LEGAL ANALYSIS OF NKOMATI AGREEMENT

1. Introduction

1.1. This a provisional and preliminary attempt to provide the NEC with an analysis of the Nkomati agreement between the South African regime and the People's Republic of Mozambique. The review is from a strictly international legal perspective and therefore does not canvass the political, economic and strategic aspects of the treaty and implicitly accepts the statement of the NEC of March 16th, 1984 and, inparticular, the observation that the adoption of agreements '...concluded as they are with a regime which has no moral or legal right to govern our country, can not but help to perpetuate the illegitimate rule of the South African white settler minority'.

1.2. This analysis is meant to provide the NEC with assistance in the international campaign which the African National Congress has launched in the new situation. It will also be concerned with drawing attention to those areas where Mozambique has gone beyond - or been induced to go beyond - what was required in its proffessed self-interest.

1.3. As there are two discrepancies between the versions of the treaty printed by the African National Congress and the South African regime, references to the agreement will be to that version printed in the South African Digest on March 23rd, 1984.

2. Form of Agreement

2.1. A treaty is an agreement between states whereby legal obligations are incurred. The actual form of the agreement is not legally significant. In the Nkomati Accord, the form was reflected by a head of State and a head of Government signing the treaty. Such representation occurs, as one expert on treaty law has commented, in relation to treaties of an important character. If the intention was to obtain the benefits of the treaty without increasing the status of South Africa, Mozambique representation could have been down-graded, with the two foreign ministers signing the agreement. As it was, the actual ceremony at Nkomati was carefully, expensively and effeciently organised and stage-managed to obtain the greatest benefits for the regime between the first-ever public treaty between an African head of State and the South African regime.

2.2. The particular significanee to be attached to the agreement is the use of the word 'Accord' as a synonym for treaty. 'Treaty' is the generic world used to describe inter-state agreements but numerous other descriptions may be used interchangeably with no legal significance turning upon the choice of one or another. But political significance could be attached to the description. Therefore, the basic treaty setting up the League of Nations was described as the 'Covenant' while the United Nations and the Organisation of African Unity were established by 'Charters'. Non-aggression between 1920 and 1039 generally used the word 'Pact', which would have seemed appropriate here.

2.3. From a search of a large number of sources, it is not possible to find another example of 'Accord' being used, except in the nineteenth century. This, therefore, must have been a South African proposal as it is emotionally associated with free-will and free-consent and a more intimate relationship. Significantly, the Concise Oxford Dictionary provides one definition of 'accord' as meaning: a treaty of peace.

3. Preamble

3.1. The preamble is part of the treaty and provides the background to the operative paragraphs of the treaty. In this particular case there are various 'principles' of international law invoked by the two States. These 'principles' find concrete expression in the various Articles of the treaty except that two paragraphs (inserted in my view at Mozambique's insistence) do not find any place in the normative provisions of the treaty. The first is the odd reference to the 'internationally recongised principle of the right of peoples to self-determination and independence and the principle of equal rights of all peoples'. Although Botha referred at the treaty ceremony to the struggle of his people for 'self-determination' from the British and, on occasion, to apartheid (or 'separate development') also called 'consocial self-development', this particular reference

must be seen as an assertion of the Mozambican right to self-determination and independence and not as a discreet assertion of the right of the people of South Africa to self-determination; for nearly every provision of the actual treaty is a repudiation of the right as far as the people of South Africa are concerned.

3.2. The second preambular paragraph not freflected in the text is the reference to the 'need to promote relations of good neighbourliness based on the principles of equality of rights and mutual advantage'. Once again, it seems that this (Mozambican?) reference combines the provision relating to peaceful co-existence (which reflects a rule of international law) with the progressive demand that relations should provide for 'mutual advantage' and not, as in the colonial and early rules of international law, for advantages to the stronger parties. However, this is not worked out in the treaty.

