

Denver Journal of International Law & Policy

Volume 10
Number 1 *Fall*

Article 4

May 2020

South Africa's Independent Homelands: An Exercise in Denationalization

John Dugard

Follow this and additional works at: <https://digitalcommons.du.edu/djilp>

Recommended Citation

John Dugard, South Africa's Independent Homelands: An Exercise in Denationalization, 10 Denv. J. Int'l L. & Pol'y 11 (1980).

This Article is brought to you for free and open access by the University of Denver Sturm College of Law at Digital Commons @ DU. It has been accepted for inclusion in Denver Journal of International Law & Policy by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu, digitalcommons@du.edu.

ARTICLES

South Africa's "Independent" Homelands: An Exercise in Denationalization

JOHN DUGARD

The South African Government's policy of apartheid or separate development has achieved considerable notoriety over the past thirty years. To most informed persons the term apartheid conjures up a discriminatory legal order in which personal, social, economic, political, and educational rights are distributed unequally on the basis of race. Recent developments on the apartheid front are less notorious. Since 1976, the South African Government has resorted to the fictional use of statehood and nationality in order to resolve its constitutional problems. New "states" have been carved out of the body of South Africa and been granted independence, and all black¹ persons affiliated with these entities, however remotely, have been deprived of their South African nationality. In this way the government aims to create a residual South African state with no black nationals. The millions of Blacks who continue to reside and work in South Africa will be aliens, with no claim to political rights in South Africa. In this way, so the government believes, Blacks will be given full political and civil rights in their own states and a hostile international community will be placated. A number of studies have examined this exercise in political fantasy from the perspective of statehood in international law.² Although the present study will trace the development of the homelands policy and describe the creation of "independent" homelands,

© 1980 by John Dugard

John Dugard is Professor of Law and Director of the Centre for Applied Legal Studies at the University of the Witwatersrand, Johannesburg, South Africa. B.A. 1956, LL.B. 1958, University of Stellenbosch; LL.B. 1965, LL.D. 1980, Cambridge University.

1. In 1978 the word "Black" replaced "Bantu" as the official term to describe the African people of South Africa. Second Black Laws Amendment Act 102 of 1978. This creates certain difficulties as the "non-white" people of South Africa—*viz* African, Colored, and Indian—generally prefer to use the word "Black" to describe all such peoples. In this study, however, the term "Black" is used to describe the African people alone as this is the term used in the statutes and official documents which are featured prominently in this article. Sometimes the word "Bantu" is used in an historical context.

2. Norman, *The Transkei: South Africa's Illegitimate Child*, 12 *NEW ENGLAND L. REV.* 585 (1977); Witkin, *Transkei: An Analysis of the Practice of Recognition—Political or Legal?*, 18 *HARV. INT'L L.J.* 605 (1977); Richardson, *Self-Determination, International Law and the South African Bantustan Policy*, 17 *COLUM. J. TRANSNAT'L L.* 185 (1978).

the main focus will be upon denationalization and upon the important role it plays in the ideology of separate development. Since this issue has already given rise to much bitterness in South Africa, it is essential that the international community appreciate more fully an issue which threatens the already fragile racial peace that exists in South Africa.

I. HOMELANDS POLICY AND IDEOLOGY

The National Party Government of South Africa is clearly and firmly opposed to the sharing of political power in a unitary South Africa. On the other hand, it accepts the fact that both internal and external forces require the extension of political rights to Blacks. Hence, it has developed the homelands policy by which Blacks will be given political rights in their own "states" and Whites will retain exclusive political control over the remaining part of the Republic of South Africa, comprising eighty-seven percent of the original territory of South Africa.

The homelands policy evolved slowly in the early years of National Party rule, accelerated after 1959, and reached its peak in 1976 on the granting of independence to Transkei. At that stage, and indeed until the retirement of Mr. B.J. Vorster as Prime Minister in 1978, the final goals were clear: all homelands would become independent states; the entire black population of the Republic would be granted political rights and citizenship in these independent states; and, consequently, there ultimately would be no black citizens of the Republic of South Africa requiring accommodation in South Africa's political order. The "purity" of this ideology has been abandoned by the Government of Mr. P.W. Botha. There is now talk of a constellation or confederation of states in southern Africa in which Blacks will possess the nationality of the proposed confederation while exercising their citizenship rights mainly within black member states of the confederation. Moreover, the permanency of the black urban population appears to have been recognized at long last as a political fact. Mr. Botha's plans are at present confined largely to rhetoric, however, and the institutional structure of 1976 still dominates the statute book. This accounts for the difficulty in describing the present homelands policy.

