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NOTES

Nonrecognition of the Independence of Transkei

ON OCTOBER 26, 1976, Paramount Chief Kaiser Daliwonga Matanzima declared Transkei¹ an independent state. Normally the Third World and the West would have welcomed the independence of another black African state but in this case they did not, for Transkei was the first of the Republic of South Africa's black "homelands" to receive independence under that government's multinational development policy. The Republic was the only state to send diplomatic representatives to the Transkeian independence celebrations and so far has been the only state to recognize the new entity.

Transkei is one of nine homelands set aside by the South African government as the national territory for the tribal groups present in the Republic.² Its population includes several tribes which share a common background, the Xhosas being the predominant component. Consisting of three blocks of territory with a combined surface area about the size of Switzerland, Transkei is located in south-central South Africa, with 270 miles of coastline on the Indian Ocean. It shares a common border with Lesotho.³

This note will examine the background of the independence movement in Transkei and explore the use of nonrecognition as an appropriate response by the international community and its effect on South Africa's homeland strategy.

THE NATIONAL PARTY'S BANTU POLICY

As soon as the ruling National Party gained control of the South African Parliament in 1948, it began implementation of its apartheid (separate development) policy.⁴ A party pamphlet issued before the election set out the basic terms of that policy:

¹On Transkei see generally P. LAURENCE, *THE TRANSKEI: SOUTH AFRICA'S POLITICS OF PARTITION* (1976); B. ROGERS, *DIVIDE AND RULE: SOUTH AFRICA'S BANTUSTANS* (1976); and Note, *The Transkei: South Africa's Illegitimate Child*, 12 *NEW ENGLAND L. REV.* 585 (1977).

²The eight other homelands and their tribal identities are: Bophuthatswana (Tswana), Ciskei (Xhosa), Gazankulu (Tsonga/Shangaan), KwaZulu (Zulu), Lebowa (North Sotho), Qwaqwa (South Sotho), Swazi (Swazi), and Venda (Venda). A tenth homeland is planned for the South Ndebele people.

³Backgrounder: Transkei Independence, South African Embassy, Wash., D.C., Sept. 1976, at 2.

⁴The Republic of South Africa uses the term "multinational development" for its policy of separation along racial and cultural lines. An official explanation of the

In general terms our policy envisages the most important ethnic groups and sub-groups in their own areas where every group will be enabled to develop into a self-sufficient unit.

We endorse the general principle of territorial segregation of the Bantu and the Whites

The reserves should be the national home of the Bantu.⁵

In 1955 the report of the Tomilison Commission became available. Commissioned by the South African government to recommend the way in which its native policy should be implemented, the Commission advised that the African reserves be consolidated into seven ethnic blocks and further developed.⁶ Integration was rejected.⁷ Up to this point attempts had been made to establish specific territory for development into self-governing-reserves for the ethnic groups, but no official had proposed the creation of independent states for the black groups as a solution to the race problem. In 1959, however, Dr. Verwoerd and the National Party reversed their position and enacted the Promotion of Bantu Self-Government Act.⁸ The Act set up machinery for the creation of national homelands for Africans with the eventual goal of self-government and independence. It was made clear in the preamble of the Act that the government considered the African tribes as separate units.

In 1963 Transkei became the first black homeland to establish territorial authority and create a legislative assembly. Its constitution provided for a unicameral legislative assembly with limited powers to repeal South African legislation in force in the territory.⁹

Passage of the Bantu Homelands Constitution Act in 1971¹⁰ facilitated the creation of other self-governing homelands. The Act empowered the President of the Republic of South Africa to form a

policy can be found in SOUTH AFRICAN INFORMATION SERVICE, SOUTH AFRICA: 1976 at 196-222 (1976).

⁵Quoted in Jacobs, *Hazards of Homeland Policy*, in SOUTH AFRICAN DIALOGUE: CONTRASTS IN SOUTH AFRICAN THINKING ON BASIC RACE ISSUES 153 (N. Rhoodie ed. 1972). South African blacks now regard the term "Bantu" as derogatory.

⁶When the Nationalists came to power in 1948, the tribal territories consisted of 260 separate areas. There are now plans to consolidate the present areas into 36 blocks.

⁷UNION OF SOUTH AFRICA, REPORT OF THE TOMILISON COMMISSION ON THE SOCIO-ECONOMIC DEVELOPMENT OF THE BANTU AREAS, UG 61/1955, 180-83 (1955).

⁸Act 46 of 1959.

⁹Transkei Constitution Act, Act 48 of 1963.

¹⁰Act 21 of 1971.

legislative assembly for the seven ethnic areas, in addition to Transkei, where the tribal groups were concentrated. By 1972 legislative assemblies had been established for seven ethnic groups.¹¹ The 1971 Act also provided for the South African President to declare a territory "self-governing,"¹² along the Transkeian model, with an executive council and an assembly with the power to repeal or amend acts of the South African Parliament.¹³ The preamble of the Bantu Homelands Constitution Act affirmed the intention of the government to lead each ethnic African group to self-government and independence. Rather than enact separate legislation for each area as had been done for Transkei in 1963, the 1971 Act applied to all homeland territories. Chapter I of the Act provided for the establishment of legislative assemblies to replace the territorial authorities; Chapter II dealt with the self-governing stage. Certain matters, however, would not be transferred to the legislative assemblies at the self-governing stage. These included defense, postal service, customs, banking, the conduct of foreign affairs, and various police functions.

Earlier legislation, the Bantu Homelands Citizenship Act of 1970,¹⁴ had provided that every African in South Africa who was not already a citizen of a self-governing territory would become one, although he would retain South African citizenship for international purposes.¹⁵ The goal of this citizenship provision and the development of the homelands was to force all blacks in the Republic to become citizens of the homelands, either *de facto* because they resided in the area, or *de jure* because of some cultural or blood tie to the ethnic group residing in the homeland. In this way blacks could be effectively removed from participation in South African political life, while at the same time they could be available as a cheap source of labor for the South African economy, in many cases actually living around white urban areas.

TRANSKEIAN CONSTITUTIONAL DEVELOPMENT

Under the Transkei Constitution Act of 1963¹⁶ Transkei became a

¹¹Tswana (Apr. 30, 1971); Ciskei (May 21, 1971); Venda (May 21, 1971); Gazankulu (June 25, 1971); Lebowa (June 30, 1971); Qwaqwa (Oct. 1, 1971); and KwaZulu (March 30, 1972).

¹²Act 21 of 1971, § 26.

¹³*Id.* § 18.

¹⁴Act 26 of 1970.

¹⁵*Id.* §§ 2(3) & (4).

¹⁶Act 48 of 1963.

separate territory for the Xhosa people,¹⁷ while certain towns and areas in which whites lived within the territory remained under the control of Cape Province. All blacks who were born in Transkei or who had lived in the territory for five years became citizens. Additionally, any member of a tribal group residing in Transkei, though living elsewhere, was considered a citizen of Transkei. Thus, for example, a Xhosa living in Soweto whose family had not lived in Transkei for many years, would nevertheless become a citizen of Transkei.

A Legislative Assembly was created, consisting of 64 chiefs and 45 elected members.¹⁸ The Assembly could exercise some powers such as taxation and control over agriculture, but the South African Parliament retained authority over defense, security, railways, banking, hospitals, and certain other important functions. Gradually more aspects of public functions were turned over to the Transkeian legislature.¹⁹ Executive authority resided in a cabinet chosen by the Chief Minister, who was elected by the Assembly. All citizens over twenty years of age were enfranchised and elections were to be held every five years.

In 1963 the first of these planned elections was held. At that time there were no political parties in Transkei and the contest for the 45 elective seats in the Legislative Assembly revolved around two groups. Chief Mantanzima, who ultimately became Chief Minister and is the present Prime Minister of Transkei, led one faction; Paramount Chief Poto headed the other.²⁰ Matanzima's group formed the nucleus of the Transkei National Independence Party (TNIP), advocating separate and independent development for Transkei, while Poto's faction later formed the Democratic Party (DP), contending that the territory should remain part of a multiracial South Africa. Between thirty and thirty-eight²¹ of Poto's supporters were elected to the contested seats in the Assembly in 1963. Chief Matanzima nevertheless became Chief

¹⁷In addition to Transkei the Xhosa-speaking people have the homeland of Ciskei, with a population of 1,760,000 (1970 census).

¹⁸The paramount chiefs held their seats indefinitely; the other chiefs were at first appointed, but under a 1967 amendment to the Act were elected from and by the chiefs themselves.

¹⁹For example, under the Bantu Laws Amendment Act, No. 23 of 1972, Transkei received control of prisons and transportation regulations; the 1972 General Law Amendment Act, No. 102 of 1972, authorized the transfer of police control.

