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Henry J. Richardson

Indiana University School of Law - Bloomington

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Self-Determination, International Law and the South African Bantustan Policy

HENRY J. RICHARDSON, III*

I. INTRODUCTION

An integral element of the South African apartheid policy is the permanent repatriation of most members of various government-designated African tribal groups to ten territorial areas around the country, designated as the respective "homelands" of each group. Citizenship for members of such groups is apparently to be transferred from South Africa as a whole to the respective bantustan, each having been granted internal self-government in many respects. The implementors of the bantustan policy see the territorial status of the bantustans as a precursor to independence, with a progressive reduction of blacks' privileges in South Africa as the program is further implemented. The bantustan of the Transkei requested and was granted independence by the Vorster government on October 26, 1976.

This Article will explore the legality under international law of the bantustan policy in South Africa—as distinguished from the legality of similar policies in the international territory of Namibia¹—especially as that policy relates to the right of self-determination for black South Africans. Two comparatively recent United Nations General Assembly resolutions² provide a useful pre-

* Staff, National Security Council; Associate Professor, Indiana University School of Law (Bloomington) 1971-77; LL.B., Yale Law School, 1966; LL.M., U.C.L.A. Law School 1971. This Article, largely completed prior to assuming his current position, reflects the personal views and research of the author, and not those of the U.S. government or any agency thereof. The author benefited from comments on previous drafts by Profs. A. A. Fatouros and Jordan Paust.

1. See United Nations Unit on Apartheid, Notes and Documents, U.N. Doc. 11/75, at 17-18 (1975); *Id.*, U.N. Doc. 19/75, at 5 (1975); Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, [1971] I.C.J. 16 [hereinafter cited as Advisory Opinion on Namibia]; U.N. ECOSOC, RACISM AND APARTHEID IN SOUTHERN AFRICA AND NAMIBIA, at 142-46 (1974); C. DUGARD, THE SOUTH WEST AFRICA/NAMIBIA DISPUTE, at 431-35.

2. G.A.Res. 2775, 26 U.N. GAOR, Supp. (No.29) 39, U.N.Doc. A/8429 (1971); G.A.Res. 3411, 30 U.N.GAOR, Supp. (No.34) 35, U.N. Doc. A/10034 (1975).

scriptive focus. Both explicitly condemn the bantustan policy and declare it to be a violation of the United Nations Charter because of the denial of self-determination to black South Africans. To these must be added a third resolution³ passed directly in response to the Transkei's change of status. The General Assembly resolutions raise the question whether maintaining the original territorial integrity of South Africa would help or hinder black South Africans to achieve self-determination. They also raise the questions of the permissibility under international law of intense coercion against blacks to prevent self-determination and the effect of coercion upon the international legal competence of black groups to conclude with the South African government certain transactions vital to the bantustan policy.

This Article concludes that the granting of "independence" to bantustan territories, as has been done for the Transkei and Bophuthatswana, and related South African policies, violate international law. A final question, then, is the scope of the expectations and legal obligations that flow to the international community from this violation.

II. THE BANTUSTAN POLICY

The idea of "separate development" for Africans and whites originated, not surprisingly, among Afrikaners, especially from the then Prime Minister Voerwoerd in the 1950's. Its territorial manifestations have only recently become of international concern.⁴ Since at least 1968, a policy of forcible resettlement of over 900,000 persons of various government-designated tribal groups into some 800 resettlement areas has been carried out by the government in order to "return" such people to "their own homeland" or at least to remove them from "white" areas. The government has frequently used coercive measures to accomplish resettlement because of the Africans' antagonism to the disruption of their well-rooted lives resulting from their removal from "black spots" within areas designated for whites only and because of their unwillingness to abide by Pretoria's tribal designations. Those being resettled are Africans not needed for work in close proximity to white-reserved urban areas, mostly women, children, the elderly, and the infirm, and often whole families minus their able-bodied menfolk.⁵ The completion of the resettlement policy would thus still leave a significant propor-

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

4. See Carter, *South Africa: African State or Colonial Power?* AFRICA REPORT, Sept.-Oct. 1976, at 4.

5. DIGGS, SOUTH AFRICA, H.R. REP. NO. 109, 92d Cong., 2d Sess., 95-97 (1972) [hereinafter cited as DIGGS]; A.MATHEWS, LAW, ORDER, AND LIBERTY IN SOUTH AFRICA at 247

tion of Africans residing in South Africa's urban areas in an ambiguous legal status, their numbers augmented by those pushed back into urban areas by overcrowding and unemployment in the bantustans.⁶

As announced in 1971, the South African government intends eventually to grant "self-determination" or "sovereign independence" to the ten tribal reserves it has designated as tribal homelands.⁷ These territories, all contained within present South African national boundaries, comprise in collected total area less than 13% of the national territory. The land in these territories is reserved for Africans and prohibited from settlement by whites.⁸ They feature some of the least fertile and arable land along with land of better quality and are apparently now the most densely populated areas in the country, containing nearly 50% of South Africa's population. The subsistence agricultural economy, the erosion of some 30% of the land, and overpopulation combine to make the economic and social development of the bantustans quite difficult, if possible at all.⁹ There is scant hope that present or projected policies will pro-

(1972) [hereinafter cited as MATHEWS].

In a speech reminding urban blacks that they were present in white areas "to sell their labor and for nothing else," Minister Michel Botha stated that those who accepted the citizenship of a tribal homeland would be "more welcome in white areas than those who did not." *The Times* (London), Aug. 22, 1976, at 7. The official South African attitude is that married women, children, and older people are "superfluous appendages," to be removed from the urban areas as soon as possible. United Nations Unit on Apartheid, Notes and Documents, U.N. Doc. 4/75, at 7 (1975); *Id.*, U.N. Doc. 36/75, at 12 (1975); see DIGGS, *supra* note 5, at 94-97.

6. Such ambiguity is indicated by the Bantu Homelands Citizenship Act of 1970, which provides that a citizen of a territorial authority shall nevertheless not be an alien of the Republic, thus retaining a basis in law for government control over Africans otherwise designated "citizens" of "their" homelands. See MATHEWS, *supra* note 5, at 250-52 for the operation of South African law relative to Africans in urban areas; Farah, *South Africa's Apartheid Policy: An Assessment*, in *AFRICA & INT'L ORGANIZATION* at 72, 76-77, 80 (Y. Ayouty & H. Brooks, eds. 1974) [hereinafter cited as Farah]; DIGGS, *supra* note 5, at 98. The Act aims to remove any remaining rights of blacks permitted to remain in white areas. This system is therefore "designed to bind every African legally and constitutionally to his own people." Certain rights are to be granted by the homelands governments to compensate for the loss of rights in white areas (though the Transkei Assembly resisted South African pressure to accept such people as its citizens. *Cf.* note 89 and accompanying text *infra*). Every African will be a citizen of either a "self-governing" Bantu area or one or another Territorial Authority. All Africans are affected whether or not they have ever lived there. The decision of the Minister as to which homeland an African belongs to is final. See Farah *supra* at 79; United Nations Unit on Apartheid, Notes and Documents, U.N. Doc. 20/74, at 26-27, 40-42 (1974).

7. United Nations Unit on Apartheid, Notes and Documents, U.N. Doc. 20/74, at 1, 26-27, 40 (1974); *id.*, U.N. Doc. 36/75 at 1, 3-4 (1975).

8. BANTU HOMELANDS CONSTITUTION § 36(A)(1971)(South Africa); see MATHEWS, *supra* note 5, at 249.

9. Apparently, the continuing economic subordination of the Bantustans to South Africa is an essential element of the overall apartheid scheme. United Nations Unit on Apartheid, Notes and Documents, U.N. Doc. 36/75 at 8-10, 13; Farah, *supra* note 6, at 76.

vide even minimally adequate employment.¹⁰ Moreover, the individual territories of the ten homelands are discontinuous areas separated by land where whites reside and develop. They are destined to remain discontinuous, even should a government consolidation plan be implemented.¹¹ The Transkei still comprises three separate pieces of territory.¹²

It is apparent that the recent black South African protests and violence are at least partly a protest against the homelands policy.¹³ For example, the government has attempted to transfer by legislative fiat the citizenship of Africans to the bantustan of their government-designated tribal affiliation, a strategy developed to force Africans into the bantustans. Thus, in May, 1976, the government published legislation under which an estimated 1.3 million members of the Xhosa tribal group who live outside of "their Transkei homeland" were to lose their South African citizenship when the Transkei became independent.¹⁴ Furthermore, the government had previously tied the right to own or expand a business in black townships and the right to take a thirty-year leasehold—the only real property rights available to blacks—to the taking of homeland citizenship.¹⁵ Although the pressure from black protests and deaths resulted in the South African government's recent repeal of the latter regulation, thus opening the way for the limited leasing of

10. Farah, *supra* note 6, at 77; Diggs, *supra* note 5, at 93. A five year development plan for the Bantustans initiated by the South African government in 1970, now including three development corporations, has been described as too little too late. Farah, *supra* note 6, at 77; Diggs, *supra* note 5, at 94, 99.

11. United Nations Unit on Apartheid, Notes and Documents, U.N. Doc. 11/75, at 8 (1975); *id.*, U.N. Doc. 36/75 at 5-6 (1975). *Cf.* Diggs, *supra* note 5, at 94, 99. As early as 1970, the territorial governments of both the Transkei and KwaZulu asked the South African government for the transfer to their territories of certain land held by whites, a process which can be accomplished under the legislative authority of the State President acting by decree. BANTU HOMELANDS CONSTITUTION, *supra* note 8, at § 36. So far, these requests have met little or no positive response.

12. Farah, *supra* note 6, at 78; Diggs, *supra* note 5, at 100-02. *See South African Apartheid: Questions and Answers on System and Chances for Change*, N.Y. Times, Aug. 21, 1976, § 1, at 5, col. 1.

13. *See* The Times (London), Aug. 21, 1976, at 4, col. 4; *id.*, Aug. 16, 1976, at 4, col. 2; *id.*, Aug. 18, 1976, at 13, col. 1; *id.*, Aug. 31, 1976, at 11, col. 1; N.Y. Times, Aug. 12, 1976, at 30, col. 1; *id.*, Aug. 22, 1976 § 1, at 22, col. 1; *id.*, Aug. 27, 1976, at 2, col. 3; *id.*, Aug. 28, 1976, at 8, col. 2; *id.*, Aug. 30, 1976, at 23, col. 1. Indeed, there is some indication that the government's separate development policy, of which the homelands policy is a critical element, has been a major factor in the rise and spread of black consciousness, especially among university students. This attitude is a main ingredient leading blacks to see themselves as "blacks" rather than as members of separate tribal groups. *See Leaders' Arrests Aid Black Militancy*, The Times (London), Aug. 24, 1976, at 4, col. 7.