3.3. The Accord begins with the phrase: 'Agreement on non-aggression and good neighbourliness' between the two governments. This is omitted in the African National Congress version. The comment that is necessary is that the racists, who have been looking for non-aggression agreements for nearly a decade, emphasise the first part and Mozambique the second. There really is no need for non-aggression agreements nowadays, compared to the pre-United Nations period. The Charter of the United Nations forbids the threat or use of force against the territorial integrity or political independence of a State; all international disputes have to be settled peacefully and non-intervention in the internal affairs of a State is part of a basic rule of international law, covered by Article 2(7) of the Charter. Three very important declaratory resolutions of the General Assembly, commonly accepted as expressing rules of international law, cover specifically every aspect regulated by this treaty. These resolutions are: the Inadmissability of Interference in the Internal Affairs of States (1965); Friendly Relations between States (1970) and the Definition of Aggression (1974).

3.4. The motive, therefore, must be political, involving an attempt to legitimise the South African regime at a time when its very legal warrant is in doubt, to assimilate the actions of the

African National Congress to that of bandits and terrorists and to reject the applicability of the basic rule of international law, the right to self-determination, to the South African situation.

Article One

4.1. Respect for each other's sovereignty is described as 'this fundamental obligation'. This obscures the legal dimensions associated with the right to self-determination, the way in which it has been associated with a struggle against racial discrimination and the evolution of the crime of apartheid. The enclosed document traces these evolutionary legal steps and attention is drawn to what the International Court of Justice - the premier legal body in the world - has described as duties owed not by one State to another, but towards the world community at large. Traditionally, a State owed a duty to another State, one of which was to respect the sovereignty of the other, from which there arose the duty not to interfere in the internal affairs of the other State. But the development of the duties owed to the international community at large - the duty not to commit genocide, aggressive war, violate the right to self-determination, practise an official policy of racial discrimination - are part of fundamental, basic and peremptory rules of international law described as jus cogens and a State practising these breaks a duty owed not merely to another State but to the international community at large.

4.2. The chief point to remember is that a treaty entered into in breach of a rule of jus cogens is null and void. That this is not simply a matter of opinion is borne out by the provisions of the Vienna Convention on the Law of Treaties of 1969 and commentators agree that its provisions are part of customary international law and whether South Africa and Mozambique have ratified the 1969 Convention or not is irrelevant. Article 53 of the Convention lays down that 'A treaty is void if, at the time of the conclusion, it conflicts with a peremptory norm of general international law'. The international community has therefore a clear interest in any arrangements which are made with representatives of a government whose actions are deemed

to be criminal (not only under the Convention for the Suppression and Punishment of the Crime of Apartheid of 1973, of which Mozambique is not a party but, more importantly, under the Nuremberg Principles, one of which regulated crimes against humanity, of which apartheid is an example.

4.3. In any event, the situation arising within South Africa has for more than twenty years been withdrawn from the domestic jurisdiction domain by international law. It is commonly and wrongly thought that the demands for economic, military and nuclear sanctions against the South African regime have been made either because of its illegal occupation of Namibia or because of the aggressive and violent acts against the Front Line States. This is totally erroneous. From the time that the egregious Eric Louw opposed the insertion of the item concerning the treatment of people of Indian origin at the General Assembly in 1948, the General Assembly has made it quite clear that the consistent and systematic violation of national rights by the South African regime is not a matter covered by the domestic jurisdiction clause of the Charter. The General Assembly, the Security Council and from its foundation, the Organisation for African Unity, have never treated the issue of apartheid as a matter of domestic jurisdiction. On the contrary, the General Assembly affirmed in 1973 that the South African regime was illegitimate and had no warrant to speak for or represent the people of South Africa.

4.4. Associated with this has been the General Assembly's insistence that the issue of apartheid, far from being an internal matter, was of such international importance that it threatened international peace and security. At the beginning, reflecting the balance of forces at the General Assembly, this organ in 1963 referred to the policy of apartheid as seriously endangering international peace and security; in 1965, for the first time, the General Assembly drew to the attention of the Security Council that 'the situation in South Africa constitutes a threat to international peace and security' and by using this formula, the General Assembly asked the Security Council to trigger off the mechanism of Chapter VII of the Charter under which the Council can take binding, mandatory action. The fact that the Security

Council took recorse to other formulae to characterise the apartheid situation (the situation in South Africa was one that led to international friction and, if continued, might endanger international peace and security as it did in 1960, following the Sharpville and Langa massacres) had more to do with the power of veto by the three Western members of the Security Council than with the legality of the situation.

