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## The Ingwavuma Land Deal: A Case Study of Self-Determination

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# THE INGWAVUMA LAND DEAL: A CASE STUDY OF SELF-DETERMINATION

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## I. INTRODUCTION

In 1982 the public of South Africa became aware of proposals by its government to cede two portions of South African territory, Kangwane and Ingwavuma, to the neighbouring state of Swaziland. Kangwane, with its own Legislative Assembly, is a semi-independent "national state" composed of two separate sections, the larger of which lies on the northern and western borders of Swaziland. Ingwavuma, formerly known as Thongaland, is part of another South African semi-independent "national state," KwaZulu. Ingwavuma extends from the south-eastern border of Swaziland to the Indian Ocean and has the natural advantage of a deep water harbour at Kosi Bay. The Minister of Co-operation and Development claimed that the South African Government was taking the opportunity: "om die geskiedenis in belang van Suider-Afrika te herskryf sodat alle volke en bevolkingsgroepe meer tot hul reg kom."<sup>1</sup> In other words, the proposed land cession was an attempt to reunite the Swazi peoples who had been divided for the past hundred odd years by boundaries imposed by the colonial powers.

A storm of protest greeted the proposal of cession.<sup>2</sup> On June 18, 1982, the South African government issued two proclamations; one to abolish the Kangwane Legislative Assembly<sup>3</sup> and one to excise Ingwavuma from KwaZulu.<sup>4</sup> Both territories were placed under the authority of the Minister of Co-operation and Development.<sup>5</sup> The legislative assemblies of both the 'national states' took immediate steps to contest the validity of these proclamations. In the case of Kangwane, the matter was settled out of court.<sup>6</sup> KwaZulu

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<sup>1</sup> "To rewrite history in the interests of Southern Africa so that all nations and population groups will be better served." Rapport, June 20, 1982.

<sup>2</sup> For a critical review see *The Land Dispute: Incorporating Swaziland?*, SA RESEARCH SERVICE (SARS) Information Publication (1982).

<sup>3</sup> Proclamation R108/82, Government Gazette 8269, June 18, 1982.

<sup>4</sup> Proclamation R109/82, Government Gazette 8269, June 18, 1982.

<sup>5</sup> For a brief review of the dispute see Beukes, *Oor die Kwessie van grensaanpassings met Swaziland*, CODICILLUS 19-20 (1983).

<sup>6</sup> On November 24, 1982, Proclamation R108 was repealed by Proclamation R232 of 1982 and the territory returned to the Kangwane Legislative Assembly.

sought a declaratory order in the Natal courts<sup>7</sup> and finally won its case. The South African Government deflected further controversy by placing the issue under the inquiry of a Commission chaired by a former Chief Justice, F.L.H. Rumpff.<sup>8</sup> Even this did not prove to be a viable method of settling the matter. The Commission reported that its task had become impossible because it was not able to determine the wishes of the inhabitants of the areas affected "without the probability of intimidation of some sort or another having a decisive influence on the result."<sup>9</sup> On June 19, 1984, South Africa announced that Ingwavuma and Kangwane would not be unilaterally incorporated into Swaziland. The Minister of Co-operation and Development said that leaders of Swaziland, KwaZulu and Kangwane should discuss the matter amongst themselves.<sup>10</sup> The Rumpff Commission ceased to function and, temporarily at least, the South African Government bowed out.

On the face of it, the South African offer appears as a rare example of altruism: to unite people of the same ethnic/linguistic group by revising colonial boundaries.<sup>11</sup> To the South African public this is presented as part of a familiar programme to allow self-determination to the various ethnic minorities comprising the South African state.<sup>12</sup> However, a deeper investigation of the circumstances of the cession of the territory of Ingwavuma and the background of the South African policy of apartheid reveals the full implications of the practice of self-determination for the peoples affected. This article is a case study of the exercise of self-determination; a right which is still so flexible that it can be moulded to suit the most diverse political aims and which is apparently an ideological construct with little or no benefit for the people who possess such a right.

## II. THE DEVELOPMENT OF SELF-DETERMINATION

The concept of self-determination originated in the doctrine of popular sovereignty proclaimed during the French Revolution: government should be based on the will of the people, not that of the monarch.<sup>13</sup> When this doctrine was supplemented by the emotive appeal of nationalism, it implied that "the people" concerned ought to be an ethnically homogeneous group.<sup>14</sup> As a popular slogan and an ideal, self-determination was a powerful political force during the nineteenth century. During this period, however, it was a vaguely defined concept of political theory. Self-determination was a moral/political goal

<sup>7</sup> The first attempt was in the Durban and Coast Local Division, *Government of KwaZulu v. Government of the Republic of South Africa & ano*, 1982 (4) SA 387 (D), where it was decided that the KwaZulu Legislative Assembly had *locus standi*. Proclamation R109 was *ultra vires*, and, therefore, it was null and void. The South African government then issued a further proclamation, R121, on June 28, 1982 seeking the same goal. Again KwaZulu succeeded in having the proclamation declared null and void. *See Government of the Republic of South Africa & ano v. Government of KwaZulu & ano*, 1983 (1) SA 164 (A).

<sup>8</sup> The Commission was established on December 10, 1982, GN 901.

<sup>9</sup> Cape Times, June 20, 1984, at 1, col. 1-3.

<sup>10</sup> *Id.*

<sup>11</sup> *See* Beukes *supra* note 5. This is contrary to Article 16(1) of the Organization of African Unity Resolution of 1964 in which members of the Organization undertook to respect colonial frontiers. *See Sanders, The "Swaziland Deal" Peoples*, CODICILLUS 34-35 (1983). Sanders notes, in addition, that most African nationalist leaders were strongly committed to the idea of national, as opposed to tribal, self determination.

<sup>12</sup> *See supra* note 1.

<sup>13</sup> For a short account of which, see A. RIGO SUREDA, *THE EVOLUTION OF THE RIGHT OF SELF-DETERMINATION* 17-25 (1973).

<sup>14</sup> Redslob, *Le Principe des Nationalites*, 37 RECUEIL DES COURS 5sq (1931).

rather than one of the working tools of international law. It was only after the First World War that self-determination was given concrete expression<sup>15</sup> and entered the vocabulary of international law. The peace treaties which established the new boundaries of Europe, as far as economic, strategic and other considerations allowed, took into account the interests of minority groups which made up the former German, Austro-Hungarian and Russian empires.<sup>16</sup> The map of Europe was reconstituted into a series of small states which were supposed to represent the territories of homogeneous groups of people. The mandate system, established under the League of Nations, likewise reflected the prominence given to self-determination. The colonial possessions of Germany and parts of the Ottoman Empire were not annexed by the Allies. These territories were a "sacred trust of civilization"<sup>17</sup> to be developed under the tutelage of more advanced states until the people of the territories would be able to face the "strenuous conditions of the modern world,"<sup>18</sup> at which time, they would be given their independence.

After the Second World War, self-determination was enshrined as one of the purposes of the United Nations. Article 1(2) of the Charter provided that the aims of the Organization were, *inter alia*: "To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples . . ."<sup>19</sup>

Self-determination was by now a phrase in the repertoire of any post-war politician, but was it a legal concept? Article 1 of the Charter did no more than enumerate principles or goals, which members should strive to achieve. Apart from Article 73 of the Charter, which dealt with trust territories, Article 1 did not necessarily imply that self-determination was a duty incumbent upon member states.<sup>20</sup>

Self-determination as a legal concept would have to be elaborated from the *basis* of the Charter. In other words, the Charter was a starting point for development, not the end of that process. In 1960 the General Assembly passed a Resolution<sup>21</sup> heralding the decade of decolonization, where it declared that:

1. The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation.
2. All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

<sup>15</sup> See the address by President Woodrow Wilson to Congress on January 8, 1918. PRESIDENT WILSON'S FOREIGN POLICY - MESSAGES, ADDRESSES, PAPERS 359-62 (J.B. Scott ed. 1918). See also, 13 AMERICAN JOURNAL OF INTERNATIONAL LAW 161-63 (1919) and SUPPLEMENT TO 13 AMERICAN JOURNAL OF INTERNATIONAL LAW 85-96 (1919).