14. N.Y. Times, May 27, 1976, at 4, col. 3. *See* notes 78-94 and accompanying text *infra*.

15. Apparently only one business may be owned by a black African under such conditions, and it must be one selling basic necessities.

property in the Republic irrespective of homeland citizenship,¹⁶ the issue of whether these protests will ultimately deflect the government's homelands policy is as yet unanswered.

Several homeland leaders have emerged into international prominence, most notably Chief Gatsha Buthelezi of KwaZulu and Chief Kaiser Matanzima of the Transkei. They have attempted to use their positions, to some extent, to secure additional benefits for their peoples. Somewhat protected from arrest or worse by the South African government's heavy reliance on the success of the bantustan policy, they have spoken out more or less forcefully in support of greater rights and relief from the oppressive effects of apartheid on all black South Africans, though not without some challenge by other—especially urban—segments of black South Africa to their authority to do so.¹⁷ Chief Buthelezi has for some time been on public record firmly against the idea of any kind of "independence" for any of the bantustans, a stand followed so far by all of these leaders¹⁸ but Chief Matanzima of the Transkei and Lucas Mangope of Bophuthatswana.¹⁹

The bantustan policy represents a major attempt by the Vosters government to preserve the security and standard of living of South African whites by maintaining the basic structure of apartheid while keeping enough able-bodied Africans conveniently useable as the main source of much-needed labor for South Africa's mines, farms, and industry. An additional aim might be to regular-

16. The Times (London), Aug. 21, 1976, at 4, col. 4. Regulations allowing the new privilege have apparently not yet been promulgated.

17. There are rural (*e.g.* homelands) — urban (*e.g.* Soweto) splits among black South Africans, as well as generational splits, and some tribal antagonisms. The recent protests have thrown these factors into bas-relief without giving any clear equation for their relative strength. For example, the bantustan leaders, while using their positions to speak to some extent on behalf of urban Africans as well as for their own appointed rural constituencies, have been somewhat excoriated by younger urban blacks directly involved in the protests, which, however, seemingly has not led to the former's disparagement by all urban black South Africans, and in turn has apparently led those leaders to speak up even more forthrightly against government policies in repressing the protests. See N.Y. Times, Aug. 21, 1976, § 1, at 5, col. 1; *id.*, Aug. 22, 1976 § 1, at 22, col. 1; *id.*, Aug. 27, 1976, § 1, at 1, col. 6.

18. Indeed, the homeland leaders meeting in the context of the recent protests, and explicitly noting the lack of agreement by the leaders of the Transkei and Bophuthatswana, recently reiterated that "they have no intention whatsoever of opting for the 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." Text of the Statement Issued by the Representatives of the Blacks in South Africa, N.Y. Times, Aug. 22, 1976, § 1, at 22, col. 1. See also *id.*, May 27, 1976, at 4, col. 3. This statement is all the more significant in that all of those leaders draw their salaries from the South African government. See Christian Science Monitor, Aug. 23, 1976, at 3.

19. Farah, *supra* note 6, at 78; Chicago Sun-Times, May 27, 1976, at 39. The Transkei request for independence was apparently made without consultation by Matanzima with other homeland leaders, in violation of a previous agreement among them.

ize the deflection of basic apartheid policy produced by industrial labor demands, forcing the government to condone the legally ambiguous and, as the current bloodshed has shown, volatile existence of large concentrations of Africans at the edge of major urban areas, such as Soweto adjacent to Johannesburg.²⁰ One can also safely infer, as has the United Nations General Assembly, that the bantustan policy and particularly the change in status of the Transkei is a response to the sustained international pressure against apartheid and is designed to split black African and world opinion in its opposition to the continuation and the brutality of South African white minority domination.²¹ There is speculation, finally, that the successful implementation of this policy is seen by Pretoria as a prerequisite for more complete partition of the entire country between whites and blacks, one ultimate "solution" to South Africa's racial problems. Should this partition occur, whites would be left in control of the richest parts of the country.²²

III. SELF-DETERMINATION AND APARTHEID

The self-determination of peoples has evolved into a principle of international *jus cogens*,²³ though many of the definitional problems familiar to this right remain as to its scope.²⁴ Although the principle may recently have drawn its greatest sustenance from

20. See MATHEWS, *supra* note 5, at 250-52 for pertinent legislative background to the conflict between apartheid restrictions on African mobility and promotions to white-held jobs, and profit imperatives in the manufacturing sector.

21. N.Y. Times, May 27, 1976, at 4, col. 3. The Organization of African Unity opposes recognition by other states of the Transkei "independence," but there is some indication that one or two Southern African governments, such as Lesotho, might carry on at least technical dealings with such a regime. See Southall, *Lesotho/Transkei: What Kind of Relationship?*, AFRICA REPORT, Sept.-Oct. 1976, at 41-43.

22. For useful recent discussions of the bantustan policy, see Carter, *South Africa's Battleground of Rival Nationalisms*, in SOUTH AFRICA IN CRISIS 84, 108-20 (1977); J. BUTLER, R. ROTBERG & J. ADAMS, *THE BLACK HOMELANDS OF SOUTH AFRICA: THE POLITICAL DEVELOPMENT OF BOPHUTHATSWANA AND KWAZULU* (1977).

23. I. BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW*, 496-503, 575-81 (2d ed. 1973); Case Concerning the Barcelona Traction, Light and Power Co., [1970] I.C.J. at 4; U.N. Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, as reproduced in 9 INT'L LEGAL MATERIALS 1293-94, 1296-97; cf. McDougal, Lasswell & Chen, *The Protection of Respect and Human Rights: Freedom of Choice and World Public Order*, 24 AM. U.L. REV. 919, 1002-03 (1975). See generally McDougal, Lasswell & Reisman, *Theories about International Law: Prologue to a Configurative Jurisprudence*, 8 VA. J. INT'L L. 188 (1968); McDougal & Reisman, *Rhodesia and the United Nations: The Lawfulness of International Concern*, 62 AM. J. INT'L L. 1-5 (1968).

24. Emerson, *Self-Determination*, 65 AM. J. INT'L L. 459 (1971). See also Paust, *A Survey of Possible Legal Responses to International Terrorism: Prevention, Punishment and Cooperative Action*, 5 GA. J. INT'L & COMP. L. 431, 460-62 (1975) and authorities cited therein [hereinafter cited as Paust].

legal expectations mandating the end of colonialism, there would seem to be no barrier, with proper precision, to formulating such a legal claim in a context arguably non-colonial. Indeed, Ved Nanda has reminded us of the increasing need to do so as one strategy for preserving international peace and security.²⁵

The principle of self-determination, *jus cogens* or not, has existed for some time in uneasy proximity to the principle of respect for territorial integrity and national unity, especially in that both concepts were clearly stated in the 1960 United Nations Declaration on the Granting of Independence to Colonial Countries and Peoples.²⁶ The central question thereby raised is whether a right to self-determination can be realized in an arguably non-colonial situation with an appropriate resolution of the problem of territorial integrity.²⁷ The question calls for further clarification of South Africa's objectives and of expectations connected with its bantustan policy.

There has always been a strange self-determination argument buried in the white South African rationalization of apartheid. Expressed in terms of desirability to the peoples themselves (including whites) of maintaining their own separate cultures in their own communities, it posits the preference of living in a national community structured as a matter of law to achieve separation. Recently this rationale was publicly refined by the Vorster regime to deny that the aim of apartheid was racial discrimination.²⁸ In light of the stark history of repression of black Africans in South Africa, this denial may legitimately be mistrusted. The South African rationale does not speak to the willingness of black South Africans to be designated as separate "nations" and "protected," save to postulate it.²⁹ The rationale speaks rather of the general aim of whites to prepare these various peoples to cope with a "civilization" in which they are perceived as not yet capable of functioning satisfactorily. Concomitantly, whites are considered a single group regardless of

25. See generally Nanda, *Self Determination in International Law*, 66 AM. J. INT'L L. 321, 322 (1972) [hereinafter cited as Nanda].

26. G.A. Res. 1514, 15 U.N. GAOR, Supp. (No. 16) 66, U.N. Doc. A/4684 (1960). Nanda, *supra* note 25, at 326. Practice in both the United Nations and the Organization of African Unity shows that both organizations have had great difficulty in supporting the principle of self-determination when the territorial integrity of their member states has been involved. *Id.* at 326-27.

27. Cf. Nanda, *supra* note 25, at 336 and PAUST & BLAUSTEIN, *WAR CRIMES JURISDICTION AND DUE PROCESS*, 10 n. 25, 22-23, 42-44 (1974) and authorities cited therein [hereinafter cited as PAUST & BLAUSTEIN].

28. 11 U.N. MONTHLY CHRONICLE, no. 10, at 21 (1974).

29. The recent South African protests clearly undermine this postulate insofar as it implies African agreement.

their origins.³⁰ In this sense, the bantustan policy is but the logical territorial extension of apartheid as both a general policy and a way of life for whites as a single preferred tribe over blacks as an inferior collection of tribes.

Given the force of legal expectations against colonialism and thereby in support of a right of self-determination, and given the intensity of the international struggle against apartheid, the claim that apartheid as a government policy violates international law by perpetuating colonial domination was perhaps inevitable. The South Africans vehemently deny this claim and apparently point to the increased "autonomy" of the homelands territories as well as the "independence" of the Transkei. Their denial fails to be convincing on the facts, given the similarity of present and proposed white-African relationships to colonial structures.³¹ The logic for South African vehemence is clear enough. If apartheid, and specifically the bantustan policy, is adjudged to be one species of colonialism, anti-apartheid forces may invoke a principle of international law that binds South Africa. This principle would comprise a legal prescription against apartheid clearly not limited by the residual restrictions of article 2(7) of the United Nations Charter regarding matters within South Africa's domestic jurisdiction.³²

Claims have recently been made from several sources that South African apartheid *cannot* be equated with colonialism as a matter of international law.³³ During the debates on a recent General Assembly resolution condemning the bantustan policy, representatives of the Benelux countries, in explaining their governments' abstentions, said that

the three delegations were opposed to the general tendency in the resolution to equate the position of the black

30. Carter, *supra* note 4, at 4; G. CARTER, *SOUTH AFRICA'S TRANSKEI* 37, 53-54 (1967). Apparently the very notion of a united African nation poses a threat to the white nation-state. United Nations Unit on Apartheid, Notes and Documents, U.N. Doc. 36/75 at 1-6 (1974); *id.*, U.N. Doc. 11/75 at 1, 7-10 (1975).

31. See Carter, *supra* note 4 for her argument that the South African situation strongly resembles a pattern of colonial domination.