4.5. In any event, in 1977, for the first time in the history of the United Nations, the Security Council took action under Chapter VII against a Member State by imposing a mandatory arms embargo under Resolution 418. The 'determination' required under Article 39 of Chapter VII was carefully worded in order to get western support. All the same, the Resolution associated the acquisition by South Africa of arms and related materiel as being a threat to international peace and security 'having regard to the policies and acts of the South African Government (my emphsis). Such an approach can refer only to the policy of apartheid. The General Assembly has, in line with this, consistently referred to the need for action against the apartheid system.

4.6. It is, therefore, totally untenable and unsustainable to demand non-interference in the alleged internal affairs of South Africa. This matter has been internationalised by international law and the organs of the United Nations charged with the duty of interpreting and applying the rules of international law.

5. Article Two

5.1. This Article is divided into two parts. The first part refers to an aspiration to settle disputes likely to endanger peace and security between the two countries and in the region by certain procedures laid down and the parties undertake not resort, individually or collectively, to the threat or use of force 'against each other's sovereignty, territorial integrity or political independence'. The second part provides examples of the use of force, but the use of inter alia before the list clearly implies (a South African ?) determination that other action could also come within the definition of force.

5.2. There are a number of features of this Article that require comment. Firstly, there is the reference to the 'regional' factor which refers to South Africa's vaunted regional sphere of interest, a discredited notion now revived by the United States and South Africa. Secondly, this agreement cannot interfere in any way with the right of the African National Congress to take up arms for the overthrow of apartheid because such a right is now recognised by international law.

5.3. Thirdly, Mozambique seems to have committed itself by treaty not to use or threaten action against the 'political independence' of South Africa, which in international law terms means the governmental structure inside South Africa. Such an undertaking is contrary to the Charter of the Organisation for African Unity under which member states are obliged to take action to eliminate colonialism and racialism and also inconsistent with two kinds of international obligations. Firstly, states cannot provide assistance in any form to an international outlaw, in this case, a party guilty of the crime of apartheid. The World Court has laready established in 1971 the duty of State not to recognise in any form South Africa's legislative and economic activities in Namibia, and from this duty not to recognise the consequences of illegality has arisen a duty not to collaborate.

5.4. Mozambique cannot sign away its duty to impose sanctions if it is ordered to do so under Chapter VII of the Charter or under binding obligations uder any regional arrangements. Nowadays, as the oil crisis of 1974 showed, economic pressure is considered to be a 'threat of force' and any pressure concerned with affecting the 'political independence' of a state- which is what the argument over apartheid has been over the past twenty years - is considered to come under this description.

5.5. The international law dimension has gone further in laying down that there is a <u>duty</u> to support those who are attempting to remove the conditions of illegality, which will be developed in the discussion on the next Article.

5.6. Finally, the Nkomati Accord provides in paragraph (3) for an undertaking which can benefit only South Africa, is breath-taking in its audacity and inconsistent with Mozambique's obligations. This provision lays down that either of the parties 'shall not in any way assist the armed forces of any state or group of states deployed against the territorial sovereignty or political independence of the other'. This is in clear breach of the provisions of the Charter of the United Nations wherein the Security Council can take all forms of action, including the use of military force where there is a threat to the peace, breach of the peace or act of aggression. Mozambique will be obliged to provide assistance if the Security Council so determines and this provision, being inconsistent with its Charter obligations, does not have priority over it.

5.7. In fact, the International Law Commission - the most authoritative body of international lawyers and a subsidiary organ of the United Nations in a recent report suggests, in the context of international enforcement against an international crime that one specific legal consequence 'could be an <u>obligation</u> of all States to "contribute" to a situation in which the author State of an "international crime" could be "compelled" to stop the breach. As a minimum such a contribution would include refraining from a support <u>a posteriori</u> of the conduct constituting an "international crime". A second degree of contribution would be a support of counter measures taken by another State or States and a third degree would be the taking of counter measures against the author State'. (see A/CN.4/345/Add.2.1982)

5.8. What this means is that a State or a group of States would be entitled to take measures to counteract or remove an international crime. Mozambique cannot, by treaty, undertake not to do this with the author of the international crime.

