first exercised in 1882 in a treaty between Great Britain and the now defunct state of Montenegro.

By 1884, the negotiation of treaties reached a significant milestone when it was agreed that the Colonial representative had the power to sign a treaty together with the British ambassador. Since 1854 it had been the practice to associate a Colonial representative with the British ambassador to the country concerned, during the negotiations on commercial treaties. This Imperial assistance was further greatly modified as a result of the Colonial Secretary, Lord Ripon's reply to the proposals of the Colonial governments assembled at the Ottawa Colonial Conference of 1894. He laid down important principles[8] in his Dispatch of 28 June 1895 which were to govern relations until the Great War.

These principles may be summarized as follows. Lord Ripon asserted that the colonies neither desired, nor would it be possible to give them the treaty power, since that would result in the destruction of Imperial unity. Secondly, that separate treaties could properly be made for colonies which desired them. Thirdly, that in such treaties colonies should not accept concessions which would operate detrimentally to the interests of the other parts of the Empire. Fourthly, that any concessions made to foreign powers should be extended forthwith to all other

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8. 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. Great Britain. Parliament. Command Papers, C. 7824 of July 1895.

powers entitled by treaty to most-favoured-nation treatment; and finally that such concessions should be granted gratis to other parts of the Empire.[9]

The authority to negotiate, sign and ratify such treaties, remained the prerogative of the Imperial Government, consequently this method was still not entirely satisfactory to the colonies.

Complementary to the right of separate adherence, was the right of separate withdrawal. This appeared much later and it was only in 1899 that colonies were granted this right, which first appeared in a treaty concluded between Great Britain and Uruguay. It entailed giving one year's notice and also ensuring that by such a withdrawal, the validity of the treaty for the entire Empire was not affected.

In 1907, the colonies won further concessions when it was agreed that the Colonial representative could negotiate treaties without the assistance of the British negotiator. Signature was still in the hands of the Imperial Government, as was ratification after joint consultation between both the Colonial and Imperial representatives. Canada circumvented this method of control by entering into a series of informal agreements, which were followed by legislative action but not concluded as formal treaties.

Colonial representatives were permitted to participate in international conferences of a non-political and administrative nature. An example of this was the Universal Postal Union where colonies were able to exercise a vote.

These hard-won rights did not, however, confer international legal personality on the colonies. Many of the treaties directly negotiated by the colonies were mainly of minor importance. Oppenheim states that the colonies

'... although in a somewhat anomalous position... simply exercised for the matters in question the treaty-making power of the mother country which had been to that extent delegated to them.'[10]

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9. Principles summarized in Keith, A. op. cit. p. 8.

10. Oppenheim, L. International Law, vol. 1, 8th ed. London: Longmans, 1955, p. 198.

1.2 Cape Colony

1.2.1 Constitutional Development and Treaty-Making Powers

The peaceful isolation enjoyed by the Cape Colony since its establishment in 1652 as a refreshment station for Dutch East India traders en route from Europe to India, came to an end in the late eighteenth century. Its strategic position decreed that it became a pawn on the political chessboard and it was twice occupied by the British during the Napoleonic wars in 1795 and 1806 (Treaty no. C1) a[illegible]formally ceded by the Netherlands to Great Britain in 1814 (Treaty

As was customary with recently conquered or newly ceded possessions to Great Britain, Crown Colony rule was implemented. It is described by Hahlo and Kahn as 'the centralising of governmental powers in a Governor virtually all powerful save as to directions from a Colonial Secretary ninety days' sail away. Subject to orders in council, letters patent and the Royal instructions, he legislated at his good will and pleasure by proclamation.'[1] He was furthermore responsible for making appointments, suspending or dismissing all officials other than the President of the High Court, hearing criminal appeals with the assistance of two assessors, and subject to a further appeal in certain cases to the Judicial Committee of the Privy Council, could sit with the Lieutenant-Governor as a court of civic appeal. He could also dispute the control of the troops with the General.[2]

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1. Hahlo, H.R. and Kahn, E. The Union of South Africa. London: Stevens, 1960, p. 51.

2. Walker, E. A History of Southern Africa. London: Longmans, 1959, p. 140-141.

The prolonged period of Crown Colony administration was punctuated by several important constitutional and judicial changes which are important as they both established the pattern of development for the Colony, and they were partly responsible for the Great Trek and the subsequent break-up of the Colony. Changes to be noted are the introduction of an Advisory Council in 1825, similar in nature to one established in New South Wales two years previously. It comprised the Governor, the Chief Justice and leading officials such as the Colonial Secretary, the Officer Commanding, the Deputy-Quartermaster General, the Auditor-General and the Treasurer. Ordinances were thereafter to be passed instead of the proclamations issued by the Governor alone. His autocratic power was not fully curtailed however, as he retained the right of independent action during an emergency, and could reject the advice of the Council. It did not satisfy the growing demand for representative government but as Marquard indicates '... it was the beginning of the long process of passing from the government by one man to parliamentary rule; and the officials whose advice had been rejected had the right to record that fact.'[3]

1828 witnessed the right to a free press and local administrative and judicial systems were reformed. A stable judicial system was ensured by the establishment of a Supreme Court with the Chief Justice and two judges independent of the executive; an Attorney-General; the insistence that judges now had to be qualified lawyers and the establishment of the jury system. In local administration resident magistrates replaced the former post of landdrost. They were granted limited jurisdiction in both civil and criminal cases; and appeals lay from the circuit courts to the Cape Town

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3. Marquard, L. The Story of South Africa. London: Faber and Faber, 1966, p. 115.

Supreme Court, and from thence to the British Privy Council.

In 1834 letters patent were issued for a nominated Legislative Council, and Sir Benjamin D'Urban was responsible for putting the new constitution into effect. It set the pattern for the next twenty years. It comprised an Executive Council of the Governor and four officials and a Legislative Council which also included the same officials, the Attorney-General and from five to seven unofficial nominees. Its consent was necessary for legislation and in theory the Governor's powers were considerably curtailed but he retained both the deliberative and casting vote, and he continued to wield great power. The Crown reserved the right to legislate over the Colony and of disallowance. All ordinances were subject to Crown approval within a three-year period, failing which they would automatically lapse.

In 1849 the decision to confer representative government was reached, and in 1853 the necessary formal steps were completed for the implementation of a new constitution. This provided for a bi cameral system in the form of a House of Assembly and a Legislative Council, both elected by males over the age of twenty one irrespective of colour who earned £50 per annum, or who owned property with a rentable value of £25 a year. Voting was on an oral basis. The upper house or Legislative Council comprised fifteen members, eight elected by the Western and seven by the Eastern District, and was presided over by the Chief Justice. The House of Assembly was composed of forty-six members holding office for a five-year period dependent on the House being dissolved earlier or simultaneously with the Council. The Governor's powers were narrowed and included the power to dissolve parliament, to veto legislation, or to reserve it for the approval or disapproval of the Crown. The ultimate power of the Imperial Parliament remained unimpaired (corresponding to the provisions of the Colonial Laws Validity

Act of 1865), and Orders-in-Council when used thereafter 'related to extra-territorial matters or those arising from international conventions with regard to which the local legislature had no competence.'[4]

The 1853 Constitution served the Cape until Union in 1910 but there were several important amendments. A select committee of the Assembly in 1855 found that responsible government could be implemented simply by amending Section 79 of the Constitution, thus enabling the Executive Council to hold seats in the Legislature.[5] The advent of full responsible government, despite the fact that North America and Australia had long achieved that status, was delayed until 1872 when it passed by a single vote. Post 1872 constitutional developments included the alteration of Parliament's composition, a tightening of the liberal franchise qualifications, the introduction of a secret voting ballot, and the clearer definition of the rights and privileges of the two houses by the Powers and Privileges of Parliament Act, 1883.

1.2.2 Boundaries and Treaties with Local Chiefdoms

The boundary line around the refreshment station established at the Cape was originally demarcated by a bitter almond hedge planted to contain the settlement. The boundaries soon expanded especially after 1657 when selected servants of the Dutch East India Company were granted 'letters of freedom' which enabled them to settle permanently at the Cape as farmers, traders or artisans. The villages of Stellenbosch, Swellendam and

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4. Cambridge History of the British Empire, vol. 8. Cambridge: Cambridge University Press, 1963, p. 386.

5. Hahlo, H. and Kahn, E. op. cit. p. 55.

Graaff-Reinet were established in 1679, 1746 and 1786 respectively. The borders existent by the end of the eighteenth century have been defined as the following: '... in the West by the Atlantic, in the East by the Fish River, and in the South by the Indian Ocean, and in the North by the plains bordering the Orange River.'[6]

The nineteenth century witnessed an enormous extension by the white population of its territory. It was, however, only by the latter half of that century that the Cape could be considered as relatively unified, having increasingly drawn the blacks on its frontiers under its jurisdiction. The resolution of the problem on the eastern frontier, as will be seen, proved to be a protracted and contentious issue, spanning the century 1778 to 1878 and punctuated by sporadic warfare. The problem owed its inception to the increasing contact between the Xhosa and the colonists. This proved contrary to Dutch East India Company policy which failed to combat interaction, as did successive British governments. This was reflected in the ever changing frontier policies which Davenport succinctly summarizes as 'the blockhouse system and the military village; the buffer strip, the frontier of no outlets and the trading pass; the trade fair, mission station, hospital and school; the spoor law, the treaty system, the government agent and the magistrate - all these were tried in various combinations, in a bid to maintain order and peaceful co-existence at the meeting point of two disparate but competing cultures.'[7]

Colonists reached the Great Fish River by the 1770's and, with both

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6. Hahlo, H. and Kahn, E. op. cit. p. 3.

7. Davenport, T.R.H. South Africa: A Modern History. Johannesburg: Macmillan, 1977, p. 99.

minor and temporary alterations, this remained the eastern boundary until 1847. Border friction was exacerbated by the fact that definition of the Fish River boundary was ambiguous. Governor von Plettenberg in vain attempted an agreement with the Xhosa in 1778 by demarcating a line between the Cape and the Xhosa without taking into consideration that many of the Xhosa had permanent homes to the west of the line! His was the attitude that they 'had no "right" to be there, having certainly no organised "state" to insist on private rights of occupancy in the "annexed" country.'[8]

By the time of the second British occupation in 1806, the eastern boundary problem was aggravated by the land hunger resulting from tribes fleeing the wrath of Chaka. Later, from the settler side, this was exacerbated by the impact of British policy on the Dutch frontiersmen. The so-called Frontier Wars arose inevitably from the raids and counter-raids to retrieve stolen cattle, and the Xhosa were repeatedly driven back across the Fish River boundary. In 1819 after the fifth such war, Governor Lord Charles Somerset (Treaty no. C4) attempted to resolve the issue by fixing the Keiskamma River as the boundary between the colonists and the Xhosa. The territory between the Keiskamma and the Kei was declared a Neutral Territory. This policy proved to be futile, as not only did it remove a large piece of land from use during a period of land hunger but it was impossible to enforce, and soon both 'sides' of the Neutral Territory were back grazing their cattle. As far as the Xhosa were concerned this was regarded as no treaty, and Gaika was by no means regarded as the paramount authority to engage in such action. Lord

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8. Cambridge History of the British Empire, vol. 8. op. cit. p. 302.

Charles Somerset's attitude too must be regarded as debatable for when reporting the new arrangement to Lord Bathurst, Secretary for War and Colonies, he hinted at future colonization '... the country thus ceded is as fine a portion of ground as it is to be found, and with still unappropriated lands in the Zuurveld it might be perhaps worthy of consideration with a view to systematic colonisation.'[9]

As the Xhosa were pushed back and the white population in the eastern frontier district was augmented by the arrival of the 1820 settlers, the 'Neutral Territory' shifted and the Keiskamma River definitively became the eastern boundary by a proclamation dated 17 April 1829.

The origins of the Treaty System can be discerned by early 1833 in a Colonial Office Despatch[10] addressed to Sir Benjamin D'Urban in which he was directed '... to cultivate an intercourse with the Chiefs of the Caffre tribes by stationing "prudent and intelligent" men among them as government agents.' The Colonial Secretary considered that in return for small annual presents, the chiefs could be prevailed upon to enforce the peaceable conduct of their respective tribes. The treaty signed between Sir Benjamin D'Urban and Andries Waterboer of the Griquas (Treaty no. C5) subsequent to this instruction, was the first in a series of treaties. This treaty later achieved notoriety as a pretext for the Diamond Fields Annexation (discussed on page 54).

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9. Ibid. p. 310. Originally cited in: Cape Colony Records, vol. 12, 15 October 1819, p. 337.

10. Cited in: Brookes, E.H. The History of Native Policy in South Africa from 1830 to the Present Day. 2nd Rev. Ed. Pretoria: Van Schaik, 1927, p. 14.

After the war of 1834/35 Sir Benjamin D'Urban proposed making the land between the Kei and the Keiskamma Rivers available for white settlement, and the 'Neutral Territory' was proclaimed as British territory under the designation, the Province of Queen Adelaide. The Xhosa refused to cross the Kei so treaties were signed with leading chiefs such as Pato, Kama, Cobus, Gaika and T'Slambie (Treaties C6, C7, and C8). By these treaties, they undertook to become British subjects, and although retaining their own customary law, they agreed to come, generally, under Cape government control. This policy proved contrary to that of the Colonial Secretary, Lord Glenelg, and the territory was disannexed (Item no. C10).

Policy regarding the implementation of a treaty system was the outcome of the deliberations of a Commons Select Committee of 1836-37. The Committee was generally supposed to be in favour of the system, but in theory it was opposed to the implementation of the treaties and said of them '... compacts between parties negotiating in terms of such disparity are rather the preparatives and the apologies for disputes than securities for peace.'[11]

However with regard to the Cape, specific instructions were given for the implementation of treaties with the indigenous people as executed by Lieutenant-Governor Stockenström on Lord Glenelg's instructions. He was given the duty of 'framing, consolidating, and carrying into effect such a system as may ensure the maintenance of peace, good order and strict justice on the frontier.'[12] As they are deemed relevant to the

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11. Brookes, E.H. op. cit. p.

12. Cambridge History of the British Empire, vol. 8. op. cit. p. 321.

understanding of the system, the Committee's guidelines are reproduced in full:-

1. A treaty, fixing the boundaries of the Colony, must be made in writing, in English and the Caffre language, and being explained to each border Chief, must be signed or attested by each. Copies of this treaty must be delivered to each of the contracting Chiefs.

2. A separate treaty must be made in the English and in the Native languages, with the Chief of every tribe to which a portion of territory is assigned within the British Dominions: defining the limits of his allocation, the degree of his responsibility, and the nature of his relations with the British Government, and all other matters admitting of specification. A copy of this treaty in the native tongue must be preserved by the Chief.

3. A separate treaty must be made in the Native and English languages with the Chief of every tribe in alliance with us, or in any degree under our protection, defining also in each case all that can be specified in such an instrument. A copy of the treaty must be preserved by each Chief.

These instructions conclude with a strongly worded injunction: 'Your Committee would strongly impress upon His Majesty's Government the propriety of a strict adherence to these regulations.'

The Colonial Office thus proceeded to implement its previously adopted Treaty System more completely and the following treaties were signed: with the Fengo Chiefs Umklambiso and Jokwani on 10 December 1836 (Treaty no. C13) and that of 29 December 1840 (Treaty no. C18); with the Tambookie Chief Mapassa on 18 January 1837 (Treaty no. C14) and on 28 January 1841 (Treaty no. C20); with the Ammakwane on 19 June 1837 (Treaty no. C15); with the Gaika on 17 September 1835, a provisionally ratified treaty (Treaty no. C7) followed by that of 5 December 1836 (Treaty no. C11) and 2 December 1840 (Treaty no. C16); with the Congo in 1836, (Treaty no. C9); with the T'Slambie on 31 December 1840 (Treaty no. C19); in 1843 with Moshesh of the Basuto (Treaty no. C22).

The system ultimately proved to be unsuccessful and many of the treaties were later repudiated as raid and retaliation continued. Davenport points out too, that this system which specified that tribal law should operate in the black territories, and colonial law in the white, and that all inter-racial conflicts and negotiations with the chiefs were to be controlled by diplomatic agents, was further weakened by the fall of Andries Stockenström and by the military authorities ignoring the diplomatic agents. Furthermore not enough deference was paid to the chiefs as territorial rulers, which the system required.[13] The frontier too was insufficiently policed and this made an enforcement of the system impossible.

Frontier relations deteriorated, and Lieutenant-Governor John Hare who succeeded Stockenström destroyed all confidence in the system and some of the chiefs complained that the 'Government only kept that half of the treaties that suited them best and thereby left chiefs who kept the whole worse off than their backsliding colleagues.'[14] Faults were on both sides. Sir George Napier himself broke the provisions of the system and revised it introducing 'Not Reclaimable List' of allegedly stolen animals deemed irreclaimable as their owners were unable to comply with the rigorous stipulations of the treaties. He then allowed, as a result of a Proclamation dated 28 January 1841, small unarmed parties to enter black territory and to take additional cattle for retrieving stolen cattle. He relieved the herdsmen of the duty of being armed, and warned all chiefs that they were not allowed to harbour murderers.

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13. Davenport, T. op. cit. p. 100.

14. Walker, E. op. cit. p. 225.

Sir Peregrine Maitland reversed the Treaty System in 1844 by implementing a new style of treaty (Treaty no. C24-C29). These annulled former treaties but stipulations regarding boundaries, which appeared in the treaties of 5 December 1836, were repealed. The main difference lay in the trial of stock thieves who were now to be brought to trial in the Cape Colony even if they were apprehended in black territory. Furthermore he revived military patrols between the Fish and the Keiskamma territories, thus precipitating the War of the Axe.

Sir Harry Smith, newly appointed Govern r of the Cape, was determined to make an end to the Treaty System, although one should take cognizance of the fact that they were by no means the unqualified failure as traditionally suggested. 'Granting all that can be said of their futility as a permanent solution, they marked an undoubted advance on the bellum in pace of the years between 1811 and 1834. The reprisals and commandos of a l these years contributed their share to the insecurity and unrest out of which the Great Trek developed.'[15] His policy was one of annexation and rule of the Xhosa through their chiefs. The territory between the Fish and the Keiskamma Rivers were annexed as Victoria East, and between the Keiskamma and the Kei as British Kaffraria, a separate imperial dependency. It became a Crown Colony in 1860 and in order to relieve the British of some of its heavy military expenditure, the then Governor, Sir Philip Wodehouse prevailed upon the Cape Parliament to assume responsibility for the area, and it was annexed to the Cape in 1865 (Treaty no. C37).

The Eastern boundary was gradually extended until by 1894 the gap between the Cape and Natal was closed. In 1844 a treaty (Treaty no. C25)

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15. Macmillan, W. Bantu, Boer and Briton. London: Faber and Gwyer, 1929, p. 234.

was signed between Faku, Paramount Chief of the Pondos and Sir Peregrine Maitland, as Governor of the Cape Colony with Article XII covering boundary stipulations. All sovereign rights and the waters of the Umzimkulu River were ceded to the Cape in 1878, by the Chief of the Pondos, Nquiliso (Treaty no. C76). As early as 1861 President Pretorius of the Orange Free State had cast his eyes in the direction of Port St Johns. In 1870 Sir Philip Wodehouse attempted to persuade the Pondos to cede the port in continuation of the effort to prevent the Boer Republics from reaching the sea, but it was only by 8 September 1878 that a Proclamation was issued declaring British sovereignty over the Port and tidal estuary (confirmed by Letters Patent of October 1881 (Treaty no. C91). In 1884 (Treaty no. C102) an Act was passed to provide for its annexation to the Cape. At the request of the Cape Government, the British established a Protectorate over the whole coast of Pondoland.[16] When Natal demonstrated an interest in acquiring Port St Johns and Pondoland in order to protect its trading interests, and to secure itself against possible conflict on its boundaries, Cecil Rhodes as Prime Minister of the Cape Colony persuaded the Cape that an independent African chiefdom between the Cape and Natal was an anomaly in the 1890's.[17] The whole of Pondoland, up to the Natal border was annexed in 1894, thus performing the final act of dispossession (Treaty no. C156).