<sup>16</sup> R. SUREDA *supra* note 13, at 21-22. Where international boundaries could not accommodate specific racial groups, the rights of such minority groups were generally protected by treaties.

<sup>17</sup> Article 22 of the Covenant of the League of Nations, April 28, 1919, *reprinted in* INTERNATIONAL ORGANIZATIONS AND INTEGRATION; A COLLECTION OF REGIONAL INTERNATIONAL ORGANIZATIONS 18 (H.F. Van Panhuys ed. 1968).

<sup>18</sup> *Id.*

<sup>19</sup> See also, G.A. Res. 217, U.N. Doc. A/211 (1948), Department of State Publication No. 3381. INTERNATIONAL ORGANIZATION AND CONFERENCE SERIES 111, 20, *reprinted in* Van Panhuys, *supra* note 17, at 247.

<sup>20</sup> Submission to the Trusteeship system was also voluntary. *International Status of South-West Africa* 1950 I.C.J. Reports 128, 144.

<sup>21</sup> Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514, 15 U.N. GAOR, Supp. at 16, U.N. Doc. (1960) A/4684 *reprinted in* Van Panhuys, *supra* note 12, at 290.

Ten years later the Assembly again declared that:

... all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.

Every State has the duty to promote, through joint and separate action, the realization of the principle of equal rights and self-determination of peoples . . . .<sup>22</sup> Both of these declarations gave added impetus to the progressive development of self-determination. As non-binding Assembly resolutions, however, they did not establish law. By their very generality, they tended to suggest moral/political goals, in the same manner as the Charter, rather than legal rights and duties. Self-determination has been most clearly articulated in treaties. The International Covenants on Human Rights of 1966,<sup>23</sup> for instance, both have a common article, 1(1), which provides:

All peoples have the right to self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development.

Finally, in both the *Western Sahara Case*<sup>24</sup> and the 1971 *Namibia Case*,<sup>25</sup> self-determination was implicitly accepted by the International Court as part of international customary law.

### III. THE BASIS OF THE RIGHT OF SELF-DETERMINATION

The legal nature of self-determination remains controversial while the content of the right has been equally ambiguous. It is perhaps most convenient to think of self-determination not as a single right but as a cluster of powers and rights. In its popular sense, at least two things are implied; an "external" right to choose independence from a state or to choose union in whatever form with another state,<sup>26</sup> and an "internal" right to decide the form and substance of government.<sup>27</sup> The various treaties and General Assem-

<sup>22</sup> Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 25 U.N. GAOR at 1 (1970), *reprinted in* 65 AMERICAN JOURNAL OF INTERNATIONAL LAW at 243.

<sup>23</sup> International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights, *reprinted in* 61 AMERICAN JOURNAL OF INTERNATIONAL LAW at 861-90; Annex to G.A. Res. 2200 (XXI) 16 Dec. 1966 UKTS 6 (1977). The tendency in the West has been to link self-determination and human rights on the understanding that they cannot be implemented in isolation; in other words, prohibitions on the discrimination against groups of individuals will inevitably foster the identity of groups. *See, e.g.*, Article 14 of the European Convention of Human Rights (1950).

<sup>24</sup> Advisory Opinion (1975) I.C.J. Reports 12 paras. 54-59.

<sup>25</sup> Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16.

<sup>26</sup> Whether self-determination justifies secession is, however, doubtful. General Assembly Resolution 2625, *supra* note 22, is quite clear: "Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States . . . possessed of a government representing the whole people belonging to the territory . . ." *See generally*, L.C. BUCHHEIT, SECESSION, THE LEGITIMACY OF SELF-DETERMINATION (1978).

<sup>27</sup> A. CASSESSE, UN LAW/FUNDAMENTAL RIGHTS 137 (1979).

bly resolutions in which the right is expressed do not make this distinction. When the Western nations speak of self-determination, they tend to include both the internal and external rights, but the Socialist bloc seems to exclude the right of internal self-government.<sup>28</sup> A right to self-determination in either of its two senses suggests three corollaries: a right to physical existence (or freedom from genocide),<sup>29</sup> a right to preserve and maintain its separate identity,<sup>30</sup> and a right to sustain itself materially from a portion of the earth's surface.<sup>31</sup> These are no more than the logical bases for self-determination yet their fundamental importance is very often obscured by emphasis on the political implication of the right.

The bearer of the right to self-determination is a "people," a non-technical term which is not defined in any of the instruments in which it is expressed.<sup>32</sup> From the practice of states, however, it appears that a "people" is a group which meets both a subjective and objective requirement. The objective requirement suggests a degree of homogeneity which suffices to distinguish the group from any other. Various criteria may be used to distinguish a group: common language, religion, culture and history. In addition to this, the group must subjectively consider itself to be a separate entity. Are all such "peoples" entitled to exercise the right of self-determination? The Socialist states would deny a general entitlement by limiting the right to peoples suffering colonial domination, racist regimes, and foreign occupation.<sup>33</sup> Even the Western understanding of self-determination would tend, in practice if not theory, to support this view.<sup>34</sup> The radical implications of self-determination have caused most members of the world community to restrict its legal exercise in the main to situations of colonialism, although most states rhetorically extend the concept far more broadly.

Whether the right to self-determination is to be exercised and how it is to be exercised must depend upon the wishes of the people concerned. The ascertainment of the will of the people is obviously of great significance. Undeniably the fairest and most direct means possible is the holding of a plebiscite.<sup>35</sup> Moreover, where the people concerned have their own form of representative democracy it would be quite in order to consult the elected representatives of the people. But in situations where the representatives of the people have not been freely chosen, their opinions cannot be considered a genuine expression of the people as a whole.<sup>36</sup> Furthermore, if the people have no form

<sup>28</sup> *Id.* at 139-41.

<sup>29</sup> Dinstein, *Collective Human Rights of Peoples and Minorities*, 25 ICLQ 105 (1976). More certain protection is found in the Convention on the Prevention and Punishment of the Crime of Genocide of 1948.

<sup>30</sup> This logical premise for the development of the right of self-determination was identified in the Advisory Opinion on *Minority Schools in Albania* P.I.C.J. Reports AB/64 17 485 (1935). See Article 27 of the International Covenant on Civil and Political Rights and Dinstein, *supra* note 29, at 118-20.

<sup>31</sup> See Articles 1(2) and 25 of the International Covenant on Economic, Social and Cultural Rights and Article 47 of the Covenant on Civil and Political Rights. This right corresponds to the rights developing under the umbrella of the New International Economic Order.

<sup>32</sup> Dinstein, *supra* note 29, at 103-5.

<sup>33</sup> A. CASSESE, *supra* note 27, at 140.

<sup>34</sup> R. SUREDA, *supra* note 13, at 110-11.

<sup>35</sup> *Id.* at Chapter IV. Where certain territory is the object of dispute, it has been the practice to resort to the politically more expedient means of a commission of inquiry. *Id.* at 303-04.

<sup>36</sup> A significant case in point was the South African government consultation with the people of South West Africa to establish their attitude to incorporation in South Africa. The whites, via the

of political organization or where it is poorly developed, consultation is, as a matter of expediency, waived. In these circumstances,

... the will of a people is not something free and subjective, but something determined by objective national characteristics, such as religion, race or language, [and] the appropriate procedure is to compile statistical data so as to determine what proportion of the people in a certain area belongs to a particular religion or race or speaks a particular language.<sup>37</sup>

The latter has been the approach in Ingwavuma. The South African Government has refused to hold referenda, arguing that intimidation would distort the true wishes of the people.<sup>38</sup> The objectivity of the supposed ethnic links and the criteria on which those links were based, however, cast doubt on the reliability of this method.

The Ingwavuma case highlights the unacceptability of any such form of "objective" assessment without an additional subjective expression of the will of the people. Self-determination rests firmly on the democratic ideal that it is the wishes of the people that count and that these must be expressed in as direct a way as possible.