5. <u>Article Three</u>

6.1. This is the most important provision in the treaty. It commits the parties to two matters. Firstly, not to allow their territories to be used as a 'base, thoroughfare or in any other way by another State, Government, foreign military forces,

organisations or individuals which plan, or prepare to commit acts of violence, terrorism or aggression against the territorial integrity or political independence of the other or may threaten the security of its inhabitants'. Straight off, it should be said that the worlds underlined are totally new to international usage, are vague in the extreme and demand a system of insurance unkown to international law. The second part of the Article provides for action to be taken to 'prevent or eliminate the acts or the preparation of acts' mentioned in the first part.

6.2. The first point to identify is that the breadth of paragraph (1) makes it inconsistent with the provisions of the Charter of the United Nations. If the Security Council orders enforcement action to be taken under Chapter VII of the Charter involving the front line states, then Mozambique would be obliged to assist 'foreign military forces' by allowing it transit, at the least. But more important is the unwarranted and illegal equation made between the African National Congress and the bandit, terrorist groups such as the MNR.

6.3. From the enclosed document, it will be quickly evident that the African National Congress, as with other recognised liberation movements, enjoys a protected status in international law. This arises from the nature of the struggle against the colonial and racist regime of South Africa, the evolution of the law associated with the instrumentality of national liberation and the right of peoples in such a situation to use all forms of struggle, including armed struggle, to achieve liberation. This is a rich and important development which imposes important duties on the culprit to recognise the legal status of combatants of liberation movement, on other States to refrain from assisting the culprit and the duty to assist liberation movements. In this paper, the evolution of the legal status of our struggle is traced wherein even the Security Council has recognised 'the legitimacy of the struggle of the South African people for the elimination of apartheid and racial discrimination' (Resolution 392 of 1976) and in 1977, unanimously affirmed the right of the people of South Africa as a whole, irrespective of race, colour or creed, to the exercise of

self-determination (Resolution 417 of 1977). The United Nations has been at pains to distinguish between 'international terrorism' and 'national liberation struggles' and the work of the General Assembly Ad Hoc Committee on International Terrorism reflects this fundamental distinction.

6.4. The rest of the Article, therefore, has to be seen in this context. Once this spurious 'even-handedness' is accepted, its application can be as wide as the authors of the treaty wish to make it. The 'elements' who may wish to carry out the acts defined in paragraph (1) of Article Three would be defined by each State, although the Joint Security Commission would doubtless jog memories and assist in the process. The provision could be interpreted to cover all refugees from South Africa, could cover all <u>bona fide</u> important African National Congress personnel and <u>all</u> African National Congress centres of education and training for vocational skills, even, Paragraph (g) would affect transit travel to Zimbabwe from Mozambique and paragraph (f) stop all broadcasts from Mozambique. This last provision would affect United Nations broadcasts and is inconsistent with a whole series of General Assembly resolutions prescribing the widest possible dissemination of information about apartheid. Ultimately, all political work or broadcasts advocating support for the African National Congress or for national liberation could be construed as support for the 'elements' defined in paragraph (1) of the Article.

6.5. Once there is acceptance of this equation and the rejection of the international status of the African National Congress, then all the measures identified in Article Three, paragraph (2) are permissible. How Mozambique can square up this approach to continuing to provide diplomatic and political support for the African National Congress is not very clear. In any event, the duty to provide support for the African National Congress is a much wider one, most recently identified in the Summit of Front Line States held in Maputo in March 1982 where the Summit committed itself to 'intensify their material and diplomatic support for the liberation movements, SWAPO and ANC of South Africa, so that they can intensify the armed struggle for the attainment of the national independence of their peoples'.

7. Article Four

7.1. This Article presupposes that joint patrols or 'steps' will be taken, and that joint border posts may be set up to prevent 'illegal' crossings from one State to another. This really breathtaking proposal is aimed at 'preventing' illegal crossings by all persons because there is specific reference to the 'elements' wishing to join the African National Congress would not be permitted to cross (iii) refugees would have to satisfy criteria not laid down but that, in any event, 'illegal crossings' must be prevented.

