RE- INCORPORATION OF THE TBVC STATES

AGENDA.

1. Introduction and Welcome

   - S.Z. SKWEYIYA

2. Terms of reference of the working group on the future of TVBC States

   - DULLAH OMAR

3. Legal Implications of Reincorporation of the Homelands

   - V. DUBA

4. Role of the Institution of Chieftanship and Institutions of Civic Society

   - BRIGITTE MABANDLA

   - THOZAMILE BOTHA

   - PAT HOLOMISA

5. Demarcation of Regions

   - ALBIE SACHS

6. Economic Implications

   - PAUL DAPHNE

7. Allocation of Tasks

8. Next Meeting

9. **CLOSURE**

SA - liable

Gerrymandered / neo-apartheid

~~Nullity~~ Secret agrees.

Phased re-inc.

Nationality

Vote

Embarrass Govt

Territorial dim. — 10 - Comp, urban/rural - not

Constit dim.

Polit dim. - lists/alliances. Pop support all over.
Senior/junior.

Pre-Empts CA.

Wage workers
Seamen

Constitutional
rules
Hereditary functions
vs
hered. powers

Affirm. action.
equal rts.
personal powers. rule of law
courtesy. local govt

COMMENTS ON THE VENDA REINCORPORATION FORUM PROCLAMATION, NO; 28 OF 1991.

Introduction

Since Ramushwana assumed control of the "Republic of Venda" through a bloodless coup, he has on several occasions made statements about "reincorporation of Venda into South Africa.

On the 9 August 1991 while addressing the conference of Umkhonto We Sizwe at the University of Venda, he promised that his Administration will be making important announcement about "reincorporation of Venda into South Africa". He further indicated that "the reincorporation of Venda into South Africa will be a democratic process by the people of
Venda".

The ANC structures in Venda waited anxiously for consultation to be done by the Venda Administration before the actual announcement . Our structures were surprised when an announcement was made publicly by Ramushwana about the "Reincorporation Forum".

VENDA REINCORPORATION FORUM PROCLAMATION, 1991

The proclamation provides for the establishement of a forum to "advise the chairman of the council... on matters concerning the reincorporation of the Republic of Venda into the Republic of South Africa.

COMPOSITION OF THE FORUM

The proclamation provides for the composition of the Forum as follows:

(a) twenty eight chiefs

(b) Fifty six elected members from the eight territorial councils

(c) Two members, elected by the Venda Chamber of Commerce and Industries (VENCOCI)

(d) Two members elected by representatives of the recognised churches in the Republic of Venda

(e) Two members elected by the senate of the University of Venda and

(f) Ten members appointed by the chairman of the council for national unity.

It is important to mention that the twenty eight chiefs mentioned in the proclamation are actually chiefs who were members of the dissolved National Assembly. This may create a very serious problem, since there are on going disputes in Venda about chieftainship more especially in the light of the fact that the previous Administrations had powers to appoint chiefs and this problem of appointing chiefs by the previous Administrations led to the Ramushwana Administration appointing a Commission of Inquiry into the whole issue of chieftainship in Venda. The Commission made recommendations which have created further problems about chieftainship.

However, as ANC we cannot oppose involvement of the traditional rulers in the whole process but it is an issue which needs through discussion.

Furthermore, the problem with fifty elected members is that the whole question of elections in different areas may be problematic As ANC we need to prepare our people for elections for the Constituent Assembly. The question is whether if there are elections in Venda for members of the Forum, the same elections would not confuse our people? It goes without saying that elections for a Constituent Assembly is very complicated issue that needs through preparation on our part and if other elections are held, this may complicate the issue further for our people. In anyway the Venda Government was represented at the Patriotic Front and therefore committed to our demand for a Constituent Assembly.

Therefore, elections for members of the Forum as envisaged by the Ramushwana Administration cannot be supported.

Furthermore, the Proclamation provides for two members elected by representatives of "the recognised churches". The question is how are the recognised churches going to be identified? In principle, the ANC should not have serious problems about the involvement of churches in the process but this is a sensitive matter which needs to be approached with caution.