²⁰For an analysis of this and other Transkeian elections, see Williams, *Transkeian Elections*, in A. LEMON, *APARTHEID 208-13* (1976).

²¹*Id.* at 212; P. LAURENCE, *supra* note 1, at 69.

Minister, largely because of his support among the sixty-four chiefs who were members of the legislature *ex officio*.

The issues remained essentially the same in the 1968 Transkei elections. This time the TNIP won a clear victory, taking twenty-eight of the Assembly seats compared to the DP's fourteen; three seats went to independents.²² Moreover, Matanzima and the TNIP retained the support of the chiefs in the Assembly, thus giving the Chief and his party clear control of the government. The TNIP made further gains in the 1973 elections, where the only issue was Transkeian independence. Again, TNIP dominance was obvious; the party won twenty-six seats, the Democratic Party eleven, and independents eight. To the extent that the elections represented the preference of the people of the homeland, the results gave a strong mandate to the TNIP to seek independence from Pretoria.

The South African government supported the independence movement in Transkei and looked favorably on the TNIP's success, for Transkeian independence was compatible with its own policies of multinational development. No doubt this support was helpful to the TNIP, especially in influencing the chiefs in the Assembly who received payments from the South African government. Still, the success of Matanzima and his party can also be attributed to a growing acceptance of the policy of independence by Transkeian people, and to the economic growth in the homeland during the TNIP's rule.²³

The TNIP goal of an independent Transkei reached fruition on October 26, 1976. On June 11 of that year the South African Parliament, controlled by the National Party, enacted the Status of Transkei Act²⁴ over the opposition of the United and Progressive Reform Parties.²⁵ Under this Act full sovereignty and legislative competence was transferred to the Umtata legislature. Provision was made for the creation of a Transkei constitution, making the homeland an independent state, separate from the Republic of South Africa. Laws in force in Transkei before independence would remain in force unless repealed

²²In addition to the independents, a third party, the Transkei People's Freedom Party, existed for a short time.

²³It should be noted that the South African government subsidized the Transkeian economy heavily during this period.

²⁴Act 100 of 1976.

²⁵The United Party opposed an independent Transkei, while the Progressive Reform Party believed that the homelands should become self-governing provinces within a South African federation.

or amended by the new state's legislature, now called the National Assembly.

Long, heated debate took place in the South African Parliament during the three readings of the Status of Transkei bill. Both opposition parties maintained that the solution to the country's racial problems should be found within the totality of South Africa. They pointed out that no referenda had ever been held on independence for Transkei either in that territory or in the Republic, and that the problem of citizenship in the new state had not been resolved. Typical of this reasoning was the remark of Sir De Villiers Graaff (United Party), who said of the Act, "It heralds the first stage of the Nationalist Government's long-term policy of seeking to solve the problems of our plural society by what I would describe as systematic abdications of sovereignty over large portions of our common fatherland."²⁶

THE CITIZENSHIP CONTROVERSY

A major conflict arose, and continues to exist, between the Nationalist government and Chief Matanzima on the issue of Transkeian citizenship. The Status of Transkei Act's definition of citizenship is based on the provisions of the 1963 Transkei Constitution Act.²⁷ Essentially this South African legislation extends citizenship not only to all blacks residing in Transkei, but also to all persons living in South Africa who are culturally or otherwise related to the tribes living in Transkei.²⁸ All Xhosa-speaking persons in the Republic of South

²⁶19 SOUTH AFRICAN HOUSE OF ASSEMBLY DEBATES, June 7, 1976, at col. 8534.

²⁷Act 48 of 1963, § 7(2).

²⁸Specifically Schedule B of the 1976 Act provides:

Categories of persons who in terms of section 6 are citizens of the Transkei and cease to be South African citizens:

- (a) Every person who was a citizen of the Transkei in terms of any law at the commencement of this Act;
- (b) every person born in the Transkei of parents one or both of whom were citizens of the Transkei at the time of his birth;
- (c) every person born outside the Transkei whose father was a citizen of the Transkei at the time of his birth;
- (d) every person born out of wedlock (according to custom or otherwise) and outside the Transkei whose mother was a citizen of the Transkei at the time of his birth;
- (e) every person who has been lawfully domiciled in the Transkei for a period of at least five years, irrespective of whether or not such period

Africa (except those associated with Ciskei), as well as Sotho-speaking persons related to the Sotho tribes resident in Transkei would cease to be citizens of South Africa upon the independence of Transkei. A board established by the two governments would decide borderline cases of citizenship.²⁹ The impact of these citizenship provisions is that the vast majority of Transkei citizens living outside the territory, about 1.3 million persons (1970 census), would automatically lose their South African citizenship without being given a choice in the matter. South Africa had previously encouraged blacks to become citizens of Transkei or one of the other homelands by giving certain preferential treatment in employment, home ownership rights, and professional licensing to those persons who did become homeland citizens. Those who did not become citizens were denied rights.³⁰

Chief Matanzima said that he would not accept these citizenship provisions as they related to persons living outside of Transkei. He maintained that the Status of Transkei Act of the South African Parliament made citizenship optional for those people.³¹ The Chief believed that Transkei should not be responsible for the blacks of Transkeian origin living in South Africa, and that few of them would choose to return to Transkei after independence.³²

Opposition leaders in Transkei, as well as the opposition parties in the South African legislature, rejected the proposed citizenship provisions. Two leaders of the Transkeian Democratic Party had planned to

includes any period prior to the commencement of this Act, and, on application in the prescribed manner, has been granted citizenship of the Transkei by the competent authority in the Transkei;

- (f) every South African citizen who is not a citizen of a territory within the Republic of South Africa, is not a citizen of the Transkei in terms of paragraph (a), (b), (c), (d), or (e), and speaks a language used by the Xhosa or Sotho speaking section of the population of the Transkei, including any dialect of any such language;
- (g) every South African citizen who is not a citizen of a territory within the Republic of South Africa, and is not a citizen of the Transkei in terms of paragraph (a), (b), (c), (d), (e), or (f), and who is related to any member of the population contemplated in paragraph (f) or has identified himself with any part of such population or is culturally or otherwise associated with any member or part of such population.

²⁹Act 100 of 1976, § 6(2).

³⁰SOUTH AFRICAN INSTITUTE OF RACE RELATIONS, A SURVEY OF RACE RELATIONS IN SOUTH AFRICA: 1976, at 231-32 (1976) [hereinafter cited as RACE SURVEY].

³¹*Id.* at 237.

³²Johannesburg Star, Oct. 26, 1976, at 29, col. 3.

introduce legislation in the National Assembly of Transkei to the effect that the homeland not accept independence until Pretoria had given all Transkeians living in the white urban areas the option of keeping their South African citizenship.³³ The Matanzima government detained these men before the legislative session began and their motion was never made.³⁴

On May 18, 1976, the Legislative Assembly did amend provisions in the Transkei's Republic of Transkei Constitution Act. These amendments were not substantial, and the principal difference between the Transkeian Act, as amended, and the South African Status of Transkei Act, was the respective treatment of citizenship in borderline cases.³⁵ Under both Acts almost all blacks of Transkeian origin would lose their South African citizenship and become Transkeian citizens automatically.³⁶ Chief Matanzima, nevertheless continued to insist that

³³RACE SURVEY, *supra* note 30, at 236.

³⁴See note 49 *infra*.

³⁵RACE SURVEY, *supra* note 30, at 235.