For a clear understanding of homelands policy and ideology *as reflected in the present legal order*, it is necessary to examine the evolution of this policy in the context of the internal and external forces which have shaped it.

A. *The Period 1948 to 1976*

Race separation has been a dominant feature of policymaking in South Africa since the advent of the white man. On occasion this resulted in separate areas being set aside for exclusive occupation by Blacks. But until recent times there was no suggestion that separate states should be created for Blacks. On the contrary, the historical trend in South Africa in the first part of this century was towards unity and expansion in state-building, as evidenced by the Union in 1910 and by the attempts, albeit unsuccessful, on the part of successive South African governments to in-

corporate the High Commission Territories (comprising Basutoland, Bechuanaland, and Swaziland), South West Africa, and Southern Rhodesia into a greater South Africa.

When the National Party came to power in 1948 it promised, and practiced, more separation and more discrimination. The Bantu Authorities Act of 1951,³ which provided for the establishment of tribal, regional, and territorial authorities, was certainly aimed at strengthening the power of tribal authorities in the "reserves," as the homelands were then known, but there was still no hint of territorial fragmentation of South Africa.

National Party spokesmen argue that the notion of independent homelands was a logical evolutionary consequence of apartheid or separate development. A more realistic explanation, however, is that this radical change in direction was a result of the new international order and its expectations.

Toward the end of the 1950's it had become clear that the *baaskap* (boss-ship) form of apartheid could no longer be retained as official policy. The government was compelled to produce a new version of apartheid in line with contemporary international standards or to accept the inevitability of a common society. It chose the former. In 1959 the Promotion of Bantu Self-Government Act⁴ was introduced to pave the way for "self-governing Bantu units." At this stage there seemed to be no certainty that self-government would lead to independence, though the Prime Minister, Dr. H.F. Verwoerd, did tell Parliament that "if it is within the power of the Bantu and if the territories in which he now lives can develop to full independence, it will develop in that way."⁵ This act was premised heavily on the principle of self-determination of nations, a principle enshrined in the Charter of the United Nations and constituting the cornerstone of the powerful decolonization movement. Thus, in introducing this legislation, Dr. Verwoerd informed Parliament that "the choice of separate Bantu development" was "in line with the objects of the world at large."⁶

In the early 1960's, external pressure intensified as a result of the Sharpeville tragedy (which led to the first Security Council resolution on apartheid) and of the institution of legal proceedings against South Africa over South West Africa before the International Court of Justice. Consequently, the new idealism of self-development, inherent in the notion of self-government for "Bantu national units," was emphasized with new vigor. At the same time Dr. Verwoerd admitted that it was a policy that had been imposed as a result of external pressure. In 1961 he told Parliament that South Africa was compelled to choose between sacrificing

3. Act 68 of 1951.

4. Act 46 of 1959.

5. 101 *House of Assembly Debates*, col. 6221, May 20, 1959.

6. *Id.* col. 6236.

apartheid completely or making concessions within the framework of the policy of separate development by allowing the different "Bantu nations" in South Africa to develop into "separate Bantu states." Then he added:

That is not what we would have liked to see. It is a form of fragmentation which we would not have liked if we were able to avoid it. In the light of the pressure being exerted on South Africa there is, however, no doubt that eventually this will have to be done, thereby buying for the white man his freedom and his right to retain domination in what is his country If the Whites could have continued to rule over everybody, with no danger to themselves, they would certainly have chosen to do so. However, we have to bear in mind the new views in regard to human rights, . . . the power of the world and world opinion and our desire to preserve ourselves.⁷

The next step in the evolution of self-development and the appeasement of world opinion was the hurried granting of self-government to Transkei in 1963⁸ in order to provide evidence before the International Court of Justice of the sincerity of South Africa's intentions under its separate development program. In the proceedings before the Court in 1965 relating to the dispute over South West Africa, South Africa referred to the constitutional development of Transkei as evidence of its intention to grant independence to the different ethnic groups in South Africa.⁹ In his testimony before the Court, Dr. Eiselen, one of the architects of the policy of separate development, cited as an example of the government's homelands policy the "legislation . . . passed by Parliament so that the Transkei is now an independent part of South Africa, still belonging in certain ways to the Republic of South Africa but independent in most ways."¹⁰ Constitutionally, it was a gross exaggeration to describe the Transkei of 1965 as "independent in most ways," but this statement illustrates quite clearly the purpose that Transkeian self-government was meant to serve.