The proclamation also gives the chairman of council powers to appoint ten members. This may be a problem if such powers are exercised without due consultation.

The most serious objection to the composition of the reincorporation of Forum is the non-participation of the liberation movement. The issue of reincorporation has political implications for our people in Venda, as such

involvement of the liberation movement is of cardinal importance.

QUALIFICATION FOR MEMBERSHIP OF THE FORUM

The proclamation inter alia provides that qualification for membership of the forum will be restricted to persons who are or over twenty five years. Our objection regarding this clause is that it effectively excludes a numbe of people. In actual fact, most members of the ANC in Venda are below twenty five years. For example, the majority of members of the Youth League are below the age of twenty five years.

There is general agreement within our ranks that the voting age will be eighteen years. Therefore, it is difficult to understand the age qualification as proposed by the Ramushwana Administration.

Furthermore, the proclamation disqualifies persons who have been "convicted of any crime in respect of which capital punishment may be imposed". This means that our cadres who have been convicted for political offences cannot participate in the Forum.

As ANC, obviously we cannot accept such an arbitrary disqualification

CHAIRMAN OF THE FORUM

The proclamation gives the chairman of council for national unity powers to designate from amongst members of the forum one of them as a chairperson of the Forum. In this case, the chairman of National Unity is given unnecessary powers since members of the Forum can elect a chairperson for the forum amongst themselves.

The chairman of council for National unity also has powers to dissolve the Forum "at any time".

POWERS AND FUNCTIONS OF THE FORUM

It appears the Forum can only advise the chairman of council on any matter concerning the reincorporation at the request of the chairman though the Forum has a discretation to advise the chairman.

APPEARANCE OF WITNESSES BEFORE THE FORUM

The Forum has powers to summon any person to appear before it. This clause leaves a number of questions unanswered. Is the forum empowered to exercise judicial powers. Why is it necessary to summon people to appear before the Forum? Surely if the reincorporation Forum is a public matter there is no need to summon people to participate.

The next logical question is what will happen to a person who refuses to appear before the Forum? The answer is that such a person would have committed an offence in terms of the Proclamation.

The proclamation also provides for offences that may be committed by members of the public. The offences listed appear to criminalise any action or conduct of members of the public who may interference with the proceedings of the Forum. Again the question is whether it is necessary to create offences in terms of the proclamation if the reincorporation is supported by the people.

OUR RESPONSE TO " THE REINCORPORATION FORUM".

The ANC Region has not yet formally responded to the proposal tabled by the Ramushwana Administration. The PAC

and AZAPO rejected outrightly the Forum as proposed by the Ramushwana Administration.

Thus far, the ANC Region has only discussed the proposal through the liaison structure with the Ramushwana Administration.

Our structures in the area are pressurising that the Region should respond by rejecting the Reincorporation Forum.

Now what is our response as ANC to the proposal tabled by the Ramushwana Administration?

In principle, as ANC we are not against reincorporation. It is also important to link reincorporation with our demand for an Interim Government. Therefore, it is important to analyse the proposal by Ramushwana and check how as ANC we can actually take the initiative and direct the whole process.

Therefore, outright rejection of the Forum may be contrary to our demand for an Interim Government.

We need to table our objections to the Reincorporation Forum to the Ramushwana Administration and together with them constructively work out mechanisms for reincorporation which will actually strengthen our demand for an Interim Government. In any case, the future of TBVC states is one of the items on the agenda for CODESA.

SETH NTHAI
ANC : NORTHERN TRANSVAAL REGION
DECEMBER 1991.

MARITIME CONVENTIONS AND THE REINCORPORATION OF THE COASTAL HOMELANDS INTO SOUTH AFRICA

It is almost certain that the coastal homelands Ciskei and Transkei (as well as other homelands) will be reincorporated into South Africa.[1]

The basic problem here will be ensuring that conventions to which South Africa is a party will apply also in the territory of what is now Ciskei and Transkei after reincorporation.[2] It is therefore proposed to examine the current situation relating to such conventions and then to make suggestions as to how the goal might be achieved. There are two overall classes of Convention to consider.