32. See McDougal, Lasswell & Chen, *supra* note 23, at 1006, 1008-15; and PAUST & BLAUSTEIN, *supra* note 27.

33. Professor Dugard has argued that a liberation movement including paramilitary action against South Africa cannot find support under international law as action in self-defense against the continuing imposition of colonialism. Dugard, *Namibia (Southwest Africa): The Court's Opinions, South Africa's Response, and Prospects for the Future*, 11 COLUM. J. TRANSNAT'L L. 14 (1972). Even if his argument is accepted at face value—and there are serious problems in doing so—it does not foreclose the further argument that the black South Africans' rights to be free of apartheid derive in part from their right in international law to self-determination as a people or collection of peoples, from which stems their right to be free of colonial and colonial-type domination.

people of South Africa with the situation of a people living under colonial rule. [They] could not acquiesce in the suggestion that the white population be equated with white overlords. That would amount to a kind of reverse discrimination.³⁴

The gravamen of that position would appear to be that whites in South Africa were lawfully (under international law) in control of that territory under the present apartheid system and that any significant change in the system would constitute illegal, or at least unjust, "reverse discrimination" against them. This position is untenable unless it is accepted, as it is not here, that claims of South African whites founded on past and present reliance on material benefits, benefits largely made possible by their massive subjection and exploitation of Africans, are superior as a matter of either law or justice to claims by black Africans for an end to the brutality of apartheid institutions, policies, and practices.

Despite the position that apartheid cannot be equated with colonialism, neither apartheid nor the bantustan policy can be justified under a self-determination rationale.³⁵ Apartheid and the bantustan policy may violate the right to self-determination of black South Africans even if apartheid is not a variety of colonialism. The maintenance and consolidation of apartheid is no longer barred, as a matter of law, from authoritative international inquiry by article 2(7) of the United Nations Charter. The multitude of resolutions and declarations by the General Assembly condemning both South African apartheid-related strategies and apartheid *per se*, as well as similar statements by the Security Council, are authoritative under the Charter.³⁶ Moreover, apartheid can now be said with confidence to violate a general principle of international law against systematic racial discrimination.³⁷

Accordingly, the important question becomes whether apartheid violates any legal principle *other* than that mandating an end to racial discrimination, specifically, the right to self-determination of black South Africans. Does a group lose all rights to self-determination in international law if not involved in a struggle to-

34. 12 U.N. MONTHLY CHRONICLE, no. 11, at 25 (1974).

35. See notes 23-27 *supra*.

36. R. HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS 76-77* (1963) [hereinafter cited as HIGGINS]; McDougal, Lasswell & Chen, *supra* note 23, at 1006-34.

37. McDougal, Lasswell, & Chen, *supra* note 23, at 1039; South West Africa Cases, Second Phase, Judgment, [1966] I.C.J. 287-93 (*dissent*, Tanaka); Advisory Opinion on Namibia, *supra* note 1, at 57 ¶ 131.

wards independence, or alternatively, if not heading a government? Though opinion is mixed on this point, there seems to be agreement that all such rights are not lost and that a residuum, of undetermined scope, is still retained by a group encapsulated within a nation-state. At the least, these residual rights would necessarily include the right to be free as a group from undue coercion specifically directed at them as a group, especially if that coercion is used to violate any of their other rights under international law, such as freedom from systematic racial discrimination.³⁸

Such coercion is applied by the white South African government under its apartheid policy to all black Africans.³⁹ The bantustan policy is an integral element of apartheid. The coercion of apartheid weighs on those who would be residing in and governing the bantustans under Pretoria's fully implemented policy as well as on Africans who would continue to reside in South African urban ghettos adjacent to white areas. The intensity of such coercion is consistently high, as confirmed by international findings concerning both "routine" apartheid and the forcible resettlement measures of the South African government under the bantustan policy. It is sufficiently high, in fact, to conclude, as a matter of law, that all political and most personal options are denied systematically under apartheid to black Africans as an identifiable group of people, whether such denial is labeled a form of colonialism or not.⁴⁰ The impermissibility under law of the process of coercion which is

38. This point is well illustrated by the legal status of American Indians in the United States. While they have so far failed to assert separate standing before international bodies, there are indications of some Congressional recognition of their relationships with foreign states. Their status in international law has been likened to that of semi-sovereign states. McGimpsey, *Indian Tribal Sovereignty*, 2 STUDIES IN AMERICAN INDIAN LAW 1, 4-16 (R. Johnson ed. June 1971). Their sovereignty retains some practical force within the United States, e.g., in their exercise of rights to adopt and run a government of their own choice, to determine their own membership, and to administer justice through their own courts under codes enacted on their own. In short, they retain all their original sovereignty *except* that withheld by Congress. A. BROPHY & S. ABERLE, *THE INDIAN* 33-34 (1966). Court decisions on these issues, however, have produced a variety of holdings, leading the relationship between the U.S. government and the tribes to be compared to a wardship with a consequent duty of "protection." When a governmental definition of a part of this duty conflicts with internal tribal sovereignty, the government generally prevails. See McGimpsey, *supra* at 17-18.

A core of rights going to the "peoplehood" of the Indians would thereby seem to exist vis-a-vis the U.S. government, and these rights appear to rest on expectations under international law and under that of the United States that this government may not coercively abrogate all vestiges of the semi-sovereign status of the Indians, a group not heading towards revolution or secession. See also Paust, *supra* note 24; McDougal, Lasswell & Chen, *supra* note 23.

39. See E. ROUX, *TIME LONGER THAN ROPE* 421-30 (2d ed. 1964); L. MARGUARD, *THE PEOPLES AND POLICIES OF SOUTH AFRICA* (4th ed. 1969); B. BUNTING, *THE RISE OF THE SOUTH AFRICAN REICH* 194 *et seq.* (1969); McDougal, Lasswell, & Chen, *supra* note 23, at 1002-03.

40. McDougal, Lasswell & Chen, *id.*; Carter, *supra* note 4.

apartheid would seem clear.⁴¹ The bantustan policy, as an integral element of apartheid, thereby violates whatever content the right to self-determination retains for an encapsulated group.

IV. THE UNITED NATIONS AND THE BANTUSTAN PROBLEM

During recent years, the United Nations General Assembly has spoken several times to the problem of bantustans. Four Assembly resolutions are of particular pertinence here. The first is the Declaration on the Granting of Independence to Colonial Countries and Peoples of 1960.⁴² It states a general principle of international law mandating an end to colonialism. It emerged with legal authority because of the practice of the international community before and after its enactment in conjunction with general international legal expectations.⁴³

On November 29, 1971, the General Assembly adopted Resolution 2775 E (XXVI) on the Establishment of Bantustans, by 110 votes to two with two abstentions.⁴⁴ This Resolution stated that the Bantustan policy was in pursuance of apartheid, and it condemned the policy as violating the right to self-determination and as prejudicial to territorial integrity.⁴⁵ On November 28, 1975, the General

41. See notes 122-38 and accompanying text *infra*.

42. See note 26 *supra*.

43. Bleicher, *The Legal Significance of Re-citation of General Assembly Resolutions*, 63 AM. J. INT'L L. 444, 470-74 (1969) [hereinafter cited as Bleicher].

44. G.A. Res. 2775, 26 U.N. GAOR, Supp. (No. 29) 39, U.N. Doc. A/8429 (1971).

45. *Noting* that the Government of South Africa, while treating the white inhabitants of that country, irrespective of their national origins, as constituting one nation, seeks artificially to divide the African people into "nations" according to their tribal origins and justifies [Bantustans] on that basis,

Recognizing that the real purpose of the establishment of Bantustans is to divide the Africans, setting one tribe against the other with a view to weakening the African front in its struggle for its inalienable and just rights,

Noting further that under [previous Assembly resolutions] crimes against humanity are committed when enslavement, deportation and other inhuman acts are enforced against any civilian population on political, racial or religious grounds,

Noting that many African communities have been uprooted and that large numbers of Africans have been forcibly removed from their homes in pursuance of the policies of *apartheid*,

Considering that the establishment of Bantustans and other measures adopted by the Government of South Africa in pursuance of *apartheid* are designed to consolidate and perpetuate domination by a white minority and the dispossession and exploitation of the African and other non-white people of South Africa, as well as of Namibia, [the General Assembly]

1. *Again condemns* the establishment by the Government of South Africa of Bantu homelands (Bantustans) and the forcible removal of the African people of South Africa and Namibia to those areas as a violation of their inalienable rights contrary to the principle of self-determination and prejudicial to the territorial integrity of the country and unity of their peoples;

Assembly adopted six resolutions concerning the apartheid policies of the South African government, all on the recommendation of the Special Political Committee on Apartheid. Included among them was Resolution 3411 D (XXX),⁴⁶ which again condemned the bantustan policy as furthering apartheid and again affirmed the right to self-determination and the principle of territorial integrity. On October 26, 1976, the General Assembly in Resolution 31/6,⁴⁷ by a

2. *Declares* that the United Nations will continue to encourage and promote a solution to the situation in South Africa through the full application of human rights and fundamental freedoms, including political rights, to all inhabitants of the territory of South Africa as a whole, regardless of race, colour or creed;

Id.

The third quoted preambular paragraph attracted the objections of several countries including the United States and Great Britain, especially in its reference to "crimes against humanity." Their position was that apartheid was not a crime equatable with crimes against humanity as defined by the Nuremberg Tribunal. However, that paragraph refers for the most part not to apartheid as a system but to specific actions by South Africa in implementing it—such as enslavement and deportation—especially as they relate to the bantustan policy. To the extent that precedents can be found in Hitler's actions, at least some South African actions, such as mass deportations of Africans to the "homelands," are eligible for designation as "crimes against humanity." Secondly, the United States government has generally had difficulty, as a matter of policy, in accepting the fact that black people, and especially Africans, see racial discrimination by whites against blacks as the primary evil to be eliminated. It has instead viewed that goal as subordinate to that of eliminating "greater" evils, *e.g.*, the advent of Communism, the breakdown of public order, or the probability of Hitler-type mass slaughter. This position seems just another instance of the same, and indeed, issues of human rights in Southern Africa have done the most to spotlight this communications barrier in international organizational arenas. McDougal, Lasswell & Chen, *supra* note 23, at 997-1039. Further indication of this problem is found in the divergent reactions to the U.N. Convention on Apartheid as a Crime Against Humanity. *Id.*

46. THE GENERAL ASSEMBLY,

Recalling its resolution 2775 E (XXVI) of 29 November 1971 and subsequent resolutions by which it condemned the establishment of bantustans by the racist regime of South Africa,

Taking note of the maneuvers of the racist regime of South Africa to proceed with the establishment of bantustans in the Transkei and other regions,

Reaffirming the legitimacy of the struggle of the South African people, under the leadership of their national liberation movements, by all means possible, for the total eradication of *apartheid* and for the exercise of their right to self-determination,

1. *Again condemns* the establishment of bantustans as designed to consolidate the inhuman policies of *apartheid*, to perpetuate white minority domination and dispossess the African people of South Africa of their inalienable rights in their country;

2. *Reaffirms* that the establishment of bantustans is a measure essentially designed to destroy the territorial integrity of the country in violation of the principles enshrined in the Charter of the United Nations;

3. *Calls upon* all Governments and organizations not to deal with any institutions or authorities of the bantustans or to accord any form of recognition to them.