#### IV. THE DEVELOPMENT OF APARTHEID

The development of the policy of apartheid in South Africa shows a remarkable degree of conformity to the international principle of self-determination. The cession of Ingwavuma to Swaziland appears to be a logical outcome of the apartheid programme. If South Africa is doing no more than fulfilling her international obligation, why should she attract such universal condemnation and need to adopt such a defensive posture? The answer is an ironical one: self-determination has been *imposed* on the African peoples of South Africa; it is not a right freely sought by them. Self-determination thereby fulfills an ideological function by justifying the maintenance of white political and economic hegemony over the black population. Its application in the Ingwavuma context shows how the very ambiguity and generality of the principle of self-determination can be manipulated to favour the particular policies of the South African government. In addition, the genuine exercise of self-determination in the present South African context is made impossible by the political suppression of the African people.

The development of apartheid shows that it is only in recent times that the South African Government has sought to bring its policies into line with the international demands for self-determination. For well over a century, successive white governments have grappled with the so-called 'native problem'. Prior to the Union of South Africa in 1910, the four constituent provinces followed entirely different approaches to this issue. In the Cape, Africans were on the common voters' role whilst in the Boer Republics and Natal, policies had been implemented which aimed at securing varying degrees of racial

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Legislative Assembly, voted for incorporation, but the Africans, represented by chiefs and headmen, were consulted by administrative and judicial officials in terms of their tribal units. They were not consulted as individuals. The General Assembly of the United Nations rejected the appeal for incorporation on the basis that: "the African inhabitants of South West Africa have not yet secured political autonomy or reached a stage of political development enabling them to express a considered opinion which the Assembly could recognize on such an important question as incorporation of their territory." See *THE SOUTH WEST AFRICA/NAMIBIA DISPUTE* 104-12 (J. Dugard ed. 1973).

<sup>37</sup> R. SUREDA, *supra* note 13, at 294.

<sup>38</sup> SARS, *supra* note 2, at 7.

segregation without political rights for Africans.<sup>39</sup> Even in the more liberal Cape there was general agreement that the granting of political rights to Africans should never lead to an African majority party in Parliament.<sup>40</sup> Although the "native question" was a key issue during the negotiations preceding Union in 1910, no settlement was reached. The South Africa Act<sup>41</sup> simply entrenched the Cape franchise<sup>42</sup> and provided that all existing legislation was to remain in force until amended or repealed.<sup>43</sup>

Since Union, however, successive South African governments have had a steadfast goal: the maintenance of white supremacy.<sup>44</sup> The problem has been how to realize this goal despite a rapidly increasing African population and hostile world opinion. General James Barry Munnik Hertzog, as Minister of Justice in the first Union Cabinet, saw racial segregation as the only long term solution<sup>45</sup> and, in his opinion, segregation should be encouraged by setting aside land for the exclusive occupation of Africans where ultimately they might establish their own government.<sup>46</sup> He regarded the common voters' roll in the Cape as a crime against the whites and a "snare and hypocrisy" for the "natives."<sup>47</sup> The principles underlying General Hertzog's policy formed the basis for the Native Land Act which was proposed by his successor and promulgated in 1913.<sup>48</sup> The Act was generally welcomed by the white population because, by this stage, it was agreed that racial segregation was the best solution for the "native" problem.<sup>49</sup> General Smuts outlined the South African government policy in London in 1917:

We have felt more and more that if we are to solve our native question it is useless to try and govern Black and White in the same system, to subject them to the same institutions of government and legislation. They are different not only in colour but in mind and political capacity and their political institutions should be different, while always proceeding on the basis of self government . . . Thus in South Africa you will have in the long run large areas cultivated by Blacks and governed by Blacks, where they will look after themselves in all their forms of living and development while in the rest of the country you will have your White communities which will govern themselves separately according to the accepted European principle.<sup>50</sup>

The Native Land Act established territorial segregation but it was not until 1936 that provision was made for political segregation. In the interim period the policy was separate

<sup>39</sup> L. MARQUARD, *A FEDERATION OF SOUTHERN AFRICA* 33 (1971); F. VAN ZYL SLABBERT & D. WELSH, *SOUTH AFRICA'S OPTION: STRATEGIES FOR SHARING POWER* 77 (1979); D. WELSH, *THE ROOTS OF SEGREGATION: NATIVE POLICY IN COLONIAL NATAL 1845-1910* 39 (1973).

<sup>40</sup> F. VAN ZYL SLABBERT, *supra* note 39, at 77-78.

<sup>41</sup> South Africa Act, 1909, 9 Edw. 7, ch. 9, *reprinted in* STATUTES OF THE UNION OF SOUTH AFRICA, 1910 and 1911, at 2; published by and under authority of the Government Printer.

<sup>42</sup> South Africa Act, 1909, 9 Edw. 7, ch. 9, § 35.

<sup>43</sup> South Africa Act, 1909, ch. 9, § 135.

<sup>44</sup> H. KENNEY, *ARCHITECT OF APARTHEID HF VERWOERD - AN APPRAISAL* 80 (1980).

<sup>45</sup> VERWOERD SPEAKS 28 (A.N. Pelzer ed. 1966).

<sup>46</sup> Pelzer, *supra* note 45, at 32.

<sup>47</sup> Pelzer, *supra* note 45, at 28.

<sup>48</sup> Act No. 27 of 1913, now called the Black Land Act. This Act provided that certain parts of South Africa were to be scheduled for occupation by Africans only.

<sup>49</sup> General Louis Botha, for instance, maintained that placing the races on the same level would never result in satisfaction and that segregation of Africans was the answer. To this he added that if Africans were segregated, they would be given the right to govern themselves under the supervision of whites. HOUSE OF ASSEMBLY DEBATES col. 2129, 2133 (1913); Pelzer, *supra* note 45, at 29-30.

<sup>50</sup> Pelzer, *supra* note 45, at 30-31.



*existence* for Africans, as opposed to separate *development* for whites, except in the Cape where Africans still had voting rights. In 1936 General Hertzog introduced the Representation of Natives Act<sup>51</sup> which removed Africans in the Cape from the common voters' roll and placed them on a separate roll<sup>52</sup> through which they would be entitled to elect three white members for Parliament.<sup>53</sup> In addition, the Act made provisions for political representation of Africans by creating a Natives' Representative Council for the whole Union, consisting of six white and sixteen African officials.<sup>54</sup> Its function was to advise on proposed legislation or any other matter concerning Africans, including budget proposals.<sup>55</sup> In this way the last vestiges of the Africans' control over their political destiny were lost.

Self-determination for the African people was henceforth, both formally and substantially, in the hands of the whites. At the same time the Native Trust and Land Act was promulgated,<sup>56</sup> in which the amount of land to be set aside for African occupation was increased to 7,25m morgen.<sup>57</sup> The Representation of Natives Act and the Native Land Acts together, formed the foundation for the policy of racial segregation in South Africa.

When the Nationalist Party came to power in 1948, it inherited a coherent system of segregation, but it existed on paper only. There was every indication that the law was simply ineffective. As a result of the Second World War there had been a tremendous growth in industry which was almost entirely dependent on black labour. Industrial development had prompted a massive influx of Africans to urban areas. Then, as now, people were only too eager to leave the poverty and overcrowding of the areas reserved for them under the Native Land Act.<sup>58</sup> The Second World War had also brought about a new awareness of human rights. South Africa's policies were again under fire. General Smuts yielded to world opinion by stating that there would be greater contact between black and white people in South Africa.<sup>59</sup> In fact this had already happened as a result of economic integration. The Nationalist Party, however, disapproved strongly of this process of integration. They had won the 1948 election by campaigning for "apartheid," the election slogan for racial segregation.<sup>60</sup> Their declared policy was to make the areas reserved under the Native Land Act African "homelands."<sup>61</sup> Blacks would be allowed to

<sup>51</sup> Act No. 12 of 1936.