(1) Conventions to which South Africa became a party before homelands independence[3]

An example of such a convention would be the International Convention on Civil Liability for Oil Pollution Damage of 29th November 1969.[4] The independence of the homelands in relation to these conventions poses two questions: (i) did the coastal homelands succeed to them and (ii) did South Africa cease to be a party to them in relation to the territory of the homelands?

(a) Succession of the coastal homelands

The question is important because if the homelands succeeded to conventions on independence this would mean that on reincorporation the question of South African succession to them would also arise! Succession to conventions would mean

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1 Such reincorporation will certainly have wide ranging legal implications. See M Wiechers 'Reincorporation of the TBVC countries - international law practice and constitutional implications' 16 (1990-91) SAYIL 119-26.

2 This is actually a problem relating to all conventions to which South Africa is a party and it applies not only to the coastal homelands but also to the land-locked ones namely Bophuthatswana and Venda. A solution to the problem may however be more urgent in the case of maritime conventions because the new South Africa will be dealing here with areas in which foreign states are directly active. Any solutions found here for maritime conventions would also be relevant for conventions in general. For a list of environmental conventions to which South Africa is a party see RF Fuggle & MA Rabie Environmental Management in South Africa (1992) 180.

3 In relation to Transkei before 26th October 1976. In relation to Ciskei before 4th December 1981.

4 For several other examples see Fuggle and Rabie (n2) supra 180.

also that the homelands had international obligations and rights under them in relation to third states.[5] On reincorporation the question of South African succession to these rights and obligations in relation to third states would arise in the territories of the former homelands.

The question of succession to the treaties of a mother state on attaining independence was a complicated one to which there were a number of approaches. State practice was inconsistent.[6] By 1979 the position was that a successor state had substantial freedom regarding the continuity of treaties.[7] In order to exercise their choice, new states would make unilateral declarations or conclude devolution agreements with the mother state. These would be deposited with the Secretary-General of the United Nations.[8] The system assumed of course that third states which are parties to the treaties in question accept the capacity of the new - state to be a party to international treaties.

In the case of the homelands an approach called 'legislative devolution' was adopted. The intention of the homelands to continue treaties was included in enabling legislation.[9] The intention probably was to avoid the necessity of depositing a devolution agreement with the Secretary-General of the United Nations as this would probably have been rejected.[10] The process of 'legislative devolution' was criticized on a number of grounds.[11]

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5 The homelands would also have rights and obligations in relation to South Africa.

6 For a useful summary of the situation see LF Jackson International Marine Pollution Conventions and the Independent States of Southern Africa (1989) 30-1.

7 Ibid. J Crawford The Creation of States in International Law (1979) 29.

8 Jackson (n6) supra 31. In the case of multilateral treaties the Vienna Convention on Succession of States in respect of Treaties 1978 provides for accession by new states by a notification of succession.

9 Ibid 32. Status of Transkei Act 100 of 1976 (a South African statute) sec 4. Republic of Transkei Constitution Act 15 of 1976 sec 68; Status of Ciskei Act 110 of 1981 (a South African statute) sec 4; Republic of Ciskei Constitution Act 20 of 1981.

10 Jackson (n6) supra 33.

11 For details see ibid. As far as pre-independence agreements between South Africa and the homelands are concerned it is also doubtful whether these could have the effect of ensuring state succession by the homelands. Ibid 13-4, 37; Status of Transkei Act 100 of 1976 sec 5; Republic of Transkei Constitution Act 15 of 1976 sec 68; Status of Ciskei Act 110 of 1981 sec 5.