The pace of separate development slowed down considerably in the mid-1960's. This was probably due to the death of its creator, Dr. H.F. Verwoerd, and to the technical victory achieved in the *South West Africa Cases*, which removed the fear of an adverse judgment enforceable by the Security Council of the United Nations.

In the late sixties and early seventies new international forces prompted a further acceleration of self-government for "Bantu national units." Protests against apartheid at the United Nations continued unabated, and the Security Council first exercised jurisdiction over South West Africa in 1968, but the South African Government had now decided to outmaneuver the United Nations by means of its "outward policy," which was primarily aimed at winning friends in Africa. While the stick

7. 107 *House of Assembly Debates*, cols. 4191-93, Apr. 10, 1961.

8. TRANSKEI CONST. Act 48 of 1963.

9. *Ethiopia and Liberia v. South Africa (Second Phase)*, [1966] I.C.J. 6.

10. 10 *South West Africa Cases*, [1966] I.C.J. Pleadings 103.

of world opinion had been responsible for the initial move toward self-government for black nations, it was the carrot of African support and "dialogue" which led to an acceleration of this policy. South Africa dropped its rigid refusal to discuss domestic policy and indicated that dialogue with African leaders included discussion of South Africa's racial policies. If such discussions were to be meaningful, however, it would become necessary for self-development to be presented in a more positive manner.¹¹ The notion of self-government for Black nations was thus revived.

The first step was the Bantu Homelands Citizenship Act of 1970,¹² which provided that every Black who was not a "citizen" of a self-governing territory would become a "citizen" of the territorial authority area to which he was attached by birth, domicile, or cultural affiliation. Then, in 1971, came the Bantu Homelands Constitution Act,¹³ which empowered the government to grant constitutions substantially similar to that conferred on the Transkei in 1963 to territorial authorities, after consultation with them. Although no provision was made for the granting of independence to homelands in this 1971 Act, both its preamble and the White Paper accompanying it affirmed the intention of the government to lead the homelands to self-government and independence.

After 1971 the homelands advanced rapidly toward self-government: by January 1977, Bophuthatswana, Ciskei, Lebowa, Venda, Gazankulu, Qwaqwa, and KwaZulu had become self-governing. Meanwhile, in 1974, the Transkei indicated that it would opt for independence, and constitutional planning to that end was soon set in motion.

B. *The Period 1976 to 1978*

In 1976 Transkei was granted independence. Prior to the granting of independence to Transkei it was generally believed that international recognition of the homelands was of fundamental importance to the South African Government. Transkeian independence was primarily aimed at the assuagement of world opinion. Recognition must, therefore, have constituted one of the main objectives of independence, in much the same way as recognition is viewed as essential to the creation of an independent Namibia.

Although the General Assembly of the United Nations had already called upon its members to refuse recognition to Transkei or to any other homeland before 1976,¹⁴ it seems that both Transkei and South Africa believed that recognition would be forthcoming, at least from South Africa's Western friends. This is evidenced by the fact that the South Afri-

11. Barratt, *South Africa's Outward Policy: From Isolation to Dialogue*, reprinted in *SOUTH AFRICAN DIALOGUE* 543, 559-61 (1972).

12. Act 26 of 1970, now termed the Black States Citizenship Act.

13. Act 21 of 1971, now termed the Black States Constitution Act.

14. G.A. Res. 3151G, 28 U.N. GAOR, Supp. (No. 30) 32, U.N. Doc. A/9030 (1973); G.A. Res. 3411D, 30 U.N. GAOR, Supp. (No. 34) 37, U.N. Doc. A/10034 (1975).

can Department of Foreign Affairs set about training Transkeian diplomats for posts in the main Western countries before independence. To many familiar with the international scene this appeared to be misplaced optimism, but it was a gamble that might have succeeded had the new state of Transkei been structured in such a manner that it would not look like a means of achieving the ultimate goal of separate development: a South Africa in which there are no black South Africans, but only black "guest workers" linked through the bond of nationality to a number of black mini-states carved out of the original boundaries of South Africa. This is why the nationality issue assumed such important dimensions in the pre-independence period. If Transkeian nationality had not been compulsorily extended to all persons connected with Transkei, however remotely, it might have been possible to view Transkeian independence as a simple achievement of statehood. But once South Africa set the denationalization of all persons ethnically or culturally linked with Transkei as the price for independence, the goal of recognition became impossible.