In the interim period, Fingoland (the country between the Bashee and Kei Rivers), the Idutwya Reserve and Nomansland (the area between the Umtata and Umzimkulu Rivers), suffered the same fate. Sir George Grey's

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16. By Proclamation dated 5 January 1885 (British and Foreign State Papers, vol. 75, p. 720).

17. Beinart, W. The Political Economy of Pondoland, 1860 to 1930. Johannesburg: Ravan, 1982, p. 35.

policy of extending direct Colonial control over all indigenous people up to the Natal border, initially came to fruition after the Ninth and Final frontier war. It broke out as a result of conflict between the Galekas under Chief Kreli and the Fingos east of the Kei River. As such it was crushed, but not fully contained and furthermore Gaika tribes under Sandile, within the Colonial boundaries, rebelled. British Letters Patent were authorized (Treaty no. C64) in 1876, for the annexation of these territories, and on Chief Kreli's defeat considerable lands were declared forfeit to the Cape Government. In 1877 by Act no. 38 annexation of these territories was provided for by the Cape Government (Treaty no. C68) and this was assented to by Great Britain in April 1878 (Treaty no. C74) and finally annexed in 1879 (Treaty no. C78). Galekaland, though not annexed, came under Cape administration. It was united with Bomvanaland and the Emigrant Tembu lands of Southeyville and Xalanga to form the magistracy of Tembuland. This territory was only annexed in 1885 (Treaty no. C110). The Xesibes of the Rode Valley were added to Griqualand East and annexed in 1886 (Treaty no. C116 and C120). It was thus that the independence of these tribes passed away in the wake of white colonialism. The Transkei was eventually accorded its 'independence' as part of the National Party's plan for the political future of South African blacks, and at the cost of South Africa's territorial unity. For a further discussion of Transkei's constitutional development see p. 168-172.

Griqualand West was finally annexed to the Cape in 1878 (Treaty no. C73). See p. 14 for an explanation of its boundary history with the Cape. On 30 September 1885, a Proclamation (Treaty no. C113) was issued by the High Commissioner, defining its boundaries with the Cape and established two distinct territories, viz British Bechuanaland, and a British Protectorate and territory known as Bechuanaland and Kalahari.

The Protectorate was administered as a High Commission Territory from 1891 to 1964, and it became independent as Botswana in 1966. By a Royal Commission dated 3 October 1891, the Governor of the Cape Colony was designated as Governor of British Bechuanaland. Authority for its annexation to the Cape Colony was given by an Order in Council dated 3 October 1895 (Treaty no. C163) and this also stipulated boundary provisions. This was eventually incorporated into the Union of South Africa, thus partitioning the Tswana people.

For an explanation of boundary issues with the Basuto, see the section on the Orange Free State with whom they fought their fiercest border disputes (p. 46-54). Basutoland was annexed to the Cape in 1871 (Treaty no. 021) but British direct administration was resumed in 1884 (Treaty no. 038). Thereafter until 1964 Basutoland was a High Commission Territory, with the High Commissioner of the United Kingdom in South Africa acting on behalf of the Crown, in matters legislative and executive. Independence was granted to the territory, as the Kingdom of Lesotho, on 4 October 1966.

South African ownership of Walvis Bay and its enclave within the Namibian territory (or South West Africa as it was known, prior to 1968,

has long been a contentious issue in the negotiations for Namibian independence.[18] The ownership stems from a Proclamation dated 12 March 1878[19] issued on behalf of Queen Victoria by Richard Cossantine Dyer, Staff-Commander of Her Majesty's ship, Industry, anchored off Walvis Bay. This Proclamation and the boundary stipulations contained therein, were ratified by Letters Patent of 14 December 1878 (Treaty no. C77). German missionaries had operated in Namaqualand and Damaraland since the early nineteenth century, but it was only in 1883 that Germany made any move in the area.

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18. Further references to the dispute include:
Goetkner, Gregory P. and Gonning, Isabelle R. Namibia, South Africa and the Walvis Bay Dispute. Yale Law Journal, vol. 89, no. 5, April 1980, p. 903-922;
Brooks, Pierre E.J. The Legal Status of Walvis Bay. South African Yearbook of International Law, 1976, p. 187-191;
Huraka, T. Walvis Bay and International Law. Indian Journal of International Law, vol. 18, April/June 1978, p. 160-174;
Lavers, L.A. Walfish Bay and Angra Pequena. New York: Columbia University, 1923;
Prinsloo, Daniel Stefan. Walvis Bay and the Penguin Islands: Background and Status. Pretoria: Foreign Affairs Association, 1977;
United Nations. Commissioner for Namibia. Memorandum on Walvis Bay. New York: United Nations, 1978;
Walvis Bay: An Integral Part of Namibia. Objective: Justice, vol. 10, no. 2, Summer 1978, p. 42-59.

19. See Brownlie, I. African Boundaries: A Legal and Diplomatic Encyclopaedia. London: Hurst, 1979, p. 1277-1278;
British and Foreign State Papers, vol. 69, p. 1177;
Hertslet, Sir Edward. Map of Africa by Treaty, vol. 1. London: HMSO, 1896.

Franz Lüderitz purchased a twenty-mile wide strip of land in November 1882 and proposed building a factory there. The British Foreign Office was informed and were asked by the German Ambassador if they exercised any jurisdiction over the locality and requested Lüderitz's protection in the case of need. Lord Granville, the then Colonial Secretary consulted the Cape Government, who showed no inclination to take possession of the land south of Walvis Bay. Angra Pequena, now modern day, Lüderitz, came under German Protection (Treaty no. C104) and Germany established a Protectorate in the area, with the exception of Walvis Bay (Treaty no. C95). On 22 July 1884 the Government of the Cape Colony adopted Act no. 35 of 1884 to provide for the annexation of that Colony of the Port or Settlement of Walvis Bay and certain surrounding territories (Treaty no. C102). On 7 August 1885 Walvis Bay was annexed by Proclamation, as part of the Cape Colony (Treaty no. C111).

Between 1884 and 1892, South West Africa was extended by Germany to its present day boundaries. German recognition of British title to Walvis Bay can also be found in a notification dated 1885[20] and also in the Anglo-German agreement of 1 July 1890,[21] Article III, subject to the deliniation of the Southern Boundary.[22] After World War I Germany lost its African possessions, and in 1920 South West Africa was declared a League of Nations, Class C Mandate. Walvis Bay and its twelve off-shore islands were excepted from this Mandated Territory.

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20. British and Foreign State Papers, vol. 76, p. 756.

21. Ibid. vol. 82, p. 35.

22. See Brownlie, I. African Boundaries. op. cit. p. 1276-1277.

South Africa's continued retention of these twelve islands, spanning 180 nautical miles off the coast could jeapordize a future independent Namibia's territorial and fishing zone boundaries. The islands comprise the following, viz Hollams Bird, Merker, Ichaboe, Seal, Penguin, Halifax, Long Posession, Albatross, Pomona, Plumpudding and Sinclair (Roast Beef). They were initially claimed in 1793 by Holland. Although the Dutch possessions were ceded to Great Britain in 1814, no formal possession of these guano islands was undertaken until 1861. Although a Proclamation was issued by the Cape Governor on 12 August 1861 to bring the Island of Ichaboe, and the cluster known as the Penguin Islands, under British domination,[23] this was not confirmed by the British Government. The islands' status was settled by British Letters Patent dated 27 February 1867 (Treaty no. C38) whereby the Cape Governor was also to be Governor of these islands, and the annexation of these islands to the Cape was provided for. After some delay these islands were finally annexed by Act no. 4 of 1874 (Treaty no. C52).

1.2.3 Extradition

Treaties of extradition entered into by Great Britain and other foreign powers were extended in many cases to include the British colonies, including the Cape. See for example, the treaties with the United States (Treaty no. C21); Germany (Treaty no. C42); Brazil (Treaty no. C43); Austria (Treaty no. C50); the Netherlands (Treaty no. 51); Haiti (Treaty no. C55); Belgium (Treaty no. C62 and no. 63); France (Treaty no. C66); Spain (Treaty no. C75); Ecuador (Treaty no. C84); Luxembourg (Treaty no. C86); and Switzerland (Treaty no. C87).

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23. See Hertslet's Treaties, vol. 15, p. 497 and Foreign and State Papers, vol. 60, p. 1123.

In 1856, Great Britain passed an Act relating to the Colonies entitled: Act to Provide for taking Evidence in Her Majesty's Dominions in relation to Civil and Commercial Matters pending before Foreign Tribunals.[24] The Cape Colony in 1877 (Item no. C70) passed an Act to provide for the more convenient administration of the Imperial Extradition Acts of 1870,[25] which was amended by the Act of 1873.[26] The latter could be construed as one with the former of which Section VI was amended. British law was further amended in 1881 (Item no. C90), and subsequently also in the Cape (Item no. C92). Provision for the transit under warrant of extradited offenders was provided for in the Cape Act, 6 of 1895 (Item no. C159).

Inter-State agreements existed within the Southern African region and in 1874 the Cape Government (Item no. C54) passed an Act to facilitate apprehension of offenders who committed crimes in Natal, Griqualand West, the Orange Free State, or in the South African Republic. Examples include agreements with the South African Republic (Treaty no. C117 and C134) and Ordinance no. 1 of 1882, of the Orange Free State.[27]

1.2.4 Other

The Cape participated in other inter-colonial or inter-state regional agreements. Of note are those pertaining to the establishment of a

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24. South African Treaties, Conventions, Agreements and State Papers, p. 254-255.

25. Ibid. p. 256-265

26. Ibid. p. 265-267.

27. Ibid. p. 288-293.

Customs Union (Treaty no. C131-132, C138-139 and C179-182), the discussion of which appears on p. 65-66. Of further interest are those pertaining to intercommunication by telegram or cable, and a Telegraph Convention was entered into by the Cape, Natal and South African Republic in 1886 (Treaty no. C120) This was modified in 1887 (Treaty no. C126). The transfer of telegraph traffic to and from South Africa was provided for in 1901 (Treaty no. C176). The Cape acceded to the Universal Postal Union in 1891 (Treaty no. C147) and a Postal Union Convention was entered into by the above-mentioned states in 1897 (Treaty no. C171).

Several agreements were entered into regarding the inter-working of the different railway administrations, for example between the Cape and the Orange Free State (Treaty no. C166), and the Cape and the South African Republic (Treaty no. C158).

1.3 Natal

1.3.1 Constitutional Development and Treaty-Making Powers

Natal, which derived its name from a Christmas Day 1497 landing by Vasco da Gama en route to India, was not permanently settled by whites until 1824. A small group of 1820 settlers migrated there from the Eastern Cape, and initial petitions[1] for its incorporation by Great Britain were refused. A group of trekkers arrived from the Cape in 1837, with Port Natal potentially satisfying their desire for access to a harbour free from British control. Frequent skirmishes between the Zulus and the Trekkers led the Governor of the Cape Colony, Sir George Napier, to send a military force into the area, and in 1843 it was annexed to Great Britain (Treaty no. N6). This Proclamation of 12 May 1843 stated in Article 3 'that the district of Port Natal, according to such convenient limits as shall hereafter be fixed and defined, will be recognized and adopted by Her Majesty the Queen as a British Colony, and that the inhabitants thereof shall, so long as they conduct themselves in an orderly and peaceable manner, be taken under the protection of the British Crown.' It was not until a year later that Natal was annexed as a separate District to the Cape Colony (Treaty no. N8) and not until 1845 that a Lieutenant-Governor was appointed, the first incumbent being Martin West. The Lieutenant-Governor and the principal officials comprised an Executive Council

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1. See: Bird, J. The Annals of Natal, vol. 1. Fascimile Reprint. Cape Town: Struik, 1965, p. 253-255, p. 311-312 and also: Brookes, E.H. and Webb, C. de B. A History of Natal. Pietermaritzburg: University of Natal Press, 1965, p. 43.

but the only body empowered to legislate for Natal was the Cape Legislative Council.[2] This incorporation with the Cape lasted until 1856 but the inconvenience incurred was so marked that a local, wholly official Legislative Council for Natal was constituted in 1847 (Item no. N12).

The 1856 Charter of Natal (Item no. N14) revoked all previous Letters Patent viz 3 May 1844; 30 April 1845; 2 March 1847 (excepting for the Legislative Council referred to previously, until the return of the first writs for the members of the future Legislative Council); and 15 January 1850. By its terms Natal became a separate colony with a limited form of representative government. The Legislative Council was enlarged to comprise sixteen members, twelve of whom were elected by colonists possessing the property qualifications while the remaining four were official appointments consisting of the Colonial Secretary, the Colonial Treasurer, the Attorney-General, and the Secretary for Native Affairs. The franchise qualifications were limited to males over twenty one years of age, owning immovable property to the value of £50 or renting such property to the value of £10 per annum. The Constitution made no stipulations regarding colour and theoretically blacks could participate but as soon as this became a possibility, it was removed by Law 11 of 1865.[3] The Executive Council comprising five officials (and from 1869, two non-officials) remained responsible to the British Government and the Governor of the Cape Colony,

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2. Brookes, E.H. and Webb, C. de B. op. cit., p. 54

3. Ibid. p. 75.

in his capacity as High Commissioner for South Africa, remained responsible for dealings with independent territories in South Africa.

Responsible government was only granted to the Colony in 1893 after a long struggle dating from 1874, and which came to a head in the period 1887 to 1893.[4] The motivating factor behind the plea for self government was the colonists desire to control the so-called 'native policy.' This element notwithstanding, responsible government was a principle adhered to by the ruling Liberal Government of the time, and an accepted tradition of the late 1880s. The issue became more urgent after the granting of this form of government to Western Australia in 1890 which left Natal one of the last colonies to lack it. The need to safeguard the rights of blacks became crucial to the question but this later became submerged in the definition of Governor's powers. The amended bill was submitted to the General Election of 1892 and by a small majority, Law 4 of 1893[5] came into effect, and British Letters Patent constituted the office of Governor and Commander-in-Chief of the Colony (Item no. N80).

A bicameral system was thus introduced in Natal, and consisted of the Legislative Council and the Legislative Assembly. The former consisted of eleven members, nominated initially by the Governor and thereafter by the Governor-in-Council. They served for a ten year period. The old franchise system provided the basis for election of thirty seven members to the Legislative Assembly. Brookes and Webb point out that the distribution of members was not based on proportional representation and that Durban

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4. Ibid. p. 168-188 for full details of the implementation of responsible government.

5. For the text see: Eybers, G.W. Select Constitutional Documents Illustrating South African History, 1795-1910. London: Routledge, 1918, p. 204-208.

which in 1893 possessed about twenty five percent of the Colony's total white population, only returned four members out of the total thirty seven.[6]

The Act further provided for not more than six political offices to be designated by the Governor, not more than two of whom could serve on the Legislative Council. Ministers had the right to speak, but not to vote in the House of which they were not members.

This form of government remained existent in Natal until its incorporation in the Union of South Africa in 1910 (Item no. N124), with several alterations which should be noted. These include the 1896 alteration to the franchise to the disadvantage of the Indian population; the changes resulting from the annexation of Zululand (Treaty no. N105), and that of the districts of Vryheid and Utrecht (Treaty no. N114).

1.3.2 Treaties with Local Chiefdoms

Transactions between the early settlers and the ruling chiefs took the form of land cessions, the concept of which was interpreted very differently by the parties concerned. The first important cession of note took place between Chaka, the formidable Zulu Chief and Francis Farewell, a British trader who together with James King had been authorized by the Cape Governor, Lord Charles Somerset to trade with Natal. Chaka, unthreatened by the few white traders, attached no importance to the grant of land (Treaty no. N1) and considered it merely the granting of permission for the settlers to occupy the land over which they could exercise

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6. Brookes, E.H. and Webb, C. de B. op cit., p. 179.

authority subject to his pleasure. The ceded land, variously defined as extending ten miles south and twenty five miles north of Port Natal, and hinterland for approximately 100 miles, was regarded in a completely different light by Farewell, who accepted the land in a formal ceremony which included the hoisting of the Union Jack and the firing of a royal salute.

His misinterpretation of the cession was underscored by his erroneous acceptance of the land in the name of King George IV, when it was in reality made over to 'F.G. Farewell and Company', and as such this move was not sanctioned by Lord Charles Somerset and Farewell was informed 'His Excellency... cannot sanction the acquisition of any territorial possessions without a full communication being made to him of the circumstances under which they may be offered, and be intended to receive.'[7] Provisions to be noted in this cession include the recognition of Farewell as Chief of the proclaimed area, and the exercise of authority by the white settlers over any refugees seeking shelter from his conquests.

This area was ceded to successive white leaders. One could cite in this respect James King to whom in February 1828, Chaka reportedly gave 'the free and full possession of my country near the sea-coast and Port Natal... together with the free and exclusive trade of all my dominions.' Upon his death later in 1828, Isaacs claimed that Chaka made him 'Chief of Natal' and granted him a tract of land, twenty five miles by one hundred, including Port Natal.[8]

As previously indicated however, the Zulu chiefs concerned had no intention of renouncing their sovereignty. Allen Francis Gardiner, a retired naval commander, later devoted to evangelical work, established

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7. Bird, J. op cit., p. 73.

8. Wilson, M. and Thompson, L., eds. The Oxford History of South Africa, vol. I. Oxford: Clarendon Press, 1969, p. 349.

the first Christian mission in Natal. He negotiated the cession of large tracts of land from Dingaan (Treaty no. N2) and exerted his influence in 'establishing the small community on a basis of local responsibility and settled order.'[9] He was much criticized in England however, for a clause in the treaty. This stated that in return for the waiving of all claims by Dingaan over persons and property in the area, the British residents, or so Gardiner signed on their behalf, 'engaged never to receive or harbour any deserter from the Zulu country or any of its dependencies, and to use every endeavour to secure and to return to the King every such individual endeavouring to find asylum among them.' Gardiner was known on at least one occasion to personally return refugees to Dingaan.[10] He prevailed upon Dingaan to clarify his earlier grant of the Port and its neighbourhood by recognizing Gardiner as the Chief of the whole country south-ward from the Umzimkulu and westward as far as the Drakensberg (Treaty no. N3).

The Voortrekker leader Piet Retief, while in pursuance of a grant of land from Dingaan, was murdered by his impis in 1835. This cession was dependent upon the recovery of cattle from one Sikonyela, a Batlokwa chief who had raided Dingaan of his cattle and who had furthermore insulted him. Dingaan affixed his signature to the grant (Treaty no. N4) which gave to Retief and his followers for their 'everlasting property... a place called Port Natal, together with all the land annexed, that is to say from the Tugela to the Umzimvubu River westward, and from the sea to the north.'

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9. Hattersley, A.F. The British Settlement of Natal. Cambridge: Cambridge University Press, 1950, p. 16.

10. Brookes, E.H. and Webb, C. de B. op cit., p. 26.

This became the basis for the Voortrekker Republic of Natalia. Brookes and Webb describe the treaty, which was discovered in R. .ief's leather hunting bag when his corpse was located in December 1838, as 'no more and no less valuable than the preceding cessions.'[11] Confusion over land ownership was clearly evident as illustrated by a letter written by Gardiner to Dingaan, reminding him that he had already granted him the land which the Boers were claiming![12]

Andries Pretorius on behalf of the short lived Voortrekker Republic, entered into treaty relations with Mpande, Dingaan's brother on his request. The price he was called upon to pay for Trekker intervention however, was inordinately high. On Dingaan's death, after the annhilation of his regiments, Mpande was declared King of the Zulus but in return was forced to cede approximately half of Zululand, the land between the Tugela and the Black Umfolozi, to the Republic of Natalia (Treaty no. N5).[13] In addition, he was considered to be the Republic's vassal. This vassalage lapsed when the Republic came to an end in 1843. In the same year he signed a treaty (Treaty no. N7) with Henry Cloete as Her Majesty's Commissioner for Natal, by which Mpande was recognized as the independent ruler of the Zulu kingdom north of the Buffalo-Tugela Rivers, with the exception of St. Lucia Bay, which had possible potential as a port.