The problem of homelands succession therefore comes down to one of non-recognition.[12] Third states did not recognize the homelands as independent states. Hence the homelands had no capacity to be parties to treaties with such non-recognizing third states. The homelands had neither international law rights nor obligations arising out of such treaties. There could not therefore be any question of succession to the treaties.[13] This is so even though it is not a prerequisite for becoming a party to maritime conventions that a state should be a member of IMO.[14]

As pointed out, South Africa did of course recognize the homelands as independent states.[15] The terms of the conventions may therefore be applicable between them and South Africa where agreements have been concluded to that effect.[16] In the field of marine pollution it may be that no Conventions apply between South Africa and Transkei[17] with the possible exception of the Civil Liability Convention[18] and the London Dumping Convention. The two latter conventions also apply between South Africa and Ciskei.[19]

It is submitted that it is immaterial whether any of these conventions are applicable in relations between the homelands and South Africa. Such arrangements would be of a purely bilateral nature. On reincorporation of a homeland, one of the parties to the bilateral arrangement would cease to exist. The other party (South Africa) could not succeed to a treaty with itself! The question of succession could only arise if a homeland had succeeded to a convention in the sense that it was operative between the homeland and a third state. This possibility has been excluded on the ground that no third state recognizes the homelands. The

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12 Jackson (n6) supra 33.

13 In relation to marine pollution conventions, Jackson (n6) supra 34-5, concluded that Transkei and Ciskei cannot be considered as parties to such. It is submitted that the same conclusion would be valid for other conventions. Views have also been expressed in the context of other conventions that the TBVC states did not succeed to them. See AJGM Sandars 'A southern African exercise in non-recognition' 9 (1976) CILSA 356 at 359-64; ER Dutkiewicz 'The applicability and effect of International Civil Aviation Conventions in Southern Africa' 11 (1978) SAYIL 70 at 78-80, 87-8.

14 Jackson (n6) supra 34.

15 See ibid 26.

16 Ibid 35.

17 Ibid 37-8.

18 Ibid 15, 16. The agreement between South Africa and Transkei covers only oil pollution. Essentially it only introduces a policy of cooperation. It does not refer to any particular convention. Ibid 38.

19 Ibid 16, 38.

overall conclusion therefore is that there will be no treaty relationship to which South Africa may succeed on reincorporation of the homelands.

(b) Cessation of South Africa as a party to conventions

The fact that South Africa granted independence to a homeland does not mean that it ceases to be a part to that convention. The question is whether the geographical application of the convention was reduced in that henceforth it applied only to territory which remained in South Africa and thus not to the territory of the homeland. The net question would be whether South Africa continued to have rights and obligations in relation to the territory of the homelands vis a vis third states.

The South African intention on granting independence to Ciskei and Transkei was to absolve itself from continued responsibility for commitments in terms of multilateral treaties in so far as these related to the territories of the homelands.[20] The intention of South Africa clearly was to cease to be a party to such conventions in relation to homelands territory.

On the other hand there are indications that third states still consider such conventions as applying to homelands territory but with South Africa as the responsible party.[21] Thus, for example, when Transkei closed its borders with Lesotho in 1976, the government of the latter did not protest to Umtata. It directed its complaints to South Africa and took the issue up with the United nations.[22] In 1986 a British court held that the United Kingdom government continued to regard South Africa as the responsible authority for the territory of Ciskei and the government of the latter as a subordinate authority of South Africa.[23] The above incidents indicate that third states may regard South Africa as continuing to be responsible for the territory of the homelands including the observance in them of obligations contained in conventions to which South Africa is a party.

In view of divergent attitudes on the part of South Africa and possibly on the part of third states, the question as to whether South Africa has ceased to be a party to conventions in relation to homelands territory must be a debatable one in international law. The question is however relevant to the reincorporation of the homelands. If South Africa still is a party to such conventions in relation to the territory

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20 Ibid 35.
21 Ibid 35, 38.
22 Ibid 35-6.
23 Gur Corporation v Trust Bank of Africa Ltd (1986) 3 WLR 583 (CA).

of the homelands then no action is called for on reincorporation. The conventions simply continue to apply. On the other hand, if South Africa has ceased to be a party in relation to homelands territory, the conventions should be extended to the territories when reincorporation takes place.