³⁶Section 57 of Transkei's Constitution Act sets out the provisions for citizenship:

These shall become a citizen of Transkei

- (a) at the commencement of this Act
 - (i) every person who, having been born in any district of the former Transkeian Territories or the former territory of the Transkei, is immediately prior to such commencement, a citizen of that territory;
 - (ii) every person born outside the districts of the former Transkeian Territories or former territory of the Transkei who is immediately prior to the commencement of this Act a citizen of that territory and whose father is, or but for his death would have been, a citizen of Transkei in terms of subparagraph (i);
 - (iii) every other person who, immediately prior to such commencement, is a citizen of the former territory of the Transkei and has not lost or renounced such citizenship;
- (b) with effect from the date of his birth every person born in Transkei on or after the date of commencement of this Act: Provided that no person shall become a citizen of Transkei, by virtue of the provisions of this paragraph, if at the time of this birth
 - (i) his father was a person enjoying diplomatic immunity in Transkei under any law and was not a citizen of Transkei and his mother was not a citizen of Transkei;
 - (ii) his father was a citizen of a country with which Transkei was at war and the birth occurred at a place under the occupation by the enemy and his mother was not a citizen of Transkei;
 - (iii) his father was a citizen of a country with which Transkei was at

Transkeian citizenship remained optional for persons living outside the territory.³⁷

The South African government made conflicting comments of the citizenship legislation, further confusing the issue. At one time M.C. Botha, South African Minister of Bantu Administration, said that there was no real citizenship disagreement between the two governments. Later he stated that if Transkei refused to grant citizenship to the Africans living in South Africa, they would become stateless persons by the acts of Umtata, not Pretoria.³⁸

The disagreement over the interpretation of the citizenship provisions notwithstanding, the Republic of Transkei Constitution Act³⁹ was signed by both governments on October 26, 1976. A temporary solution to the problem was reached by allowing the 1.3 million Xhosa living in the urban areas of South Africa to retain their South African citizenship for a two-year period.⁴⁰ At the end of this time, however, those Africans of Transkeian origin who wanted to remain in South

war, had no right of permanent residence in Transkei and was interned or detained in custody and his mother was not a citizen of Transkei;

- (iv) his father was a prohibited immigrant or had no right of permanent residence in Transkei and his mother was not a citizen of Transkei;
- (c) with effect from the date his birth, every person born outside Transkei on or after the date of commencement of this Act whose father was at the time of the birth a citizen of Transkei: Provided that a person shall not become a citizen of Transkei by virtue of the provisions of this paragraph if at the time of his birth he becomes a citizen of any other country;
- (d) any person born outside Transkei on or after the date of commencement of this Act if in accordance with law (including customary law) he is adopted by or otherwise becomes the child of a citizen of Transkei and his birth is, within two years thereof or with the permission of the Minister of the Interior or other competent Minister at a later date, registered with a registering authority of the government of Transkei.

³⁷RACE SURVEY, *supra* note 30, at 237.

³⁸For a more extreme statement on citizenship consider the comment of Hugh H. de Villiers, Information Attaché of the South African Embassy in Washington. "Transkeians living and working in the Republic of South Africa will not 'lose their South African citizenship' because they never enjoyed South African citizenship." *Christian Science Monitor*, Nov. 5, 1976, at 31, col. 3 (letter to the editor).

³⁹The text of the Draft Bill appeared in Special Gazette No. 1 of Apr. 23, 1976 of the Transkeian government, *reprinted in* 15 INT'L LEGAL MATERIALS 1136 (1976).

⁴⁰Johannesburg Star, Oct. 26, 1976, at 1, col. 4.

Africa would have to obtain Transkeian identity documents. In spite of the two-year grace period provision, Pretoria later announced that if a Transkeian living in South Africa visited Transkei, upon re-entry to South Africa he would have to produce documents from the Transkeian authorities that are only given to Transkeian citizens or those who have applied for citizenship.⁴¹

OTHER CONSTITUTIONAL PROVISIONS

Under the new constitution Transkei became an independent republic with a non-executive president as head of state.⁴² The National Assembly membership increased to 150, 75 members elected by universal suffrage of all citizens over twenty-five (eighteen if taxpayers), and 75 members *ex officio* (70 chiefs and 5 paramount chiefs).⁴³ All powers, authority, and functions previously exercised by the South African President were transferred to the President of Transkei.⁴⁴ Prime Minister Matanzima noted that many South African laws would remain in force in Transkei, even though they were subject to repeal or amendment by the Assembly. Among the laws that the government chose to retain were those giving it strong police powers and control over dissent: the Immorality Act,⁴⁵ the Prohibition of Mixed Marriages Act,⁴⁶ the Terrorism Act,⁴⁷ the Suppression of Communism Act,⁴⁸ and Proclamation R400.⁴⁹

A series of treaties and agreements were concluded between Um-

⁴¹RACE SURVEY, *supra* note 30, at 244-45.

⁴²TRANSKEI CONST. §§ 1 & 2.

⁴³*Id.* § 22.

⁴⁴*Id.* § 4(a).

⁴⁵Act 23 of 1957. George Matanzima, brother of the Prime Minister, later indicated that the Immorality Act would be repealed in Transkei. *Johannesburg Star*, Oct. 29, 1976, at 1, col. 9.

⁴⁶Act 55 of 1949.

⁴⁷Act 83 of 1967. This Act contains especially harsh measures for control by the government. For example, it shifts the burden of proof to any person found with an unauthorized weapon to show beyond a reasonable doubt that he did not intend to use the weapon for a disorderly act. *Id.* § 2(c).

⁴⁸Act 44 of 1950.

⁴⁹This state of emergency proclamation was issued on November 30, 1969, after the Pondoland disturbances and has remained in force ever since. See KEESING'S CONTEMP. ARCHIVES, Oct. 7-14, 1961, at 18367. The proclamation authorizes police and army officers to arrest persons without a warrant, gives chiefs the right to banish any tribesman from any tribal area, authorizes restrictions on travel and the right to assembly, and gives the government detention powers. Chief Matanzima has on several occasions employed R400 to detain and silence political opposition in Transkei.

tata and Pretoria including a non-aggression pact,⁵⁰ under which the two states agreed not to use armed force against the territorial sovereignty and political independence of the other; they further agreed that their respective territories would not be used for military or subversive actions against the other. Other agreements allowed Transkei to remain in the rand monetary unit, and made provision for customs, including application for membership in the South African Customs Union (South Africa, Botswana, Lesotho, and Swaziland).⁵¹ Citizens of the two states will have to produce proper identity documents when entering the other state; only specific ports of entry can be used.

REACTION TO INDEPENDENCE WITHIN SOUTH AFRICA

In the absence of a referendum on independence it is difficult to tell how many Transkeians living both within the territory and in South Africa really favored the separation. General elections held just prior to independence, on September 29, 1976, resulted in an overwhelming victory for the TNIP and Chief Matanzima. The party was assured of the support of 72 of the 75 chiefs in the National Assembly, and took 69 of the 75 elected seats. A Democratic Party secessionist faction, which supported the TNIP independence policy, won two of the six remaining seats.

This endorsement of independence is less convincing than it appears. In the first place, only 43.45% of the electorate voted in the election.⁵² More importantly, the Transkeian government emasculated the opposition Democratic Party, which had favored an undivided, democratic South Africa, by arresting its leaders before the elections. Using his powers under Proclamation R400, Matanzima ordered the detention of Democratic leader Hector Ncokazi and twelve other top party members in late July.⁵³ At the time of independence in October;

⁵⁰The pact did not include a mutual defense agreement in the event of aggression by a third party. However, in December 1975, Matanzima affirmed that any attack on the Republic of South Africa would be considered an attack on Transkei. KEESING'S CONTEMP. ARCHIVES, Nov. 26, 1976, at 28061.

⁵¹The agreements are set out in Government Gazette No. 5320 (Oct. 20, 1976).

⁵²The official figure was 65.95%, but an analysis appearing in the Rand Daily Mail indicated that the official percentage was obtained by assuming a 100% poll for the uncontested seats. If only the contested seats are taken into account, the figure is 43.45%. KESSING'S CONTEMP. ARCHIVES, Nov. 26, 1976, at 28062; RACE SURVEY, *supra* note 30, at 244.

⁵³RACE SURVEY, *supra* note 30, at 243.

thirteen executive members of the DP were in detention.⁵⁴ Without the leadership of these men the opposition presented in the election was not effective, and thus the TNIP mandate is subject to attack.⁵⁵

A further indication of popular dissatisfaction with the independence of Transkei is shown by the large number of refugees created by the secession of the Hershel and Glen Gray districts to Transkei. These areas were part of the Ciskei homeland, whose population is also composed mainly of Xhosas, but were ceded to Transkei in exchange for other territory in 1975.⁵⁶ An earlier referendum in 1971 indicated that a large majority of the people in the district wished the area to remain in Ciskei, and thus in South Africa, rather than become a part of an independent Transkei.⁵⁷ Over 30,000 refugees left Transkei at the time of independence,⁵⁸ and the Ciskei government fears that over 100,000 will flee altogether.⁵⁹ While some of those leaving Transkei, such as the Sotho-speaking refugees, sought to avoid living in the Xhosa-dominated state, others acted on political and economic grounds believing that their interests would be served best by remaining citizens of South Africa.

Six of the eight other South African homelands refused to support Transkeian independence. In a joint statement issued in August 1976, the six said that they wanted "to reiterate that they have no intention whatever of opting for so-called independence, as we do not want to abdicate our birthright as South Africans, as well as forfeiting our share of the economy and wealth which we have jointly built."⁶⁰ Typical was the response of Chief Buthelezi, head of the 4.3 million Zulus and the largest homeland, KwaZulu, who emphatically denounced Transkei's independence from South Africa.⁶¹

⁵⁴Johannesburg Star, Oct. 26, 1976, at 1, col. 5. *See also id.*, June 12, 1976, at 1, col. 7.