7.2. This approach seems to violate the provisions of the Convention on the Status of Refugees of 1951, whose status is that its its terms are now part of international law. Refugees are defined as persons who 'owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality... or who, not having a nationality and being outside the country of his former national residence, is unable or, owing to such fear; is unwilling to return to it'.

7.3. All black South Africans would incontrovertably come within either of the two sections of Article 1(2) of the Convention. There are important duties laid down on the State providing refuge the most important of which is the prohibition on the expulsion or returning of a refugee to the frontiers of a State where his life or freedom would be threatened on account of his race, religion, nationality etc. In such a case, if a refugee is to be expelled, he or she must be allowed to go to a third country which is prepared to receive the refugee.

7.4. Regrettably, there is no saving clause for refugees in this agreement and unless the Government of Mozambique drafts clear instructions for the frontier guards and insists on a clear distinction between refugees and the 'elements' defined in Article Three, then the position of 'ordinary' people fleeing, as thousands of our people did after 1976, would be parlous. They would have to depend, if at all, on the exercise of dis-

cretion either by frontier guards or the pressure of the Joint Security Commission whose role would be very crucial. The United Nations High Commissioner for Refugees would have to be involved in establishing the now accepted special place of refugees.

7.5. It is now understood that the Mozambique Government will only allow access to refugee camps to the UNHCR and his representatives and that access to the African National Congress would not be allowed. The territorial sovereign is entitled to set limits on such matters in 'ordinary' circumstances. In the context of the special place of liberation movements, this is totally impermissible, as are the other restrictions on the activities of the African National Congress. But this is the consequence of treating the African National Congress as the legal equivalent of the MNR.

8. Article Five

8.1. It is now accepted that propaganda calculated to incite to a war of aggression is unlawful as it would be part of preparation for aggression, forbidden under the Nuremberg Principles. But there can be no equation between the dissemination of anti-apartheid and anti-colonialist views, attitudes and policies and propaganda for aggression. As has already been pointed out, it is illegal to equate struggles for national liberation to terrorism and, if there is a right to revolt, as there is in struggles for national liberation and struggles against racism, then a state is entitled to assist in the dissemination of anti-apartheid material.

8.2. Under this Article, Mozambique will be obliged to prohibit all news, statements and comment in support of the African National Congress or issued by them as this would be construed as support for 'terrorism and civil war' (sic!) in South Africa. Just how Mozambique could square support for this Article and belief in its statement that it will continue to provide 'diplomatic and political' support for the African National Congress is not clear.

9. Article Six

9.1. This Article is very coy about the conflict between the Nkomati Accord and the obligations under the Charter of the United Nations, which is the superior law of the international community. The Article does not in fact mention the Charter, as other similar treaties do, because it would be self-evident that there is, in fact, such a conflict under Article 103 of the Charter, in the '... event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreements, their obligations under the present Charter shall prevail'.

9.2. This means that nay conflict between the express stipulations of the Charter and the Nkomati Accord will result in priority being given to the Charter. As has been pointed out, enforcement action under Chapter VII of the Charter may oblige Mozambique to provide assistance, notwithstanding Article Two, paragraph (3) of the Nkomati Agreement. But obligations under the Charter are not limited to Chapter VII stipulations. It is quite clear that the obligations relating to self-determination arise also out of the application of Article 1,2 and 13 of the Charter and the development of international law. In the same way, the obligation not to assist a situation arising out of a condition of illegality is a prior obligation, as a rule of jus cogens imposes a superior obligation.

9.3. A treaty in breach of jus cogens is void. In my view, the Nkomati Agreement is null and void as it imposes obligations and recognises rights which are in conflict with basic, fundamental rules of international law and it is therefore open for forces in Mozambique and, certainly, a new Government in Mozambique to oppose the legal obligations under this treaty. An example of this is the opposition of the Government of Czechoslovakia to the German-Czech Treaty of 1938 ceding Sudetenland to Nazi Germany as it had been obtained by the use of the threat of force and duress.