(2) Conventions to which South Africa acceded after homelands independence

An example of such a convention would be the Convention on the Conservation of Antarctic Marine Living Resources of 20th May 1980. The South African intention here would clearly have been that such conventions would be geographically limited in that they would not extend to the territories of the homelands. It is however also possible that unless South Africa indicated a contrary intention at the time of accession to such conventions, that other states could regard the conventions as being applicable to the territories in question. It is submitted however that such an attitude by third states would be difficult to justify. The fact that South Africa had transferred independence to the homelands and had treated them as independent states must be a clear indication of an intention that subsequent treaties concluded by South Africa were not to apply to the homelands. The situation, it is submitted, is different from that pertaining to pre-independence treaties. In the latter case it is undisputed (i) that South Africa was a party to the treaty and (ii) that the treaty applied to the territory of the homelands. The last factor is not present with post-independence treaties. It is therefore easier to maintain the non-applicability of these treaties to the territory of the homelands. It cannot of course be stated finally and definitively that such treaties apply or do not apply to the territories. Hence it would be sensible to consider the question of their extension when reincorporation takes place.

Overall conclusions

It is certain that the homelands did not become parties to South African pre-independence treaties by succession. It is also certain that they are not parties to post-independence South African treaties. In these two cases the simple reason is lack of recognition of the homelands by third states.

It is virtually certain that South African post-independence treaties did not extend to the territory of the homelands. The South African intention on concluding such treaties would be to confine them geographically to the then Republic of South Africa.

It is doubtful whether pre-independence South African treaties continued to apply in the territory of the homelands after the grant of independence. South African intentions here would be important. Certain attitudes displayed by third states could also be relevant.

The problem

The fact that the homelands did not succeed to conventions and that the conventions did not apply in their territories on the basis that South Africa was a party to them meant that there was a lacuna. Conventions simply did not apply to the geographical area comprising the homelands, their territorial waters and other maritime zones.[24] It was realized that this created problems. Various suggestions have therefore been made on ways by which the conventions could in practice be extended to the territory of the homelands. Several possible solutions have been suggested by Jackson for pollution conventions. These included unilateral declarations by the homelands to abide by the terms of conventions and agreements with recognizing states[25] to apply the terms of conventions[26], agreements with South Africa setting up joint responsibility for the application of the conventions or assigning responsibility to South Africa for the application[27], the exercise of governmental authority on the basis of agency by the South African Department of Environment Affairs on the request of the homelands (a delegated authority) and the creation of joint organs for specific purposes, for example a regional organization to exercise control.[28] Booysen[29] also suggested two possible solutions: treating the homelands as members of a federation endowed with unlimited capacity to conclude treaties and the recognition of the homelands as organs of the South African state with treaty-making capacity.[30] It will be seen from the above that over the years from the first grant of independence to a homeland in 1976, there has been no watertight solution to the lacuna stemming from the fact that conventions to which South

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24 Transkeian maritime zones exist by virtue of the Territorial Waters Act 8 of 1978. Ciskeian maritime zones exist by virtue of the Territorial Waters Act 12 of 1986.

25 South Africa and other homelands.

26 If such agreements were to carry any advantages for third states, it is submitted that they would have to have been in the nature of pacta tertiis.

27 See comments in (n26) supra.

28 (N6) supra 46-53.

29 H Booysen 'The South African homelands and their capacity to conclude treaties' 8 (1982) SAYIL 58 at 80-2.

30 These two solutions are criticized by Jackson (n6) supra 49.

Africa is a party do not in all probability apply to homelands territory.

Suggestions

It is indeed politically inconceivable that a new South Africa would not wish the conventions to which it was a party to apply to the entire national territory, including the reincorporated homelands. The adoption of a new constitution for South Africa and the reincorporation of the homelands will therefore furnish the opportunity for solving the above problem. It is submitted that new constitutional provisions will be a sine qua non for an appropriate solution here. It must be emphasized that the problem is technically not one of state succession (for there is nothing for South Africa to succeed to) but rather one of the geographical extension of conventions to areas in which, in all probability, they were previously inapplicable.