⁵⁵Many educated blacks in Transkei are critical of Matanzima's independence policy. Joseph Kobo, a Democratic Party politician, claimed that 85% of the Transkeian population opposed independence. Christian Science Monitor, Sept. 8, 1976, at 7, col. 3.

⁵⁶These two blocks of territory are not contiguous to the main area of Transkei.

⁵⁷Johannesburg Star, Oct. 26, 1976, at 21, col. 3; RACE SURVEY, *supra* note 30, at 245.

⁵⁸Wash. Post, Jan. 15, 1977, at A9, col. 6.

⁵⁹Johannesburg Star, Oct. 26, 1976, at 21, col. 3.

⁶⁰Sunday Times (South Africa), Aug. 22, 1976, *reprinted in* RACE SURVEY, *supra* note 30, at 247.

⁶¹Christian Science Monitor, Sept. 30, 1976, at 4, col. 3. *See also* Buthelezi, *South Africa's Approaching Crisis*, AFRICA REP., May-June 1976, at 2.

The homeland of Lebowa first opposed independence for Transkei, but later waived on the issue.⁶² Its leader indicated that the homeland might be willing to accept independence itself if land disputes with South Africa could be settled.⁶³ Only Bophuthatswana supported Transkei wholeheartedly and accepted the invitation to the independence ceremonies.⁶⁴ Bophuthatswana will follow the Transkeian model and become independent on December 6, 1977.⁶⁵

Most black leaders in South Africa have rejected separation of Transkei from the Republic, viewing it as the ultimate step in the apartheid policy of Pretoria. They question the economic viability of the new state in light of its dependence on the South African economy, contending that it will become little more than a reserve for cheap labor for South African industry.⁶⁶

INTERNATIONAL RESPONSE TO INDEPENDENCE

Despite extensive efforts by both the South African and Transkeian authorities to elicit support for the new state from the international community, no state other than South Africa was officially represented at Umtata on independence day and no other state has recognized Transkei as an independent state.

In the months prior to independence Chief Matanzima and his brother George Matanzima, the Transkeian Minister for Justice, Police, and Prisons, made trips to Europe and to other African states

⁶²Christian Science Monitor, Oct. 28, 1976, at 9, col. 3.

⁶³RACE SURVEY, *supra* note 30, at 247.

⁶⁴Johannesburg Star, Oct. 23, 1976, at 3, col. 6.

⁶⁵N.Y. Times, Jan. 25, 1977, at 4, col. 6. Chief Lucas Mangope rejects the belief that homeland independence should be opposed by South African blacks and the world community as being against the interests of his people. "Nobody need sell us any theories, never mind whether such salesmen are paid in rands, dollars or roubles. As if we haven't got our own notions about what liberty is, or values, or what human living is about!" S. AFR. PANORAMA, June 1977, at 19.

⁶⁶*See, e.g.*, the criticisms of John Gaetsewe, General Secretary of the South African Congress of Trade Unions, *South African Bantustans: How the So-Called Independent Transkei Will Affect the African Workers*, U.N., Dep't of Political and S.C. Aff., Centre Against Apartheid, No. 28/76 (1976); C.F. Beyers Naude, Director of the Christian Institute of South Africa, *The Balkanization of South Africa*, AFRICA REP., May-June 1976, at 16; David Sibeko, Director of Foreign Affairs of the Pan Africanist Congress of Azania (South Africa), *The Sham of Independence*, AFRICA REP., May-June 1976, at 14; and Oliver Tambo, Acting President of the African Congress of South Africa, *The Victory of Our Cause is Assured*, U.N., Dep't of Political and S.C. Aff., Centre Against Apartheid, No. 33/76 (1976), 7-8.

in an attempt to win support and recognition for Transkei.⁶⁷ They made an overture to the Organization of African Unity for membership.⁶⁸ Transkei spent over \$365,000 in the United States alone to gain favor for its cause; its efforts included the hiring of a Madison Avenue firm to handle the public relations campaign, junkets to Transkei for Congressmen, and advertisements heralding independence which were run in American newspapers and magazines.⁶⁹

Transkeian leaders hoped that at least a few states, such as Taiwan, Paraguay, Kenya, and Malawi (whose President has relatives in Transkei), would extend recognition.⁷⁰ In the end, not even Rhodesia, perhaps the closest state to South Africa, attended the Transkeian independence ceremonies; South Africa alone sent representatives.⁷¹ Nevertheless, foreign states indicated some interest as evidenced by the presence of several dignitaries, including deputies from conservative European parties, an American Senator, Taiwanese politicians, and various Latin American VIP's.⁷²

Nevertheless, it is evident that the international community has almost universally rejected Transkeian independence, viewing it as a sham and the culmination of South African apartheid policy. The United Nations General Assembly has passed several resolutions condemning the homeland policy of the Nationalist government in Pretoria. For example, in 1971 the Assembly denounced the Bantustan policy as contrary to the principle of self-determination.⁷³ In

⁶⁷Johannesburg Star, June 10, 1976, at 19, col. 1.

⁶⁸*Id.*, May 28, 1976, at 3, col. 1. The O.A.U. rejected Transkei's bid for acceptance, denouncing the Bantustan policy of South Africa as "the cornerstone of *Apartheid*" in a resolution passed on June 28, 1976. O.A.U. Doc. CM/Res. 493 (XXVII), reprinted in 15 INT'L LEGAL MATERIALS 1221 (1976).

⁶⁹Christian Science Monitor, Oct. 26, 1976, at 1, col. 1. See also Johannesburg Star, May 27, 1976, at 1, col. 7.

⁷⁰Christian Science Monitor, Sept. 17, 1976, at 11, col. 1.

⁷¹Johannesburg Star, Oct. 26, at 29, col. 7. South Africa does not officially recognize Rhodesia, but the countries maintain missions under an accredited diplomatic representative in each other's capital, and South Africa may be considered sympathetic to the Rhodesian government. On the relationship between South Africa and Rhodesia in international law see Dugar, *Rhodesia: Does South Africa Recognize It As an Independent State?*, 94 S. AFR. L.J. 127 (1977); Devine, *The Status of Rhodesia in International Law (Pt. 2)*, 1974 ACTA JURIDICA 109, 119-123.

⁷²The Times (London), Oct. 26, 1976, at 8, col. 5; Johannesburg Star, Oct. 26, 1976, at 29, col. 7.

⁷³G.A. Res. 2775 E, 26 U.N. GAOR, Supp. (No. 29) 42-43, U.N. Doc. A/8429 (1971).

November 1975 it again condemned the establishment of the homelands and called upon the governments of its members not to deal with institutions or authorities associated with the Bantustans or to recognize them.⁷⁴ On Transkei's independence day the General Assembly passed a similar resolution calling upon "all Governments to deny any form of recognition to the so-called independent Transkei and to refrain from having any dealings with the so-called independent Transkei or other bantustans."⁷⁵ The resolution was adopted by a vote of 134 to 0, with the United States abstaining.⁷⁶ The day before the General Assembly resolution, and only hours before independence, Secretary General Kurt Waldheim issued a statement expressing the United Nations position on the independence of the homelands indicating that South Africa must understand that the world would never accept Transkei or the other homelands as separate political entities.⁷⁷ The Security Council endorsed this view as well as the General Assembly resolution in a resolution of its own approved by consensus on December 22, 1976.⁷⁸ The nine members of the European Economic Community announced on September 27, 1976, that they would not recognize the new state, stating that "South Africa is a multinational society in which all people, irrespective of their race or color, should have the right to live peacefully together on the basis of equality."⁷⁹ The Nordic countries expressed similar feelings, refusing to extend recognition to Transkei and rejecting the Bantustan policy.⁸⁰

⁷⁴G.A. Res. 3411 D, 30 U.N. GAOR, Supp. (No. 34) 37, U.N. Doc. A/10034 (1975).

⁷⁵G.A. Res. 31/6 A, 31 U.N. GAOR, Supp. (No. 39) 10, U.N. Doc. A/31/39 (1976).

⁷⁶The United States defended its abstention on the grounds that the resolution went beyond the nonrecognition of Transkei, and might hinder the protection of American interests in Transkei. The U.S. also thought that only the Security Council could impose the sanction of trade restraints on the state. U.N. CHRONICLE, Nov. 1976, at 14; N.Y. Times, Oct. 27, 1976, at 1, col. 5. See also the remarks of Secretary Kissinger made at a Oct. 27, 1976 news conference, 75 DEPT STATE BULL. 640, 642 (1976). At the time of the U.N. resolution Kissinger was conducting negotiations with Prime Minister Vorster, and thus an abstention was considered prudent policy. N.Y. Times, Oct. 31, 1976, § IV, at 4, col. 2.