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11. Ibid. p. 33.

12. Wilson, M. and Thompson, L. op cit., p. 359.

13. An interesting sideline is mentioned in the Natal Archives Depot of stones erected to commemorate the treaty between the Voortrekkers and Mpande. These consist of one stone standing upright, and the other prostrate at the side of the upright one. They are now housed in the Voortrekker Museum, Pietermaritzburg. (Archives of the Chief Native Commissioner, Nata . vol. 297, 1917/4114).

Land cessions formed the basis of early agreements between the African ch. fs and the earlier settlers in Natal. These were later extended to include boundary arrangements which also entailed annexative treaties, as evidenced in Section 1.3.3.

1.3.3 Boundaries

The area constituting the district of Natal in 1843 was considerably enlarged by various cessions by native chiefs and the subsequent annexation of their territories. In the treaty previously referred to between Mpande and Henry Cloete (Treaty no. N7), the native chief ceded to Great Britain the mouth of the Umfolosi River including St. Lucia Bay '... for the time being, for ever, with full liberty to visit, land upon and occupy the shores along the said bay and mouth.' The respective boundaries between the Zulus and Natal was defined along the line of the Buffalo and Tugela Rivers and remained permanent until the incorporation of Zululand into Natal in 1897 (Treaty no. N105).

A Proclamation dated 21 August 1844 followed the Letters Patent annexing Natal to the Cape Colony (Treaty no. N8), and defined the incorporated area.[14] The south-western boundary was settled through the offices of Walter Harding, one time Crown Prosecutor and later Natal's Chief Justice. He negotiated a treaty with Faku, chief of the Amapondas in 1850 (Treaty no. N13) which included the cession to Great Britain of the territory between the Umtanvuna and Umzimkulu Rivers, and between the Quathlamba or Drakensberg Mountains and the sea. The territory lying between the two rivers, referred to as Nomansland, was formally annexed to Natal in 1863

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14. Hertslet, Sir Edward. Map of Africa by Treaty, vol. 1. London: HMSO, 1896, p. 200.

(Treaty no. N19 and no.N20). This was after Natal was declared a separate colony in 1856, with boundaries defined by a British Order in Council (Item no. N16) followed by a Proclamation dated 5 June 1858 (Item no. N17).

The Amaquati tribe was placed by their chief under British protection in 1875 (Treaty no. N37). The next major territorial arrangement followed the Zulu War of 1879 and concerned the conditions governing the restoration by the British of Cetewayo to Zululand after his defeat and subsequent exile. He was prohibited both from entering into any agreement or treaty outside his territory without the prior consent of the British Government, and also from alienating or selling any of the land designated as 'reserved territory.' He had to undertake to respect the boundaries of both this land and that of the newly appointed Chief Zibhebhu. Within Zibhebhu's newly defined boundary - indicated to Zibhebhu but not to Cetewayo[15] lived many of Cetewayo's supporters who rose up against Zibhebhu. Warfare ensued leading to Cetewayo's complete defeat, and his death shortly thereafter.

Great Britain and Germany entered into a treaty in 1885 (Treaty no. N50) defining their respective spheres of action in certain areas in Africa. This followed inter alia German protest at the British taking possession of St. Lucia Bay in 1884 (Treaty no. N49) based on their earlier arrangement with Mpande (Treaty no. N7). The Germans thereafter withdrew their protest and undertook 'to refrain from making acquisitions of territory or establishing protectorates on the coast between the Colony of Natal and Delagoa Bay.' On 25 July 1885, the Notification of 18 December 1884 was published by the High Commissioner of South Africa in a Notification from Cape Town, in which it stated that the hoisting of the British flag at St Lucia Bay by Lieutenant Commander William John Moore was authorized and had been ratified by Great Britain.[16]

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15. C.T. Binns in Brookes, E.H. and Webb, C. de B. op. cit., p. 153

16. Hertslet, Sir Edward. op. cit., p. 202.

The New Republic, an area of some 4,000 square miles was located within the parameters of Zululand. It came into being as a result of assistance rendered by the Transvaal boers to Cetewayo's successor, his minor son Dinizulu. They claimed over eight hundred farms, contrary to their initial undertaking that they wanted no land. Its borders with the Zulus were defined in a treaty with Great Britain (Treaty no. N52), and the territory was later incorporated into the South African Republic (Treaty no. N59), as consented to by Great Britain in 1888 (Treaty no. Z 51). As a result of the Anglo-Boer War, it was handed back to Natal in 1903 (Treaty no. N114), but never again became an integral part of Zululand.

Zululand itself was only annexed to Great Britain in 1887 (Treaty no. N53). This delay was in keeping with W.E. Gladstone's Liberal Party principles (annexations... 'by augmenting space diminish power')[17] which refused to sanction annexation despite the turmoil prevalent in the area, and repeated appeals from those in authority. Natal colonists too, were desirous of opening up the territory for farming and the cultivation of sugar. The act of annexation was notified to the Powers Signatories to the Berlin Act (Item no. N54) and a Royal Commission was issued (Item no. N55) appointing the Governor of Natal to be Governor of Zululand and providing for its government. Definition of its boundaries was also notified to the powers party to the Berlin Act (Item no. N57). Zululand was extended in 1888 to include the territories of the Chiefs Deamana (Umcamana) and Sibonda (Treaty no. N64). This was a logical conclusion as these chiefs and their tribes had for many years formed part of Zulu sovereignty.

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17. Knaplund, P. in Brookes, E.H. and Webb, C. de B. op. cit., p. 155.

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17. Knaplund, P. in Brookes, E.H. and Webb, C. de B. op. cit., p. 155.

Tongaland, at present designated as the Ingwavuma District, which together with KaNgwane (referred to on p. 78) is the subject of a possible but highly controversial cession to Swaziland and has long been disputed territory. As far back as 1889, President Kruger in perpetuating the South African Republic's access to the sea, requested British assistance in acquiring the territories of Zambaan, Umbegesa and Amatongaland, including Kosi Bay. Great Britain had however concluded a treaty on 6 July 1887 (Treaty no. N56) with Zambili, Queen of the Amatongas,[18] which placed the foreign relations of the Amatongas in the hands of the British Government. The treaty was communicated to the Government of the South African Republic. The State Secretary of the Republic in his reply dated 30 January 1888 pointed out that Tongaland, as described in the treaty, included the territory of two independent chiefs, Zambaan and Umgebesa, albeit erroneously.[19] He added that Mr. Ferreira, Native Commissioner of Wakkerstroom had concluded agreements with these chiefs, and that the Republic was considering the question of taking transfer of these agreements.

Sir Hercules Robinson, Cape Governor and High Commissioner in his reply of 7 February 1888, indicated that the territory included the whole area between Swaziland and the sea. It was regarded as exclusively within the sphere of British influence, and that the British Government was most unlikely to sanction Ferreira's agreements, as they would be considered in

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18. See correspondence (Z.A. Republic no. 17) dated 13 September 1895 from Sir Hercules Robinson, to President Kruger (Transvaal Archives Depot, ZAR 91, Greenbook, no. 6, 1899).

19. Walker, E. A History of South Africa. London: Longmans, Green, 1928, p. 422.

conflict with British interests and possessions in South Africa.

In 1890, a Convention relative to Swazi affairs was concluded with the South African Republic (Treaty no. Z58), the former was permitted access to the sea subject to three conditions viz, Articles 16 and 17 which stated the foreign relations of the newly acquired territory to be in the hands of the British Government; Article 20 indicated the entry of the Republic to the South African Customs Union as a prerequisite as well as the free importation of South African produce into the Republic, as articulated in Article 22.

The Republic however took no steps to fulfil these conditions. Years of controversy ensued during which Zambili applied for British protection in 1887, withdrew her request a year later and in 1890 attempted to get Portugal to take over her country. Due also to the unofficial intervention of Transvaal burghers in the territories of Zambaan and Umbegesa, their lands were annexed to the British crown (Treaty no. N83) and incorporated in 1897 into Zululand (Treaty no. N105).

Brookes and Webb point out that Zambaar was not personally in favour of the annexation, but that Umbegesa was in favour.[20] Evidence to the contrary is substantiated by a letter of protest written on his behalf by Theophilus Shepstone[21] by virtue of the power of attorney granted to him by the Chief, and in which he states 'As Umbegesa has in no way signified

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20. Brookes, E.H. and Webb, C. de B. op. cit. p. 188.

21. Letter (Z.A. Republic, no. 5) dated 1 May 1895 (Transvaal Archives Depot, ZAR 91, Greenbook, no. 6, 1899).

his willingness to go under British rule and has always expressed his desire to me to be dealt with in conjunction with Swaziland, I have the honour, in his behalf to protest against the annexation of his territory by Her Majesty's Government.' The desires and interests of the inhabitants, it therefore appears, were not considered but that they were pawns in an intricate diplomatic game between Britain and the South African Republic.[22]

The boundaries between British and Portuguese possession in the neighbourhood of Tongaland were defined in an Exchange of Notes in 1895 (Treaty no. N95), and were in 1897, subjected to delimitation by Joint British and Portuguese commissioners (Treaty no. N102). This was in accordance with Article 3 of the Treaty of 11 June 1891 between the two countries (Treaty no. N71). Thus by 1897, Natal reached its present boundaries with the exception of the erstwhile New Republic, which was re-joined in 1903.

1.3.4 Extradition

Natal, as did the Cape, automatically became party to extradition treaties entered into by the British Government. Examples of this included treaties with Germany (Treaty no. C42); with Brazil (Treaty no. C43); with Italy (Treaty no. C45); Denmark (Treaty no. C46); Sweden and Norway (Treaty no. C48); the Netherlands (Treaty no. C51); Bolivia (Treaty no. N74); Portugal (Treaty no. N76); Liberia (Treaty no. N77); Roumania (Treaty no. N78) and the like. The more convenient administration of the British Extradition Acts of 1870 and 1873 was provided for in the Natal statutes by virtue of Law no. 6 of 1877 (Item no. N39). Natal's extradition law was given effect by

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22. Brookes, E.H. and Webb, C. de B. op. cit. p. 188.

a British Order in Council dated 1878 (Item no. N40), and was amended several times (Item no.N45 and no. N75), and the Fugitive Offenders Act of 1881 was applied in 1901 (Item no. N113).

Arrangements for the extradition of offenders from neighbouring states and colonies such as the Cape, Orange Free State and South African Republic were evidenced by Treaties no. N26, N27, N28, N43, and N103. Natal signed an extradition treaty with Pondoland [23] (probably in 1887), although it was not possible to locate its text. The need for such a treaty was illustrated in correspondence from the Resident Magistrate in Harding[24] who described the difficulty in obtaining a fugitive who fled to Pondoland after battering a person into 'small bits.' The Chief Unquikela acquiesced, and in a letter written from the Great Place, Pondoland by his Chief Councillor on his behalf states '... with reference to several applications that have been made to him by the Resident Magistrate of Alfred County for the extradition of natives who have fled from Natal to Pondoland for refuge and with reference thereto to bring to Your Excellency s notice that no extradition treaty exists between the two countries and have to request that Your Excellency will take such steps as you may deem necessary with a view to having a treaty made as soon as possible so that his country can be placed on a more satisfactory footing with the Colony of Natal with whom he is very desirous of remaining on a friendly footing...'

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23. Archives of the Colonial Secretary's Office, Natal, vol. 1143, 1887/2958.

24. Archives of the Secretary for Native Affairs, Natal, vol. 75, 1884/579.

Evidence[25] can be located in the Natal Archives of inter-colonial or state requests for the extradition of offenders, especially between Natal and the Transvaal. Stolen goods, embezzlement and malicious damage to property appear to be the main grounds for extradition requests.

1.3.5 Other

Natal entered into several other inter-state treaties within the Southern African region. For example see the treaties concerning the Customs Union (Treaty no. N106 and N115) which are discussed on p. 65-66.

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25. See for example Archives of the Colonial Secretary's Office, Natal, vol. 1541, 1897/8769 and 1897/8441; vol. 1542, 1897/8972.

CHAPTER 2 : The Boer Republics

2.1 The Orange Free State

2.1.1 Constitutional Development and Treaty-making Powers

Sir Harry Smith, Governor of the Cape of Good Hope, proclaimed on 3 February 1848, the Queen of England's sovereignty over all inhabitants in the territories north of the Orange River as far as the Vaal River and East of the Drakensberg Mountains (Treaty no. 03). They were thus subject to the laws and ordinances of the Colony of the Cape of Good Hope, and in all international disputes concerning the territory, Her Majesty was to be the 'paramount and exclusive authority.' A distinct and separate government, administered by the Governor of the Cape of Good Hope was constituted by Letters Patent dated 22 March 1851, under the name of the Orange River Sovereignty (Treaty no. 06).

The Queen abandoned for herself and her heirs all dominion and sovereignty over the Orange River territory by a proclamation dated 30 January 1854 (Treaty no. 07) and this was followed by the Bloemfontein Convention, (Treaty no. 010), a similar but more precise version of the Sand River Convention. The whole significance of the Convention was contained in the first two articles, which, together with those pertaining to slavery and the supply of ammunition to the blacks, were to form the basis of all future relations between the Republic and the British Government. The first article guaranteed '...the future independence of that country ...and their government to be treated and considered thenceforth to be a free and independent government.' Although an attempt had been made to elicit a promise from Her Majesty's Government that no more treaties would be signed with the indigenous people 'to the northward of the Orange', all the Commissioner responsible 'for settling and

adjusting the affairs of the Orange River Territory, Sir George Clerk, would concede was that the British Government no longer had alliances with any such chiefs, with the exception of Adam Kok, but had 'no wish or intention to enter hereafter into any treaties which may be injurious or prejudicial to the interests of the Orange River Government.' The existing treaty system, which is more fully described in Section 2.1.2, was thus replaced by the Bloemfontein Convention.

Within two months the new Orange Free State had instituted its own constitution. It should be noted however, that the repeal of the Cape Punishment Act of 1836[1] technically necessary to free the British subjects north of the Orange from the jurisdiction of the Crown, was only enacted in 1863.

It is generally agreed that this Constitution was sound. Its provisions were clearly articulated and thus understood by the people for whom it was intended. In his analysis, Thompson states 'it was almost exclusively concerned with establishing the essential institutions of government and defining their powers and duties and their relationships with one another.'[2] He points out the important role played in drafting the Constitution by two immigrants, J.G. Groenendaal, a Hollander and J.M. Orpen, an Irishman. A copy of the Constitution of the United States was available and the 'resemblance between the American and the Free State Constitutions are striking, in spite of the fact that one was federal and bi-cameral, the other unitary and uni-cameral. Several of the American provisions, indeed, were taken over practically word for word.'[3]

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1. Eybers, G.W. Select Constitutional Documents Illustrating South African History, 1795-1910. London: Routledge 1918, p. 146-148.
2. Thompson, L.M. Constitutionalism in the South African Republics. Butterworth's South African Law Review, 1954, p. 52
3. Ibid.

With regard to treaty-making, the consent of the Volksraad was necessary for a Presidential declaration of war or conclusion of peace, a convention or a treaty. However Ordinance no. 1 of 1856 enabled the President to enter into treaties and conventions without the prior authority of the Volksraad, but the Raad could fix the duration of the treaties. In practice, legislative confirmation was usually sought but not invariably granted. The President had extensive powers regarding foreign relations, and was responsible for declaring war and concluding peace, being granted ex post facto approval by the legislature.[4]

The status therefore of the Orange Free State up to commencement of the Anglo-Boer War in 1899 was that of an independent state and in the opinion, dated 5 February 1900, of the British Colonial Law Officers, Richard E. Webster and Robert B. Finlay '...it had concluded treaties with foreign powers on an equal footing and without any interference or intervention on the part of the British Government.'[5]

As a result of the defence alliance (Treaty no. 046/Z54) entered into in 1889 between the Orange Free State and the South African Republic, the latter assisted the South African Republic in the War of 1899-1900. This led to its annexation to the British Dominions by a Proclamation made on 24 May 1900 (Treaty no. 087) and it was thereafter known as the Orange River Colony. Oppenheim states that although this practice of annexation during a war sometimes prevails, '...it cannot be approved. For annexation of conquered enemy territory, whether of the whole or of part, confers a

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4. Hahlo, H.R. and Kahn, E. The Union of South Africa: The Development of its Laws and Constitution. London: Stevens, 1960, p. 79.

5. Quoted in full in MacNair, A.D. The Law of Treaties. Oxford: Clarendon Press, 1961, p. 706-710.

title only after a *firmly established* conquest and so long as war continues conquest is not firmly established. For this reason the annexation of the Orange Free State in May 1900, and of the South African Republic (Treaty no. Z85) in September 1900, by Great Britain during the Boer war, was premature.'[6]

Letters Patent created Crown Colony Rule with nominated Executive and Legislative Councils in 1902 and Lord Milner became the Governor of both the Orange River Colony and the Transvaal. Substantial financial provision in the form of grants and loans was made by Great Britain for the purpose of reconstruction and repatriation. An Inter-Colonial Council was established in May 1903 which comprised the High Commissioner, the Lieutenant Governors, various officials and representatives of the Executive and Legislative Councils, to advise the High Commissioners on the finances of the railways, the constabulary and various other matters of common expenditure.[7] Responsible government was granted to the Orange River Colony (Item no. 0101) in June 1907.

Upon the Orange Free State's annexation by Great Britain, all treaties were considered to have lapsed. See also the discussion pertaining to the 'clean slate' theory, with regard to the South African Pepublic (p. 71). This was tested in 1903, when the Belgian Minister in London inquired of the British Minister whether its treaties with the South African Republic of 1876 (Treaty no. Z24) and the Orange Free State of 1894 (Treaty no. 070) were considered as having terminated by the fact of annexation of these countries, and whether the extradition relations betweer

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6. Oppenheim, L. International Law: A Treatise. 8th Ed. London: Longmanns, 1955, vol. 1, p. 570-571.

7. Hahlo, H.R. and Kahn, E., op cit., p. 111.

Belgium and the Orange River Colony were to be considered as being regulated by the Anglo-Belgian Convention of 1901. Lord Landsdowne replied that treaties of commerce and extradition entered into by the former Boer Republics were no longer in force, and that the new colonies were under British treaties of commerce and extradition.[8]

2.1.2 Boundaries and Treaties with Local Chiefdoms

The problem of land tenure proved central to the issue of demarcating the land north of the Orange River. The vast spaces initially provided sufficient living space for all, but with the permanent settlement of Trekkers in the area, conflict was inevitable. Cattle rustling was rife, especially west of the Caledon River, and in 1842, the Governor of the Cape Colony received an official inquiry from Moshesh, Chief of the Basutos, as to terms on which Britain would be willing to 'recognize' the Basuto.[9] Dr. John Philip, of the London Missionary Society, advocated measures to keep 'Basuto country' out of the hands of the Boers, and recommended to the Governor, Sir George Napier, in a letter dated 25 August 1842,[10] 'that treaties should be entered into with Moshesh and Adam Kok. A treaty with Moshesh would not involve a salary in it, a present from Government, as a pledge of its good will towards him, is probably all that would be necessary... Were treaties with the Government to become a common thing among the chiefs beyond the Northern Boundary of the Colony, they would lose their value and cease to answer good purpose, and for that reason I would recommend that none should be made at present except with the two

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8. O'Connell, D.P. State Succession in Municipal Law and International Law. Cambridge: Cambridge University Press, 1962, vol. 2, p. 35-36.