(1) Relationship between international law and national law

The new constitution should contain a provision on the status of treaties or conventions in South African law.[31] This could read somewhat as follows

> 'Unless otherwise provided by this constitution or by Act of Parliament, international agreements binding upon South Africa shall form part of the law of South Africa'.[32]

(2) Definition of the national territory

The definition of the national territory should include the territory of the TBVC states. However in case reincorporation should not have taken place, it should be provided in principle that South African law does not extend to the TBVC states until reincorporation. In order however to be compatible with the claim to TBVC areas it should also be provided that this geographical limitation of South African law is without prejudice to the right of Parliament

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31 Needless to say it should also contain provisions on the status of international customary law and other matters pertaining to international law but such matters are not germane to the questions discussed in this paper. For a general discussion and suggestions see DJ Devine 'Suggestions for the incorporation of some international law-related provisions into a new South African constitution' (1991) 6 SA Public Law 216-20.

32 See Devine (n31) supra 216, 218-9.

The solution depends upon having adequate provisions in the new constitution on two topics: (1) the relationship between international law and national law and (2) the definition of the national territory.

to exercise jurisdiction over the areas in question.[33] The net result would be that the application of South African law to TBVC areas would be suspended until reincorporation but the power to legislate for the areas would be confirmed.

Using these two bases, how would it be possible to extend the conventions to the areas of Transkei and Ciskei (1) in international law and (2) in national law?

(1) International law

It is submitted that the simple device to be used here would be that of a declaration. The Government of South Africa would make a declaration to the effect that as from the date of the declaration the conventions must be regarded as applying to the areas of Ciskei or Transkei or both.[34] The declaration should specify all the conventions involved and a copy should be deposited with the depositories of the various conventions. In this way the conventions would certainly apply to homelands territory as a matter of international law.

(2) National law

Since the various conventions are international agreements binding on South Africa, they would automatically be part of South African law in terms of the constitution. Further they would apply as South African law in the national territory as defined in the constitution. This would include Ciskei and Transkei if incorporation has been achieved.

One final matter must be discussed, the timing of the declaration. It is submitted that this should be done immediately on reincorporation of a homeland. In order to describe how the solution would work, let us assume the following hypothetical events. First Ciskei is reincorporated. Later the new constitution becomes effective. Afterwards Transkei is reincorporated. On reincorporation South Africa should make a declaration that the conventions apply to the territory of the former Ciskei. In international law the effect would be immediate. The conventions would apply in respect of the area in question.

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33 See suggestions in Devine (n31) supra 221, 223-4. See too DJ Devine Maritime Zone Legislation for a new South Africa: Historical, Contemporary and International Perspectives (1992) 69, 71-3.

34 If it was considered politically opportune, the declaration could contain a statement that it was made ex abundanti cautela and in order to eliminate any doubts which might exist as to the applicability to the territories of the former homelands of Conventions to which South Africa is a party.

The solution depends upon having adequate provisions in the 9 new constitution on two topics: (1) the relationship between international law and national law and (2) the definition of the national territory.
When the constitution comes into force later the conventions would also become municipal law in South African territory, including Ciskei. The conventions would become municipal law automatically by reason of the constitutional provisions defining the status of international agreements and the national territory. At this stage the conventions would not yet apply in respect of Transkeian territory nor would they be municipal law in that area (since Transkei had not yet been reincorporated). On reincorporation of Transkei, South Africa should make a further declaration that the conventions apply to the territory of the former Transkei. The effect would be immediate in both international law and national law. The conventions would apply to the area of Transkei as a matter of international law. Under the South African constitution they would also automatically be municipal law in that area.

It is submitted that the above provisions and procedures should adequately solve the problem of applying conventions to homelands territory. It would involve a minimal amount of inconvenience (the making and depositing of appropriate declarations at the correct time). Such a solution is however based entirely on having constitutional provisions defining the status of international agreements and the national territory. Such provisions should appear in the constitution in the normal course of events. The additional effort to solve the homelands problem is therefore minimal.

One final comment may be made. The suggestion was that the declarations should be made on reincorporation of a homeland, even if this occurs after the constitution comes into force. The reason for this is that if the declaration is made before reincorporation, the conventions would apply at least as a matter of international law. The fact however that reincorporation had not been effected might make it difficult for South Africa to discharge obligations to third states under the conventions in the homeland in question.

D J Devine