<sup>52</sup> Act No. 12 of 1936, § 7.

<sup>53</sup> Act No. 12 of 1936, §§ 12, 7(6); Act No. 12 of 1936, § 15(1), read with South Africa Act of 1909, § 44.

<sup>54</sup> Act No. 12 of 1936, § 20. The six officials were the Secretary of Native Affairs, as President of the Council and five Chief Commissioners. Four out of sixteen Africans were nominees appointed by the Governor-General and the remaining twelve were elected, three from each territory (the Transkeian Territories, Natal, the Cape - excluding Transkei - and the Transvaal/Orange Free State). With the exception of the President of the Council who had a casting vote, none of the officials had a vote on the Council.

<sup>55</sup> Act No. 12 of 1936, §§ 27, 28.

<sup>56</sup> Act No. 18 of 1936, now called the Black Trust and Land Act.

<sup>57</sup> Section 10 of Act No. 18 of 1936. The areas set aside under this Act are known as "released areas."

<sup>58</sup> H. KENNEY, *supra* note 44, at 82.

<sup>59</sup> Pelzer, *supra* note 45, at 32; H. KENNEY, *supra* note 44, at 84. In 1942 Smuts had already said to the Institute of Race Relations: "I am afraid segregation has fallen on evil days . . . You have this urbanisation and the phenomenon of detribalisation . . ." See H. KENNEY, *supra* note 44, at 85.

<sup>60</sup> H. KENNEY, *supra* note 44, at 76, 126.

<sup>61</sup> First styled "bantustans", it subsequently became the "national states" and ultimately independent homelands.

enter white areas only as migrant labourers — temporary sojourners — to assist in the development of white South Africa.<sup>62</sup> This was the only way in which white supremacy could be maintained.<sup>63</sup>

The man mainly responsible for implementing the apartheid policy was Dr. Hendrik Verwoerd, first as senator, then as Minister of Native Affairs and, finally, as Prime Minister.<sup>64</sup> As the “architect of apartheid,” he gave the concept meaning and content.<sup>65</sup> Whereas previously “native” policy had been piecemeal, he gave it direction by laying down certain basic principles in accordance with which decisions would be made regarding the future of Africans in South Africa.<sup>66</sup> His first aim was to reverse the uncontrolled urbanization process. The influx of Africans was to be restricted and all “surplus natives” in the towns sent back to their reserves.<sup>67</sup> This meant that only the number of Africans required to sustain the economy would be permitted to remain in white areas<sup>68</sup> and, even there, apartheid would be enforced as far as practically possible.<sup>69</sup> Verwoerd proposed establishing educational and other facilities in the reserves as an inducement to Africans to stay there rather than in the urban areas.<sup>70</sup> As far as he was concerned, all Africans had their roots in the reserve areas,<sup>71</sup> even those people who had been born and lived in the cities. The rest of South Africa belonged to the whites.

The main obstacle to the Nationalist policy was the backwardness of the homelands/reserves. The Tomlinson Commission,<sup>72</sup> which had been appointed before the Nation-

<sup>62</sup> Pelzer, *supra* note 45, at 32; H. KENNEY, *supra* note 44, at 84.

<sup>63</sup> Verwoerd always maintained that there were only two possible solutions to the ‘native’ problem: one was racial segregation, each race having its own area, and the other was integration which would lead to domination by the majority African population. According to him, there was no alternative. Pelzer, *supra* note 45, at 283, 292.

<sup>64</sup> Verwoerd became Minister of Native Affairs in 1950 and Prime Minister in 1958. He was assassinated in 1966.

<sup>65</sup> H. KENNEY, *supra* note 44, at 10.

<sup>66</sup> *Id.* at 80.

<sup>67</sup> Pelzer, *supra* note 45, at 10; H. KENNEY, *supra* note 44, at 97.

<sup>68</sup> In quoting from *The HNP’s Economic Plan for South Africa*, Verwoerd said: “The non-European population is an important and valuable economic factor. As such its place in the development of society and the achievement of the greatest possible welfare must be properly recognized. In its own interest and with a view to the most harmonious co-operation with the European race, however, this must be done with the full recognition of essential social lines of division.” See Pelzer, *supra* note 45, at 5.

<sup>69</sup> Pelzer, *supra* note 45, at 11. If the economy required more labour, Africans could be recruited from the reserves on a temporary basis, always returning to their homes in the reserves when their work ended. For this purpose, the Native Laws Amendment Act, No. 54 of 1952 was passed, which set up labour bureaux and divided the country into “prescribed” (mainly urban) and “non-prescribed” (mainly rural) areas. Africans who wished to come to town to find jobs, needed permission from the labour bureaux in their areas to enter a prescribed area. As Verwoerd said in the Senate debate on the Bill, “[e]migration control must be established to prevent manpower leaving the platteland to become or create loafers in the cities.” SENATE DEBATES col. 3611 (1952); see also, Pelzer, *supra* note 45, at 10.

<sup>70</sup> Pelzer, *supra* note 45, at 8-9, 17.

<sup>71</sup> H. KENNEY, *supra* note 44, at 98, 127.

<sup>72</sup> The Commission was chaired by F.R. Tomlinson, an agricultural economist. The Commission had been instructed “to conduct an exhaustive inquiry into and report on a comprehensive scheme for the rehabilitation of the Native Areas with a view to developing within them a social structure in keeping with the culture of the Native and based on effective socio-economic planning.” UG61/1955 xviii (hereinafter cited as the Tomlinson Report).

alists came to power to investigate the economic viability of the reserves, reported that they were "far more densely" populated than the rest of South Africa<sup>73</sup> and that the land which was used mainly for agricultural purposes, was suffering from soil erosion and overstocking.<sup>74</sup> To resolve this problem the Commission recommended that industries be established in the reserves.<sup>75</sup> This proposal ran counter to the apartheid policy, however,<sup>76</sup> since no white person could be permitted to invest in the reserves for the same reason that Africans could not be permitted to do so in white areas. In Verwoerd's view such integration would lead to the downfall of white supremacy. He opted, instead, for the Commission's alternative recommendation, which was to establish "border" area industries; industries in white areas situated close to the borders of the reserves so that Africans could work in the white areas but live in the reserves.<sup>77</sup>

Apartheid did not begin and end with geographical segregation. Verwoerd's demand for a consistent programme found expression in the political sphere as well. This meant abolition of any form of African representation in white government, such as the Native Representative Council, and establishing, instead, traditional African forms of representation in the homelands.<sup>78</sup> To this end, Verwoerd introduced the Bantu Authorities Act<sup>79</sup> which created a three-tier hierarchy of government. At the lowest level was a tribal authority, a headman or chief and his councillors.<sup>80</sup> The second level was a regional authority, consisting of two or more tribal authorities,<sup>81</sup> and finally a territorial authority, consisting of two or more regional authorities.<sup>82</sup> Each authority was given varying degrees of limited governmental power.<sup>83</sup> Initially at least, they were to be guided and advised by white officials.<sup>84</sup> Verwoerd believed that the political development of Africans was a gradual process and he intended to keep strict control over it. He was in no hurry to grant Africans political rights<sup>85</sup> and he said frequently that the political development of the reserves was a problem for future generations.<sup>86</sup> He even denied that independent black states were the logical outcome of apartheid.<sup>87</sup>

World events forced Verwoerd to change his mind and to speed the political development of the reserves. Towards the end of the 1950s, the Western nations started to grant independence to their colonies, beginning with Ghana in 1957. In 1959, Verwoerd introduced the Promotion of Bantu Self-Government Act<sup>88</sup> which established eight Afri-

<sup>73</sup> In 1951 there were on average sixty-three persons per square mile in the reserves compared with twenty-seven for South Africa as a whole. Tomlinson Report, *supra* note 72, at 49.

<sup>74</sup> H. KENNEY, *supra* note 44, at 105.

<sup>75</sup> *Id.* at 106.

<sup>76</sup> *Id.* at 111.

<sup>77</sup> *Id.* at 107.