⁷⁷For the text of the statement see U.N. CHRONICLE, Nov. 1976, at 14.

⁷⁸S.C. Res. 402, 31 U.N. SCOR, Res. & Decs. 13, U.N. Doc. S/INF/32 (1976).

⁷⁹Christian Science Monitor, Sept. 30, 1976, at 4, col. 3. The EEC indicated that it would not provide any economic aid for Transkei. KEESING'S CONTEMP. ARCHIVES, Nov. 26, 1976, at 28063.

⁸⁰U.N. CHRONICLE, Nov. 1976, at 15.

The Organization of African Unity decided in July 1976 that none of its members should recognize an independent Transkei,⁸¹ affirming the resolution of June 28th of its Council of Ministers.⁸² The Conference of Non-aligned Countries resolved not to recognize any of the South African homelands.⁸³ *Pravda* condemned the independence of Transkei as a political bluff and asserted that the domestic and foreign policy of Transkei would remain under the full control of South Africa.⁸⁴

The United States State Department acted cautiously in committing itself to a statement on recognition of Transkei, in part because of negotiations then being conducted between Secretary Kissinger and Prime Minister Vorster. The United States went on record as opposed to independence just five days before the official ceremonies.⁸⁵ This decision was forced in part by a resolution in the House of Representatives calling for the President not to extend recognition to Transkei.⁸⁶ Although the resolution was finally rejected, not having received the necessary two-thirds vote, a substantial number of representatives did support the measure.⁸⁷

It is now appropriate to consider whether Transkei deserved this overwhelming rejection by the international community both as a matter of international law and as a proper response to the South African apartheid strategy.

STATEHOOD IN INTERNATIONAL LAW

Nation-states are the primary subjects and actors in international relations. It is therefore necessary to examine the legal criteria for statehood in order to determine if Transkei and the other homelands of South Africa exhibit sufficient attributes of a state to be accorded recognition.

⁸¹KEESING'S CONTEMP. ARCHIVES, Nov. 26, 1976, at 28063.

⁸²See note 68 *supra*.

⁸³Fifth Conference of Heads of State or Government of Non-aligned Countries, Colombo, Sri Lanka, August 1976, Res. NAC/CONF 5/S/RES 4, *reprinted in U.N., Dep't of Political and S.C. Aff., Centre Against Apartheid, Notes & Documents, No. 23/76* (1976).

⁸⁴KEESING'S CONTEMP. ARCHIVES, Nov. 26, 1976, at 28063.

⁸⁵Christian Science Monitor, Oct. 26, 1976, at 6, col. 3.

⁸⁶H.R. Res. 1509, 94th Cong., 2d Sess. (1976). See also H.R. REP. NO. 1463, 94th Cong., 2d Sess. (1976). For Congressional debate on the issue, see 122 CONG. REC. H10636-42 (daily ed. Sept. 21, 1976).

⁸⁷The vote was 245 yea, 156 nay, and 29 not voting.

Although there is no definitive international convention on the criteria for statehood, there is a strong consensus among scholars and jurists on the attributes of statehood. The traditional four requirements are that the entity have: 1) A defined territory, 2) a population, 3) a government with substantial control over the population and territory, and 4) the capacity to engage in foreign relations.⁸⁸ Legal writers have suggested other criteria, such as independence, willingness to observe international law, and a degree of permanence,⁸⁹ but the traditional legal definition of a state has prevailed.⁹⁰ In fact, the fourth criterion may well be superfluous since the ability to engage in and meet international obligations is part of the effective control exercised by a government. Although the criteria purport to be objective, measuring them is a process which necessarily involves political decisions by the evaluating party.

In the case of Transkei, states have denied recognition, claiming that the homeland failed to meet established criteria for statehood, when in fact the response was based on moral and highly political decisions concerning the policy of the Republic of South Africa, rather than the characteristics of Transkei.⁹¹ Transkei satisfies the conditions of statehood. The first two criteria are easily met: Transkei has a definite territory and a permanent population.⁹² Transkei's government exercises effective control over the territory, with complete authority over police, army, and judicial administration. South African law is applicable to Transkei only to the extent that the Transkeian legisla-

⁸⁸See, e.g., RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 100 (1965); J. BRIERLY, LAW OF NATIONS 137 (6th ed. 1963); 1 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 221-23 (1963).

⁸⁹I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 80-81 (2d ed. 1973). See J. FAWCETT, LAW OF NATIONS 38-39 (1968) for the suggestion that a government of a state must be "good." *But see* Devine, *The Requirements of Statehood Re-Examined*, 34 MOD. L. REV. 410 (1971).

⁹⁰O'Brien & Goebbel, *United States Recognition Policy Toward New Nations*, in 3 THE YEARBOOK OF WORLD POLITY: W. O'BRIEN, THE NEW NATIONS IN INTERNATIONAL LAW AND DIPLOMACY 105-06 (1965).

⁹¹For example, British Foreign and Commonwealth Secretary, Anthony Crosland, stated that Transkei did not "fulfil our well-established criteria for recognition as an independent state." *Quoted in* KEESING'S CONTEMP. ARCHIVES, Nov. 26, 1976, at 28063. *But see* Preparatory Study Concerning A Draft Declaration on the Rights and Duties of States (U.K. Comments), at 53, U.N., Int'l Law Comm., U.N. Doc. A/CN.4/2 (1948).

⁹²The problem of the 1.3 million citizens of Transkei not resident in the territory is discussed below.

ture decides. Thus, the legal attributes of effectiveness and internal supremacy are met. While it is true that the economy of Transkei is tied to that of South Africa, with up to 80% of the state's \$140 million budget contributed by Pretoria,⁹³ this does not mean that Transkei cannot follow an independent course in many respects. Many states are economically dependent on others to some degree, yet manage to pursue a separate foreign policy. Botswana is a good example of this principle, for like Transkei it is strongly linked to the South African economy, conducting the bulk of its trade with South Africa, which is also a major source of jobs for its citizens. Still Botswana has shown independence in its foreign policy.⁹⁴ Lesotho is another example.⁹⁵

Assuming that Transkei meets the requisites for statehood, the question then becomes how should an entity that displays the attributes of a state be treated by the international community. There has been a longstanding controversy about recognition of states, centered on two schools of thought. The constitutivists believe that a state becomes a legal entity under international law only through the act of recognition by another state.⁹⁶ It is a positivist view of law, with recognition creating the legal entity. A difficulty arises when this theory is compared with actual state practice, for states are free to recognize or refuse to recognize another state as they see fit. This freedom creates a high degree of subjectivity in the recognition policies of various states. A state such as Israel may be recognized by some states but not by others. If recognition is considered constitutive, then Israel exists and does not exist simultaneously as an international entity. Lauterpacht and others attempt to avoid this problem by imposing a duty to recognize if the tests for independent statehood are met. Recognition then becomes merely an objective legal function which serves to identify the subjects of international law.⁹⁷ The opposing declaratory school holds that recognition is merely the acknowledgement of existing facts.⁹⁸ Once a territory satisfies the basic re-

⁹³N.Y. Times, Oct. 31, 1976, § IV, at 4, col. 2.

⁹⁴Henderson, *Independent Botswana: A Reappraisal of Foreign Policy Options*, 73 AFR. AFF. 37 (1974).

⁹⁵See note 126 *infra*.

⁹⁶See, e.g., H. LAUTERPACHT, *RECOGNITION IN INTERNATIONAL LAW* (1947); I. L. OPPENHEIM, *INTERNATIONAL LAW* 119-22 (5th ed. 1937); and Kelsen, *Recognition in International Law: Theoretical Observations*, 35 AM. J. INT'L L. 605 (1941).

⁹⁷H. LAUTERPACHT, *supra* note 96, at 32-33; 2 M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 15-17 (1963).

⁹⁸See T. CHEN, *INTERNATIONAL LAW OF RECOGNITION* (1951); and J. BRIERLY,

quirements it becomes a state and a member of the community of nations. Recognition serves to establish legal relations between the new state and the declaring state. Recognition is thus cognitive, not creative. The practice of most states is in accord with the declaratory theory, a natural law theory. International law imposes no duty upon a state to recognize a new state, even when the new state meets the tests of statehood, but instead allows a state to extend or withhold recognition as a matter of policy. This means that recognition will be a political decision.⁹⁹

This is the case with respect to nonrecognition of Transkei. Individual states withheld recognition not on the basis of legal grounds, though some alluded to such a decision, but rather on their political interpretation of South African policies.¹⁰⁰ The moral overtones of the denial of recognition are even more evident when a group of states acts in concert through a joint association.