9. Stevens, R.P. Lesotho, Botswana & Swaziland: The Former High Commission Territories in Southern Africa. London: Pall Mall, 1967, p. 18.

10. Basutoland Records, vol. 1, p. 47.

individuals named, - Moshesh and Adam Kok, and my reasons for recommending them are the positions they occupy on the Frontier of the Colony.'

This advice was heeded, and in 1843 Napier concluded treaties with both Adam Kok (Treaty no. C 23) and Moshesh (Treaty no. 01). The Napier treaty with Moshesh proved distasteful to the Boers, but satisfied Moshesh. According to its terms, Moshesh undertook to be 'the faithful friend and ally of the Colony' in this document which Stevens notes could be cited 'as proof that Basutoland had acquired the status of a Protected State and could not be treated either as a colony or a protectorate.'[11] He undertook to preserve order in his territory, to hold the Cape frontier against violation and to surrender criminals and fugitives to the Cape Colony for trial - in other words, he was helping to enforce the Punishment Act which gave colonial magistrates the power to try offences incurred by British subjects beyond the borders of the Cape Colony, as far as the twenty-fifth degree of Southern latitude.[12] The boundaries of Basutoland were roughly defined for the first time in Article 3, but there was failure to clearly demarcate the western boundary. This was later to prove a constant source of conflict with the Boers. In return for signing this treaty, Moshesh was to receive £75 annually from the Colonial Treasury, either in the form of ammunition or money, as he chose. He was to communicate in future, directly with the Governor. With the signed copy of the Treaty, Moshesh sent a letter saying that 'it being evident to me... that it is not the desire of the Government to place any undue restraint upon me as to the extent of the Territory' but that he signed in good faith that Napier would make specific

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11. Stevens, R.P., op cit., p. 19.

12. For details of this Act no. 94 of 13 August 1836, see: Eybers, G.W., op cit., p. 146-148.

alterations regarding the boundary.'[13]

Sir Peregrine Maitland suceeded Sir George Napier in March 1844, and due to the constant disputes between the Trekkers and the indigenous people, especially in Adam Kok's territory, he summoned the chiefs to meet him at Touwfontein in 1845. He attempted to create peace (Treaty no. 02) in the area by proposing that each chief should divide his territory, the one side as an inalienable reserve, and the other set apart for white settlement in which quit-rent farms could be leased. The chiefs would continue to rule their own people but a British Resident (Captain, later Major Warden was the first incumbent) was to deal with the whites. The status of the Boers as landowners was thus recognized and 'certainly it marked the first partial extension of British authority beyond the Orange,'[14] but the vexing problem of boundaries remained unsolved. This meant it was impossible for Warden to maintain more than a semblance of peace while the chiefs engaged themselves in constant border conflicts.

In March 1846 Warden held a meeting of all the chiefs at the Platberg Mission where they signed a petition requesting the Governor to appoint a commission to settle their boundary disputes.[15] The War of the Axe (1847) intervened and Sir Harry Smith took over as Governor. His secretary, Richard Southey, was entrusted with drawing up a new boundary after Smith received numerous complaints of whites trespassing in Moshesh's territory

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13. Basutoland Records, vol. 1, p. 56. Letter to the Civil Commissioner of Colesberg, dated 13 December 1843.

14. Cambridge History of the British Empire, vol. 8. Cambridge: Cambridge University Press, 1963, p. 341.

15. Basutoland Records, vol. 1, p. 119-120.

between the Caledon and the Orange Rivers. According to Sanders[16] Southey suggested a line (Treaty no. 04) which would leave several thousand Basuto on the European side and about six whites on the Basuto side. Southey justified his action in a letter.[17] 'After every inquiry I have been able to make, I have come to the conclusion that Moshesh does not relinquish any land to the Boers, but that my letter to him, retains more than was ever occupied by him previous to the Boers settling in the country.' Moshesh objected vociferously '... I complain of, is the fixing of limits to people under me *without any reference to me* but on the contrary stating publicly that I *have nothing to say in the matter*. I had conceived that my limits, at least on certain points, were guaranteed to me by the Treaty entered into with the Colonial Government... I should not be very far wrong in saying the line would cut off *half* of the habitable country, and some thousands of Basutos would be driven from their homes, it is said, to give place to a very small proportional number of British Subjects.'[18]

These unsuccessful attempts to delineate the western boundary and in order to secure regional peace beyond the Cape borders led Sir Harry Smith to declare Britain's sovereignty over the territories north of the Orange River in 1848 (Treaty no. 03). The boundary issue was referred to in vague terms and was to encompass the territories north of the Great Orange and 'including the countries of Moshesh, Moroko, Molitsani, Sinkonyala, Adam Kok, Gert Taayboach, and other minor chiefs, as far north as to the

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16. Sanders, P. Moshweshwe of Lesotho. London: Heinemann, 1971.

17. Reproduced by A.J. van Wyk in: Smit, P., et al. Lesotho. Pretoria: Africa Institute of South Africa, 1969, p. 2-3.

18. Basutoland Records, vol. 1, p. 217.

Vaal River, and east to the Drakensberg or Quathlamba Mountains.' Prior to this declaration Moshesh was given an assurance by the High Commissioner that he would remain independent and would be allowed to rule his land according to custom. It was only due to this assurance that Moshesh agreed to accept British jurisdiction.[19]

Major Warden was given the task of demarcating the western boundary line which would be acceptable to all, but which ultimately proved unacceptable to the parties concerned (Treaty no. 05). He amended the Napier delimitation by recognizing the Rolong, Tlokwa and Kora as independent countries and compelled Moshesh to accept a southern boundary which, according to Walker 'cut off over 100 Basuto villages. Some of them had only recently been occupied but others were of old standing and with them were cut off a great wedge of good land in the Caledon area, and nearly all the cornlands to the west of the Caledon for the benefit of the Europeans or minor chiefs.'[20]

Naturally peace was not forthcoming. The Basuto refused to move to their side of the so-called Warden Line. After suffering a series of defeats by the Basuto at the battles of Viervoet and Berea (1851-52), the British decided to permanently withdraw from the Sovereignty. This decision was formalized in the Bloemfontein Convention of 1854. The Orange Free State was recognized as an independent republic, but the troublesome border and land disputes with the Basuto were not referred to, and confusion continued to reign. The whites continued to recognize the Warden Line but Moshesh regarded the withdrawal of British Sovereignty as rendering all previous agreements as null and void and that the 'Basuto were again in

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19. Stevens, R.P., op cit., p. 19.

20. Walker, E.A. A History of Southern Africa. 3rd Ed. London: Longmans, 1959, p. 247.

full possession of all the land by virtue of 'hereditary right' or according to their indefinite and unsubstantiated claims.'[21]

The Government of the Orange Free State had to bear the burden of trying to enforce land grants to their farmers on lands actually occupied by the Basuto. This precipitated several crises within the Government itself, and after the resignation of President Hoffman. his successor Jacobus Boshof realized that a mediator was necessary. and Sir George Grey was requested to arbitrate. The contending parties met at Smithfield in 1855, where an agreement was reached. Implicit in the Treaty however, was an acceptance of the Warden Line but as each party was trying to expel the other from the coveted cornlands, the agreement was doomed to failure.

The conflict continued and culminated in a declaration of war by the Orange Free State against the Basuto. The war was eventually terminated by an offer of Sir George Grey to mediate and this resulted in the First Treaty of Aliwal North of 1858 (Treaty no. 013). Again this proved to be a somewhat worthless document as the Warden Line north of the Caledon River was retained but some concessions were made to Moshesh in the southern part where the Orange Free State surrendered some fifty farms in the area between the Orange and Caledon Rivers (in the modern day di tricts of Wepener and Zastron). This agreement merely shelved the difficulties, and indeed was to have ramifications over a century later, when Lesotho laid claims to the so-called Conquered Territory.[22]

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21. Eloff, C.C. Lesotho Claims to Part of the Orange Free State. South African Yearbook of International Law, vol. 4, 1978, p. 116.

22. See: Eloff, C.C., op cit., p. 109-129, for a full analysis of this issue.

Border friction was exacerbated by Sir Philip Wodehouse's response to a plea from President Jan Hendrik Brand to delineate a boundary line, which he did in 1864, in a manner favourable to the Orange Free State and for the first time the Orange Free State's rights were recognized in a large section of land between the Orange and Caledon Rivers (Treaty no. 015). Moshesh was also presented with an ultimatum to withdraw his subjects from Orange Free State Territory before 30 November 1865. In a letter from Mr. J.M. Orpen[23] to the Civil Commissioner of Aliwal North, dated 14 November 1864, some indication of the reaction to the proposed removal of the Basutos can be ascertained. 'The other chiefs are dreadfully cut up too about the decision, especially Moperi and Molapo... /The former said/ 'What a destroyer without pity the white man is. Where are we to go to? Where are we and our children to live?'... and Molapo 'How am I to explain it to my people that they are to leave their own villages where they were born?'... Molapo told me he would agree to the people being removed, but never agree to an acknowledgement that the land was alienated. The claim, however dormant, must descent to their children's children unimpaired.'

Moshesh made only a pretence with complying with the removal of his subjects and the Great Basuto War as it was known, broke out in 1865. It continued for a year and surrender came in stages. Firstly, Malapo was compelled to cede his territory in the north and west of the Caledon River, and to become a vassal of the Orange Free State (Treaty no. 016).

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23. Basutoland Records, vol. 3A, p. 312-314.

With his subjects on the brink of starvation, Moshesh signed the Treaty of Thaba Bosigo soon after Molapo's Treaty of Imparani in 1866. This treaty (Treaty no. 017) has been described by various historians as the most disastrous treaty to be enforced on the Basuto. By its harsh terms the Basuto were to vacate the territory on the Free State side of the Caledon for all time. It was '... an extent of land equal to about a third of the whole of Basutoland, well over half its arable land, and so rich that nothing in the Free State could compare with it.'[24] As noted by De Kiewiet 'like all frontiersmen, the fruits of conquest were the lands of the vanquished, and gave little thought to the lot of the natives they expelled.'[25] Eloff justifies the acquisition of the so-called Conquered Territory by the Orange Free State, as an act of cession on the part of Moshesh and states that this acquisition 'undoubtedly satisfies the conditions laid down by the law of nations.'[26]

The Basuto showed no sign of leaving the annexed territory. Moshesh repudiated the Treaty and again voiced his appeal to be taken over as a British subject. This was in keeping with the Imperial policy of the time, and his request was acceded to (Treaty no. 018) and they were saved the danger of complete absorption by the Orange Free State. The border issue was still not resolved but eventually after negotiations, the new border between the Orange Free State and Basutoland was delineated in 1869 according to a treaty signed between the Orange Free State and Great Britain, known as the second Treaty of Aliwal North (Treaty no. 019).

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24. De Kiewiet, C.W. British Colonial Policy and the South African Republics, 1848-1872. London: Longmans.Green, 1929, p. 194.

25. Ibid. p. 192.

26. Eloff, C.C., op cit., p. 122.

Briefly summarized this reaffirmed the Bloemfontein Convention, restored to the Basuto the lands east of the Caledon River but otherwise confirmed all existing borders. The Basuto... were given barely enough to preserve them from the worst effects of congestion.'[27]

The borders thus laid down and subsequently ratified were substantially the same as those recognized today. There were several amendments which should be consulted: the British High Commissioner's Notice of 13 May 1870 (Treaty no. 020), which was confirmed by the Cape of Good Hope Act, 11 August 1871, p. 185.

Further stipulations regarding the boundary[28] were contained in another agreement signed between the British Government and the Orange Free State on 13 July 1876 (Treaty no. 033). The need for this treaty arose as a result of the discovery of diamonds, and the so-called Diamond Dispute. This involved Chief Waterboer of the Griquas and President Brand of the Orange Free State. Put in basic terms the British Government acquired the rights of Waterboer, and after lengthy negotiations, it was arranged that the Orange Free State should abandon its claim on receiving from Griqualand West, the sum of £90,000.

Boundary problems with the South African Republic were provided for in terms of the London Convention of 1884 (Treaty no. Z33) by which stipulations were made for beaconing off the south-west boundary of the

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27. Stevens, R.P., op cit., p. 24.

28. For a detailed account of tracing the boundary one should consult: Warren, Charles. Boundary Line Between the Orange Free State and Griqualand West. Royal Engineers' Occasional Papers, 6, 1882, p. 92-147.

Republic, and in the case of disagreement, a referee was to be appointed. On 5 August 1885, a referee appointed by the Orange Free State, Melius de Villiers, one of the Judges of the High Court of the Orange Free State made his pronouncement (Treaty no. 040).

In 1886 the need to beacon the boundary between the Orange Free State and Basutoland and following a survey of the alignment, 303 beacons were placed by Boundary Commissioners (Treaty no. 041).[29] It was deemed that closer definition of the boundary between the Orange Free State and Basutoland was necessary, and accordingly in 1891, a Proclamation (Treaty no. 062) was issued by the High Commissioner for South Africa, Sir Henry Brougham Loch, based on the 1869 Treaty of Aliwal North.

The Orange Free State was annexed in 1900 (Treaty no. 087) by Great Britain (as referred to previously) and known as the Orange River Colony '... and form part of Her Majesty's dominions' and as stated by Hertslet, 'the boundaries of the Colony do not anywhere touch the territories of a foreign power.'[30]

2.1.3 Diplomatic Background

The Orange Free State entered into a period of prosperity after the Diamond Fields Dispute. It was mainly during the presidency of Jan Hendrik Brand, and through the efforts of his Consul-General in the Netherlands, Hendrik Hamelberg, that many treaties were concluded, both abroad and with neighbouring states and colonies. The role of Hendrik Hamelberg is note-

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29. As cited in Brownlie, I. African Boundaries: A Legal and Diplomatic Encyclopaedia London: Hurst, 1979, p. 1110.

30. Hertslet, Sir Edward. The Map of Africa By Treaty, vol. 1, 2nd Rev. Ed. London: HMSO, 1896, p. 217.

worthy in this respect. Prior to his departure from South Africa in 1871, he was also appointed as the Orange Free State's Plenipotentiary and Diplomatic Agent for the United States of America, Germany and Russia. His brief was 'to treat, and confer, to negotiate and to enter into treaties... and to do whatever he may deem necessary for the welfare of the Orange Free State.'[31]

He compiled a draft set of regulations pertaining to consular duties and on 22 May 1876, this was submitted to the Orange Free State Volksraad. From the discussions it became apparent that many of the members saw no necessity for consular representation abroad. Their reasoning was that their Free State citizenship ceased once they left the Orange Free State, and thus they could not be represented abroad! They also questioned the cost to the state. Consequently the draft was only accepted in the following year. Article 14 of the Regulations is of importance because Hamelberg stressed the need to promote and protect commerce, agriculture and industry in the form of treaties.

A series of honorary consuls were appointed in various countries in order to further the Orange Free State's interests abroad. J.H. Riley of Philadelphia, for example, filled this role in the United States and was later succeeded by his son. The Consul in England was one, P.G. van der Bijl, but he was so often in the Cape that Thomas Blyth acted on his behalf, and later took over as Consul-General. Belgium, Germany, Italy, Portugal, France and Spain, too, were represented in this way.

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31. Du Toit Spies, F.J. Hamelberg en die Oranje-Vrystaat. Amsterdam: Swets en Zeitlinger, 1941, p. 350-351.

An analysis of treaties concluded during this period reveals the following categories:-

2.1.4 Friendship and Commerce

The United States was one of the first countries with which the Orange Free State concluded an international agreement (Treaty no. 022). It was signed in 1871 in Bloemfontein with the United States consul, stationed in the Cape Colony, as the other signatory. This treaty, which was valid for a ten year period after its ratification, gave reciprocal rights of admission, equality and treatment to the citizens of both countries, but these rights did not extend to political privileges. Citizens of the one country, residing in the other were exempt from military service but were required to make the same compensatory contribution, financial or as specified, as those citizens of the country concerned who were exempt from such a service. No higher taxes were levied on citizens of one country residing in the other. In the case of war, seizure or occupation of property was to be on an equal footing. Articles III and IV laid down provisions regarding the disposal of property either by sale, donation or testament, and any dispute arising from such a transaction was to be subject to the laws of the country in which the property was situated. The establishment of Consuls and Vice-Consuls were provided for, with appointments subject to the approval of the country in which they were to serve. Articles VI and VII defined the status of tariffs and duties between the contracting parties, each of which undertook not to grant any favour in commerce to any other country which could not be utilized by the other party. Extradition of criminals, subject to clearly defined conditions was also provided for.

Hamelberg negotiated the recognition of the Orange Free State with Belgium on President Brand's instigation. This resulted in a treaty of friendship and commerce (Treaty no. 025) which was signed in 1874, and later, upon its termination, renegotiated in 1894 (Treaty no. 070). Shortly after the initial treaty was signed with Belgium, which incidentally was the first which Hamelberg concluded, he negotiated a treaty of commerce and friendship, with the Dutch Minister of Foreign Affairs, Pieter de Willebois, acting on behalf of the Netherlands. This treaty (Treaty no. 027) granted to the subjects of both contracting parties equality with the citizens of those countries 'especially in all that concerns trade, industry, and employment, payment of taxes, performance of Divine service, the right of acquiring or disposing of movable and immovable property by purchase, sale, donation, exchange, last will, and inheritance ab intestato.' Furthermore, the treaty granted reciprocal most-favoured nation status, and their consular officials were to enjoy the same privileges and immunities as those of the same rank belonging to the most favoured nation.

This treaty lapsed on 23 September 1894, and Hamelberg approached President Reitz regarding the negotiation of a further treaty. However when it came before the Volksraad in May 1895, the President was on sick leave in Europe, and the general consensus of opinion in the Volksraad was against its renewal. The main reason for this attitude was that the Orange Free State was in the throes of persuading the Transvaal to enter into a Customs Union, and it was feared that the conclusion of further treaties abroad would prove a stumbling block in the realization of this proposed Customs Union. This decision proved to be a personal disillusionment to Hamelberg, as negotiations with the Netherlands were far advanced

and the treaty all but signed. He took up the matter with President Reitz who concluded that the Volksraad had misunderstood the implications of such a treaty, and that it would not detrimentally affect South African inter-state relations. In 1895, President Steyn finally convinced the Volksraad of its necessity and the treaty was concluded (Treaty no. 072). Its provisions were identical to the initial treaty except that it was to be valid for three years after its ratification.

Attempts had been made since 1872 to enter into a treaty of friendship and commerce with Portugal, but this only came to fruition in 1876 (Treaty no. 031). Negotiations were carried out between Hamelberg and Viscount Duprat who was the Portugese Consul-General in London. 'Full and mutual freedom of commerce' was provided for, and the citizens of each country were granted reciprocal rights concerning residence, trade, access to the courts of justice, disposal of property, the right to inherit property and freedom of religion. They were exempt from forced loans, extraordinary taxation and conscription. Several of the clauses regulated the trading provisions through the Portuguese possession of Mozambique, and Muller[32] points out a discrepancy in the Portuguese and Orange Free State texts regarding Article VIII. The Dutch text (as does the English translation) stated that an increase from the three percent fixed import duty to a six percent maximum was optional to the King of Portugal, whereas the Portuguese text stated categorically that this import duty of six percent maximum had to be levied on all goods coming through Delagoa Bay. As the goods came through the South African Republic,

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32. Muller, H.P.N. Oude Tyden in den Oranje-Vrystaat. Leiden: Brill, 1907, p. 243-244.

the Orange Free State was allowed to give them certain privileges. In the same vein Portugal reserved the right to grant to Brazil special advantages that could not be claimed by the Orange Free State as a consequence of the right to most-favoured-nation treatment (Article XIV). Consular privileges were exchanged, and the treaty was to be valid for twenty years after the date of ratification. Hamelberg was awarded an honour by the Portuguese, in recognition of his efforts to facilitate this treaty.