<sup>78</sup> Pelzer, *supra* note 45, at 12. Verwoerd summarized this policy in the following words: "South Africa is a white man's country and . . . he must remain the master here. In the reserves we are prepared to allow the Natives to be masters." See Pelzer, *supra* note 45, at 16.

<sup>79</sup> Act No. 68 of 1951.

<sup>80</sup> *Id.*, § 3(1).

<sup>81</sup> *Id.*, § 2(1)(b).

<sup>82</sup> *Id.*, § 2(1)(c).

<sup>83</sup> *Id.*, §§ 4, 5, and 7.

<sup>84</sup> H. KENNEY, *supra* note 44, at 95 - 96.

<sup>85</sup> *Id.* at 95.

<sup>86</sup> *Id.* at 157 - 58, quoting Verwoerd's statements in Parliament, DEBATES OF THE HOUSE OF ASSEMBLY, Hansard, Vol. 89, col. 62 (1959).

<sup>87</sup> H. KENNEY, *supra* note 44, at 160.

<sup>88</sup> Act No. 46 of 1959.

can national units and provided for the development of self-government and ultimately, their independence.<sup>89</sup> For the purposes of the Act, the entire African population was now divided into eight ethnic groups, each being allotted a portion of the reserves as its national homeland.<sup>90</sup> This dramatic change of policy took everyone by surprise, including Verwoerd's closest associates.<sup>91</sup> A storm of protest broke out in white political circles and Verwoerd was accused of sacrificing South Africa for the sake of the blacks. It was feared that independence would give the Africans a sense of equality with the whites and that the homelands would become a base for dangerous foreign ideologies.<sup>92</sup> Verwoerd allayed these fears by saying that political evolution was a gradual process in which Africans would be guided by the whites. He gave Parliament the assurance that if the homelands became independent,

development [would take] place in such a spirit and in such a way that friendship will remain possible although the White man will never be under any form of Bantu control, whether in Federal form or in the form of Union.<sup>93</sup>

That mounting international protest had persuaded Verwoerd to change course seems clear from a statement made in January 1959:

. . . we cannot govern without taking into account the tendencies in the world and Africa. We must have regard to them. Our policy must take them into account. And we can only take them into account and safeguard the White man's control over our country if we move in the direction of separation — separation in the political sphere at any rate. [Thus] the choice of separate Bantu development is in line with the objects of the world at large.<sup>94</sup>

If Verwoerd thought that granting independence to the homelands would win international approbation, he was mistaken. The United Nations threatened economic sanctions and suspended South Africa's membership in the organization.<sup>95</sup> In a final attempt to gain world approval, Verwoerd sent his Minister of Foreign Affairs, Helgard Muller, to explain the Government's policy to the General Assembly in 1964. In his speech to the Assembly, the Foreign Minister showed how South Africa's policies were conforming to international standards:

<sup>89</sup> "To provide for the gradual development of self-governing Black national units and for direct consultation between the Government of the Union and the said national units . . ." Preamble to Act No. 46 of 1959.

<sup>90</sup> H. KENNEY, *supra* note 44, at 160; Act No. 46 of 1959, § 2(1) provided that "[t]he Black population shall for the purpose of this Act consist of the following national units, namely -

- (a) the North-Sotho unit;
- (b) the South-Sotho unit;
- (c) the Swazi unit;
- (d) the Tsonga unit;
- (e) the Tswana unit;
- (f) the Venda unit;
- (g) the Xhosa unit;
- (h) the Zulu unit."

<sup>91</sup> H. KENNEY, *supra* note 44, at 157.

<sup>92</sup> As expressed by Mr. D.E. Mitchell, House of Assembly, DEBATES OF THE HOUSE OF ASSEMBLY, Hansard, Vol. 101, cols. 6210-14 (1959).

<sup>93</sup> DEBATES OF THE HOUSE OF ASSEMBLY, Hansard, Vol. 101, col. 6241 (1959).

<sup>94</sup> DEBATES OF THE HOUSE OF ASSEMBLY, Hansard, Vol. 99, col. 62; Vol. 101, col. 6221 (1959).

<sup>95</sup> H. BOOYSEN, VOLKEREK, 'N INLEIDING 399-440 (1980).

We White South Africans are . . . not the only nation living in a traditional territory of its own within the borders of South Africa. For South Africa is in fact and in the first place a multi-national country, rather than a multi-racial country. Apart from the South African nation of European stock, the country comprises the homelands of a number of other nations. These have their own separate identities, each with its own undeniable right to separate nationhood in a land which, too, has always been its own. I am, of course, referring to the various Bantu nations, differing from one another in language, culture, tradition and in everything else that determines national identities, rights and aspirations. . . . The processes of history have brought all these nations under the sovereignty of the South African Parliament. . . . We must bring about a situation where peaceful co-existence of the various nations in our country will be possible. We believe that this can be achieved only by the independent development of each of these peoples towards the full realization of its separate nationhood and the recognition of the right to each nation to govern itself in accordance with its own national tradition and aspiration.<sup>96</sup>

The South African delegate exhorted the General Assembly to accept South African policy on the same terms that it was presented to the African population of South Africa; apartheid was no more than the South African version of self-determination. The ultimate aim of this policy was expressed by Dr. Connie Mulder in Parliament in 1978:

If our policy is taken to its full logical conclusion as far as the black people are concerned, there will be not one black man with South African citizenship. . . . Every black man in South Africa will eventually be accommodated in some independent new state in this honourable way and there will no longer be a moral obligation on this Parliament to accommodate these people politically.<sup>97</sup>

#### V. THE INGWAVUMA - SWAZILAND RELATIONSHIP

The Ingwavuma land cession is a clear example of the practical workings of apartheid. It seems to conform to the "external" aspect of self-determination, i.e., that an ethnic group be permitted union under another state. The people of the region, however, were not consulted and their allegiance is also claimed by KwaZulu on the basis of complex political, ethnic and other links. The South African government ignored this claim, assuming the responsibility for deciding the proper ethnic association after consultation with only one other interested party, Swaziland. An examination of the history of the Swazi that now follows reveals an association with the people of Ingwavuma. This would be inevitable given the geographic proximity of Swaziland and Ingwavuma and the unstable political conditions of the nineteenth century. The question is really whether these links are sufficiently real for the purpose of the assumptions on which the land deal was based.

The people now called the Swazi and Zulu originated from a group designated the "Southern Bantu"<sup>98</sup> which had migrated southwards in prehistoric times. The people

<sup>96</sup> Helgard Muller's address to the General Assembly of the United Nations on December 21, 1964, published by the South African Department of Information 7, Government Printer, Pretoria.

<sup>97</sup> HOUSE OF ASSEMBLY DEBATES col. 579 (1978), quoted in Dugard, *South Africa's "Independent" Homelands: An Exercise in Denationalization*, 10 DENVER JOURNAL OF INTERNATIONAL LAW AND POLICY 11, 16 (1980).

<sup>98</sup> One of the many terms of convenience coined by historians and anthropologists.

<sup>99</sup> Such as the patrilineal system of succession which distinguishes the Southern from the Central Bantu.

originally constituting this group are supposed to have had linguistic and social similarities,<sup>99</sup> but when the Southern Bantu fragmented into smaller units, each of these naturally tended to develop in its own way. One branch of the Southern Bantu, the Embo-Nguni,<sup>100</sup> came to settle on the coastal plain near Delagoa Bay. This area was then, as now, inhabited by Thonga people.<sup>101</sup> The Ngwane,<sup>102</sup> an Embo-Nguni clan led by the Diamini, after a time moved away to the west, crossing over the Lebombo Mountains and coming to settle at Eshiselweni, north of the Ingwavuma River.<sup>103</sup> This is regarded as the starting point of Swazi history. The land into which they had migrated was already settled by Sotho and Nguni clans. Dates are impossible to fix with any accuracy but, at the beginning of the nineteenth century, the Ngwane clashed with a brother Embo-Nguni group — the Ndwandwe — who were busy forging for themselves a kingdom on the south bank of the Pongolo River. The Ngwane, at this point led by Sobhuza I (c1815-1839), were driven north to the foothills of central Swaziland. Since then this has remained the heart of Swazi country.