COLLECTIVE NONRECOGNITION

Recognition is traditionally viewed as a function exercised by an individual state.¹⁰¹ However, in the 20th century there has been a growing practice of groups of states acting together to protect a general international policy rather than their own interests. Moral policy determines treatment of the unrecognized state.¹⁰² Recognition is withheld because it is believed that some "illegal" act has occurred.¹⁰³ The first

LAW OF NATIONS (6th ed. 1963). The Montevideo Convention, signed by the United States and 19 other American states, is an example of the declaratory view of recognition. Dec. 26, 1933, 49 Stat. 3097, T.S. No. 881, 165 L.N.T.S. 19.

⁹⁹See Kato, *Recognition in International Law: Some Thoughts on Traditional Theory, Attitudes of and Practices by African States*, 10 INDIAN J. INT'L L. 299, 307-10 (1970).

¹⁰⁰For example, an editorial in the New York Times stated, "The reason for shunning the Transkei is moral and political, rather than legal and juridicial." Oct. 26, 1976, at 38, col. 2. George Ball makes the recommendation that the United States avoid a display of moral superiority in dealing with South Africa, and not dismiss out of hand the idea of separate territories. *Asking for Trouble in South Africa*, ATLANTIC, Oct. 1977, at 50-51.

¹⁰¹H. LAUTERPACHT, *supra* note 96, at 4.

¹⁰²There is a growing practice of a group of nations acting together to protect a general international policy rather than their own interests. Moral policy determines the action. Note, *The Doctrine of Recognition—A Case Note on Bilang v. Rigg*, 7 VICT. U. WELLINGTON L. REV. 477, 481 (1975).

¹⁰³H. KELSEN, PRINCIPLES OF INTERNATIONAL LAW 415-16 (2d ed. rev. 1966); 5 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 874-965 (1965).

major application of this concept took place in 1932 with the development of the Stimson doctrine. In response to the creation of the Japanese puppet state of Manchukuo in Manchuria the American Secretary of State sent identical notes to Japan and China which explained the denial of recognition to the entity on the grounds that it was contrary to the Kellogg-Briand Pact and the Covenant of the League of Nations.¹⁰⁴ The refusal to recognize would deny legitimacy to the acts of aggression involved in the taking of the territory from China. The League of Nations affirmed the Stimson Doctrine on the basis of a commission report that Japanese officials were prominent in the Manchukuo government, that there was little popular support for the state, and that Japanese troops were present in the territory.¹⁰⁵ The League Assembly resolved that its members "continue not to recognize this regime either *de jure* or *de facto*."¹⁰⁶

The United Nations response to the Rhodesian unilateral declaration of independence (UDI) from Britain in 1965 is a more recent example of collective nonrecognition.¹⁰⁷ The General Assembly had previously adopted a number of resolutions urging the members of the United Nations not to accept the Rhodesian UDI.¹⁰⁸ After the fact, the Security Council resolved that members not recognize the illegal regime, thus making nonrecognition binding on the member states of

¹⁰⁴The Stimson Doctrine of nonrecognition was embodied in two identical notes sent to Japan and China. For the text of the notes see [1931-1941] 1 FOREIGN RELATIONS OF THE U.S. 76 (1943) (special Japan volume); 5 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 874-75 (1965). See also Borchard, *Recognition and Non-Recognition*, 36 AM. J. INT'L L. 108 (1942); McNair, *The Stimson Doctrine and Non-Recognition*, 14 BRIT. Y.B. INT'L L. 65 (1933).

¹⁰⁵Report of the Commission of Inquiry, L.N. Doc. C.66.M320 (1932).

¹⁰⁶Draft Report of the Committee of Nineteen, at 21, L.N. Doc. A (Extra.) 22 (1933).

¹⁰⁷For analysis of the problems of recognition of Rhodesia see *The Personality of Unrecognized States in International Law: A Case Study on Rhodesia as an Illustration*, in C. OKEKE, CONTROVERSIAL SUBJECTS OF CONTEMPORARY INTERNATIONAL LAW 81-105 (1974); Cummings, *The Rhodesian Unilateral Declaration of Independence and the Position of the International Community*, 6 N.Y.U. J. INT'L L. & POL. 57 (1975); Devine, *The Status of Rhodesia in International Law* (pts. 1-2), ACTA JURIDICA 1, 109 (1973-1974).

¹⁰⁸See, e.g., G.A. Res. 2022, 20 U.N. GAOR Supp. (No. 14) 54, U.N. Doc. A/6014 (1965). Chief Matanzima once said that he would declare a UDI from South Africa if the United Party ever gained power in the Parliament and opposed the independence of Transkei. Johannesburg Star, May 27, 1976, at 12, col. 1.

the organization.¹⁰⁹ Later, economic sanctions were imposed by the United Nations after the situation was characterized as a threat to peace. Under Article 25 of the Charter these sanctions became binding on the members.

A third example of the refusal of a collective body to grant recognition to an entity purportedly created in violation of international law is the case of Namibia. South Africa refused to release its mandate from the League of Nations over South West Africa to the United Nations for trusteeship. After General Assembly resolutions and opinions by the International Court of Justice (ICJ) that the mandate had been terminated, the Security Council declared that the continued presence of South African authorities in Namibia was illegal and actions taken by those authorities invalid.¹¹⁰ All states were called upon to refrain from dealing with South Africa in any manner inconsistent with the resolution.¹¹¹ The ICJ later held that member states of the United Nations were under an obligation to recognize the illegality and invalidity of South Africa's continued presence in Namibia and to abstain from entering into any economic dealings with the government of South Africa or establishing any other relationship which might imply recognition of the legality of its presence.¹¹²

The use of nonrecognition in these cases has not proved to be an effective tool of international law. Nor has the process of recognition been divorced from the political decisions of individual states to further their own self-interest. The world is still a long way off from the treatment of recognition as an international responsibility.¹¹³ As Lauterpacht wrote several years ago:

We are not in a position to say either that there is a clear and uniform practice of States in support of the legal view of recognition, or that the process of recognition has invariably taken place, in all its aspects, under the aegis of international law.¹¹⁴

While there may be a modest movement toward the acceptance of the

¹⁰⁹ S.C. Res. 217, 20 U.N. SCOR, Res. & Decs. 8, U.N. Doc. S/INF/20/ Rev. 1 (1965).

¹¹⁰ S.C. Res. 277, 25 U.N. SCOR, Res. & Decs. 5, U.N. Doc. S/INF/25 (1970).

¹¹¹ *Id.*

¹¹² 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, 58.

¹¹³ Meeker, *Recognition and the Restatement*, 41 N.Y.U. L. REV. 83, 94 (1966).

¹¹⁴ H. LAUTERPACHT, *supra* note 96, at 78.

idea of collective nonrecognition as an authoritative decision of the international community based on the even-handed application of legal principles, such a practice is not imminent. The nonrecognition of Manchukuo, Rhodesia, and the South African control over Namibia had limited practicality. The realities of state practice undermine what value there is in such moral posturing. The United Nations resolutions on Transkei fit into this same pattern, although there is even less justification for the collective response there.

The Stimson Doctrine failed as a legal device partly because of the weakness of the world organization.¹¹⁵ It was only after the defeat of the Japanese in World War II, fourteen years after employment of the doctrine, that the objective of the nonrecognition was achieved. Nonrecognition of Rhodesia has not deprived that state of an international personality. Although the withholding of recognition of Rhodesia by the United Nations may express that organization's view of the morality of the Smith regime, it cannot prevent the state from acting in international affairs.¹¹⁶ South Africa's presence in Namibia continues.

The situation with respect to Transkei is unprecedented in international law. The state came into existence through a purportedly constitutional process, with full support of the parent state. This distinguishes Transkei from the cases of Manchukuo and Rhodesia. There are no South Africans in authority in Transkei.¹¹⁷ The reaction of the United Nations in refusing to recognize the state is based on the members' moral judgment of the internal policy of apartheid in South Africa and not on the merits of Transkei's own government. Transkei is firmly opposed to apartheid and, *e.g.*, affirms the doctrine of racial equality in its own territory.¹¹⁸ Yet the members of the United Nations, and in particular the black African states, can hardly point to the record of their own state's practices as examples of the proper extension of human rights to all citizens.

Despite the nonrecognition accorded to its status as an independent state, Transkei may well become an established actor in international

¹¹⁵P. JESSUP, A MODERN LAW OF NATIONS 162 (1946).

¹¹⁶See Kato, *supra* note 99, at 320-21.

¹¹⁷During Transkei's self-governing stage there were some whites seconded by the South African government in the Transkeian public service. In 1975, for example, 255 of the 10,291 government officials in Transkei were whites from South Africa. Backgrounder, *supra* note 3, at 4.