Treaties of friendship and commerce were also signed with Italy (Treaty no. 050) and Germany (Treaty no. 079). The treaty with Italy was initiated by the Italian Consul in Cape Town in 1889, and President Reitz of the Orange Free State, empowered George Hollis, Consul for the United States in the Cape Colony, to act on their behalf. The treaty, which was ratified by the Volksraad in 1891, granted mutual most-favoured-nation status to the contracting parties, and provided for the exchange of residential, inheritance, and consular rights. Article VIII extended these rights to any country 'with which the Orange Free State forms or shall form a Customs Union.' The treaty with Germany contained very similar provisions but with regard to a Customs Union stated that favours... 'cannot be claimed by the other Party, so long as these favours are also withheld from all other non-contiguous States, Colonies and territories, or from all other States, Colonies and territories which are not joined with it in a Customs Union' (Article VIII).

Free trade had long existed between the Orange Free State and the South African Republic, and this was formalized in 1872 with a treaty of commerce, friendship and extradition (Treaty no. 024/Z18). This however was deemed by President Brand to have lapsed on the annexation of the

South African Republic by the British (Treaty no. Z85). It was only with the discovery of gold on the Witwatersrand in 1885, which brought with it increased movement, that the need, on both sides, for a further treaty was felt. The initial overtures for closer union were made by President Kruger, but were rejected by President Brand who was determined not to be led into conflict with the paramount powers. Upon his death in July 1888 however, he was succeeded by President F.W. Reitz, an avowed advocate of an Afrikaner Republic of South Africa and 'he speedily committed the little pastoral Free State to the ambitious policy of the Transvaal.'[33] On the 8 and 9 March 1889, three agreements were signed, the third of which was a treaty of friendship and commerce (Treaty no. 041/255). A state of 'inviolable peace and perfect amity' between the two states was recognized, and the burghers of each state were granted equal rights, with the exception of political rights, in the state in which they were residing. Free trade was allowed which 'shall not extend to contraband articles, ammunition, and guns, traffic with the natives, or in explosives, or in other articles in regard to which a general prohibition of import or a State monopoly exists' (Article V). Goods passing through the territory of one of the contracting parties, or from the territory of the other were to be exempt from transit dues. Ratifications were exchanged on 16 August 1890, and six months notice on either side was required to terminate it.

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33. Cambridge History of the British Empire, vol. 8, op cit., p. 536.

2.1.5 Extradition

The Orange Free State entered into several extradition treaties. While these were mainly with other states and colonies within the Southern African region, such as the South African Republic (Treaty no. 024/Z18); the Cape Colony (Treaty no. 035,C54); Natal (Treaty no. 023/N28 and no. 034/N43); Rhodesia (Treaty no. 074); Bechuanaland (Treaty no. 065) and Basutoland (Treaty no. 044), the Orange Free State also concluded various agreements abroad.

The United States entered into an extradition agreement with the Orange Free State as early as 1871 (Treaty no. 022). Crimes of a political nature were excluded from those listed as reasons for the mutual extradition of offenders. The list however included murder, or attempted murder, forgery, arson, rape, robbery with violence, forcible entry of an inhabited house, piracy and embezzlement. These clauses pertaining to extradition were part of the friendship and commerce treaty referred to previously. In 1896 a separate treaty was negotiated (Treaty no. 077), which contained a more detailed description of the crimes or offences which could result in extradition, and also the procedures necessary to effect the extradition of the criminal concerned.

Great Britain and the Orange Free State 'with a view to the better administration of justice and the prevention of crime within the two countries and their jurisdictions' entered into an extradition convention in 1890 (Treaty no. 053). This treaty applied to crime and offences committed prior to the signature of the treaty. The stipulations of the treaty were not applicable to the 'South African colonies and possessions' of Great Britain, but with this exception, was applicable to all other

British colonies in so far as laws in force in those colonies would allow.

The Netherlands and the Orange Free State agreed to conclude 'a new convention' relating to extradition in 1893 (Treaty no. 067). The treaty contains twenty-six crimes, again excluding those of a political nature, which would render a person liable to be extradited, including abortion, bigamy and the 'abduction, carrying off, concealment or substitution of a child.' It details reasons for not permitting extradition, such as a crime being committed in a third state, when the person concerned has already been tried, sentenced or acquitted, and if the period of prosecution had lapsed according to the laws of the country from which extradition was demanded. The treaty was not applicable 'to the colonies' and replaced the earlier convention of 1874 (Treaty no. 026).

2.1.6 Human Rights

In the light of the Orange Free State's racial policies, especially that of prohibiting the immigration of Asians,[34] it is somewhat contradictory to read of the reasons given for their accession to the Brussels Slave Trade Act of 1890 (Treaty no. 054).

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34. Orange Free State. Laws, Statutes, etc. Wetboek van den Oranje Vrijstaat, 1891, p. 262. This law was taken to court in the case of Cassim and Solomon v The State 1891. The appellants pleaded the invalidity of the law as being in conflict with Article 58 of the constitution which guaranteed equality. In a brief review of the case, the Cape Law Journal, 1892, p. 58 (as cited in Thompson, L.M., op cit., p. 55), concluded: The High Court held that the plea was groundless, that the article of the Constitution that 'the laws were equal for all' had not the meaning contended for, and that the Ordinance was not ultra vires of the Constitution.

> The Government of the Orange Free State have followed with interest the considerable work that the International Conference, which met at Brussels, has accomplished with the view of serving the cause of humanity and of civilization in Africa; and they earnestly desire to be associated with it.
>
> The enfranchisement and elevation of the negro race has always, when cirumstances have admitted of it, been the object of its solicitude. The legislation of the Free State furnishes many proofs of this.
>
> The Government of the Orange Free State are therefore disposed to the General Act of Brussels, in conformity with Article XCVIII of that Act.[35]

2.1.7 Defence Alliances

The Orange Free State and the South African Republic drew closer together recognizing the 'many bonds of blood and friendship' in a political treaty (Treaty no. 046/Z54), which was signed in Potchefstroom on 9 March 1889, and ratified on 16 August 1890. This defence pact envisaged a 'federal union' between the two states and in the interim period, bound the two republics to assist each other whenever the independence of either was threatened or attacked, provided the one determined the other's cause to be just.

In March 1897 the Transvaal and the Orange Free State concluded an offensive and defensive alliance facilitating a loose scheme of federation (Treaty no. 078/Z75). The appended protocol[36] contained details of co-operation and laid down the principle of interchangeable citizen rights.

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35. Archives of the Colonial Secretary's Office, Natal, vol. 1425, 1895/1276.

36. Cambridge History of the British Empire, vol. 8, op cit., p. 593.

It also provided for a permanent Council of Representatives or Federale Raad, which was to comprise the two Presidents or their deputies, and five representatives of each republic holding office for a two year period. Annual meetings were to be held alternatively in Pretoria or Bloemfontein with the brief 'to report and to advise the respective governments on matters of common interest concerning mutual protection and trade relations, proposals in regard to Federal Union and objections thereto, to make recommendations with a view to uniformity of legislation, and such other matters as may be referred to it...' By this alliance system which pointed the way towards federation, the South African Republic 'stood to benefit by any treaties its ally chose to make without let or hindrance by the Queen.'[37] It was these treaty obligations that brought the Orange Free State into the Anglo-Boer War of 1899-1902.

2.1.8 Customs Union

The dues collected by the British colonies on imports through their harbours had been a contentious issue ever since the birth of the two Boer Republic. 'The responsibility of the British colonies for the financial weakness of the Republic and for the harmful effects of that financial weakness was very great.'[38] The discovery of gold on the Witwatersrand radically altered the South African Republic's financial status. The rebuff dealt in 1885 by the Cape Colony rejecting their pleas for an agreement on customs policy on goods destined for the Transvaal, could now be turned to their advantage and they refused an invitation to a customs conference

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37. Ibid.

38. De Kiewiet, C.W. A History of South Africa. London: Oxford University Press, 1941, p. 123.

organized by the Cape in 1886. They also refused to consider a proposal from the Cape regarding the extension of the railway northwards and duty free admission into the Cape of their produce.

In 1888 delegates from Natal, the Orange Free State and the Cape Colony met at a customs convention. Natal could not accept the proposed tariff basis, but the Cape and the Orange Free State agreed to form a Customs Union in 1889 (Treaty no. 048/C 31). The convention made provision for other South African states to be admitted to the Customs Union on adopting the uniform tariff provisions. Basutoland (Treaty no. 058) and Bechuanaland (Treaty 051) joined shortly thereafter, Natal joined in 1898 (Treaty no. 081/C 172 /N 106), but the Transvaal only joined as late as 1903 (Treaty no. 094/C 179 /N 115/ Z101).

2.2 The South African Republic

2.2.1 Constitutional Development and Treaty-Making Powers

The Sand River Convention, signed on 17 January 1852 (Treaty no. Z5) may be regarded as one of the basic agreements in South African history as it guaranteed the full independence of a Boer state, north of the Vaal River. It assured ... Trekkers ... '... the right to manage their own affairs, and to g... elves, without any interference on the part of Her Majesty the Qu... s Government.' Furthermore, the agreement facilitated mutual trade, extradition of criminals and abstention from encroachment of territory, binding on both parties. Slavery was prohibited in the Transvaal and the sale of ammunition to blacks was forbidden, and all alliances with 'coloured nations north of the Vaal River' were disclaimed by Her Majesty's Government.

Free movement across th· common boundary, the Vaal River, was recognized by the Convention but no further boundary limitations were imposed. Sir George Grey, in a despatch to Sir E.B. Lytton criticized the Convention saying that '... it left all the boundaries of the Trans-Vaal country but one defined.'[1] This lack of clarity led to various land and border disputes, especially over the North-Eastern border of Natal and the Missionaries Road to the west. According to De Kiewiet the discrepancy in six semi-official maps published between 1870 and 1877 was enormous and '... they showed no agreement whatever in either the western or eastern boundaries varying sometimes as much as one hundred and fifty miles.'[2]

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1. Bell, K.N. and Morrell, W.P. Select Documents on British Colonial Policy, 1830 to 1860. Oxford: Clarendon, 1928, p. 182.

2. De Kiewiet, C.W. The Imperial Factor in Africa. Cambridge: Cambridge University Press, 1937, p. 218.

On 21 November 1853 by a resolution of the Volksraad[3], The Transvaal adopted the name of the South African Republic North of the Vaal. This was later shortened to the South African Republic, in February 1858[4] and 'as such Republic they acted and were recognized by foreign powers as an independent state making treaties with Portugal and Belgium on a sovereign footing.'[5] Portugal was prompted to enter into an alliance with the Republic after the discovery of gold; and over the disputed port of Delagoa Bay resulting from the need of the Transvaalers to have an outlet to the sea, and the subsequent British declaration of ownership. As a means of entrenching Portuguese interest in the area therefore, a treaty of commerce and friendship was signed in 1869 (Treaty no. Z15) by which Transvaal recognition of Delagoa Bay was secured, in return for receiving freedom of trade wit' that port.

The danger of foreign intervention was inherent in President Burgher's attempts to form foreign alliances, and as such were a contributory factor leading to the annexation of the Republic by Great Britain as '... if England declined to interfere, her place would be taken by Germany. For the demand for colonies was growing louder in Berlin, and the Brussels Conference of 1876 was heralding the coming scramble for Africa.'[6]

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3. Eybers, G.W. Select Constitutional Documents Illustrating South African History, 1795-1910. London: Routledge, 1918, p. 361.

4. Ibid. p. 363

5. Law Officers to the Colonial Office, 5 February 1900 quoted in full by McNair, A.D. Law of Treaties. Oxford: Clarendon, 1961, p. 706-710.

6. Cambridge History of the British Empire, vol. 8, Cambridge: Cambridge University Press, 1963, p. 475.

By 1877 the Republic was on the verge of bankruptcy, anarchy and under continuous attack from the indigenous people. It therefore seemed expedient to come under British rule, and accordingly on 12 April 1877, Sir Theophilus Shepstone issued a proclamation (Treaty no. Z25)[7] in which the South African Republic was declared 'to be British territory, and brought under the Government of the Crown as a dependency acquired by cession.'[8] According to the Proclamation 'all bona fide concessions and contracts with Governments... by which the State is now bound, will be honourably maintained and respected.'[9]

British rule was challenged by the Boer rebellion of December 1880. Peace was made and in August 1881 the terms of the settlement were arranged by a Royal Commission acting under instructions from Great Britain. By the Preamble of the Convention of Pretoria (Treaty no. Z30) the territory, once more to be designated as the Transvaal, was guaranteed 'complete self-government subject to the suzerainty of Her Majesty' and subject to further conditions and reservations itemized in 32 articles. British control of external relations, including the conclusion of treaties was secured by Article II.

Such limitations upon the Boers' desire for absolute independence and to form their own alliances with foreign powers, as well as their quest for expansion encouraged the newly-elected President Kruger to lead a deputation to London in order to demand a revision of the Pretoria Convention.

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7. Also published in Eybers, G.W., op. cit. p. 448-453.

8. Law Officers to the Colonial Office, 5 February 1900. Quoted in full in McNair, A.D. op. cit., p. 707.

9. Eybers, G.W., op cit. p. 453.

The Pretoria Convention was superseded by the London Convention of 27 February 1884 (Treaty no. Z33) in which the name South African Republic was permitted. British sovereignty was not expressly retracted. Lord Derby, the Colonial Secretary, consented only to relinquish specific mention of the term 'suzerainty' as it has never been definitively clarified. In a speech to the House of Lords on 17 March 1884,[10] Derby explained he was content to abstain from repeating the word, while retaining the substance. In order to do this the Preamble to the Pretoria Convention was omitted and instead 'the following articles of a new convention' were 'substituted for articles embodied in the .' This led to differences in legal opinion as to whether the Provisions of the Preamble were thus waived, but the substance of British suzerainty was certainly retained by curtailing the Republic's liberty in the sphere of external relations.

Article IV of the London Convention reserved to the Crown control over the Republic's treaty-making powers. It was restrained from concluding treaties with any nation or state, other than the Orange Free State, and with the indigenous people to the East or West without the consent of the British Government, it was, however to have the power to make treaties with the indigenous people to the North. Approval would be considered granted if the British Government did not signify its disapproval within six months of signing the treaty.

The status, therefore, of the South African Republic at the outbreak of the Anglo-Boer War in 1899 may be thus summarized as one of self-government, subject to the suzerainty of the Crown. Annexation of the

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10. Great Britain. Parliament. House of Lords. Hansard's Parliamentary Debates, 3rd Series, vol. 286, 17 March 1884, cols. 7-10.

Republic to Great Britain was proclaimed on September 1900 (Treaty no. Z85). The 'clean slate theory' of state succession prevailed in Great Britain at the time, the terms of which stipulated 'that when the territory of one state had been annexed by another resulting in a merger, the treaties of the extinct state came to an end, at least in the absence of any other treaty obligations resting on the annexing state which required it to maintain treaties in force, and provided that the treaties could not be classified as dispositive treaties.'[11] In general therefore, the British Government regarded all treaties signed between the South African Republic and other states as having lapsed by virtue of this annexation and 'automatically became subject to British treaty obligations once they became foreign possessions of the Crown.'[12] Schaffer indicates that 31 May 1902, the date of signing of the Peace Treaty of Vereeniging, is probably to be regarded in preference to the annexation date of 1 September 1900, as the time from which British treaties can be considered as binding on the South African Republic.

2.2.2 Treaties between the Boers and the Local Chiefdoms

The Trekkers were anxious to secure title-deeds to the land in which they had settled, and many of the early transactions between the Boers and the native chiefs took the form of land cession. According to Lindley's definition these 'may comprise the whole of the sovereignty over the area; or it may cover part only of the sovereignty, as in the

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11. Schaffer, R. A Critical Analysis of the Treaty-Making Powers of the Union of South Africa and the Republic of South Africa. Johannesburg: University of the Witwatersrand, 1978, p. 273.

12. Ibid. p. 274.

case where the external sovereignty is ceded by a native chief in return for protection. It may be by way of exchange, sale or gift.'[13] Many of the early documents have not survived, as for example the treaties concluded by Retief with chiefs such as Moroka, Moshesh, Towana and Sikonyele.[14] From those which have survived, Agar-Hamilton has adduced a 'common form' comprising a formal preamble, a peace undertaking on both signatories and the granting of permission to the farmers to settle in a given area, usually in return for a number of horses or cattle.[15]

One of the earliest existent declarations in this regard is dated 12 October 1839, (Treaty no. Z1) and was made by Chief Maleliele, upper chief of the Marotse, and Chief Mattjawa of the Maroekas by which A.H. Potgieter was given rights to the land of the chiefs Magalie, Magata, Maseloa, Pilana and Ramathlape, which had been siezed by Umzilikazi and 'that in the opinion of the signatories at any rate, after the defeat of the Matabele, it had devolved upon their conqueror Potgieter.'[16] The area in question roughly comprised the modern districts of Rustenburg, Marico, Potchefstroom and the surrounding country. The document was Potgieter's justification of occupying native territory and 'shows some desire to secure evidence in support of the contention that the original owners of the soil had already been displaced.'[17]

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13. Lindley, M.F. The Acquisition and Government of Backward Territory in International Law. London: Longmans, Green, 1926, p. 166.

14. Cloete, H. History of the Great Boer Trek. London: Murray, 1899, p. 94.

15. Agar-Hamilton, J.A.I. The Native Policy of the Voortrekkers: An Essay in the Interior of South Africa, 1836-1858. Cape Town: Miller, 1928.

16. Ibid. p. 5?.

17. Ibid.

The power relationships in the Eastern Transvaal were altered in 1845, when A.H. Potgieter and his followers moved from Potchefstroom to the village of Ohrigstad and were joined by Trekkers from Natal under the leadership of J.J. Burger. The settlement was subject to internal strife and as Delius states 'the problem of securing rights to the land upon which the community had settled also played a significant part in these disputes.'[18] Potgieter concluded an agreement with the Pedi leader Sekwati (Treaty no. Z2), the exact terms of which are unknown as it was handed in to be presented with the Volksraad minutes but it was subsequently lost. Bonner indicates that Potgieter secured cession of land for himself in return for the promise of Boer protection against future Swazi attacks.[19] The exact area of land was not specified but the treaty was referred to as a 'vredenstractaat' in the Voksraad minutes.[20] Delius points out that Potgieter used this agreement to enhance his authority over the community, while Sekwati ceded rights of occupation to the land, but not ultimate control. 'Perhaps most crucial of all, however, was the fact that the Maroteng were in no position to dictate to the Trekkers where they could or could not settle.'[21]

Lindley cites four rules relevant to the conclusion of treaties with native sovereigns, namely the Paramount Authority should be a party to the agreement; the treaty should be made by the person who according to

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18. Delius, P. The Land Belongs to Us: The Pedi Polity, the Boers and the British in the Nineteenth-Century Transvaal. Johannesburg: Ravan, 1983, p. 31.

19. Bonner, P. Kings, Commoners and Concessionaires: The Evolution and Dissolution of the Nineteenth Century Swazi State. Cambridge: Cambridge University Press, 1982, p. 52.

20. Agar-Hamilton, J.A.I. Native Policy... op. cit., p. 57-58.

21. Delius, P. op. cit. p. 32.

the law of the Government or custom of the tribe, possesses or might be reasonably expected to possess, the power to make the cession; the form of the agreement should be that which is usually adopted for acts of a public nature among those with whom it was contracted and fourthly, the nature of the agreement should be understood by the parties to it.[22] The latter clause goes on to state 'an agreement to which an ignorant chief has affixed his mark without understanding a word of it, or having any correct idea as to its consequences, can have no validity, either as binding the natives or as against other powers.'[23] It seems likely that Sekwati's view of the agreement falls into this category.