The small beleaguered group succeeded in holding their own and building a petty kingdom through skillful marriage alliances with more powerful neighbors,<sup>104</sup> and by force of arms where feasible. Under Mswati (1840-1868), the king who gave his name to the modern nation and people, military reforms were introduced<sup>105</sup> as a result of which the Ngwane/Swazi were established as one of the major powers of the area. The scattered Sotho/Nguni clans around the Swazi nucleus either submitted or were plundered and massacred. Thus the developed Swazi kingdom of the mid-nineteenth century comprised three groups: the so-called “pure” Swazi, who originated from Eshiselweni; the *emakhandzambili* (literally “those found ahead”), the ones encountered in Sobhuza’s move north; and the *emafikamuva* (literally “those who came late”) immigrants who chose to move into the zone of Swazi hegemony and submit to the Swazi king.

Swazi power was secured by force of arms only against openly antagonistic peoples. Normally control over people falling within the Swazi sphere was achieved by more subtle and indirect means. The wealth of the royal family facilitated multiple marriages and a large stock of descendants. Kinship loyalties made these people dependable and so they were given positions of power and control. A royal presence was secured by founding homesteads and cattle posts in outlying areas of the kingdom, under the watchful eye of a chosen wife or lieutenant/kinsman. The unity of the Swazi realm took the tangible form of

<sup>100</sup> Or Bembo-Nguni. A term used to distinguish the people who lived in the Delagoa Bay area, east of the Lebombo Mountains, from those to the south - the Zulu. See J.J. GROTPETER, *HISTORICAL DICTIONARY OF SWAZILAND* 10 (1975).

<sup>101</sup> Regarding these people, see N.J. VAN WARMELO, *THE BANTU-SPEAKING PEOPLES OF SOUTH-AFRICA* 68-71 (W.D. Hammond-Tooke ed. 1974).

<sup>102</sup> From which term Kangwane is derived from “the place of the Ngwane”. The ruling house in Swaziland is designated by the use of two terms “Dlamini” and “Nkosi”.

<sup>103</sup> An event which impressed itself on the national consciousness. One of the praises for the royal family is “You who pushed back and forth across the Lebombo”. For the history of the Swazi nation, the following may be consulted: P. BONNER, *KINGS COMMONERS AND CONCESSIONAIRES* Chapter 2 (1982); A.J.B. HUGHES, *LAND TENURE, LAND RIGHTS AND LAND COMMUNITIES ON SWAZI NATION LAND IN SWAZILAND* (1972); H. KUPER, *AN AFRICAN ARISTOCRACY* Chapter 2 (1961 reprint); H. KUPER, *THE SWAZI, A SOUTH AFRICAN KINGDOM* Chapter 1 (1963); J.S.M. MATSEBULA, *A HISTORY OF SWAZILAND* (2d ed. 1976).

<sup>104</sup> The Ndwandwe and the Zulu.

<sup>105</sup> The idea of drafting all young men of similar age into military regiments was the same strategy which had proved so successful with the Zulu.

tributes paid to the royal family and participation in distinctive rituals, such as the *incwala* ceremony.

While the Swazis were entrenching themselves north of the Pongolo River, the exploits of the militant Zulu to the south provoked the *Mfecane*. The Ndwandwe were among the early victims of the Zulu king Dingane. Three leaders passed by Swaziland on their way north, Zwangendaba, Shoshangane and Zwide. They brought with them large groups of refugees who were looking for new homelands. The Ndwandwe were followed by Mzilikazi. Some of the refugees passed on, others came to stay. For instance, after the Shangane civil war to the east of Swaziland (1860-64) a large group of refugees settled in the lowveld area of Swaziland. These were troubled times, people were on the move and old homelands had to be abandoned. Compounding the disruptions caused by *Mfecane* was the penetration of white men, at first invited to Swaziland as missionaries<sup>106</sup> and later as concessionaries.<sup>107</sup>

The burgeoning Swazi kingdom inevitably came into contact with the neighbouring white territories of the South African Republic (Transvaal), Natal and Portuguese East Africa. Swaziland had three great attractions; its strategic position astride the route from the Transvaal to a deep water port in the Indian Ocean, gold, and the potential alliance against the warlike Zulu and Sotho. Considering the general instability of southern Africa in the nineteenth century, relationships were remarkably cordial. It is, perhaps, a sign of this cordiality that the expansionist tendencies of these neighbours did not result in violence. Instead, their spheres of jurisdiction were demarcated peacefully as boundaries were drawn around the Swazi kingdom.<sup>108</sup>

The first initiative to delimit the Swazi border came from the Transvaal.<sup>109</sup> Portugal<sup>110</sup> and Britain<sup>111</sup> were also interested parties and it was on the basis of maps submitted by a three man Royal Commission in 1879 that the first generally recognized boundary lines were drawn on the north and west side of Swaziland. The Commission was accompanied and advised by a group of Swazi chiefs. A further joint commission, representing Portugal, Britain, the Transvaal, and Swaziland then surveyed the eastern border. The Swazi considered themselves entitled to lands as far east as modern day Maputo, based on their sojourn there amongst the Tembe in the eighteenth century. The Commission, however, used a boundary line agreed to by the Transvaal and Portugal in 1869, the Lebombo Mountains. This border has never been successfully disputed since.<sup>112</sup> The southern border proved to be an especially troublesome one. The question was whether the Swazi kingdom should end at the Pongolo River and then run eastwards to include the land occupied by the Nyawo, Mngomezulu and Mathenjwa peoples: the Ingwavuma area. The

<sup>106</sup> Mswati requested the first two Wesleyan missionaries in 1844.

<sup>107</sup> The so-called "paper conquest" concessions for a variety of activities were granted, many in respect of the same land. They assured the Swazi king of a comfortable cash income, between £15,000 and £20,000 per year according to H. KUPER, *AFRICAN ARISTOCRACY* 25.

<sup>108</sup> The drawing of the boundaries was significant in that it gave an early indication of the limits of the Swazi Kingdom. An excellent account of the demarcation of boundaries can be found in J.S.M. MATSEBULA, *supra* note 103, at Chapter 9.

<sup>109</sup> In 1866, the transvaal government set up a four man commission and on the basis of its report, the Transvaal proclaimed the boundary in 1868.

<sup>110</sup> The Transvaal and Portugal agreed on July 29, 1869 that the Lebombo Mountains would form their common frontier.

<sup>111</sup> The British had no intention of allowing the Transvaal to expand to the seaboard in the east.

<sup>112</sup> Since the Swazi did not accede to the treaty, there is no reason for considering them bound by it; *pacta tertiis non nocent*.

latter paid allegiance to the Swazi king and were claimed by him as subjects. According to the 1880 Commission set up to investigate the border, the Swazi zone of authority ended at Nyawo Point, just south of the Ingwavuma River. This excluded the area of Ingwavuma. Shepstone, the former Secretary for Native Affairs in Natal, wrote that the Mngomezulu also paid tribute to the Zulu king "but this was done for diplomatic reasons."<sup>113</sup> A magistrate from Eshowe was sent to investigate the area. He reported that the tribes there appeared to be Swazi by origin and that he doubted "whether their relations to Zululand have been closer or more intimate than has been their connection with Swaziland."<sup>114</sup> In 1895, when the administration of Swaziland was handed over to the Transvaal, Britain unilaterally proclaimed the Nyawo and Mngomezulu areas to be part of Zululand and thus under Natal administration. The southern boundary was finally fixed in 1908 by the Governor of Natal and the Resident Commissioner for Swaziland. It was a line running north from Nyawo Point to the Usutu River. Ingwavuma was excluded from Swaziland.