¹¹⁸For example, in his independence day speech, Chief Matanzima warned South Africa that homeland independence was not the solution to that state's internal problems. Johannesburg Star, Oct. 26, 1976, at 29, col. 3.

affairs. Nonrecognition may deprive a state of full participation in international relations, but it cannot deprive a state of all action. This is particularly so when nonrecognition is not followed by subsequent action by the nonrecognizing states.¹¹⁹ Despite the united opposition of many states to Rhodesia and its UDI, the Smith regime retains power and continues to function in the world. The United Nations sanctions have not produced the desired effect. If change comes to Rhodesia it will come from within the state, for international law has proved an unreliable tool for resolution of the problem. Once an entity has established itself it carries with it the capacity to have contacts with other governments, fully official or otherwise; isolation is impossible.¹²⁰

Transkei will no doubt make international contacts in the future. States such as the Ivory Coast and Malawi have hinted at recognition. Membership is possible in the South African Customs Union. Taiwan has expressed an interest in investment in Transkei.¹²¹ Trading relations are sure to develop with other states. A state can come into being without the recognition of other states. Such an unrecognized state cannot be ignored completely in international law, for other states have no right to violate the territory of an unrecognized state, or to consider ships flying its flag as stateless.¹²² State practice allows a state that has the attributes of statehood, although unrecognized, the rights and obligations accorded other states by international law.¹²³ Many states do not recognize the German Democratic Republic, for example, but that has not prevented it from belonging to international organizations and becoming a party to treaties.

Nonrecognition of Transkei will not be effective. It cannot keep the territory from becoming a state under the international law regardless of what theory of recognition is followed.

TRANSKEI'S CLAIM FOR SOVEREIGNTY

Transkei has a legitimate claim to sovereignty. It has a long ex-

¹¹⁹Report of the Special Committee Against *Apartheid*, 30 U.N. GAOR, Supp. (No. 22) 65, U.N. Doc. A/10022 (1975).

¹²⁰See Kato, *supra* note 99, for the thesis that recognition of statehood is losing political importance as a doctrine.

¹²¹Swiss bankers have indicated that they will provide assistance for Bophuthatswana's development after independence. S. AFR. PANORAMA, June 1977, at 19. Similar aid for Transkei would appear to be a possibility.

¹²²C. OKEKE, *supra* note 107, at 104.

¹²³RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 107 & 108 (1963).

istence as a recognizable national entity. Cape Colony annexed Transkei between 1879 and 1884; later in 1884 the Glen Gray Act provided indirect rule over the territory under a system of local councils under a district council. The Bantu Authorities Act of 1951 established a General Council to govern Transkei in 1956, and in 1963 Transkei became a self-governing homeland.

In addition to Transkei, other territories were annexed in South Africa: Cape Colony annexed Basutoland and Bechuanaland, and Transvaal annexed Swaziland. When the Union of South Africa was formed in 1910, these three territories became British protectorates; but Cape Colony dragged Transkei into the Union.¹²⁴ The three protectorates eventually became independent states, welcomed by the community of states and black Africa in particular: Botswana (Bechuanaland) in 1966,¹²⁵ Lesotho (Basutoland) in 1966, and Swaziland in 1968. Transkei, on the other hand, is now shunned because of its sixty-six year forced association with South Africa. Even Lesotho, with a similar history, culture, and economy, refuses to recognize Transkei as an independent state.¹²⁶

Transkei does suffer some limitations on its independence because of its tie to the South African economy, but it has potential for growth and development greater than many other African states. Lesotho and Swaziland are equally dependent on South Africa; Lesotho, for example, conducts from 80 to 90% of its trade with the Republic. Transkei possesses many advantages that these two states lack. While Lesotho and Swaziland are landlocked, Transkei enjoys 270 miles of coastline and a port of its own. The surface area of Transkei, which is about the size of Belgium, exceeds that of twenty-two members of the United Nations; its per capita income is higher than twenty-seven members. Transkei is more highly developed than many African states, with

¹²⁴See Wash. Post, Oct. 24, 1976, at A23, col. 1.

¹²⁵When Botswana became independent Prime Minister Verwoerd sent a telegram of congratulations to the new state, justifying its independence in terms of the Bantustan model.

¹²⁶Wash. Post, Oct. 24, 1976, at A23, col. 1. Lesotho appealed to the United Nations for help in resisting South African pressure to recognize Transkei, which included the closing of the common border. The Security Council adopted a resolution commending Lesotho for its decision not to recognize Transkei and condemning the South African action. Financial and technical aid to Lesotho was authorized. S.C. Res. 402, 31 U.N. SCOR, Res. & Decs. 13, U.N. Doc. S/INF/32 (1976). See also KEESING'S CONTEMP. ARCHIVES, March 11, 1977, at 28244.

growth potential in minerals and other resources. Future foreign investment is possible.

Moreover, Transkei can well pursue a foreign policy independent of Pretoria. Botswana, in a similar situation, has exercised independence from South Africa despite its vulnerability.¹²⁷ Lesotho, although conservative in its foreign policy, maintains an opposition to South Africa on apartheid and other matters. The very fact that Lesotho refused to extend recognition to Transkei despite considerable pressure from South Africa indicates the extent of that independence.¹²⁸

Transkeian independence from South Africa is further enhanced by the fact that Pretoria actively encouraged the separation of the homeland from the Republic. Thus it would be in an awkward position after its efforts to legitimize the Transkeian state to reverse its position and attempt to overtly control Umtata's policies. Even though South Africa might not tolerate the active use of Transkei as a base for guerrillas, Transkei still has substantial room to exercise control over its foreign policy.

Chief Matanzima is not a puppet of Pretoria, but rather a Xhosa nationalist who utilized South Africa's multinational development policy to achieve his own ends of an independent Xhosa state. He does not pretend that the South African policy is a solution to the racial problems of that country. His rejection of Pan-Africanism in favor of the narrower objective of Xhosa nationalism does not warrant the rejection of statehood for Transkei by the black African states. The danger lies in confusing the merits of Transkeian independence with the concern over South African internal policies. One can consistently support the independence of the Xhosas without recognition of apartheid. Transkei must be judged on its own merits. The liberal *Manchester Guardian*, which stood almost alone in favoring recognition of Transkei, argued that it was unfair to treat the state differently from the other three protectorates.¹²⁹ "If each case is taken on its merits, Transkei will be as much entitled to recognition as many a country where people scrape a living within another's sphere of influence."¹³⁰

¹²⁷Henderson, *supra* note 94.

¹²⁸The Times (London), May 26, 1977, at 8, col. 8. For Lesotho's position in opposing homeland independence see its comments before the United Nations General Assembly. 31 U.N. GAOR (29th plen. mtg.) 549-50, U.N. Doc. A/31/PV.29 (1976).

¹²⁹Editorial of Oct. 6, 1976, *reprinted in* Wash. Post, Oct. 28, 1976, at A24, col. 5.

¹³⁰*Id.*

CITIZENSHIP IN TRANSKEI

The great majority of the citizens of Transkei actually residing in the territory now probably favor the course that Chief Matanzima has taken. The crux of the problem lies with the citizenship of the 1.3 million Xhosas living elsewhere who are being forced to become citizens of Transkei. Pretoria is determined to deny these people their South African citizenship despite the lack of direct ties between them and the Transkei state. It is in this matter that international law and the collective response of states can have some influence.

International law may come into play in two ways, depending on how the Matanzima government decides to interpret the citizenship provisions of its constitution.¹³¹ If Transkei stands firm and refuses to accept as nationals those blacks living outside Transkei who want to retain their South African citizenship, the problem arises of the statelessness of those persons. Under the South African Status of Transkei Act, the urban blacks are deprived of their South African citizenship, and if Transkei refuses to accept them as nationals, they may become stateless.

The practice of international law generally allows a state to determine who its nationals will be.¹³² At present there is no general rule in international law that the deprivation of citizenship is illegal.¹³³ Even mass denationalization is not prohibited.¹³⁴ For example, during World War II Germany deprived Jews of their nationality, but however immoral this was, international law provided no remedy.¹³⁵ Thus, South Africa's denationalization may not be condemned on grounds that it was illegal according to the present structure of international law. There is, however, a tendency to deduce a rule disallowing denationalization from the concept of human rights.¹³⁶ This idea has been embodied in several international agreements. The Universal Declaration of Human Rights, adopted by the United Nations General

¹³¹See note 36 *supra*.

¹³²D. GREIG, *INTERNATIONAL LAW* 370 (2d ed. 1976); I. BROWNLIE, *supra* note 89, at 367. See Convention on Certain Questions Relating to Conflict of Nationality Laws, Apr. 12, 1930, 179 L.N.T.S. 89, arts. 1 & 2.

¹³³I. BROWNLIE, *supra* note 89, at 391.