G.A. Res. 3411 (D), 30 U.N. GAOR, Supp. (No. 34) 35, U.N. Doc. A/10034 (1975).

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

vote of 134 to zero, the United States alone abstaining,⁴⁸ specifically condemned the change in status of the Transkei. Calling it a "sham independence," the Resolution repeated paragraph 1 of Resolution 3411 D, rejected and declared invalid the declaration of independence of the Transkei, and called upon all governments to deny recognition to it and to take effective measures to prohibit dealings with it by their institutions.⁴⁹ These four resolutions, read together, constitute a General Assembly prescription on the illegality of the bantustan policy, as well as an authoritative interpretation of the meaning of self-determination of peoples under the United Nations Charter.⁵⁰

48. See also N.Y. Times, Oct. 27, 1976, at 1, col. 5. The basis of the United States abstention rested with paragraphs 3 and 4. Speaking in the Assembly, Mr. Hess stated: The United States delegation was prepared to support a resolution calling on all States not to recognize the Transkei and not to have official contacts with the Transkei Government. We regret that the present draft, in our opinion, contains some wording that goes well beyond this and with which we cannot agree. Although, with respect to operative paragraph 3, for example, we do not intend to have official contacts with the Transkei government or to establish any type of relationship with the Transkei, we do reserve the right to act as necessary to protect the interests and the rights of our citizens.

More broadly, we believe that it would be unwise to preclude contacts with any elements of the South African population who strive for social justice and racial equality, including those who have been relegated to the bantustans.

We also cannot support operative paragraph 4, which would have the effect of calling on United Nations Members to impose a type of sanction on private relationships of any kind with people in the so-called homelands. This is a matter for the Security Council to decide.

Indeed, this resolution, in our opinion, appears to contain some very loose language that forces a separation between the mind and the heart. Our heart is firmly against South African *apartheid* and its homelands policy. Our heart will continue in this deeply held belief, but much of the non-essential language forces our mind to boggle at some of the wording of this resolution.

31 U.N. GAOR (42d plen. mtg.) 726, U.N. Doc. A/31/PU.42 (1976).

49. The General Assembly, . . .

3. *Calls 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;

4. *Requests* all States to take effective measures to prohibit all individuals, corporations and other institutions under their jurisdiction from having any dealings with the so-called independent Transkei or other bantustans.

G.A. Res. 31/6, *supra* note 47.

50. In this connection, those Assembly resolutions can be interpreted as holding that the bantustan policy is a policy to consolidate apartheid, and further, that the Assembly's competence extends to the underlying "domestic" decision of the South African government to treat whites as "one nation" while dividing Africans on the basis of tribal origin.

In addition, these resolutions may declare impermissible the South African objective to cause splits of opinion among African states and others in the international community working to overturn apartheid. Such political maneuvering, classically consigned to the *laissez-faire* discretion of national governments, leaving the burden and costs of counter-maneuvering on those who may be harmed thereby, to the extent that it seeks to weaken inclusive community policies against systematic state-sponsored racial discrimination, must now be authoritatively regulated by the international community. *Laissez-faire* no longer

A. *The General Assembly Resolutions and Territorial Integrity*

A textual examination of the operative paragraphs of Resolutions 2775 E and 3411 D indicates that the Assembly considered the bantustan policy to be a *per se* violation of the right of the *single* African people in South Africa to self-determination, in substantial part because it is a "measure essentially designed to destroy the territorial integrity of the Country." The resolution on the Transkei is in accord. The right of a people to territorial integrity is apparently, under these Resolutions, an integral element of the right to self-determination. More precisely, to the extent that the general right to self-determination has come to be interpreted as that of a given people under appropriate circumstances to progress towards forming a national state, without coercive colonial or outside interference, the same people, under this view, would have the right to take control of a national patrimony the territorial integrity of which has been preserved.

The Declaration on the Granting of Independence to Colonial Countries and Peoples, though ambiguous, appears to support this interpretation. Paragraphs 4 and 6 state:

4. All armed action or repressive measures of all kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence, and the integrity of their national territory shall be respected;
-
6. Any attempt at the partial or total disruption of the national unity or territorial integrity of a country is incompatible with the Purposes and Principles of the Charter of the United Nations⁵¹

Arguably, paragraph 6 may refer to the time subsequent to independence as a sovereign state, but paragraph 4 clearly refers to the preindependence period. The two provisions read together imply meanings for "territorial integrity" with reference to crucially differ-

fixes the legitimacy of either the strategies or outcomes of political maneuvering with *that* objective. This doctrine would seem to advance the international community towards the effective maintenance throughout of a public order which upholds the value of respect, as well as values of power and wealth. See U.N. Security Council Res. 402, 22 Dec. 1976, endorsing G.A. Res. 31/6, and expressing grave concern at South African actions to coerce Lesotho into recognizing the Transkei. Cf. Text of Statement by U.N. Secretary-General Regarding Transkei, U.N. Doc. SG/SM/2382, 25 Oct. 1976. G.A. Res. 3411, *supra* note 46, at para. 2.

51. G.A. Res. 1514, *supra* note 26, at para. 4 & 6.

ent timespans in the life of a projected national state. On this basis, what content does "territorial integrity" have as the substance of a legal right?

Obviously, difficulty abounds in asserting that "territorial integrity" provides an accurate description of a territory as real estate. The territory of a state or possession remains "integral" to the extent that its boundaries are not contested as a matter of law and to the extent that no foreign invader or domestic insurgent has divested the government of occupation or control of part of it.⁵² Should the government choose to cede to another state a portion of the national territory by a treaty valid in both international law and under the respective laws of the two states, such cession is authoritative. The national territory which remains retains its "territorial integrity," as does the newly-augmented territory of the second state.

Rather, "territorial integrity" in the instant case would seem intended to communicate authoritative expectations of the international community about the behavior of the immediately preceding sovereign of the territory before its lawful and expected delivery to the people whose rights to self-determination are then in the process of being exercised. The expectation would appear to be that of a limitation on the sovereign's behavior by way of a prohibition against cession or other divestiture of its territory after a certain time before delivery, as yet unfixed. To the extent that South Africa stands in the shoes of such a sovereign and the Assembly resolutions are authoritative,⁵³ they would seem to state principles already in effect, in light of paragraph 6 of the Declaration. Given that South Africa has already announced plans to grant "independence" to certain "homelands" from territory currently its own, the prohibition may run against South African legal process operating to assign a particular territory to each bantustan and, insofar as a declaration of independence to a bantustan carries as a matter of law the grant of such territory, against such declarations.

It is obvious that the Declaration as read with 2775 E, 3411 D, and the Transkei resolution is not meant, and could not in interna-

52. This is necessarily implied by the following from *The Schooner Exchange v. McFadden*, 7 Cranch 116, 136 (1812):

The jurisdiction of the Nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.

See also, 1 D. O'CONNELL, *INTERNATIONAL LAW* 507 (1965).

53. See notes 65-73 and accompanying text *infra*.

tional law be interpreted,⁵⁴ to bar all cessions of land from one sovereign to another by an otherwise valid treaty or legal act. The question, accordingly, goes to criteria for assessing the behavior of the sovereign and determining under what circumstances an otherwise lawful transfer of territory would violate the right of self-determination and territorial integrity of the people approaching independence or otherwise encapsulated in the national state. In order to make an informed decision on this issue, any examination must include a contextual analysis of the sovereign, the particular people involved, the recent and sometimes ancient history of the territory under consideration, and relevant policies and trends of decision in the international community. For guidance in such a contextual inquiry, reference could be made to concepts used in ascertaining whether a trustee or estate administrator met his fiduciary responsibility to act in such a way as to prevent the wasting of the assets of a trust or estate.⁵⁵ The reference in any case would be to community expectations with respect to the preservation of major assets for the use of community-approved beneficiaries.⁵⁶

It is suggested that "territorial integrity" defined as expectations *within* the right to self-determination, as here for black South

54. A. McNAIR, *THE LAW OF TREATIES* 256-59, 655-57 (1961); Bleicher, *supra* note 43, at 445-48.

55. In this respect, South Africa as the sovereign would be seen as holding the territory "in trust" pending the ascent to power of a black African government as the lawful beneficiary. To the extent that all transfers of territory are not prohibited, a more precise analogy might be made to the prohibition against divestiture of part of the territory "in contemplation of self-determination," much as the common law principle goes to a similar prohibition of transfers "in contemplation of death." C. LOWNDES, R. KRAMER, J. MCCORD, *FEDERAL ESTATE AND GIFT TAXES* 68-80 (3d ed. 1974).

56. One issue is whether the transfer away of a maximum of 13% of the national territory, and per bantustan considerably less than that, could constitute such "waste" as to rationalize voiding the entire series of transfers. More troublesome is the designation of white South Africa as the "trustee" holding the entire territory for the "benefit" of black South Africans. The *Southwest Africa Cases*, especially as read in the context of the early political maneuvering between South Africa and the United Nations, held, *inter alia*, that any agreement by South Africa to place Southwest Africa under the Chapter IX Trusteeship arrangements under the Charter, had to be an *express* agreement and could not be implied either from historic factors or any analogizing forward from the League-Mandate-Mandatory relationship through a doctrine of "necessary intendment." *International Status of South-West Africa, Advisory Opinion*, [1950] I.C.J. 128, 129-45 (Majority Opinion). This holding would seem to bar any implied or constructive trust analogy operating between the present South African government and the disenfranchised black Africans. Furthermore, if any attempt was made to identify specific agreements in the situation between that government and black South Africans to serve a function similar to that of the Mandate, one is reduced to searching for a variant of Rousseau's "social compact" and finding instead only a maze of apartheid regulations and anti-communist legislation oppressing blacks. MATHEWS, *supra* note 5, at 54-115, 240-52. Finally, if a "trusteeship" claim is made on some basis divorced from the U.N. Trusteeship experience, the burden on its proponents to formulate it consistent with present or projected legal expectations would seem almost insuperable.