The Swazi people had little control over the demarcation of their borders. Apart from the economic infiltration of their territory by white concessionaires, Swazi independence was also being eclipsed by the superior power of its neighbours. Shortly after the western border had been fixed, the first signs of this process became apparent in the Pretoria Convention of 1881 between Britain and the Transvaal. Britain insisted on the inclusion of a clause providing for the recognition of Swazi independence within the boundaries specified in the Convention. Five years later, the Swazi king Mbandzeni had to appeal to the British for protection against the expansionist designs of the Transvaal. Help was provided in the form of a new convention of 1890 between Transvaal and Britain which again guaranteed Swazi independence. Observation of this promise was short-lived. In a callous *volte face* the British, in 1894, made Swaziland a protected dependency of the Transvaal. As a sop to the Swazi, clauses were included providing that Swaziland should not be "incorporated" into the Transvaal. After the Anglo-Boer War, Britain assumed jurisdiction over the country.<sup>115</sup> Hence at the time that the southern border was being fixed, Swaziland was a British dependency and the views of the Swazi people warranted even less respect than before.

Several factors need to be borne in mind when reflecting on the delimitation of boundaries. First, there was the problem of marking boundaries on the unsurveyed land of Africa. Though trite, it is necessary to remember that the politics of pre-colonial and even post-colonial Africa were not conceived as territorial states. The modern concept of the state assumes that the power of the state can be and is expressed within clearly defined regions. Before such ideas were put into effect in Africa by the colonial governments, political power was conceived more directly and more personally. The dominion of a powerful local chief would be acknowledged to the extent that it could be maintained by force, but physical power was only one means of securing control. As we have seen, kinship ties, and alliances, were equally important. Land was freely available and, even

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<sup>113</sup> J.S.M. MATSEBULA, *supra* note 103, at 110-12; and see H. Jones *The Pre-colonial Distribution of the Swazi Population*, Proceedings of a Seminar Held in the Centre of African Studies, University of Edinburgh, on African Historical Demography 2V 353 (1981).

<sup>114</sup> Garson, *The Swaziland question and a road to the sea 1887-1895*, 20 ARCHIVES YEARBOOK OF SOUTH AFRICAN HISTORY 267, 306-11 (1957).

<sup>115</sup> Order in Council June 25, 1903, Swazi Orders in Council, Proclamations and Principle Government Notices from June 25, 1903-1908, compiled by Government Secretary Pretoria, Government Printer, Pretoria.



during the later part of the nineteenth century, political dissatisfaction, droughts, poor harvests or any other reason could prompt a people to migrate in order to seek their own fortunes or to find protection from another, more powerful group. Thus the links which held together a nascent African kingdom of the Swazi or Zulu type were fragile and the political structures of the time fluid. The typical settlements on the eastern seaboard and mountain escarpments were small, scattered homesteads.<sup>116</sup> Even in the developed Swazi kingdom the royal homesteads contained only between 1,000 and 3,000 people.<sup>117</sup> As each homestead was relatively self-sufficient, contacts with the outside world would be sporadic and infrequent. Even if the colonial powers had wanted the boundaries to reflect the African political situation, it is most unlikely, given all the factors, that the boundaries imposed by colonial rule could reflect the nuances of this political affiliation.<sup>118</sup> Most colonial boundaries in Africa are notoriously arbitrary and artificial. The boundaries of Swaziland were probably not as insensitively drawn as most, yet they could hardly have been satisfactory from the Swazi point of view.

Second, the boundary delimitation took place in an atmosphere of mounting tension between Britain and the Transvaal. The views of Swazi were of secondary consideration. The Transvaal sought an outlet to the sea and was concerned about British encirclement. The port at Delagoa Bay was under Portuguese control which left the only open harbour at Kosi Bay in Thongaland (Ingwavuma). Britain forestalled any ideas the Transvaal might have had of expanding in this area by annexing it. Eight years earlier, in 1887, the Queen Regent of the Thonga people had appealed to Britain for protection.<sup>119</sup> The British responded by declaring her lands, which lay between Swaziland and the sea, within the British sphere of influence. They included in the proclamation not only the land of the Thonga but also that of the Mngomezulu and Nyawo, who were not at the time subject to the Thonga. The Transvaal protested, and the Mngomezulu and Nyawo, not adverse it seems, to playing off one colonial power against another, appealed to the Transvaal for protection. But their protests and pleas were in vain. In 1895 Britain annexed Thongaland<sup>120</sup> and in 1897, the region was handed over to Natal.<sup>121</sup>

In these circumstances, the Swazi desire to revise the imposed colonial boundaries is quite understandable. Its claim has an ethnic base, but how valid is this? The population of the region is presently described as divided into four tribes: the Tembe, Mathenjwa, Mngomezulu and Nyawo. The Tembe straddle the Natal-Mozambique border. Since prehistoric times, they have been living on the coastal plain, spreading from Delagoa Bay south. According to Bryant, they were mentioned by name in early Portuguese documents and were fully described in 1822 by a captain in the English navy.<sup>122</sup> The Tembe, despite their eighteenth century role as hosts to the migrating Swazi, have had little to do with them. Tembe are classed as Thonga on social and linguistic grounds.<sup>123</sup> The Mathen-

<sup>116</sup> Hammond-Tooke, *supra* note 101, at 85-90.

<sup>117</sup> Jones, *supra* note 113, at 344.

<sup>118</sup> See J.S.M. MATSEBULA, *supra* note 103, at Chapter 9. The fact that Portugal and the Transvaal determined the eastern boundary without consulting the Swazi is an example of this.

<sup>119</sup> 8 C. HEADLAM, *THE CAMBRIDGE HISTORY OF THE BRITISH EMPIRE* 538 (E.A. Walker ed. 1963); see A.T. BRYANT, *OLDEN TIMES IN ZULULAND AND NATAL* 307 (1929).

<sup>120</sup> Principally in order to forestall Transvaal aspirations to a free route to the sea and a deep water harbour at Kosi Bay. C. HEADLAM, *supra* note at 119, at 538.

<sup>121</sup> 71 H.C. (U.K. 1895).

<sup>122</sup> A. BRYANT, *supra* note 119, at 290.

<sup>123</sup> See, e.g., N.J. VAN WARMELO, *A PRELIMINARY SURVEY OF THE BANTU TRIBES OF SOUTH AFRICA* 81 (1935).

jwa, Mngomezulu and Nyawo, on the other hand, have been classed as Sotho in origin.<sup>124</sup> They were part of the most easterly settlements of Sotho, who inhabited the area of modern Swaziland before the foundation of the Swazi kingdom. All three groups had links with both the Swazi and Zulu kingdoms; not necessarily relationships freely chosen, however, rather ones dictated by a position of weakness between two powerful and expanding kingdoms.<sup>125</sup>

In 1935 the population of the Ingwavuma region was classified as part of the "Natal Nguni" group and the following figures were given:<sup>126</sup>

Nyawi	2,430
Mngomezulu	968
Mathenjwa	1,664
Tembe	8,010
(acknowledged as being Thonga in origin but said to have adopted Zulu custom and language).	

According to the 1980 population census<sup>127</sup> taken in South Africa, the following figures for Ingwavuma were available. These figures follow the current tribal classification in South Africa:

Xhosa	40
Zulu	95,400
Swazi	200
S. Ndebele	20
S. Sotho	60
Tswana	220
Shangaan/Thonga	40

The early Sotho origins have been ignored. The more specific tribal identities such as Nyawo, Mngomezulu, have been suppressed and the historic political affiliations with Swaziland overlooked. The 1980 census figures (and even the 1935 classification) indicates that KwaZulu, not Swaziland, can claim the closest ethnic connection with the peoples of the region.<sup>128</sup>

## VI. APARTHEID AND SELF-DETERMINATION

At this point we can compare the Ingwavuma land cession with the concept of self-determination as developed earlier in this paper, in order to establish whether its requirements can or have been met. Since the 1960s, the South African government has been able to justify its policy of apartheid on the ground that it is allowing its peoples to exercise a right of self-determination and that this is self-determination taken to its logical

<sup>124</sup> A. BRYANT, *supra* note 119, at 340.