¹³⁴M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 98 (1967). Some tribunals have on occasion stated that international law does not permit compulsory change of nationality. See I. BROWNLIE, *supra* note 89, at 392.

¹³⁵D. GREIG, *supra* note 132, at 385.

¹³⁶D. O'CONNELL, *INTERNATIONAL LAW* 684 n.63 (2d ed. 1970).

Assembly in 1948, provides in Article 15, paragraph 2: "No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality."¹³⁷ In 1961 the United Nations concluded the Convention on the Reduction of Statelessness,¹³⁸ which prohibited in principle the deprivation of nationality. Article 9 of the Convention expressly provides that a state may not deprive a person of nationality on the basis of racial or ethnic grounds.¹³⁹ South Africa's deprivation of citizenship to those urban blacks who are "associated" with Transkei in some form, can be attacked under this human rights approach, albeit an inchoate rule in international law. So in international affairs foreign states could simply treat these stateless persons as South African citizens.

If Transkei chooses to accept the urban blacks as nationals against their own desires to remain South Africans, then such action may be attacked under the "genuine link" doctrine. The principle was articulated in the *Nottebohm* case.¹⁴⁰ There the ICJ noted that for internal matters international law places few restrictions on the extent to which a state may extend (or withdraw) its nationality. But if the nationalization is to be effective in international affairs then it must conform to certain principles.¹⁴¹ In the international plane "a State cannot claim that the rules it has thus laid down are entitled to recognition by another State unless it has acted in conformity with this general aim of making the legal bond of nationality accord with the individual's genuine connection with the State which assumes the defence of its citizens by means of protection against other States."¹⁴²

In establishing an effective link to the state the law will look to such factors as habitual residence, center of interest, family ties, and attachment to the state.¹⁴³ On this basis Transkei's purported sovereignty over the urban blacks is subject to challenge because in many cases there is no genuine link between these people and Trans-

¹³⁷G.A. Res. 217, U.N. Doc. A/810, at 74 (1948). The Declaration is not legally binding on the signatory states.

¹³⁸U.N. Doc. A/CONF. 9/15, *opened for signature* Aug. 30, 1961. Note especially art. 8. See also Convention Relating to the Status of Stateless Persons, *done* Sept. 28, 1954, 360 U.N.T.S. 117.

¹³⁹Convention on the Reduction of Statelessness, *supra* note 138, art. 9.

¹⁴⁰[1955] I.C.J. 4 (Liechtenstein v. Guatemala).

¹⁴¹D. GREIG, *supra* note 132, at 320.

¹⁴²[1955] I.C.J. 4, 23.

¹⁴³*Id.* at 22.

kei. Many have lived outside of Transkei their entire lives, and have no family ties to the state.¹⁴⁴

THE OTHER HOMELANDS

Transkei's right to recognition as an independent state does not imply that the other homelands deserve the same treatment. Each case must be judged on its merits. Fragmentation of the homelands poses one of the major obstacles to the viability of independent states. Transkei consists of three blocks of land, but Bophuthatswana, scheduled to become independent in December 1977, will have eight pieces of territory. KwaZulu will have ten parts, if the 1973 consolidation plan is carried out.¹⁴⁵ Unless effective consolidation is accomplished, the smaller, fragmented homelands will experience little success as separate international entities.¹⁴⁶ Except for Transkei, the homelands are effectively landlocked, since even those with a coastline have landlocked blocks of territory; they are wholly surrounded by the Republic of South Africa. None but Transkei possesses a port.

The areas designated for homeland development account for only 13.8% of the total area of South Africa, yet Pretoria intends to assign 80% of the population to these blocks of land for citizenship purposes. In many cases the lands do not correspond to the traditional territory of the Bantu peoples.¹⁴⁷ The areas set aside in 1936 for the blacks under the Native and Trust Land Act were not intended to provide the basis for independent states. Thus a large percentage of the *de*

¹⁴⁴Chief Buthelezi, Chief Minister of the KwaZulu homeland and an opponent of Transkei's independence, disclosed in 1976 that he would bring the matter of Transkei citizenship to the attention of the O.A.U. and ask it to seek the opinion of the International Court of Justice, if necessary. KEESING'S CONTEMP. ARCHIVES, Nov. 26, 1976, at 28062.

¹⁴⁵The Rand Daily Mail commenting on the consolidation of KwaZulu wrote on May 16, 1975:

The present 48 separated areas will be reduced to 10 still-separated bits and pieces. How in heaven's name is such a patchwork quilt to govern itself? Will there be dozens of border posts manned by countless officials to allow for people travelling from one chunk of land to another? What sort of army-to-be will KwaZulu need to defend itself against possible attack? What about water supplies? Telegraph lines? Rail lines?

Quoted in Report of the Special Committee Against *Apartheid*, 30 U.N. GAOR, Supp. (No. 22) 66, U.N. Doc. A/10022 (1975).

¹⁴⁶See SOUTH AFRICAN HOUSE OF ASSEMBLY DEBATES, May 14, 1975, at col. 5926 (statement of the Minister of Bantu Administration and Development).

¹⁴⁷A. LEMON, APARTHEID 203 (1976).

jure population of the homelands lives outside the territory of citizenship. In the extreme case of the South Sotho homeland, only 1.7% of the 452,000 people actually live on the land area designated as their place of citizenship. Some of these homelands will not opt for independence, but will elect to remain in South Africa and pursue their interests as part of that state. Those that do desire independence must be judged by the principles of self-determination and fairness accorded to other black African states by the international community.

CONCLUSION

Transkei was dragged into the South African Union in 1910 without being given a choice. It has maintained a separate identity from that time. The Xhosa people should be allowed to assert their own national identity, and the argument for maintenance of the territorial integrity of South Africa should not be permitted to frustrate Xhosa self-determination to form an independent state.

To speak of a single "indivisible" nation, and to speak of "territorial integrity" as of paramount importance in countries where loyalties are fluid and national unity may not in fact exist—this is to let rhetoric obscure reality. If governments increasingly depend on the consent of the governed for their power just or not, so nations increasingly depend on the same consent for their cohesion.¹⁴⁸

Rather than view the process of independence for the Xhosas in South Africa as the balkanization of Africa, it can be seen as the Scandinavianization of the Bantu people.¹⁴⁹

The nonrecognition of Transkei will serve only to force Umtata closer to Pretoria and retard the cause of freedom in South Africa. If instead of shunning the new state, black Africa welcomed it and admitted it to the Organization of African Unity and sponsored membership in the United Nations, South Africa might well be hoisted by its own petard. Transkei could serve as a base for the liberation movement in South Africa from which the apartheid policies of the National Party could be attacked. The Republic would find itself in the

¹⁴⁸K. DEUTSCH, *Forward to NATION BUILDING* at ix, (K. Deutsch & W. Foltz eds. 1963).

¹⁴⁹Joseph S. Nye, Jr. observes that "Pan-Africanists stress the dangers of 'Balkanization,' with its connotations of poverty and dependence, never the possibilities of 'Scandinavianization,' with its implied prosperity and independence." *Quoted in* Suzuki, *Self-Determination and World Order: Community Response to Territorial Separation*, 16 VA. J. INT'L L. 779, 845 n.315 (1976).

embarrassing position of having fostered the independence of the state only to have it become a thorn in its side. The *Kenya Daily Nation* expressed this idea by commenting, "If Mr Matanzima is genuine about his interest in liberation organisations, the African homelands in South Africa may yet prove to be the Trojan horse that will contribute to the undoing of the South African Whites."¹⁵⁰

There is strong evidence that Transkeian officials do intend to oppose South African policy within the limits of their situation. Tsepo L. Letlaka, a former activist in the Pan Africanist Congress of South Africa, and now a member of the Transkeian cabinet, took this view of Transkei's role in the liberation movement.

The Transkei's decision to become a sovereign, independent state introduces an altogether new factor in national and international debates on the struggle between Black and White in South Africa. An important section of the victims of apartheid is going to speak to the world on the race issue. . . . They will speak as equals, and will look the White oppressors in the eye. They will speak not as advocates or partisans, but as people involved directly in the clash between Black and White in South Africa. Whether or not the outside world likes it, the Transkei state will be able to speak on apartheid with an authority no self-appointed body or nation outside possesses today. Independence will maximize the effectiveness of Transkei as chief spokesman of the oppressed of South Africa.¹⁵¹

These are not the words of a puppet.

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¹⁵⁰Quoted in *Johannesburg Star*, Oct. 27, 1976, at 1, col. 2.

¹⁵¹From an address given at the California Institute of Technology, quoted in Hahn, *What Should the U.S. Do?*, AFR. REPORT, May-June 1976, at 10.