1846 witnessed the conclusion of two treaties. Leyds refers to a treaty signed between the Boer Government and Umzilikazi of the Matabele in 1846/47 (Treaty no. Z4)[24] the text of which has not been located. A commando had defeated the Chief at Magaliesberg causing him to flee northwards and subsequently he agreed not to attack any of the tribes who now fell under Boer protection. He remained true to this agreement although he continued his policy of plunder towards those tribes not protected in this way.

The second agreement reached in 1846 involved a cession of Swazi land to the Boers on 25 July (Treaty no. Z3). By this agreement King Mswati II ceded all the land conquered by his father, Sobhuza, for 100 head of cattle, the first fifty to be paid within a month of signature,

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22. Lindley, A.H. op cit. p. 169-175.

23. Ibid. p. 173.

24. Leyds, W.J. The Transvaal Surrounded. London: Fisher Unwin, 1919, p. 82.

and the second instalment within two years. This payment was not in fact completed until January 1856. The cession included the modern districts of Leydenburg, Middelburg, Barberton and Carolina and, as Delius points out, included 'the new and old heartland of the Pedi polity and the domains of the Ndzundza Ndebele, the Kopa and the various Koni and Eastern Sotho groups.'[25] He goes on to quote C. Jeppe who said 'the Amaswazies did sell the land, but it is also evident that they had no right to do so.'[26]

The motives underlying the cession have been subject to various interpretations, and the validity of the agreement is open to debate. Potgieter's opponents, the Volksraad Party, were thwarted in their attempts to force Potgieter to renegotiate the terms of his agreement with Sekwati. They were thus susceptible to an approach by the Swazi, under Mswati who was in dire jeopardy of being ousted from his chiefdom by his elder brother Malambule, who had secured Zulu assistance. It thus seems likely that the agreement was mutually beneficial, and that the Boers were not the sole beneficiaries.

According to Matsebula[27] Mswati never even signed the agreement and Somcuba, his eldest brother, was in self-imposed exile at the time, and thus could not have signed as the person 'ruling in place of the king.' This argument seems to be of academic interest only, as the cession, whatever its legality, became a fait accompli, and it was this agreement and that of 1855, that later provided the border delineation between the Swazis and the Transvaal. More germane to the question, was the right

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25. Delius, P. op. cit. p. 32

26. Ibid.

27. Matsebula, J.S.M. A History of Swaziland. Cape Town: Longman Southern Africa, 1972, p. 21.

of the Swazi king to sell the land upon which his subjects were settled even though this fell in the heart of Pedi territory.[28] Also pertinent to the legality of the agreement is the unanswered question of whether it was the right of Mswati to dispose of land belonging to the Swazis. As pointed out by Agar-Hamilton 'the whole conception of land ownership was alien to the economic sentiments of the natives who were still in the communal stage. There were no landowners among them and the chief by himself had no right to alienate what was the property of the whole tribe.'[29]

The Transvaal comprised four small republics at this time and in 1853, Umzilikazi entered into treaties with two of them. Firstly his duly authorized representative Captain Marati concluded a treaty with the Zoutpansberg faction, under the Commandant-Generalship of Pieter Johannes Potgieter (Treaty no. Z7). In terms of this peace treaty, Umzilikazi agreed that neither he nor his people would engage in the traffic of arms and ammunition and undertook to ensure that anyone trading in arms, including hunters or other travellers, would be brought to the nearest landdrost for punishment. With the exception of firearms, free trade was ensured. An important provision required that the chief and his warriors, once called upon by the Commandant-General, would have to render assistance. Hunters and traders from the Republic were to be given assistance when coming into Umzilikazi's territory. In the case of disputes arising

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28. Details of the area ceded can also be found in: Brownlie, I. African Boundaries: A Legal and Diplomatic Encyclopaedia. London: Hurst, 1979, p. 1320.

29. Agar-Hamilton, J.A.I. Native Policy... op. cit. p. 136.

between Umzilikazi's people and emigrant farmers, the Commandant-General, or a court of landdrost or heemraaden, sitting with or without a jury as the nature of the case dictated, had the power to try the case. In all cases, appeal could be directed to the Volksraad.

Agar-Hamilton expresses doubt as to whether this treaty was ever taken seriously by either side, as Umzilikazi was too powerful a chief and his territory too far away for the treaty to be practical. He doubts too, that he would surrender judicial power in the case of disputes so completely into the hands of the Boers. The importance of this treaty, according to Agar-Hamilton is that it is illustrative of the Boer's policy towards a large tribe, with the prohibition of firearms trade being of paramount concern, and the obvious advantages of securing trading and hunting privileges.[30]

Umzilikazi, in the same year entered into a treaty (Treaty no. Z8) with the Transvaal Republic under Andries Pretorius, with very similar provisions concerning peace and friendship, trade in firearms and hunting. Of interest is the clause providing for the extradition of offenders, affecting both sides reciprocally and with the same force.

Also in 1853, a treaty was signed between Somcuba (designated Limoeba, a Zulu captain, near Lydenburg in the text of treaty) and members of the Krygsraad of the South African Republic (Treaty no. Z9) in terms of which he denounced his former allegiance to Mswati, and accepted the supremacy of the Volksraad, its orders and officials, in his place Furthermore, he undertook not to declare war on any other tribe.[31]

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30. Agar-Hamilton, J.A.I. Native Policy... op. cit. p. 80.

31. Ibid. p. 78.

Despite the provisions of this treaty, Bonner feels that the final dispatch of Somcuba was the turning point in Boer-Swazi relations during 1855 when they ceded a ten-mile corridor of land along the northern banks of the Pongola River to the Leydenburg boers (Treaty no. Z10). The traditional explanation of this cession, was that it was a tactical move on the part of the Swazi to provide a buffer zone populated with white people, against the might of the Zulu. Bonner points out that this only took place during 1890, some thirty-five years later. Without the elimination of Somcuba however, the agreement would have been unlikely and 'this would go a long way towards explaining whey Mswati was prepared to sign away such a vast area of land, for only something of this sort could have brought Leydenburg's acquiesence in his plans.'[32] The validity of this treaty has had important repercussions in later years when the South African Government, in an attempt to deprive over a million blacks of their South African citizenship, tried to excise the homeland of KaNgwane and thus 'reunite' the Swazi nation. The incorporation issue was referred to the Rumpff Commission of Inquiry, which was disbanded in July 1984, as the Commission believed it was serving no useful purpose. Bonner has said 'Mswati could cede away this vast tract of land with perfect equanimity because he did not endow it with any finality.'[33] The Boers in fact did not fulfil their part of the bargain and immediately populated the ceded area, neither did they complete the payment of the seventy head of cattle. As mentioned previously however, the agreement of 1855 provided a definitive border between the South African Republic and Swaziland, as delineated by the Transvaal Government Commission of 1866.

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32. Bonner, P. op. cit., p. 75.

33. Ibid.

A nominal gift of twenty-five cows, a bull, a horse-saddle and bridle was the price paid for a strip of Zulu territory along the Blood River, in an agreement entered into between Cetewayo and the Transvaal in March 1861 (Treaty no. Z11). Cetewayo was recognized by the Transvaal as king of the Zulus and undertook to prevent disturbances likely to inconvenience his neighbours. To Cetewayo this exchange was politically expedient but 'neither he nor the Boers, who did not have the population effectively to occupy the grant, troubled about any of the Zulu tribesmen who might be occupying the ground. In this wise the Boers obtained a legal hold upon land which the native tribesmen, who knew little of the binding force of these pieces of paper and cared still less, regarded as their own. Thus were the seeds of [illegible]v a scare and ultimate conflict sown.'[34]

Brownlie cites the case of another Swazi land cession to the Boers of the South African Republic taking place in 1866. It was signed by Maguazidili, empowered by the Regent Tandile and the important indunas representing the kingdom of the late Mswati. It was also signed by the Dutch Commissioners. (Treaty no. Z14).[35]

Mswati's son Umbandine was crowned king of the Swazis by Boer delegates specifically sent for that purpose by President Burger of the South African Republic.[36] The king and his councillors agreed (Treaty no. Z20) that while reserving the might to manage their own affairs, '... bind themselves to be and to remain subjects and obedient followers of the

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34. De Kiewiet, C.W. British Colonial Policy and the South African Republics, 1848-1872. London: Longmans, Green, 1929, p. 144.

35. Brownlie, I. op. cit. p. 1320-1321. He gives exact details of the cession.

36. Leyds, W.J. op. cit. p. 237.

Government of the South African Republic.' The treaty furthermore ensured Swazi assistance in the defence of the South African Republic; protection for traders and extradition facilities. The Boers promised protection to the Swazis but they did not have 'the right to enter into war without the consent of the Government of the South African Republic, or to commit murder.'

The London Convention as referred to previously, allowed the South African Republic the right to conclude treaties with the tribes in the north. Lobengula, chief of the Matabele was under considerable pressure from concession hunters and as early as 1885-86 had made requests to the Government in Pretoria to renew the 1853 treaties,[37] but it was only in 1887 that Lobengula, in an effort of counterbalancing British pressure, entered into a treaty with P.J. Grobler as the representative of the Republic (Treaty no. Z46). Lobengula was acknowledged as an independent chief in this treaty which confirmed, ratified and renewed all formerly concluded treaties. This friendship treaty also contained provision for Matabele assistance to the South African Republic, extradition, protection for hunters having a 'pass from His Honour the State President' and the post of consul having 'criminal and civil jurisdiction over all subjects of the South African Republic' residing within Lobengula's territory. On signing the treaty, Lobengula was presented with a rifle, two hundred cartridges and £140 in cash. This treaty was not invalidated,[38] although Lobengula subsequently six months later, entered into another treaty with the Reverent J.S. Moffat, on behalf of the British Government.

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37. Ibid. p. 389-392.

38. Ibid. p. 39[illegible].

The treaties previously discussed are illustrative of Boer policy towards the indigenous people. Although some measure of protection was afforded to the tribes, reciprocity in the form of assistance against attack was a feature of these treaties. Cession of land to the Boers was on occasion, a matter of expediency on the part of the chief concerned, but his understanding of what he was transferring and its long-term implications must be questioned. According to Lindley 'the fact that the form employed was that of cession shows that the power concerned did not consider that the territory was one that belonged to nobody'[39] and cannot be considered as terra nullius.

2.2.3 Boundaries

An analysis of the treaties to which the Republic was party during the period under review reveals the recurring problem of boundary definition. The first attempt at defining the territory 'beyond the Vaal River' was found in the Sand River Convention of 1852 (Treaty no. 25) wherein it was stated that 'should any misunderstanding hereafter arise as to the true meaning of the 'Vaal River' this question, in so far as regards the line from the source of that river over the Drakensberg, shall be settled and adjusted by commissioners chosen by both parties.'

As referred to previously, land cession featured largely in the Boer acquisition of land, and especially in the case of the Swazi border were the basis of several boundary commissions. Mswati's death occasioned the appointment by the South African Republic's Executive Council of a Commission, comprising of C. Potgieter, C. Pretorius, W.J. Joubert and P.J. Coetser 'to forward and erect beacons along the line of 1855, and

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39. Lindley, M.F. op. cit. p. 44.

the Commission reported on 27 June 1866 (Treaty no. Z13) that they had erected thirteen beacons each as described in the presence of and with the consent of Madobo and Maguazidili representing the /Late/ King Umswazi.'[40] Bonner has said of the 1866 negotiations that 'they constitute the single most important link in the chain of treaties and agreements that confined the Swazi kingdom within its present borders. Here for the first time, one finds a territorial treaty being entered into by the Swazi as a result of Boer initiative rather than their own... one sees the balance of advantage tipping decisively in the favour of the Republic... i was a decisive limiting of Swaziland's territorial jurisdiction.'[41]

In May 1875, another Commission, consisting of G.M. Rudolph and C.J. Joubert was appointed 'to erect beacons from the beacon no. 13 erected by the Commission of 1866 to the Lebombo, which they did in the presence and with the consent of Magwazidili, Madobo and Hlafuna sent for that purpose by the Swazi King Umbandeni.'[42] The Commission's report was dated 10 June 1875 (Treaty no. Z19).

The independence of the Swazis was recognized within the parameters of certain boundaries by virtue of the 1881 Pretoria Convention (Treaty no. Z30). These boundaries are itemized in Article I, and are based upon the findings of the Transvaal-Swazi Boundary Commission of January 1880 (Treaty no. Z28). Bonner describes the somewhat confused brief given to the Commissioners and concludes 'that the Swazis could have

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40. Brownlie, I. op. cit. p. 1320.

41. Bonner, P. op. cit. p. 110.

42. Brownlie, I. op. cit. p. 1321.

obtained a great deal more from the boundary settlement than they ultimately did.'[43] The 1884 London Convention (Treaty no. Z33) subsequently replaced the 1881 Convention, and the boundary lines with Swaziland are described in Article I.

For the record, the affairs of Swaziland were the subject of a treaty signed between Great Britain and the South African Republic in 1890 (Treaty no. Z58), 1893 (Treaty no. Z63) and in 1894 (Treaty no. Z68). The latter was signed in substitution of the two former ones. It confirmed Article X of the 1890 Convention, which stipulated the non-extension of the South Africa public and forbade signing of treaties with states or tribes to the no. north-west of the existing boundary. The administration of Swazila volved on the South African Republic by the 1894 Convention, but o Great Britain upon the annexation of the Transvaal in 1900 (Treat, o. Z85). Swaziland gained membership to the South African Customs Union in 1904.

The boundary between the South African Republic and the then Portuguese possession of Mo ambique was defined for the first time in Article XXIII of a treaty concluded on 29 July 1869 (Treaty no. Z15). A dispute between Portugual and Great Britain over the Del Bay region resulted in arbitration by President MacMahon and an award was made giving Delagoa Bay and the southern region to Portugal.[44] The boundaries with the South African Republic were modified and stipulated in a subsequent treaty

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43. Bonner, P. op. cit. p. 156. The declarations confirming the demarcations of 1880 are reproduced in Brownlie, I. op. cit. p. 1337-1341.

44. For final agreement see: British and Foreign State Papers, vol. 70, p. 338.

between Portugal and the South African Republic in 1875 (Treaty no. Z23). This latter treaty was later ratified by Great Britain, as the suzerain power, on 7 October 1882.

The Keate Award of 17 October 1871 (Treaty no. Z17) defined the boundary between Bechuanaland and the Transvaal. The Award concerned the boundary line of the Barolongs and the Batlapins in Bechuanaland. On the evidence Lieutenant-Governor Keate (of Natal) 'felt that he had no alternative but to decide for the chiefs against the Transvaal.'[45]

The boundaries of the Transvaal were clearly defined for the first time by Article I of the Pretoria Convention of 1881 (Treaty no. Z30) within the following parameters - Griqualand West; Natal; Zululand; Swaziland; the Portuguese boundary; Matabeleland, and Bechuanaland. Further expansion was barred.

It proved necessary to beacon off the south-west boundary of the Transvaal and a further treaty was signed between the Royal Commissioner appointed to the task, Lieutenant-Colonel Moysey and Chief Montsiao on 1 September 1881.[46]

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45. See: Cambridge History of the British Empire, vol. 8. op. cit. p. 457, which contains details of the dispute leading to the Award, as does Walker, E.A. History of Southern Africa, 3rd Ed., London: Longmans, Green, 1959, p. 338-339.

46. Mention should be made of the conflict arising from the faulty boundary line on the Western Border which resulted in a Treaty of Peace between Mankoroane, Chief of the Batlapin and Massow, Chief of the Koranna dated 26 July 1882. (Reproduced in part in Leyds, W.J. op. cit. p. 103). Eventually all the contending parties placed themselves by a joint act of cession under the protection of the South African Republic. The British authorities refused to recognize this as a violation of the Pretoria Convention. For a detailed history of the Western Boundary see Leyds, W.J. op. cit. pp. 99-112.

By Article II of the London Convention of 84, (Treaty no. Z33) the Government of the South African Republic undertook to adhere to the new boundaries specified in Article I, and to prevent further encroachments. The latter article again amended the south-west boundary, in dispute since the Keate Award. On 5 August 1885 the Referee appointed by the President of the Orange Free State as stipulated in the London Convention, was one of the judges of the High Court of Justice, Melius de Villiers. He made his pronouncement (Treaty no. Z40) by which the Transvaal was given the eastern parts of Stellaland and Goshen and, as a result of the compromise by which the specific mention of suzerainty was dropped, the Transvaalers were denied control of the Missionaries Road.[47]

On 22 October 1886, Great Britain signed a treaty with the New Republic[48] in which the boundaries between the New Republic and Zululand were defined. The New Republic was later, in 1887, incorporated by a Treaty of Union, (Treaty no. Z46) into the South African Republic. Further to this, Great Britain entered into a treaty with the South African Republic (Treaty no. Z51) in June 1888, which paid special regard to the definition of the boundaries of the South African Republic, as stipulated in Article II.

Mention has been made previously of the treaties signed between Great Britain and the South African Republic in 1890, 1893, and 1894 (Treaty no. Z58 , no. Z63 , no. Z68 respectively. In each

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47. Walker, E.A. op. cit. p. 398-399.

48. British and Foreign State Papers, vol. 77, p. 1280.

instance, Articles X and XXIV of the Convention of 1890 were repeated, and as they concern the last major specifications concerning boundaries of the South African Republic prior to its annexation by the British in 1900 (Treaty no. Z85) they are reproduced here, for ease of reference.

> Article X: The Government of the South African Republic withdraws all claim to extend the territory of the Republic, or to enter into Treaties with any natives or native tribes to the north or north-west of the existing boundary of the Republic, and undertakes to aid and support by its favouring influence the establishment of order and government in those territories by the British South Africa Company within the limits of power and territory set forth in the Charter granted by Her Majesty to the said Company.
>
> Article XXIV: Her Majesty's Government consent to an alteration of the boundary of the South African Republic on the east so as to include the territory known as the Little Free State within the territory of the South African Republic.

The border strip of territory designated as the Little Free State was described as 'a tract of about 50,000 acres in the western part of Swaziland...' and it was stated in the Komati Observer of 1888 that those watching Swazi affairs 'would learn with considerable surprise' that King Umbandine had signed a document offering this strip of territory to the Transvaal Government.[49]

The Letter Patent dated 23 September 1902 (Item no. Z94) which provided for the post-war government of the Transvaal specified the boundaries as comprising 'all places, settlements and territories which formed part of the territories of the South African Republic at the date when the said territories were annexed to and became part of our dominions'.

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49. South African Treaties, Conventions, Agreements and State Papers, p. 353.

The Letters Patent (Treaty no. Z96) went on however to alter existing boundaries by the exclusion of the Vryheid and Utrecht districts from the Transvaal together with 'such parts of the districts of Wakkerstroom as may be defined and delimited by Boundary Delimitation Commission... appointed for that purpose.' The Governor was thereafter to declare the boundaries by proclamation. Schaffer states that the London Convention of 1884 was therefore no longer considered as the instrument in force concerning the definition of the boundaries of the Transvaal and other British territories, but for practical purposes the boundaries did not undergo major changes and remained based on those created by the London Convention.[50]

2.2.4 Commerce

Treaties of Friendship and Commerce containing declarations of peace and amity; granting free trade and in certain cases most-favoured-nation treatment, were signed with various European countries. These included Portugal (Treaty no. Z15 , no. Z16 and no. Z23); Belgium (Treaty no. Z24 and no. Z50); Germany (Treaty no. Z36), France (Treaty no. Z39); Switzerland (Treaty no. Z44) and Italy (Treaty no. Z41). Within the Southern African region a treaty was signed with the Orange Free State (Treaty no. Z18). It is interesting to note that although in 1872, the United States concluded a treaty of friendship with the Orange Free State, it adopted a cautious

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50. See: Schaffer, R. op cit. p. 275-276 for a fuller analysis of British policy towards the succession of boundary treaties.

policy towards the South African Republic. Unofficial requests from the Republic to sign a similar treaty with them were rejected, and the State Department refused to send consular representation. The United States became increasingly interested in South Africa, especially after the discovery of minerals but it refused either to take a pro-British stance, or to provoke the British by seeming to support the Boers, and again rejected a proposed commercial treaty with the South African Republic in 1884.[51]

The 1875 treaty concluded with Portugal was the subject of some debate after the annexation of the South African Republic. As Great Britain had been the suzerain power which assented to it at the time, it was queried whether it too, had lapsed upon the application of the 'clean slate theory' referred to previously. It was deemed to have expired, and in the words of the Law Officers advising the British Government '...such assent can in no way affect the lapse of the Treaty when the Transvaal has become part of His Majesty's dominions.'[52]

The treaty concluded between Portugal and the South African Republic concerning railway traffic and the recruitment of black labour signed in 1884 (Treaty no. Z34) was also considered to have expired after annexation. As Mozambique was an important source of labour before the war, Lord Milner was anxious to negotiate an agreement for the resumption

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51. For a full examination of United States policy at this time see: Noer, T.H. The United States and South Africa, 1870-1914. Ann Arbor: University Microfilms International, 1972, especially chapter 1.