Africans, is a legal conclusion which advances other major community policies and is therefore to be preferred over an interpretation which would *separate* such expectations from self-determination. Moreover, this conclusion in the instant case does not require a legal definition of apartheid as a variety of colonialism. Two trends of legal decision over recent years support this conclusion: the emergence of self-determination as a principle of law,⁵⁷ and the decline of article 2(7) as a barrier against authoritative inquiry into South African apartheid.⁵⁸

Although questions of the legality of coups d'état and of secession of territory often arise concurrently,⁵⁹ the prospect of "independent" bantustans presents no question of either a coup or a secession as those terms are commonly understood, since the South African government fully consents to the partition. But the prospect does raise similar issues of whose right it is to govern the entire South African territory and of the appropriateness of legal criteria recommended by the South African government by which the existence of such a right to govern should be confirmed as to part of the territory. Concomitantly, these same two issues are raised by the invocation by the General Assembly of a right to "territorial integrity" as a key element of, and not in opposition to, the right to self-determination.

If for no other reason, the issue of secession arises in this inquiry because a regime, faction, or group attempting to secede frequently grounds its right to do so on some version of the doctrine of self-determination. Territorial integrity, one suspects, is therefore pertinent because, as Rupert Emerson has trenchantly noted, the question of self-determination as a legal right generally must be resolved as a right to control, or at least substantively to participate in governing, certain territory.⁶⁰ In the African context especially, the issue has long been one of appropriate criteria under which the balkanizing logic of self-determination as a principle, especially as applied to recognized sovereign states, can be squared with the need and expectations of minimum territorial viability.

It might well be true that "territorial integrity" as it relates to expectations of national viability cannot be applied as a legal prin-

57. BROWNIE, *supra* note 23, at 575-78. See also *supra* notes 24, 25 & 27.

58. See note 32 and accompanying text *supra*.

59. T. O. ELIAS, *AFRICA AND THE DEVELOPMENT OF INTERNATIONAL LAW* 107-08 (1972) [hereinafter cited as ELIAS].

60. As this entire inquiry shows, this is the case whether the right to control that territory is found to lie within the expectations of self-determination or contrary to expectations of self-determination of a particular people and in favor of an opposing government. See Emerson, *supra* note 24 at 463-72; Paust, *supra* note 24.

ciple by an international decision-maker without a designation of legitimate government consonant with major community policies. This would seem valid for South Africa, especially in light of legal expectations of majority rule as a juridical basis for national governance.⁶¹ Concomitant to its interpretation of "territorial integrity" as a right of black South Africans, the Assembly has resolved⁶² to give explicit support to liberation groups working for the overthrow of the government, and has gone so far as to support through a recent resolution efforts by black South Africans to seize power by "all possible means."⁶³

In making this choice of legitimate government, the Assembly was implementing the *jus cogens* right of self-determination, a right the validity and applicability of which bear no discernible relationship to the level of economic well-being of a particular territory. Accordingly, the legal deficiencies of the Transkei's change of status cannot be cured by arguments that its wealth and land resources compare favorably with those of other African countries. The case of Katanga indicates that the legality of such actions is not to be determined by the economic viability of the breakaway territory but by an authoritative assessment of the legitimacy, under international community policies, of the entire process of secession.⁶⁴

B. *The Legal Authority of Assembly Resolutions 2775 E and 3411 D*

It is a commonplace that, since Resolutions 2775 E and 3411 D do not relate to financial or budgetary matters under article 17 of the Charter,⁶⁵ they do not create, *qua* Assembly resolution without more, a legal obligation on member states. On the other hand, such a conclusion does not fully describe the law-formation competence

61. See generally, Paust, *Human Rights and the Ninth Amendment: A New Form of Guarantee*, 60 CORNELL L. REV. 231, 266 (1974) [hereinafter cited as Paust, *Human Rights*]; McDougal & Reisman, *supra* note 23, at 17-18; ELIAS, *supra* note 59, at 35-45, 185-89.

62. G.A. Res. 3411(D), *supra* note 46.

63. Farah, *supra* note 6, at 72-73; G.A. Res. 31/6, *supra* note 47.

64. See C. O'BRIEN, *TO KATANGA AND BACK* 86-87, 58-59 (1962); E. LEFEVER, *CRISIS IN THE CONGO* 12-14, 18, 21, 30, 42-43 (1965).

65.

Article 17

1. The General Assembly shall consider and approve the budget of the Organization.

2. The expenses of the Organization shall be borne by the Members as apportioned by the General Assembly.

3. The General Assembly shall consider and approve any financial and budgetary arrangements with specialized agencies referred to in Article 57 and shall examine the administrative budgets of such specialized agencies with a view to making recommendations to the agencies concerned.

of the Assembly in this and similar situations.⁶⁶ Accordingly, an inquiry as to the legal authority of such resolutions requires their examination in the context of other legal expectations in the international community.

Foremost among such expectations is that the Declaration against colonialism is now generally considered to have evolved into a general principle of international law proscribing colonialism. This conclusion has been reached by several avenues. One is that the Declaration reflects collected state action plus the states' general intent to act under law in moving to grant colonial peoples' independence, from which emerges a principle of customary international law binding on all states.⁶⁷ A second avenue is that the Declaration represents an authoritative interpretation and implementing measure by the Assembly of article 1(2) of the Charter, which states the principle of self-determination of peoples, and is thereby legally binding on member states as an interpretation of a previously ratified treaty.⁶⁸ A third rationale, related to the first, is based on the fact that the Declaration is one of the most frequently cited and re-cited resolutions in United Nations history. As such, its substance progressively emerges as a principle of customary international law because of constant recitation in the Assembly forum and elsewhere, and there is thus sufficient evidence of the requisite *opinio juris* of the state actors of the world community.⁶⁹

Even absent the legal expectations and obligations that the Declaration creates, Resolutions 2775 E, 3411 D and the resolution on the Transkei command great respect by member states as a matter of law under the Charter.⁷⁰ These legal expectations would seem to stand, notwithstanding the current mini-furor in the United States about the "self-serving" and "irresponsible" nature of many Assembly resolutions adopted by a substantial majority of third-world and fourth-world countries.⁷¹

66. See HIGGINS, *supra* note 36, at 2-7, 70-71, 118-22; McDougal & Reisman, *supra* note 23; ELIAS, *supra* note 59, at 71-76.

67. Bleicher, *supra* note 43, at 474-75; A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 43-44 (1971).

68. Here, the Assembly is serving basically a judicial function, but it is settled that its doing so is quite *intra vires*. Advisory Opinion on Reparation for Injuries Suffered in the Service of the United Nations, [1949] I.C.J. 178-79; Advisory Opinion on Certain Expenses of the United Nations (Article 17, para. 2, of the Charter), [1962] I.C.J. 163-70; HIGGINS, *supra* note 36, at 304; W. FRIEDMANN, O. LISSITZYN & R. PUGH, INTERNATIONAL LAW 233 (1969) [hereinafter cited as FRIEDMANN, LISSITZYN & PUGH].

69. Bleicher, *supra* note 43, at 477-78.

70. O. ASAMOAH, THE LEGAL SIGNIFICANCE OF THE DECLARATIONS OF THE GENERAL ASSEMBLY OF THE UNITED NATIONS 227-34 (1966); HIGGINS, *supra* note 36, at 4-7; D'AMATO, *supra* note 67, at 3-4, 43-44, 50.

71. *Hearings before the House Subcomm. on International Organizations of the House*

If the Declaration is used as the functional basis for these expectations, there appears to be no reason why the three resolutions cannot also be defined as an authoritative interpretation of article 1(2) of the Charter in that they implement, in concrete circumstances, key provisions of the Declaration,⁷² a previous authoritative interpretation of article 1(2). To the extent that neither a colonial situation nor South African apartheid is shielded as a matter of law from international inquiry by article 2(7),⁷³ the exercise of judicial authority by the Assembly in interpreting the meaning of self-determination as a legal right in the bantustan context would not seem to be barred by that article or any other Charter provision.

Accordingly, a strong argument can be made that these three resolutions, in declaring that the establishment of bantustans by South Africa would constitute a violation of the rights of self-determination of the African people of South Africa, are binding on member states as an authoritative interpretation of article 1(2) of the Charter and of the Declaration. Their prohibition under the Charter against the implementation of the bantustan policy by the granting of "independence" to any of the bantustans would therefore be binding on the South African government and would also have legal consequences for all other member states.

V. THE CLAIM TO CHANGE THE INTERNATIONAL STATUS OF THE TRANSKEI

In a situation where events are rapidly unfolding and documented information is necessarily incomplete, the risk in making any analytical inquiry is high. However, enough is known or substantively indicated to inquire into the nature of the claim to change the international status of the Transkei and its compatibility with international community policies.

The competing expectations which revolve around this general claim are the claim to permissible independence and the claim to continuing and impermissible control. The dispute as to which of these claims will prevail relative to the Transkei, and implicitly for any of the other bantustans arriving at the same point, is raging in

Comm. on International Relations, 94th Cong., 2d Sess. (1976); *Hearings before the House. Subcomm. on International Organizations of the Comm. on Foreign Affairs*, 94th Cong., 1st Sess. (1975). Stone, *Palestinian Resolution: Zenith or Nadir of the General Assembly*, 8 N.Y.U. J. INT'L L. & POL. 1-18 (1975); N.Y. Times, Dec. 13, 1974, at 44, col. 1; *id.*, July 16, 1975, at 36, col. 1; *id.*, Dec. 22, 1975, at 28, col. 1.

72. Cf. FRIEDMANN, LISSITZYN & PUGH, *supra* note 68.

73. See note 32 and accompanying text *supra*.

the international community,⁷⁴ in South Africa,⁷⁵ and in the Transkei.⁷⁶ Particularly, arguments about permissibility in this context go quickly to the question of the competence of South Africa as a matter of law and policy to grant independence.

In exploring these competing claims, there is a distinction to be drawn between South African legislative enactments relative to the Transkei's change of status and the system of accompanying agreements concluded between the two governments subsequent to or simultaneously with the change. The sequences of authoritative decisions made to realize this claimed South African relinquishment of sovereignty may be seen as a process of decision.⁷⁷ Accordingly, and in conjunction with the rest of this inquiry, we may inquire into the objectives and strategies of participants and the outcome and effects of the process. The general question of whether the outcome is compatible with South Africa's competence in international law to implement its objectives for the Transkei follows.

The provisions of South African legislation authorizing the Transkei's change of status, the Status of the Transkei Act of October 26, 1976,⁷⁸ [the Act] are instructive. Clause 1 declared that South Africa relinquished and transferred her authority over certain designated territory to the Transkei and that the Transkei was to be a "sovereign and independent state."⁷⁹ The territorial government of the Transkei was simultaneously empowered to pass its own constitution after relinquishment, demonstrating that the South African Parliament conveyed full sovereignty to the new state.⁸⁰ Such a constitution was indeed passed by the Legislative Assembly⁸¹ and is one focus of the present discussion.