9.4. In the present case, the illegality would turn on two factors. Firstly, it denies the special place of the struggle for national liberation in South Africa, the protected role of the liberation movement and its combatants (who will have to be returned to South Africa if they 'illegally' cross into Mozambique). Secondly, it has been well-known that South Africa has organised, sponsored and equipped the MNR for its violence in Mozambique and that South Africa has used its existence as a lever against Mozambique. The latter has not freely entered into the agreement because the arming, equipping and financing of the MNR - which is objectively verifiable - is the illegal use of force by a State contrary to the principles of the Charter of the United Nations. Under Article 52 of the Vienna Convention on the Law of Treaties, a treaty is void if its conclusion has been procured by the threat or use of force in violation of the principle of international law embodied in the Charter of the United Nations.

10. Article Eight

10.1. There is a serious (and, no doubt, intentional, on the part of South Africa) change in the wording of when the right to self-defence under the Charter of the United Nations is permitted. The Nkomati Accord refers to the right of the parties to self-defence 'in the event of armed attacks, as provided for in the Charter of the United Nations'. In fact, the Charter provides for the right to self-defence in the case of armed attack (my emphases) which has been interpreted to mean the use of physical violence by a State. By changing the word 'attack' to 'attacks', the activities of guerillas, individuals and groups could be assimilated to Article 51.

10.2. In any event, there is a regular and consistent pattern of resolutions which has denied colonial powers the right to self-defence when it has reacted to the attacks of liberation movements. On page 18 of the enclosed paper, it will be seen that the occupying power has been denied the automatic right to self-defence by the General Assembly and the Security

Council of the United Nations as the aggressor cannot avail of a legal right (such as self-defence) as it has no right to defend an illegal situation. Once again, the Nkomati Agreement accords to South Africa a right which has been denied to it and to all colonial powers.

11. Article Nine

11.1. The Joint Security Commission is to be a permanent body which is to supervise and monitor the application of the agreement. It is unusual to have such a body set up between States of differing ideologies and politics. In similar situations in the Middle East or in India-Pakistan, the United Nations established special truce supervision bodies which invigilated breaches of t the ceasefire and monitored the operations of the truce. Such a permanent body, whose functions may be changed or increased by mutual agreement would set up a process of 'socialisation' where the political elites and the military would be open to the aims and policies of the stronger partner in the relation-ship and where personal alliances could quickly develop. There is a forbidding prospect under paragraph (5) of this Article where there is a clearly worded provision which enables the JSC to have its mandate changed 'to enable interim measures to be taken in cases of duly recognised emergency.'

11.2. This can only mean one thing and that is that the JSC might 'take' emergency action where either Government (i.e. Mozambique) cannot control a situation. Otherwise, it seems that the Governments have to 'consider jointly the conclusions and re-commendations of the JSC.

12. Article Eleven

12.1. It is unusual for a treaty with such political importance to enter into force on signature. In such cases, ratification which is a formal and subsequent act which may or may not require parliamentary approval, is usually insisted on. This is what happened with the Lebanese-Israeli Agreement of 1983, which in fact was never ratified and therefore never came into force.

12.2. The haste with which this Agreement was brought into force depended on a host of political factors which is outside this study. What is even more unusual is that the Accord, under Article 11(2) could be amended by the parties by the informal method of an exchange of notes between them (the African National Congress version of the treaty misconstrues this provision). This means that in the event of perceived difficulties concerning the application or interpretation of the Accord, the two Governments can first agree on how things are to be changed and exchange correspondence to alter the treaty. This is a very informal approach to a treaty of superior political importance but may be necessitated by the exigencies facing either Government.

Conclusion

13.1. This analysis has touched, very briefly, I should add on the main provisions of the Accord. It has sacrificed thoroughness and completeness for the sake of brevity and, I hope, readability. But it is offered to the African National Congress in the hope that it may be of some assistance. If the NEC decides that international opinion, especially intenational legal opinion, should be mobilised against the Accord and its assumptions, some of the treatment would need to be developed further. I would be honoured to assist in this process and await your instructions.

Kader Asmal

Dublin, 24/04/84.