52. Opinion dated 16 February 1901. Great Britain. Foreign Office. Confidential Paper (7763) no. 30, Appendix no. 73. See also: Schaffer, R. op. cit. p. 274.

of recruiting, although this was intended as a temporary measure. The Portuguese, afraid that they would forfeit their preferential rights after the war, had an effective bargaining counter in the threat of halting or restricting the flow of labour to the mines. Negotiations[53] resulted in the Modus Vivendi of 1901 (Treaty no. Z92) which confirmed pre-war conditions. Natal in particular, reacted to the provisions of the Modus Vivendi as it was adversely affected by its railway and customs provisions. Modifications were called for which culminated in the Transvaal-Mozambique Convention of 1909 (Treaty no. Z118) This in fact did not alter the essential provisions of the earlier 'temporary' agreement.

Reaction from Natal was again stridently voiced '...perpetuating as it does the evil features of the Modus Vivendi, and it is strongly of the opinion that Union of South Africa is jeopardised thereby'[54] and an Inter-Colonial Treaty was demanded whereby no colony should be placed in a worse position than an outside state or power regarding commerce, industry and agriculture. And secondly, 'the products of a state or power outside the Union, the manufacture or exploitation of which may be assisted by a bounty or equivalent thereto, shall not be admitted at a lower duty than shall be equal to the amount of such bounty.'[55]

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53. For details of negotiations see: Katzenellenborgen, S.E. South Africa and Southern Mozambique. Manchester: Manchester University Press, 1982, p. 45-56.

54. Robert Dunlop, Secretary of the Pietermaritzburg Chamber of Commerce. Archives of the Prime Minister of Natal, Minute paper dated 22 April 1909, 1909/272.

55. Archives of the Prime Minister of Natal, vol. 77, 1909/274.

The sugar industry in Natal was suffering from the effects of the Transvaal-Mozambique treaty as was voiced by David Fowler and Company of Durban 'Mozambique sugar is sold at prices far below similar sugars produced in Natal... /Natal/ cannot tolerate the free entry of Mozambique sugars into the Transvaal. It was surely never the spirit of the Treaty that bounty-fed foreign sugars should be admitted into a British Colony without the payment of a counterrailing duty.'[56] Despite these, and many other vociferous protests from the Cape and Natal, Katzenellenbogen says of the 1909 agreement 'The New Union of South Africa could but accept it.'[57]

2.2.5 Extradition

Arrangements were made internally within the Southern African region for the return of certain categories of criminals fleeing from the South African Republic. These arrangements were given the force of law, as illustrated by examples such as Treaty no. Z29 , no. Z31 and no. Z42.

According to Law no. 9, 1887, it was not necessary to submit extradition treaties to the Volksraad for approval, as the law authorized and empowered the State President, with the advice and consent of the Executive Council to conclude treaties for the extradition of criminals. Approval was however necessary from the British Government in terms of Article 4 of the London Convention.

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56. Archives of the Prime Minister, Natal, vol. 80, 1909/819 (Natal Archives Depot).
57. Katzenellenbogen, S.E. op. cit. p. 78, and onwards.

A treaty of extradition was signed with the Netherlands in 1895 and subsequently ratified in 1896 (Treaty no. Z70). In terms of Article IV of the 1884 London Convention, it was stipulated that any treaty barring those signed with the Orange Free State or indigenous people to the East and West of the Republic, required British approval. The treaty was not communicated to the British Government either by the South African Republic or the Netherlands. A report was presented by the British Law Officers, Webster and Finlay, dated 27 July 1876[58] in which it was stated that 'Her Majesty's Government cannot recognize the validity of the Treaty of Extradition which has been concluded without her sanction... the principle involved is obviously of the utmost gravity.' It should be noted too, that the Preamble of the treaty contains a reference to a 'fresh treaty' but that the British Government was not aware of the existence of any previous treaty.

Article IV of the London Convention did, in fact, give rise to conflicting interpretations as it stated...:

> Such approval shall be considered to have been granted if Her Majesty's Government shall not, within six months after receiving a copy of such treaty (which shall be delivered to them immediately upon its completion), have notified that the conclusion of such treaty is in conflict with the interests of Great Britain or of any of Her Majesty's possessions in South Africa.

The meaning of the term 'completion of a treaty' was not clearly defined. Marais noted that the article intended to draw a distinction between the 'conclusion' and 'completion' of a treaty, since approval had to be

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58. Reproduced in McNair, A.D. op. cit. p. 45-46.

obtained before its 'conclusion' and after its 'completion'. The Republic argued that a treaty was not 'completed' until it had been sanctioned by the constitutional authories of the contracting parties. Chamberlain's view - 'that the word 'completion'... refers to the stage at which a treaty first assumed complete shape, viz., the signature of the Plenipotentiaries or other negotiators' - seems more reasonable. Sir Alfred Milner, though he endorsed Chamberlain's interpretation, considered that the article was 'somewhat ambiguous' with regard to the stage at which the Queen's approval should be sought.[59]

The extradition treaty signed between the South African Republic on 3 November 1893 in Lisbon was also part of the principle concerned, and appears to have suffered the same fate as that of the Netherlands extradition treaty. References to its impending ratification have been located[60] but not the precise date. The text does not appear either in the British Foreign and State Papers, or in the Transvaal Archives Depot.

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59. See: Marais, J.S. The Fall of Kruger's Republic. Oxford: Clarendon, 1961, p. 122-123.

60. See: Great Britain. Parliament. Command Papers, C.8423.

CHAPTER 3 : Development of South African Treaty-Making Powers, 1910-1979

3.1 The South Africa Act, 1909

This Act[1] united the four colonies in a legislative union under the Crown of the United Kingdom and served as the constitution of the country until it became a Republic in 1961. The 1909 Act provided for a bi-cameral legislature. This comprised a House of Assembly composed initially of 121 members serving for a five-year duration, and a Senate, the composition of which provided for equal representation for the four provinces. Executive power was vested in the Governor-General, and an executive council appointed by the Governor-General from the Legislature. This originally comprised ten members. Blacks were not granted the franchise, except in the Cape Province where a qualified franchise was retained.

Article 148(1) articulated the status of treaties:

> all rights and obligations under any conventions or agreements which are binding on any of the colonies shall devolve upon the Union at its establishment.

Although this was contrary to the 'clean slate theory' fashionable at the time, it emphasized the continuity of international agreements while still reserving to the Crown, the right of concluding treaties, agreements and conventions (Section 8). The King remained the contracting party despite the constitutional change which had taken place. South Africa inherited

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1. Great Britain. Laws, Statutes, etc. South Africa Act, 1909, 9 Edward VII, chapter 9.

treaty rights and obligations under treaties containing territorial application to it, and not only those in which South Africa was specifically mentioned.[2]

3.2 Status of British Self-Governing Colonies, 1910-1918

Prior to World War I and despite hard-won concessions attained in the negotiation of treaties, ultimate responsibility for treaty execution lay with the British Government. Notable changes were beginning to manifest themselves, marked in part by the resolutions of the Colonial Conferences, and those of the Imperial Conferences which dated from 1911. At both the Radiotelegraphic Conference of 1912 (Treaty no. SA 41) and that of the Conference of Safety of Life at Sea, changes in procedure were evident. For the first time ..egates were appointed by the King on the advice of colonial governments, to act on their behalf. Special full powers were issued for each delegation while the British delegates received ordinary unqualified full powers. Primary responsibility for the execution of the treaties concerned was thus shifting to the colonial governments even though the British Government might ultimately be involved.[3]

The gradual development of those colonies, which formed the Dominions, towards the attainment of international status was hastened by the outbreak of the 1914-1918 war. Changes effected were mainly of a constitutional

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2. See Schaffer, R. A Critical Analysis of the Treaty-Making Powers of the Union of South Africa and the Republic of South Africa. Johannesburg: University of the Witwatersrand, 1978, p. 276-279.

3. Keith, A. The Dominions as Sovereign States. London: Macmillan, 1938, p. 14.

nature but are notable as they prepared the way for developments in international law. At the onset of war, responsibility for all matters pertaining to the army, airforce and navy fell under the jurisdiction of the British chief command, while foreign relations were the responsibility of the Foreign Secretary.

The active participation of the Dominions in the War was recognized and they became party to policy deliberations by attending meetings of the British War Cabinet. General Smuts served continuously on this Cabinet, out of which emanated two bodies which were of significance to Dominion constitutional development. In the Imperial War Cabinet, Dominion representatives were accorded equal status to that of the British War Cabin t, and had the right not only of consultation but also of policy initiation and examination. The Imperial War Conference provided a forum for non-war problems affecting the Empire as a whole, as well as minor war issues.

At the Imperial War Conference of 1917, a decisive Resolution concerning the recognition of the separate existence of the Dominions was passed at the instigation of Sir Robert Borden, Prime Minister of Canada:

> The Imperial War Conference are of opinion that the readjustment of the constitutional relations of the component parts of the Empire is too important and intricate a subject to be dealt with during the War, and that it should form the subject of a special Imperial Conference to be summoned as soon as possible after the cessation of hostilities.
>
> They deem it their duty, however, to place on record their view that any such readjustment, while thoroughly preserving all existing powers of self-government and complete control of domestic affairs, should be based upon a full recognition of the Dominions as autonomous nations of an Imperial Commonwealth, and

> of India as an important portion of the same, should recognize the right of the Dominions and India to an adequate voice in foreign policy and in foreign relations, and should provide effective arrangements for continuous consultation in all important matters of common Imperial concern, and for such necessary concerted action, founded on consultation, as the several Governments may determine.[4]

The importance of this Resolution cannot be underestimated but, as Noel Baker points out, it spoke only of an 'adequate voice' in foreign policy, and not of an 'equal voice'. This attitude changed, and even before the cessation of hostilities 'they had demanded not only an adequate voice, but full equality with Great Britain in every right of self-government, including full control of foreign affairs.'[5] This call was again spearheaded by Sir Robert Borden, together with General Smuts.

3.3 The Paris Peace Conference of 1919

The Dominion leaders were determined to make their voice heard at the proposed Peace Conference. Britain's suggestion that the Dominions should occupy one of five alloted British places, to be taken by different Dominions or by India according to the subject under discussion, did not meet with their approval, and especially with that of the Canadian Cabinet. They presented a memorandum to the British Government in which they urged that 'in the view of the War efforts of the Dominions, the other nations entitled to representation at the Conference should recognise the unique character of

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4. Imperial War Conference, 1917. Extracts from Minutes, Proceedings and Papers Laid Before the Conference. Great Britain. Parliament. Command Papers, Cmd. 8566, p. 5.

5. Noel Baker, P.J. The Present Juridical Status of the British Dominions in International Law. London: Longmans, Green, 1929, p. 54.

the British Commonwealth, as composed of a group of free nations under one sovereign, and that provision should be made for the special representation of these nations at the Conference, even though it may be necessary that in any final decision reached they shc d speak with one voice.'[6]

In consequence, it was decided that the Dominions should acquire the same status and rights as Belgium. South Africa, together with Canada and Australia were each to nominate two delegates, and New Zealand one, to the Plenary Conference; they were entitled to appear on the delegation of the five British delegates at meetings at which only representatives of the Great Powers were present; and could sit on Conference Commissions, where each Great Power was entitled to two representatives. (It was due to this victory that General Smuts, together with Lord Robert Cecil, was one of the British Empire delegates in the Conference Commission which drafted the Covenant of the League of Nations).

Recognition of the international status of the Dominions was further stressed in the signatures to the various Peace Treaties. Sir Robert Borden, on behalf of the Dominion Prime Ministers, circulated in 1919 a Memorandum which stipulated 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 consonance with the principles of constitutional

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6. Canada. Parliament. Sessional Paper, 1919, no. 41(j). Also cited in Noel Baker, P.J. op. cit., p. 55.

> 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 upon equality of nationhood.[7]

This principle was accepted, and plenipotentiaries were designated to sign the Treaties on behalf of the Dominions. The Treaty of Peace with Germany (Treaty no. 67) for example was worded thus:

> 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 Hon. D. Lloyd George, M.P., etc.,
> and-
> For the Dominion of Canada by
> The Hon. Charles Joseph Doherty, etc.
> For the Commonwealth of Australia by
> The Right Hon. William Morris Hughes
> For the Union of South Africa by
> General the Right Hon. Louis Botha, etc.
> For the Dominion of New Zealand by
> The Right Hon. William Ferguson Massey.

As indicated by Lewis, the wording is significant in that it presumes the formal unity of the British Empire under the Imperial Crown while giving effect to the individual international personality of each of the Dominions.[8]

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7. Lewis, M.M. The International Status of British Self Governing Dominions. British Yearbook of International Law, vol. 3, 1922/23, p. 32; from Canada. Parliament. Sessional Paper, 1919, no. 41(j).

8. Ibid.

The extension of the privileges acquired by the Dominions in commercial and technical matters before the War to the political sphere of foreign policy was thus assured. The separate signatures to the Treaties of Peace were highly significant on account of the important political nature of these treaties.

3.4 The League of Nations

The League of Nations came into existence on 10 January 1920 with a membership of eighteen states which included South Africa (Treaty no. SA 67). By 1 August 1920, this membership had grown to forty states, all of which accepted membership in the League without reservation. The Dominions were accepted as original members of the League, despite the opposition from certain states. The persistence of the Dominion Prime Ministers, with support from the British Prime Minister, triumphed. However, individual membership of the League was not permitted to interfere with the principle that the British Empire remained a unit.[9]

The Dominion states were accorded the same representation in the Assembly as sovereign states and there was no legal impediment to their election to the Council of the League as representatives of the Assembly. Real equality with the other members of the League was assured, together with the same rights and duties. Evidence of this equality was their appointment as Mandatory States overcertain erstwhile German colonies. South Africa was granted a C Mandate over South West Africa (Treaty no. SA 77) directly through the League's Secretariat, and significantly, not through the Imperial Government.

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9. Palmer, G.E. Consultation and co-operation in the British Empire. London: Oxford University Press, 1934, p. 126.

The Dominions similarly became members of the International Labour Organisation as provided for in the Treaties of Peace (Treaty no. SA 67). Here they were accorded direct and separate representation at International Labour Conferences, thus consolidating their progress towards achieving full international status. This was further strengthened by the grant to the Dominions of the rank of distinct states under the Statute of the Permanent Court of International Justice (Treaty no. SA101).

3.5 Imperial Conferences

3.5.1 1921

That the Dominions had made a significant advance as a result of World War I in international status was undisputed, but the nature and extent of this advance remained a moot point. Were they sovereign states? What was their position in respect of treaty-making? The latter proved to be a test of status.

The Conference of Prime Ministers held between 20 June and 5 August 1921 did very little to clarify the situation but passed a Resolution aimed at maintaining:-

> the existing practice of direct communication between the Prime Ministers of the United Kingdom and the Dominions, as well as the right of the latter to nominate Cabinet Ministers to represent them in consultation with the Prime Minister of the United Kingdom.[10]

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10. Conference of Prime Minister and Representatives of the United Kingdom, the Dominions and India, 1921. Report. Great Britain. Parliament. Command Papers, Cmd. 1474, p. 6. As quoted in Lewis, M.M. op cit., p. 34.

The idea of unity through joint control proved to be a cornerstone in formulating a foreign policy for the Empire. According to the British Prime Minister, Lloyd George:

> The sole control of Britain over foreign policy is now vested in the Empire as a whole. That is a new fact... The advantage to us is that joint control means joint responsibility, and when the burden of Empire has become so vast it is well that we should have the shoulders of these young giants under the burden to help us along. It introduces a broader and calmer view into foreign policy. It restrains rash ministers and will stimulate timorous ones. It widens the prospect.[11]

The right of joint consultation received formal recognition in the Report of the Imperial Conference of 1921:

> It was unanimously felt that the policy of the British Empire could not be adequately representative of democratic opinion throughout its peoples unless representatives of the Dominions and of India were frequently associated with these of the United Kingdom in considering and determining the course to be planned.[12]

These principles provoked various questions. Could there be joint responsibility unless there was effective joint control? Was there effective joint control? These principles were put to the test by the Chanak incident of 1922 in which Lloyd George appealed to the Dominions for association with the British stand on the defence of the Turkish

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11. Keith, A.B. Speeches and Documents of the British Dominions. London: Oxford University Press, 1961, p. 46, 86 as quoted in Mansergh, N.: The Commonwealth Experience. London: Weidenfeld and Nicolson, 1969, p. 218.

12. Great Britain. Parliament. Command Papers, Cmd. 1474, p. 3 as quoted in Noel Baker, P.G. op. cit., p. 59.

Straits. This met with a varied response from the Dominion States, with Canada taking umbrage at the lack of joint consultation.

Joint action was further disproved by Canada's signing of the Halibut Fisheries Treaty of 2 March 1923. For the first time a Dominion minister, M. Lapointe, the Canadian Minister of Marine, acting alone both negotiated and signed a treaty, albeit one of a commercial nature. It proved a precedent of vital importance for all Dominion states, and one which was validated by the Imperial Conference of 1923. It opened the way to separate Dominion control over foreign relations.

3.5.2 1923

The Halibut Treaty, together with Canada's firm protest[13] at the procedures adopted for Dominion representation at the Peace Conference held at Lausanne between the Allied Powers and Turkey, led to an investigation of the treaty-making procedure. The subject of the negotiation, signature and ratification of treaties was investigated at the Imperial Conference which opened in London on 1 October 1923.

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13. 'The extent to which Canada may be held to be bound by the proceedings of the Conference, or by the provisions of the treaty, or any other instruments arising out of the same is necessarily a matter for the Parliament of Canada to decide, and the rights and powers of our Parliament in the particulars must not be held to be affected by implication or otherwise in virtue of information with which our Government may be supplied.' Great Britain. Parliament. Command Papers, Cmd. 2146, p. 4.

A Resolution was drawn up and approved by a committee of Dominion leaders under the chairmanship of Lord Curzon, British Secretary of State for Foreign Affairs. The provisions[14] pertaining to treaties 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.

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14 Imperial Conference 1923: Summary of Proceedings. Great Britain. Parliament. Command Papers, Cmd. 1987, p. 13-15.

(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.

3. 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.

The outcome of this Conference has been differently assessed. Professor Dawson has argued that it was this Conference and not its successor in 1926 that was decisive. He bases this statement on the grounds that the 1923 Conference marked the point at which the Empire reversed the centralizing tendencies of the War and post-War years and moved towards a more stable condition based on nationalism and the independence of the Dominions.[15] Mansergh, on the other hand, while agreeing that change was initiated in 1923 and confirmed in 1926, only accepts Dawson's point of view with qualification, as there was no guarantee that there would be consensus of opinion in 1926.