The issue of Transkei citizenship attracted international attention. An immediate question is whether some 1.3 million Xhosa born and resident in South Africa, but declared to be citizens of the Transkei as well as of South Africa by the South African legislation prior to October 26, 1976, are now in fact and law citizens of the

74. The Times (London), Feb. 17, 1976, at 7, col. 4.

75. Johannesburg Star, Feb. 2, 1976.

76. As indicated by the role of the parliamentary opposition in South African Parliamentary debates on Transkei independence. See REPUBLIC OF SOUTH AFRICA, DEBATES OF THE HOUSE OF ASSEMBLY (HANSARD), 15th Parl., 3rd Sess., vol. 63, cols. 8312-8694 (1976) [hereinafter cited as HANSARD].

77. McDougal, Lasswell & Reisman, *Theories About International Law: Prologue to a Configurative Jurisprudence*, 8 VA. J. INT'L L. 188, 200-04 (1968).

78. HANSARD, *supra* note 76, at cols. 8312-19; *Status of the Transkei Act*, 15 INT'L LEGAL MATERIALS 1175-77 (1976) [hereinafter cited as *Status of the Transkei Act*].

79. *Status of the Transkei Act* 1(1), *supra* note 78, at 1175.

80. HANSARD, *supra* note 76, at col. 8312.

81. *Republic of the Transkei Constitution Act*, 15 INT'L LEGAL MATERIALS, 1136-74 (1976) [hereinafter cited as *Transkei Constitution Act*].

Transkei and not stateless persons. Clause 6(1) of the Act states: "Every person falling in any of the categories of person defined in Schedule B shall be a citizen of the Transkei and *shall cease to be a South African citizen.*"⁸² In the South African parliamentary debates on the Act, government speakers insisted that "only one new element" was being added to the original Transkei Constitution Act of 1963 and the Bantu Homelands Constitution Act of 1971 and that was the granting of Transkeian citizenship "on the grounds of ethnic and cultural ties."⁸³ However, an examination of the schedule B provisions⁸⁴ reveals a clear South African intent to encompass the widest possible number of persons, whose South African citizenship was abrogated. The parliamentary opposition maintained that the previous legislation amounted to the granting of dual citizenship while the present Act stripped persons of such dual status.⁸⁵

The opposition further claimed that the Act's provisions were being proposed in defiance of the unanimous wish of the Transkei

82. HANSARD, *supra* note 76, at col. 8397 (emphasis added); *Status of the Transkei Act*, Schedule B, *supra* note 78, at 1176.

83. HANSARD, *supra* note 76, at cols. 8376-77.

84. Schedule B

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 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.

Status of the Transkei Act, Schedule B, *supra* note 78, at col. 1177.

85. HANSARD, *supra* note 76, at col. 8521.

Legislative Assembly⁸⁶ and constituted blackmail by the South African government.⁸⁷ Evidently there was considerable contention within the Transkei over this question. The constitution as originally promulgated indeed provided that all Xhosa would automatically become Transkeian citizens.⁸⁸ But this provision was soon amended to make such persons only eligible to apply for registration to become citizens of the Transkei.⁸⁹ That amendment confirmed the expressed fears of the opposition that "the Government by making thousands of Xhosa residents of the Republic stateless may contravene international law,"⁹⁰ at least until the citizenship of persons put in limbo between the Act and the Transkei constitution was resolved. The Act does provide for a cabinet-level inter-government board to decide whether particular persons fall under the provisions of schedule B.⁹¹ This of course does not decide the question of whether they are Transkei citizens under Transkei law unless, under some rationale unknown here, the Act supersedes the constitution on this point. The South African government's position appears to rest on the ambiguous assertion that because of the feelings of goodwill between the peoples of the two countries, citizens of the Transkei will continue to be especially welcome as a national group in South Africa.⁹² Nonetheless, as the situation now stands,

86. *Id.* at cols. 8367-68.

87. See HANSARD, *supra* note 76, at cols. 8361-70.

88. (2) Any person, who has been found in the manner to be prescribed by or under an Act of Parliament, to be predominately Xhosa-speaking or Sotho-speaking and to be a member of or descended from or ethnically, culturally or otherwise associated with any tribe resident in a district of Transkei shall be registered as and become a citizen of Transkei.

89. Any person who has been found in the manner to be prescribed by or under an act of Parliament, to be predominately Xhosa-speaking or Sotho-speaking and to be a member of, or descended from, or ethnically, culturally or otherwise associated with, any tribe resident in a district of Transkei may apply for registration as and become a citizen of Transkei.

Transkei Constitution Act, ch. 7, cl. 58(2), *supra* note 81, at col. 1157.

90. HANSARD, *supra* note 76, at col. 8362. These points were made in support of the general Opposition claim of the damaging effects on people assigned by the government to the Transkei of losing rights in the large, industrialized state of South Africa in which they actually live and work.

91. *Status of the Transkei Act*, cl. 6(2), *supra* note 78, at col. 1176.

92. Clause 6(3) of the Act reads:

No citizen of the Transkei resident in the Republic at the commencement of this Act shall, except as regards citizenship, forfeit any existing rights, privileges or benefits by reason only of the other provisions of this Act.

Status of the Transkei Act, cl.6(3), *supra* note 78, at col. 1176. This would not seem to encompass Xhosas and others newly resident in the Transkei on October 26, 1976 but with friends, family and other roots still in South Africa, nor those who may be forced to go to South Africa in the future to find work.

thousands of Xhosa are presently stateless⁹³ until granted citizenship by other Transkei legal procedures.⁹⁴

A second question concerns the amount of control South Africa will exercise over the independent Transkei, and in this connection it is relevant to analyze the system of accompanying agreements concluded between South Africa and the Transkei before, simultaneously with, and subsequent to the latter's change in status. Clause 4 of the Act carries over as binding, conventions and agreements previously entered into by South Africa "capable of being applied to the Transkei" but provides that the Transkei may denounce them.⁹⁵ This clause is to be compared with clause 5, which provides for the continuation of agreements between the two governments in force on October 26, 1976, but does not provide for a right of denunciation by the Transkei. Rather, it specifically provides that they "shall remain in force as international treaties, conventions or agreements insofar as the parties thereto are concerned."⁹⁶ Concurrently, the Transkei constitution provides: "68: All rights and obligations under conventions, treaties or other similar agreements which were binding on the Government of the Transkei immediately prior to the commencement of this Act shall be rights and obligations of the Republic of the Transkei."⁹⁷ This language would seem to constitute a ratification of these agreements incorporated into the constitution itself, thus confirming the lack of the right of denunciation under the South African act.

93. There is, however, a question as to whether these persons mired in this particular limbo can be understood as risking statelessness as between two candidate states. In light of the conclusion of this inquiry—that the Transkei does not, as a matter of law, constitute a sovereign independent state capable of conferring citizenship—it would seem that the continuing risk they run is their statelessness from South Africa, a condition unable to be remedied by the Transkei government under present circumstances. Their ultimate relief necessarily lies with the South African government.

94. At this writing the extent to which this has been done is unknown. HANSARD, *supra* note 76, at col. 8328.

95. All treaties, conventions and agreements binding on the Republic immediately prior to the commencement of this Act and capable of being applied to the Transkei shall be binding on the Transkei, but the Government of the Transkei may denounce any such treaty, convention or agreement.

Id. at cl. 4. The right of denunciation would exist under international law in any case, were the Transkei brought to legal independence.

96. All treaties, conventions and agreements entered into between the Government of the Republic and the Government of the Transkei prior to the commencement of this Act and still in force at such commencement, shall remain in force as international treaties, conventions or agreements in so far as the parties thereto are concerned.

Id. at cl. 5(1).

97. *Transkei Constitution Act*, cl. 68, *supra* note 81, at col. 1161.

One class of these agreements deals with basic services⁹⁸ and were described by a South African government speaker as being "concluded to provide for the maintenance of the status quo in regard to the many facilities or services to which citizens have grown accustomed."⁹⁹ These agreements cover the maintenance by the South African Department of Education of certain schools in the Transkei, the generation of electricity and the mandate agreement for Escom, the maintenance of certain public roads in the Transkei, and the maintenance of private hospitals by the Cape Administration.¹⁰⁰ A second class of agreements includes those "necessitated by changed circumstances arising from the independence of the Transkei," including financial assistance, the conditions of the secondment of South African officials to the Transkei, Transkei citizenship, movement across borders, a non-aggression pact, and technical aid. Further, land will continue to be bought by the South African Bantu Trust after independence and transferred to the Transkei.¹⁰¹

This system of supplementary agreements is a focus of major concern and differing expectations for both the South African government and Transkei officials and people, as reflected in the South African parliamentary debates on the Act. In a position striking international chords, opposition members argued that these agreements established controlling arrangements far beyond the mere implementation of a consensus-based public order within the Transkei and that they were of real and pervasive constitutive significance such as to render the Transkei impermissibly controlled by and dependent on South Africa.¹⁰² These agreements apparently govern major values of power, wealth, skills transfer, and other sources of authority and influence in such a way as to leave major value allocations still remaining with South African government officials, notwithstanding the Transkei's change of status.¹⁰³ Moreover, South African government speakers joined in confirming the value significance of these agreements, not only because they main-

98. Such agreements include insurance, South African Railways and Harbours, postal and telecommunications services, supply of electricity, continuation of certain survey services and C.S.I.R. projects, Transkeian economic development, and settlement of people in the territory. It is further projected that "[s]uch services will be rendered at the expense of the departments or institutions concerned, but naturally they will employ as many Transkei citizens as possible." HANSARD, *supra* note 76, at col. 8315.

99. *Id.* at cols. 8314-17.

100. *Id.* at col. 8333.

101. *Id.* at cols. 8316-17.

102. *Id.* at cols. 8331-34.

103. *Id.*

tained a "status quo" beyond the Transkei's change of status but also because of the need for continuing interdependence between South Africa and the Transkei in the areas of labor, agriculture, and food, as well as the need for common policies to enable South Africa to supply the Transkei with "knowledge" and the "methods of production."¹⁰⁴

The South African plan evidently was to secure legislative approval for these agreements without revealing their contents. The strategy was to make ratification of the agreements by the South African government and arguably by the Transkei unnecessary by the Act's provision that the system of agreements were to be confirmed by the Act and therefore need not be discussed or ratified individually by Parliament.¹⁰⁵ As discussed above,¹⁰⁶ the Act and the Transkei constitution conjoin to provide this result in the Transkei as a matter of constitutional law.