<sup>125</sup> The Nyawo have the distinction of being the people chosen by Dingane to provide his last refuge. The Mngomezulu were driven to seek Swazi protection when engaged in their own petty disputes. *Id.* at 340-5.

<sup>126</sup> N.J. VAN WARMELO, *supra* note 123, at 75, 77, 79 and 81.

<sup>127</sup> *Geographical Distribution of the Population - sample tabulation* 1980 Population Census Report No. 02-80-01 213, CENTRAL STATISTICAL SERVICES (1982).

<sup>128</sup> A significant point which causes one to doubt even the reliability of subjective assessments of group identity. It is a detail recorded in SARS, *supra* note 2, at 9, "many people registered as 'Zulu' in order to obtain schooling, pensions and trading licenses."

conclusion. In other words, the various ethnic groups are permitted to secede from the South African state or, as in the case of Ingwavuma, permitted to unite with ethnic groups across the South African border. It is clear, however, that self-determination is, in fact, imposed on the African population; they have no real choice. The entire apartheid system and the history of South Africa has guaranteed that the democratic ideal of self-determination will be frustrated.

The South African government offers its African population the choice of separate "development" in national homelands or separate nationhood, but their access to the economic and political power of South Africa is denied. By uniting Ingwavuma with Swaziland, South Africa was able to rid herself of the responsibility for a large number of relatively impoverished people. This is part of the broader policy of denationalizing black citizens, which enables South Africa to exclude them from participation in her economy and political process.<sup>129</sup> By giving the inducement of the external form of self-determination, the South African government has been able to evade the issue of internal self-determination.

The apartheid policy, as conceived by Verwoerd, rests firmly on ethnic division between blacks, whites, coloureds, and Asians. The government of the black group is facilitated by further division and classification into tribal units. Use of the concept of the "tribe" was familiar to all the colonial governments in Africa. For political and administrative reasons, tribal membership was an important tool to divide and to structure the population along the lines acceptable to colonial policy.<sup>130</sup>

The term "Zulu" is a good example of how the concept of tribe has been used in South Africa. For the purposes of modern "homeland" development, "Zulu" denotes a large group of several million people, living mainly in Natal. More narrowly conceived and closer to the historical tradition of the African people, "Zulu" is the name of a particular clan which, under the leadership of Shaka and Dingane, managed to gain ascendancy over various other clans in Natal.<sup>131</sup>

Anthropologists, who have striven to achieve a greater degree of objectivity, show that a combination of political, territorial, cultural and linguistic criteria are all at play in determining tribal membership. Yet they have found that the concept of tribe has proved to be so elusive and ambiguous that it has lost nearly all of its value as an analytical construct.<sup>132</sup> Apart from this, as a result of many years of government intervention in the political development of the African peoples of South Africa, the officially designated tribes may now bear little resemblance to the people's own conception of their group identity.<sup>133</sup>

<sup>129</sup> See Dean, *A Citizen of Transkei*, 11 CILSA 66 (1978).

<sup>130</sup> Mafeje, *The Ideology of Tribalism*, 9 JOURNAL OF MODERN AFRICAN STUDIES 253 (1971).

<sup>131</sup> See the account given in E. KRIGE, *THE SOCIAL SYSTEM OF THE ZULUS* 6-22, 217 (1936).

<sup>132</sup> One of South Africa's foremost anthropologists, for instance, eschewed the term 'tribe' in the title of an authoritative text on the African people of Southern Africa in favour of the non-technical term "people". Hammond-Tooke, *supra* note 101, at 15.

<sup>133</sup> Under the Black Administration Act No. 38 of 1927, § 5(1)(a), for instance, the President may "define the boundaries of the area of any tribe or of a location and may from time to time alter the same and may divide any existing tribe into two or more parts or amalgamate tribes or parts of tribes into one tribe or constitute a new tribe, as necessity or the good government of the Blacks may in his opinion require." Similarly, under the Black Authorities Act No. 68 of 1951, § 2, the President may establish the tribal authorities, with due regard to custom, as he thinks necessary.

The social/cultural and linguistic factors used to determine group membership are not necessarily decisive in revealing group affiliation. Differences may be perceived and stressed by one group and dismissed as irrelevant by another. In other words, any such "objective" assessment is coloured by the preconceptions and purposes of the observer. Notionally objective assessments have their limitations both in terms of the vagueness of the concepts used, such as "tribe," and the feasibility of measuring the criteria. This goes to prove that, for purposes of self-determination, the identity of the group must be determined subjectively if the determination is going to be a reliable one. Yet how can people subjectively determine their identity when their political voice has been suppressed, as is the case with all the African peoples of South Africa? The main political spokesmen of Africans, members of the African National Congress, the supposed representatives are in exile. They disclaim tribal divisions as antithetical to the creation of a *national* consciousness. Given the fact that the people of Ingwavuma are politically inarticulate, it is inevitable that others should speak on their behalf.<sup>134</sup>

## VII. CONCLUSION

It is questionable whether the current practice of separating self-determination into a series of complementary rights and powers, and granting some and withholding others is justified. If people are denied the internal right of self-determination by being denied the right to govern themselves it is unlikely that they will be able to develop their own identity and foster their own interests. Internal and external self-determination are interdependent. The case of Ingwavuma suggests that unless the people concerned have already established themselves as a coherent group, with clearly stated claims voiced through some sort of representative body, the chance of securing their right to self-determination becomes remote.

The various historical and political processes which formed the kingdom of Swaziland show, by implication, that the identity of the people of Ingwavuma was determined for them. They were peripheral to the Swazi and Zulu kingdoms and certainly had no presence of their own to force the colonial powers to take special note of their needs. Colonial policy, as evinced in the boundary demarcation of Swaziland, decided the fate of

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<sup>134</sup> The land deal was, of course, contested by KwaZulu in *Government of the Republic of South Africa & ano v. Government of KwaZulu & ano* 1983 (1) SA 164 (A). The first question posed for the court was whether KwaZulu had *locus standi* to make the application, and this was answered in the affirmative. The court was concerned with an essentially constitutional issue; whether KwaZulu was an organ of state and thus entitled to bring an action against the South African government. This issue does not concern us here. It is a pity that the issue of *locus standi* was not more fully explored since it is an ambiguous term referring to the procedural competence of a party to bring or defend a claim before a court or the *interest* which a party may have in a matter. See the South West African Case, Second Phase 1966 I.C.J. para. 44. Ingwavuma is part of KwaZulu territory and, on that ground, it seems clear that KwaZulu would have an interest in the matter. On a more general level, however, KwaZulu was allowed to arrogate to itself the role of a right bearer (*i.e.* the right to speak on behalf of the people of Ingwavuma) when, more properly, that role should have been played by the people of the territory. It might be contended that KwaZulu was bringing an *actio popularis*. The UN (or any other international organization) has been refused admission to South Africa mainly on the ground that the internal policies of the country fall within the reserved domain of a purely "domestic affair". In such circumstances, the rights of the people of Ingwavuma would have no international protection and, in consequence, if they were to be protected, the task would have to be undertaken by some person or organization within South Africa. The I.C.J. has, however, denied the existence of an *actio popularis* in international law. *Id.* at para. 88.

Ingwavuma — as part of South Africa — in the nineteenth century; apartheid politics decided its fate — as part of KwaZulu, and then Swaziland — in the twentieth century. In terms of post-colonial South African politics, the people of Ingwavuma have had no opportunity to form into a coherent group. Insofar as it is difficult, if not impossible, to distinguish the Ingwavuma people from the Zulu or Swazi, ethnically, linguistically or otherwise, it is highly questionable whether they should be accorded the status of “a people” and, therefore, the status of a right bearer. Consistent with the apartheid programme, the inhabitants of Ingwavuma have been created “a people” and the right of self-determination imposed on them. This was facilitated by manipulation of the concept of “tribe.” On a more abstract level, it seems that while a group of individuals remains politically powerless, their future will inevitably be determined for them.