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15. Dawson, R. William Lyon Mackenzie King, 1874-1923. London: Methuen, 1958, p. 479-480, as quoted in Mansergh, N. op. cit. p. 225.

Schaffer[16] agrees that the 1923 Conference formed the basis for further conventions relating to the treaty-making powers of the Dominions. She, however, concludes, with Doeker, that the Conference tended to consolidate the position of the Dominions in regard to their treaty-making power, rather than to advance their international status. She points out that the Resolution, in effect, approved the Canadian action regarding the Halibut 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.[17]

3.5.3 1926

The 1926 Imperial Conference was a highly significant event in the history of Dominion constitutional development, for, in the Report of the Inter-Imperial Relations Committee, comprising all the prime ministers and heads of delegations together with the Foreign Secretary and Dominions' Secretary of the United Kingdom and chaired by Lord Balfour, the Dominions were recognized as autonomous nations within the British Empire, equal in status to Great Britain.

As regards treaty-making powers, a certain divergence of opinion had

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16. Schaffer, P. op. cit., p. 21. See also p. 19-22 for further comment on this Conference, and its attitude towards informal agreements.

17. Ibid. p. 21.

arisen during the intervening years since the 1923 Resolution, although it was approved in principle. A subcommittee was appointed to examine 'some phases of treaty procedure... in greater detail in the light of experience in order to consider to what extent, the Resolution of 1923 might with advantage be supplemented.'[18]

The findings of the Report are reproduced below, together with the relevant terms of the 1923 Resolution, in order to demonstrate any changes or similarities:[19]

A Negotiation

1. 'It is desirable that no treaty should be negotiated by any of the Governments of the Empire without the consideration of its effects on other parts of the Empire. ...' (I.i.(a), 1923)

2. Therefore, in order that the Governments of other parts of the Empire may judge for themselves of the probable effects of a treaty, any Government intending to negotiate a treaty should so inform all the other Governments of the Commonwealth *before negotiations are begun*. This should be done in *every* case of proposed negotiation for a treaty. (I.i.(b), 1923; paras. 1 and 2 of 1st sub-sub-section of Sub-section (a) of the Report).

3. When a Government has received information of the intention of any other Government to negotiate a treaty, it has 'the opportunity of expressing its views, or, when its interests are intimately involved, or participating in the negotiations.' (I.i.(b), 1923).

4. When a Government has received such information, 'it is incumbent upon it to indicate its attitude with reasonable promptitude.' (Para. 3 of 1st sub-sub-section, 1926).

5. 'So long as the initiating Government receives no adverse comments and so long as its policy involves no active obligations on the part of the other Governments, it may proceed on the assumption that its policy is generally acceptable.' (Para. 3 of 1st sub-sub-section, 1926).

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18. Great Britain. Parliament. Command Papers, Cmd. no. 2768 contains the full report.

19. See: Noel Baker, P.J. op. cit. p. 165-183.

6. But before the initiating Government takes 'any steps which might involve the other Governments in any obligations,' it must obtain 'their definite assen .' (Para. 3 of 1st sub-sub-section, 1926).

7. If, in accordance with Rule 3 above, more than one Government decides to participate in the negotiations, 'there should be the fullest possible exchange of views between those Governments before and during the negotiations.' (I.i.(c), 1923).

8. Rule 7 is to apply to all international conferences at which the Dominions have separate delegations. (I.i.(c), 1923).

9. If, when negotiations have been begun, points arise likely to be of interest to any Government of the Commonwealth which is not taking part in the negotiations, 'steps should be taken to ensure that those Governments... be kept informed' of such points. (I.i.(d), 1923).

10. 'Where by the nature of the treaty it is desirable that it should be ratified on behalf of all the Governments of the Empire, the initiating Government may assume that a Government which (under Rule 3 above) has had full opportunity of indicating its attitude and has made no adverse comments will concur in the ratification.' (Para. 4 of 1st sub-sub-section, 1926).

11. If a Government objects to 'concurring in the ratification' of a treaty which has not been signed by its own plenipotentiary authorised to act on its behalf, 'it will advise the appointment of a plenipotentiary so to act.' (Para. 4 of 1st sub-sub-section, 1926).

B Form of Treaty. The rules under this heading are contained in Section V of the 1926 Report.[20]

The rules are as follows:

1. 'It is 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.' (Para. 2.)

2. '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.' (Para. 2.)

3. 'The British units on behalf of which the treaty is signed should be grouped together in the following order: Great Britain and Northern Ireland and all parts of the British Empire which are not separate members of the League, Canada, Australia, New Zealand, South Africa, Irish Free State, India.' (Para. 2. It may be noted that this is the order of seniority of the Dominions as self-governing units.)

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20. Great Britain. Parliament. Command Papers, Cmd. 2768, p. 22-23.

4. 'In the case of a treaty applying only to one part of the Empire, it should be stated to be made by the King on behalf of that part.' (Para. 3.)

5. If a treaty is made in the name of the King, its provisions will automatically *not* apply as between 'the various territories on behalf of which it has been signed in the name of the King.' (Para. 4.)

6. If the Governments of different parts of the Empire desire to apply an international agreement among themselves, they can of course do so 'as an administrative measure.' But in that case, 'the form of a treaty between Heads of States should be avoided,' and the treaty should be made in the name of the contracting countries or territories. (Para. 5.)

C Full Powers - The rules concerning full powers are these:

1. If a bilateral treaty imposing obligations on one part only of the Empire is to be made, the full power issued to its representative 'should indicate the part of the Empire in respect of which the obligations are to be undertaken.' (I.ii.(a), 1923.)

2. For the making of a general, group, or bilateral treaty, 'the plenipotentiaries for the various British units should have full powers, *issued in each case by the King on the advice of the Government concerned*, indicating and corresponding to the part of the Empire for which they are to sign.' (3rd sub-sub-section of Sub-section (a) of Section V., 1926.)

3. A Government may advise the issue of full powers on its behalf 'to the plenipotentiary appointed to act on behalf of the Government or Governments mainly concerned,' if it desires to do so. This 'will frequently be found convenient,' particularly where the proposed treaty may not involve active obligations on the said Government, but may affect the position of British subjects who are its 'citizens.' /Sir Cecil Hurst gives as an example the case of a British-Siamese treaty concerning capitulations, which may impose no 'active obligations' on, say, New Zealand, but which will affect the rights and position of British subjects from New Zealand in Siam./

4. 'In other cases provision might be made for accession by other parts of the Empire at a later date.'

D Signature - The rules concerning the signature of treaties are these:-

1. 'Bilateral treaties imposing obligations on one part of the Empire only should be signed by a representative of the Government of that part.' (I.ii.(a), 1923.)

2. '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*.' (I.ii.(b), 1923.)

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2. '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*.' (I.ii.(b), 1923.)

3. 'As regards treaties negotiated at International Conferences' (i.e. general treaties or conventions), 'the existing practice of *signature by plenipotentiaries on behalf of all the Governments of the Empire represented* at the Conference should be continued.' (I.ii.(c), 1923).

4. 'The signatures of the plenipotentiaries of the various parts of the Empire should be grouped together in the same order as is proposed above' (*vide* rules concerning Form of Treaty above). (Para. 1 of 4th sub-sub-section of Sub-section (a) of Section V. of Report, 1926.)

E Ratification and Coming into Force of Multilateral Treaties - The rules concerning the ratification of treaties are these:

1. 'The ratification of treaties imposing obligations on one part of the Empire is *effected at the instance of the Government of that part.*' (Explanatory statement attached to Resolution I., iii, 1923.)

2. '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.'

3. 'It is for each Government to decide whether Parliamentary approval or legislation /i.e. the approval or legislation of its own (Dominion or British) Parliament/ is required before desire for, or concurrence in, ratification is intimated by that Government.'

4. In a multilateral treaty negotiated under the auspices of the League of Nations in which a ratification clause is inserted stipulating that the treaty shall only come into force when a certain number of ratifications have been deposited, this 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.' (5th sub-sub-section of Sub-section (a) of Section V of the Report, 1926).

An analysis of the above reveals the following salient points:

1. There is an obligation on a negotiating Dominion state to inform all other Commonwealth Governments of its intention to conclude a treaty in order to give them the opportunity to decide whether their own participation would be necessary. Late objections by other Commonwealth states would thus be obviated.

2. Changes made to the form of treaties served to clarify and establish the status of the Dominions as parties equal to Great Britain in respect of the treaties they signed.

3. The right of Dominions to negotiate treaties for themselves, applicable exclusively to their territory, was recognized.

4. A separate signature on behalf of the Dominion concerned became necessary before that Dominion could be bound by that particular treaty.

5. Ratification could only take place by the Monarch with the consent of the Dominion Government concerned.

3.5.4 1930

The 1930 Imperial Conference was based on the findings of the 1929 technical Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation, which examined in detail, the legal changes necessary to bring the principles of the Balfour Report into operation. The 1930 Conference approved of its report,[21] the main recommendations of which were enacted in the 1931 Statute of Westminster.

The main focus of the 1930 Conference was on communication and consultation in foreign affairs and treaty negotiations in particular. It reported on the subject as follows:

> Previous Imperial Conferences have made a number of recommendations with regard to the communication of information and the system of consultation in relation to treaty negotiations and the conduct of foreign affairs generally. The main points can be summarized as follows:
>
> 1. Any of His Majesty's Governments conducting negotiations should inform the other Governments of His Majesty in case

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21. Great Britain. Parliament. Command Papers, Cmd. 3479.

> 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 views, do so with reasonable promptitude.
>
> 3. None of His Majesty's Governments can take any steps which might involve the other Governments of His Majesty in any active obligations without their definite assent.[22]

It now became a guiding principle in the conduct of foreign affairs that no member of the Commonwealth could commit any other member to an active obligation without its clear consent. The Resolutions stressed the necessity of continuous cooperation and stressed the need for personal contact in Inter-Imperial communication.[23]

An agreement between Governments was to be negotiated without any intervention by the Crown and without the Great Seal of the Realm. His Majesty was not regarded as a contracting party, except in the case of a treaty between Heads of State. All documents involved in the negotiations, signature and ratification, were to be issued by the Crown at the request of the Government in question.[24]

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22. Imperial Conference, 1930: Summary of Proceedings. Great Britain. Parliament. Command Papers, Cmd. 3717.

23. Palmer, G.E. op. cit. p. 5.

24. Schaffer, R. op. cit. p. 27. See also Stewart, R.B. Treaty-Making Procedure in the British Dominions. American Journal of International Law, vol. 32, 1938, p. 467-487; Oppenheim, L. International Law, vol. 1, 8th ed. London: Longmans, Green, 1955, p. 202.

3.6 The Statute of Westminster, 1931

This Statute[25] embodied the principle of equality of status and emphasized the fully autonomous statehood of the Dominions. As mentioned previously, it was enacted in pursuance of the Report of the Conference on the Operation of Dominion Legislation of 1929 which was summoned in accordance with a resolution from the 1926 Conference.

By the provisions of this Statute all formal dependence on the Imperial Parliament was removed. This was done by the repeal of the Colonial Laws Validity Act, 1865. Article 2(1) of the Statute, stated that the Colonial Laws Validity Act ...'shall not apply to any law made after the commencement of this Act by the parliament of a Dominion', while Article 2(2) provided that in future no law or provision made by a Dominion Parliament shall be void or inoperative on the grounds of repugnancy to the law of England. The Statute also empowered a Dominion Parliament to repeal Imperial legislation and provided that, unless otherwise requested or specified, no British Act of Parliament could be extended to the Dominion. The Dominions[26] obtained, in Article 3, the full right to make laws with extra-territorial effect.

The Act therefore, can be interpreted as a renunciation by Great Britain of her rights over the Dominions, and a confirmation of parliamentary sovereignty within the Dominions themselves. The implementation of the Act was left to the Dominions on an individual basis.

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25. Great Britain. Laws, Statutes, etc. The Statute of Westminster, 1931, 22 George V, Chapter 4.

26. For a description of South Africa's treaty-making procedure as at 1933 see: Arnold, R. Treaty-Making Procedure: A Comparative Study of the Methods Obtaining in Different States. London: Oxford University Press, 1933, p. 17-19.

3.7 Status of the Union Act, 1934

The coalition government of 1934 decided upon legislative action by the Union itself in order to assert the sovereignty of its Parliament. It accordingly passed an Act, the full title of which was the Act to Provide for the Declaration of the Status of the Union of South Africa; for certain Amendments of the South Africa Act, 1909, Incidential Thereto, and for the Adoption of Certain Parts of the Statute of Westminster, 1931.[27] It was generally known as the Status of the Union Act.

The doctrine that Acts of the British Parliament extended to South Africa only when they were re-enacted by the South African Parliament was reasserted in Section 2. Section 3 then declared that the Statute of Westminster, as contained in the Schedule should be deemed an Act of the Parliament of the Union and construed accordingly. Section 4 declared:

> The Executive Government of the Union in regard to any aspect of its domestic or external affairs is vested in the King, acting on the advice of His Ministers of State for the Union, and may be His Majesty in person or by a Governor-General as his representative.

It proceeded to reaffirm that any reference in both this Act and the South Africa Act, to the term 'King' should be interpreted to mean the King acting on the advice of his ministers of state for the Union. It qualified this statement with the phrase 'same where otherwise stated' and explicitly safeguarded the power of the Governor General to dismiss ministers.[28]

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27. South Africa. Laws, Statutes, etc. Status of the Union Act, no. 69 of 1934.

28. Hancock, W.K. Survey of British Commonwealth Affairs, vol. I. London: Oxford University Press, 1937, p. 279.

Section 4 of this Act was supplanted by the Royal Executive Functions and Seals Act.[29] It provides the Union with its own Royal Great Seal and Signet, and to emphasize that the Governor-General might act on behalf of the King. South Africa's right to control both its internal and external affairs was thus ensured.

3.8 The Republic of South Africa Constitution Act of 1961

Section 112 of this Act[30] deals with the status of treaties when the change from Union to Republic was effected. It provided:

> All rights and obligations under conventions, treaties or agreements which were binding on any of the colonies incorporated in the Union of South Africa at its establishment and were still binding on the Union immediately prior to the commencement of this Act shall be rights and obligations of the Republic, just as all other rights and obligations under conventions, treaties or agreements which immediately prior to the commencement of this Act were binding on the Union.

In summary, the position of succession to treaties in South Africa is as follows:

1. Treaties concluded by the Trekker Repuolics were considered void in terms of the 'Clean Slate theory' which was utilized after their annexations by Great Britain in 1900.

2. In the case of the former colonies of the Cape and Natal, all pre-1910 treaties binding on them, and still in force at the time of Union, were retained.

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29. South Africa (Republic). Laws, Statutes, etc. Royal Executive Functions and Seals Act, no. 70 of 1934.

30. South Africa (Republic). Laws, Statutes, etc. The Republic of South Africa Constitution Act, no. 32 of 1961.

3. Treaties concluded by any of the four colonies in the period 1900 to 1910, and still in force at Union, were retained.

4. All treaties binding on the Union immediately prior to 1961, were now considered binding on the Republic of South Africa.

The Act came into force on 31 May 1961, but it brought about little change in constitutional life in South Africa. Although the British monarch was no longer head of state, the British Parliamentary system with a Senate and a House of Assembly were retained. The State President replaced the Governor-General, and his function was intended to be non-political. Although internal constitutional changes were few, the 1961 Act effected important changes in South Africa's sovereign status and international personality. This was reinforced by South Africa's withdrawal from the Commonwealth in 1961, which resulted in the severing of all constitutional links with the British Empire. This constitution was to remain in force until replaced in 1984[31] by the new Tri-cameral Parliament representing Whites, Coloureds and Asians. The black majority remain unrepresented in the South African Parliament.

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31. South Africa (Republic). Laws, Statutes, etc. Republic of South Africa Constitution Act, no. 110 of 1983.

3.9 A Selection of Principal Treaties Illustrative of South Africa's International Relations, 1910-1979

3.9.1 Agriculture

3.9.1.1 Food and Agriculture Organization of the United Nations (FAO)

The Organization was founded on 16 October 1945 (Treaty no. SA 522) with South Africa participating as one of the signatory governments. The International Institute of Agriculture, which had been operative since 1905, was dissolved and its assets and functions were assigned to FAO (Treaty no. SA 536). The aims of FAO are contained in the Preamble to the Constitution and include the raising of levels of nutrition, and the standard of living of the peoples under its jurisdiction; improvements in the efficiency of food production; its distribution; and the betterment of rural populations.

South Africa did not participate directly in any FAO projects but continuously supplied the Organization with statistical data. In November 1963, at one of FAO's regular biennial sessions, Ghana attempted to have the Constitution amended[1] to exclude from FAO any member state which persistently violated the principles contained in the Preamble. The required two-thirds majority necessary for amending the Constitution was not forthcoming and the motion was defeated. Despite this, a resolution was adopted on 5 December 1963 which stated that 'South Africa shall no longer be invited to participate in any capacity in FAO conferences, meetings, training centres, or other activities in the 'African region'.' South Africa was not assigned to another region, and on 18 December gave notice of its withdrawal. This,

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1. The Food and Agriculture Organization of the United Nations (FAO), United Nations Yearbook, 1963, p. 604-605.

in terms of FAO's Constitution, became effective one year after its communication of withdrawal. In its communication, South Africa said its co-operation with FAO would cease with immediate effect.

3.9.2 Atomic Energy

3.9.2.1 International Atomic Energy Agency (IAEA)

The Statute of the International Atomic Agency (IAEA) was signed in New York on 26 October 1956 (Treaty no. SA 860) and ratified on 6 June 1957. Subsequently South Africa signed a treaty with Japan to place source materials transferred from South Africa to Japan under the safeguards of the Agency (Treaty no. RSA 34). Safeguards were also applied between South Africa and the United States (Treaty no. RSA 188 and no. RSA 296) and also between the Republic and France (Treaty no. RSA 323).

On 16 June 1977, by a vote of 19 to 13 with 1 abstention, the Republic was ommitted from the Board of Governors of the IAEA for the first time in its twenty years of membership, and was replaced by Egypt. This move[2] was contrary to Article VI A 1 of the Statute, which states that within certain specified areas, namely Africa in this case, membership of the Board of Governors shall include the most advanced in the technology of atomic energy, including the production of source materials. It was not contested that South Africa was the most advanced country in this field, but once again it was condemned for its racial policies. Moves condemning South Africa began in the early 1960s. At both the 1963 and 1964 General Conferences, South

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2. See: Barrie, G.N. The Non-Designation of South Africa to the IAEA Board of Governors. Comparative and International Law Journal of Southern Africa, vol. 10, no. 3, November 1977, p. 306-314.

Africa was condemned, at the former a review was requested of its role in the IAEA[3], and at the latter, a declaration[4] was submitted that the Republic could not represent Africa on the Board of Governors, and the African bloc asked for its removal.

Bissell[5] points out the dilemma faced by the African block in calling for South Africa's withdrawal from the IAEA, for although it would lose its privileges, conversely it would be freed from most of its responsibilities. South Africa at present is still a member but remains suspended from IAEA meetings.

3.9.3 Aviation

3.9.3.1 International Civil Aviation Organization (ICAO)

The International Civil Aviation Organization, with its power of regulating the world's airways, was formed in 1947, based on the Chicago Convention (no. SA 506). It deals with a technical subject upon which travellers are dependent but nevertheless became embroiled in the question of South Africa's continued participation, for political reasons.

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3. Declaration of the Incompatibility of the Policies of Apartheid of the Government of South Africa with the Membership of the IAEA, 30 September, 1963 (GC (VII) 266) in International Atomic Energy Agency, 7th General Conference, Agenda Item 10.

4. International Atomic Energy Agency Official Records, 8th General Conference, 84th Plenary Meeting, 15 September 1965 (GC (VIII) OR.84), p. 2.

5. Bissell, R.E. Apartheid and International Organizations. Boulder: Westview, 1977, p. 92-93.