In response, an amendment to the Act¹⁰⁷ was offered in debate requiring parliamentary approval to keep the agreements in force after Transkeian independence, so that the House could debate and approve them, and not merely give its implicit consent.¹⁰⁸ The South African Minister of Bantu Administration and Development opposed the amendment on the grounds that such agreements were "executive matters,"¹⁰⁹ that they would not be published, laid on the table, nor referred to Parliament for ratification, but that the public would "gradually get to know about them, chiefly due to personal experience."¹¹⁰ The amendment was rejected over the Opposition's dissent.¹¹¹

That the South African government so relentlessly made it a matter of policy to keep these agreements secret from its own parliament, while at the same time asserting the "independence" into which the Transkei would pass, would seem to contradict any claim

104. *Id.* at cols. 8439-42.

105. *Id.* at col. 8682. At the Committee stage of deliberations on the Act, the Chairman insisted on stopping a discussion of the details of the agreements since "they are not here" and since "we are not dealing with them."

106. See notes 95-97 and accompanying text *supra*.

107. HANSARD, *supra* note 76, at col. 8686.

108. There were at least some 48 agreements which apparently are outstanding but are not a part of the Act. *Id.* at cols. 8349-51. Evidently these included agreements which cover major financial arrangements between the Republic and the Transkei, notwithstanding the perception of an Opposition member of the inevitable need for subsidies and contributions from South Africa, and the potential problem of that government's threatening the withdrawal of such funds as a "powerful weapon." *Id.* at cols. 8511-12.

109. *Id.* at cols. 8686-87.

110. *Id.* at col. 8697.

111. *Id.* at col. 8694.

that this system of agreements is compatible with independence, especially since no reasons were adduced for secrecy. In the context of the history of the bantustan policy, such secrecy would tend to confirm the wide range of opportunities for the coercion of the Transkei that remain with the South African government.

During the Parliamentary debates there arose from the opposition unanswered and compelling assertions of a broad South African strategy to maintain governmental authority within the Transkei following its change of status.¹¹² The Act provided for the implementation of any agreement between the two governments by allowing "any department of the State . . . or any person [paid by] the State [to] perform any function outside the Republic which he would be capable of performing therein."¹¹³ In corresponding provisions, the Transkei constitution provides for the continuation in office of the officials of municipalities and especially of those in government service.¹¹⁴ These two provisions taken together leave large numbers of South African officials entrenched in the Transkei government not as advisors but as holders of official authority in established posts. These provisions further allow the establishment of what has been claimed "almost [to] constitute a State within a State," namely, private hospitals, and residential accommodations

112. *Id.* at col. 8351. For example, it was stated that an official government publication had previously noted that whites in the towns of the Transkei—as long as there are whites—will be directly governed by South Africa.

113. For the purposes of the implementation of any treaty, convention or agreement entered into at any time between the Government of the Republic and the Government of the Transkei, any department of State (including the Railways Administration, the Department of Posts and Telecommunications and a provincial administration) or any person receiving financial assistance from the State may perform any function outside the Republic which he would be capable of performing therein.

Status of the Transkei Act, cl. 5(2), *supra* note 78, at col. 1176.

114. 63 Notwithstanding anything in this Act contained every municipality and other local authority in existence in any district of Transkei at the commencement of this Act, including every regional and tribal authority, shall continue in existence and in operation until disestablished or altered in accordance with law: Provided that the President may by proclamation in the *Gazette* make such provision as he may deem necessary for the representation on municipal or other councils of citizens of Transkei and other persons who are the owners or occupiers of immovable property within the areas of such councils.

. . . .

65 (1) All persons who immediately prior to the commencement of this Act are in the service of the Government of Transkei shall become public servants of the Republic.

(2) Any person who becomes a servant of the Republic under subsection (1) or who on or after the date of commencement of this Act, is transferred from the service of any other government to the service of the Republic shall be entitled to retire from the service of the Republic at the time at which he would have been entitled to retire if he had not become a servant of the Republic.

Transkei Constitution Act, cl. 63, 65(1)-(2), *supra* note 81, at 1160.

and schools for officials, none of which are to be run for the benefit of Transkei citizens. These institutions are "part and parcel of a dependence rather than an independence."¹¹⁵

It is thus clear that the basic South African governmental objective, using intricate, supporting strategies, is to maintain substantial actual control in the Transkei beyond the date of its change in status. Such control is being exercised not only as a matter of power in the context of the history of the South African bantustan policy but as a matter of law in terms of claimed legal obligations through, at a minimum, the Act plus the interlocking provisions of a supplementary system of agreements in conjunction with concurrent provisions of the Transkei constitution.

There is even strong indication that intensely coercive strategies have operated over a period of time directly upon a class of leaders in the Transkei. After the passage of the Transkei Constitution Act of 1963, elections for the Transkei Legislative Council were held in the same year. These elections were hotly contested by supporters and opponents both of the homelands policy and of the larger question of separate development. There is evidence available that the interference of the South African government in these elections to ensure the victory of Chief Matanzima was sufficiently intense so as to preclude their being in any sense "free."¹¹⁶ This history illuminates the recent fact that persons comprising the known Transkeian opposition to Matanzima were detained, imprisoned or otherwise put out of circulation in September and October 1976, and presumably with them any source of opposition to the Transkei's change in status.¹¹⁷

The circumstances of the creation of the Transkei show how erroneous it would be to hold that an acceptance of the change in status by its executive, its constitution and its National Assembly is supported by the requisite freedom of choice to decide otherwise or the availability of other realistic options. Rather, such acceptance is entirely devoid of legal substance under long-standing principles

115. HANSARD, *supra* note 76, at col. 8376. The Act provides that the two governments may agree that South African officials will continue to exercise power and authority under South African laws that are carried over. The Transkei Constitution, cl. 54(1)(e) provides that appeals lie to South African courts. A further illustration is the proposed non-aggression pact between South Africa and the Transkei which was stated by an Opposition member to pledge non-aggression but falls short of being a mutual security pact, especially as it leaves significant questions unanswered about the use of bases, landing facilities and the contributions the Transkei will make to the defense of South Africa. *Id.* at cols. 8349-50.

116. See Carter, *supra* note 22, at 89, 112-13.

117. *Id.*

of international law governing consent as the basis of authority¹¹⁸ and of legal obligations, and under general principles of law cognizable by the international community voiding agreements (other than peace treaties) and contracts concluded under duress.¹¹⁹

It now appears to be the case that the Transkei, Bophuthatswana, and any other bantustan invoking the option of independence, are to be intertwined with the South African government by a system of agreements negotiated and ratified in maximum secrecy with all dissent suppressed or nullified. These agreements, given the instant economic and military context, and in light of past South African policies towards surrounding black-ruled states, make it highly probable that Pretoria will effectively maintain an impermissible measure of dominion into the future.¹²⁰ Thus, the situation is one of South African coercion of Africans as a matter not only of fact but of both fact and law, which in its objectives, strategies and outcomes violates major international community policies.

The white South African objective of consolidating white privilege and power by setting up bantustans which would acquire the formalistic trappings of "independence" but would as a matter of covert policy be enmeshed in a continuing coercive dependence, is not new. It was deliberately formulated in the early 1950's under the guise of separate development, and it is only coming to fruition today.¹²¹

118. See ELIAS, *supra* note 59, at 35-45, 185-89; McDougal & Reisman, *supra* note 23, at 17-18; Cf. Paust, *Human Rights*, *supra* note 61, at 252 n. 69, 255-56.

119. McDougal, Lasswell and Miller have well demonstrated that any valid interpretation of such "acceptances" must rest on an examination of the entire course of pre-outcome and post-outcome behavior. See M. McDougal, H. LASSWELL & J. MILLER, *THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER* 386-87 (1967).

120. B. BUNTING, *THE RISE OF THE SOUTH AFRICAN REICH* 425-68 (2d ed. 1969); K. GRUNDY, *CONFRONTATION AND ACCOMODATION IN SOUTHERN AFRICA* 69-82, 293-301 (1973); J. HALPERN, *SOUTH AFRICA'S HOSTAGES* 459-70 (1965); T. HAYTER, *AID AS IMPERIALISM* 150-54 (1971); P. STREENTEN, *AID TO AFRICA* 87-99 (1972).

121. It was Prime Minister Hendrik F. Verwoerd, and the Secretary for Native Affairs, Dr. W.M. Eiselen, who decided it would be possible to exploit the full political implications of the theory of separate development. As Eiselen said to me in the late 1950's: 'They will be like Basutoland, ultimately politically independent but wholly dependent on us economically.'

Carter, *supra* note 4, at 4.

And, relative to recent events,

It (the whole independence concept) was only accepted by some of the Blacks when it was made perfectly clear to them by the Government, and by the various Prime Ministers in particular, that they had no alternative. As the present Prime Minister has so often put it, either they accept separate development and independence or they stay as they are.

HANSARD, *supra* note 76, at col. 8324.

VI. THE VALIDITY OF THE CHANGE OF STATUS UNDER THE LAW OF TREATIES

Major policies of the international community are violated by the use of coercion as intense as the military and quasi-military force used by South Africa,¹²² as well as the psychological and economic modalities of its application. This coercion—both the policy and the coercion having been found as a matter of law to be integral components of apartheid¹²³—is impermissible under international law because *inter alia* it violates the rights to self-determination of black South Africans, even as an encapsulated people in an established national state.

Moreover, this continuing exercise of coercion by the South African government violates yet other major authoritative international expectations, rendering the bantustan policy impermissible on additional grounds under international law. Expectations that international agreements are to be entered into, signed, ratified or otherwise confirmed by participants who can give the consent required by international law for validating such agreements¹²⁴ raise issues which are critical to determining both the competence of South Africa to grant a change of status to the Transkei and the competence of the members of the government of that territory to accept it as a matter of law.

These expectations have found authoritative expression in articles 51 and 52 of the Vienna Convention on the Law of Treaties of 1969.¹²⁵ It is suggested here that the process of coercion applied continuously by the South African government to black South Africans, including to the people and government of Transkei, renders

122. T. O. ELIAS, *THE MODERN LAW OF TREATIES* 170-76 (1974) [hereinafter cited as ELIAS, *LAW OF TREATIES*]; PAUST & BLAUSTEIN, *supra* note 27; I. SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 95-100 (1973) [hereinafter cited as SINCLAIR]; Paust, *supra* note 24.

123. McDougal, Lasswell & Chen, *supra* note 23, at 1002-03; G.A. Res. 2775, *supra* note 44; G.A. Res. 3411, *supra* note 46.

124. I. D. O'CONNELL, *INTERNATIONAL LAW* 26 (1965).

125. ELIAS, *LAW OF TREATIES*, *supra* note 122, at 168-76; W. HOLDER & G. BRENNAN, *THE INTERNATIONAL LEGAL SYSTEM* 813-14 (1972); SINCLAIR, *supra* note 122.

Article 51

Coercion of a representative of a state

The expression of a state's consent to be bound by a treaty which has been procured by the coercion of its representative through acts or threats directed against him shall be without any legal effect.

Article 52

Coercion of a state by the threat or use of force

A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.

void *ab initio* under those articles the system of agreements projected between the two governments, because they have been deprived of the requisite autonomy and freedom to give the minimal consent necessary under international law to conclude such arrangements. Moreover, they invalidate on the same basis any transfer of sovereignty to the Transkei, especially as this includes a transfer of land to the territorial government.¹²⁶

South Africa is, generally, bound by the Vienna Convention on the Law of Treaties because that Convention is a codification of the customary and general principles of international law on the subject, including the principles here under discussion.¹²⁷ The agreements discussed in this situation do constitute "treaties" for the purposes of articles 51 and 52. International agreements both under the Convention¹²⁸ and elsewhere¹²⁹ have as a matter of law been assimilated for their legal consequences to "treaties," when such agreements are "concluded" between two "governments"; South Africa would appear to be estopped in this context from denying that such is the case. Moreover, the community policies and expectations expressed by articles 51 and 52 are equally applicable to the process of claim and acceptance by which the Transkei's change of status occurred, even were international agreements not involved.

The central issue under articles 51 and 52 is the definition of the term "force" as used therein and specifically the criteria by which an impermissible intensity of force is to be ascertained in particular situations. The issue may be otherwise stated as whether a level of coercion suffices to toll these provisions which, under article 51, is less than a threat of death or, under article 52, is less than an actual military attack or a threat of military attack. The modalities employed over time by the South African government

126. This suggestion is subject, of course, to the condition that the subsequent circumstances of the Transkei may well not amount to sufficient autonomy on its part to conclude as a matter of law that independence sufficient for constituting a sovereign state has been granted. Indeed, as the previous discussion of the projected transfer arrangements concluded, this is probably the case. But without getting to the issue of the quantum of independence required to maintain sovereignty, competence in law for either party to effect this change of status would still be lacking.

127. As Sinclair states, "The Vienna Convention on the Law of Treaties must be seen in its proper perspective, as one of the essential foundations of the codification and progressive development of international law." SINCLAIR, *supra* note 122, at 144. See Vienna Convention on the Law of Treaties, art. 43, reproduced in W. FRIEDMANN, O. LISSITZYN & R. PUGH, INTERNATIONAL LAW, CASES AND MATERIALS 75 (1972 Supp.); ELIAS, LAW OF TREATIES, *supra* note 122, at 68-69, 136-37.

128. Vienna Convention on the Law of Treaties, art. 2, reproduced in W. FRIEDMANN, O. LISSITZYN & R. PUGH, INTERNATIONAL LAW, CASES AND MATERIALS 61 (1972 Supp.).

129. McNAIR, *supra* note 54, at 3-6.

against black South Africans generally,¹³⁰ and against the people who would become "citizens" of the Transkei, including the officials of its government,¹³¹ meet the description of coercive practices under articles 51 and 52. They accord with the conclusion here that apartheid constitutes "force" as a matter of law under these provisions. Even were this not so, coercion of somewhat lesser intensity than the above, for instance sustained economic coercion in carefully defined circumstances, should still be sufficient to void any agreement concluded under its influence.¹³²

The expectations of the framers of articles 51 and 52 were in accord with the above interpretation. The question was explicitly raised by third and fourth-world states in Vienna,¹³³ and after sustained debate, concrete expectations that "force" was to be interpreted as also to refer to modalities other than physical coercion and military attack were included in the Final Act of the Conference.¹³⁴ There is no suggestion here that the above is directly binding, but clearly for this and similar questions of the interpretation of a provision, where the issue has been specifically discussed and assented to in some measure by a heavy majority of representatives of the world community, expectations in the Final Act do carry considerable authority in clarifying ambiguities towards an interpretation harmonious with major community policies.¹³⁵ This should be especially so where the ambiguity was foreseen, as is the case here. Furthermore, these expectations are additionally authoritative, since an interpretation of apartheid as lying outside the ambit of these provisions would contravene policies of *jus cogens* outlawing racial discrimination and affirming self-determination.¹³⁶

Finally, the history of these articles reveals strong expectations that their interpretation as a matter of law was to be closely tied to

130. See note 39 *supra*.

131. Cf. note 121 *supra*.

132. ELIAS, *LAW OF TREATIES*, *supra* note 122; SINCLAIR, *supra* note 122, at 99. The precise issue has been framed as to whether the government was concluding the agreement "out of economic necessity," thus incorporating expectations that its decision-makers still retained sufficient autonomy to assess that necessity, or, on the other hand, whether there was as a matter of both law and fact such a constitutively coercive relationship between the two governments, with the use of wealth benefits and deprivation as a sustained strategy, that the government lacked even the minimal autonomy to reassess its needs and act on that reassessment. This issue, however, presupposes a validly constituted government which is not found here.

133. ELIAS, *LAW OF TREATIES*, *supra* note 122, at 172; SINCLAIR, *supra* note 122, at 20-21, 97-98.

134. ELIAS, *LAW OF TREATIES*, *supra* note 122, at 175; SINCLAIR, *supra* note 122, at 99-100.

135. See FRIEDMANN, LISSITZYN & PUGH, *supra* note 68, at 1091 *et seq.*

136. See generally McDougal, Lasswell & Chen, *supra* note 23.

expectations under article 2(4) of the United Nations Charter.¹³⁷ Debate over the meaning of that Charter provision has been raging for some years, but a trend of interpretation has emerged prohibiting economic coercion by states as an instrument of foreign policy.¹³⁸

VII. CONCLUSION

Articles 51 and 52 of the Vienna Convention are satisfied by the intensity of coercion applied by South Africa to gain its objective of changing the status of the Transkei. Accordingly, the system of agreements—and each of them—between South Africa and the Transkei are void as a matter of law under these articles. Further, not only is South Africa incompetent to transfer sovereignty over land to the Transkei because to do so is a violation of black South Africans' right to self-determination but also the Transkei government is incompetent as a matter of law to accept such sovereignty, lacking the capacity to give the requisite consent because of impermissible South African coercion, under the same policies of articles 51 and 52.

Black South Africans accordingly have a right to have the national territory held intact and not be parcelled into bantustans, because as a matter of law they have been subjected to coercion such that they lack legal capacity to give the consent necessary to any divestiture envisaged by the bantustan policy. To the extent that they have a right as a people to self-determination, they have a right to be free from being coerced into accepting a portion of any territory, especially if that portion is only part of what may reasonably be foreseen to descend lawfully to them in the future.

In this sense, the right to self-determination includes the right to "territorial integrity" where the group claiming the right is encapsulated in a sovereign state and where the objective of a projected transfer is further to consolidate an unlawful program against that group. Territorial integrity under such circumstances is infringed where the government, acting to fulfill such a program, at-

137. SINCLAIR, *supra* note 122, at 99-100; ELIAS, *LAW OF TREATIES*, *supra* note 122, at 17-76.

138. Comment, *The Use of Nonviolent Coercion: A Study in Legality under Article 2(4) of the Charter of the United Nations*, 122 U.P.A. L.REV. 983 (1974). Basett, *Economic Coercion and Reprisals by States*, 13 VA.J.INT'L L. 1 (1970), quotes the United Nations General Assembly in its Declaration on Principles of 1970:

No state may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind.

Id. at 2.

See Advisory Opinion on Namibia, *supra* note 1.

tempts to coerce the group into being a party to the division of the territory. Where such an unlawful objective is present, the right to territorial integrity would also vest in the same group vis-à-vis a transfer of territory to any wholly extra-national party.

There remains only to consider the legal consequences of these violations by South Africa vis-à-vis its relationships with other member states of the world community. A complete treatment of this question is beyond the scope of this Article and must await further inquiry, but its importance is such that a few words are appropriate here.

The general question of the legal consequences of the continuing unlawful retention of control by the Pretoria regime over an adjacent territory has been thoroughly explored by the International Court of Justice in its *Advisory Opinion on Namibia*.¹³⁹ Although the facts there concern the relationship between South Africa and an international territory, the policies underpinning the Court's holding as to the resulting legal consequences are applicable to the Transkei situation. Since domestic apartheid now clearly violates the same major international policies that the analogous "exported apartheid" policy has been held to violate, the consequent treatment of Africans in and around the Transkei, whether it is now an unrecognized territory of ambiguous status or a province of the South African state, must be assessed under policies substantially identical to those adduced by the Court in *Namibia*. This is especially so in that both cases feature sustained coercion by South Africa which is simultaneously the *sine qua non* of that government's continuing control over the people involved and impermissible as a matter of law in its objectives, strategies and outcomes. Analogous legal consequences, *mutatis mutandis*, for member states of the United Nations would seem to follow.

These consequences would clearly encompass a duty of non-recognition of the Transkei's change in status, including the refusal to send special missions or diplomatic envoys to the Transkei.¹⁴⁰ They would encompass a duty to refuse to enter into treaty relations, or maintain those already in force, where South Africa purports to act as if the Transkei were independent, or where such a treaty is to be implemented on the same basis in the Transkei.¹⁴¹ Arguably, this implementation in the Transkei would include that imposed through the system of agreements linking the Transkei to South Africa since that system itself is void under international law.

139. See note 1 *supra*.

140. *Id.* at 55, ¶ 123.

141. *Id.* at 55, ¶ 122.

A further consequence to member states would embrace a duty "to abstain from entering into economic and other forms of relation or dealings with South Africa on behalf of or concerning which South Africa may entrench its authority over the territory."¹⁴² This duty may be recast in light of the previous conclusions and in light of the previously discussed Assembly resolutions to mean abstention from dealings that would support South African attempts to act as if the Transkei were legally independent and not still a part of South Africa. Legal obligations would also lie on all states to refuse to recognize the validity of any state's acts entering into relationships with either the Transkei or South Africa in violation of the above duties. All of these duties would seem, however, to be subject to the limitation in *Namibia* that non-recognition of the Transkei's change in status should not deprive its people of any humanitarian advantages derived from international cooperation.¹⁴³

142. *Id.* at 55-56, ¶ 124.

143. *Id.* ¶ 125. General Assembly Resolution 31/6 of October 26, 1976 condemning South Africa's claim to change the status of the Transkei and calling on member states to pursue similar strategies would seem to rest on these same legal expectations, especially insofar as its rests on Resolution 3411 (D) and 2775 (E), and would thereby confirm the above policies as they impose a legal duty by constituting a valid interpretation of members' obligations under the Charter.