Transkei was not recognized by any state other than South Africa. Moreover, both the General Assembly¹⁵ and the Security Council¹⁶ condemned Transkeian independence and called upon states not to recognize Transkei. This was obviously a disappointment to the South African Government, but as a result of the experience, it appears to have dropped all interest in recognition. Consequently, there was little talk of recognition at the time of Bophuthatswana's independence in December 1977, and the subject was not raised at all when Venda became independent in 1979. One must conclude, therefore, that while recognition remains a top priority for Namibia, the South African Government has abandoned all such hopes for its own homelands.

Despite the failure to secure international recognition of the homelands, support for this policy continued up to the end of the Vorster Administration. Indeed, in the twilight months of this administration, the most extreme formulation of the homelands policy was enunciated by Dr. C.P. Mulder, in his capacity as Minister of Bantu Administration and Development. On February 7, 1978, Dr. Mulder stated in Parliament:

[I]f our policy is taken to its full logical conclusion as far as the black people are concerned, there will be not one black man with South African citizenship . . . [E]very black man in South Africa will eventually be accommodated in some independent new state in this honourable way and there will no longer be a moral obligation on this Parliament to accommodate these people politically.¹⁷

C. *Homelands Policy under Mr. P.W. Botha*

It is difficult to describe the extent to which Mr. P.W. Botha remains

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

16. S.C. Res. 402, 31 U.N. SCOR, Supp. (Jan.-Dec. 1976) 13, U.N. Doc. S/INF/32 (1976).

17. 72 *House of Assembly Debates*, col. 579, Feb. 7, 1978.

committed to the homelands policy of his predecessors. The following evidence suggests that the Vorster homelands policy still prevails.

1. A "Twelve-Point" policy plan, announced by Mr. Botha in 1979 and approved by National Party Provincial Congresses, appears to confirm the homelands policy, albeit in highly ambiguous language. Points two and three of this plan affirm:

- (2) The acceptance of vertical differentiation with the built-in principle of self-determination on as many levels as possible.
- (3) The creation of constitutional structures for the black nations to make possible the highest degree of self-government, within States that have already been consolidated as far as is practicable.¹⁸

That these points are in line with the policy of his predecessor was confirmed by Mr. Botha himself in Parliament on April 30, 1980.¹⁹

2. The Status of Venda Act²⁰ conferred independence on Venda on September 13, 1979 on the same terms as Transkei and Bophuthatswana. From this it appears that the denationalization of all persons ethnically or linguistically linked to a homeland still remains the price for independence.

3. Dr. C.P. Mulder's statement of February 7, 1978 remains unaltered, despite many demands, particularly from black leaders, for its repudiation. Dr. P.G.J. Koornhof, the Minister of Co-operation and Development and Dr. Mulder's successor, has on occasion expressed guarded criticism of denationalization, but he has yet to repudiate Dr. Mulder's statement. In any event, such rhetoric can hardly be taken seriously in the light of the enactment of the Status of Venda Act, which confirms the policy of denationalization on the ground of race. In passing, it might be mentioned that in February 1979, Dr. Schalk van der Merwe, then Minister of Health, questioned the correctness of Dr. Mulder's statement when he said, first, that he could not foresee the day when there would be no black South Africans, and second, that no black man would be forced to give up his citizenship.²¹ It would, however, be wrong to attach too much significance to this statement as Dr. van der Merwe has not been closely involved with black administration and cannot be said to have been pronouncing on government policy on the occasion in question.

4. The Interim Report of the Commission of Inquiry on the Constitution of 1980²² and the legislation flowing from this report²³ make no provision for Black participation in the central political process of the

18. The "Twelve Points" are fully set out in — *House of Assembly Debates*, cols. 3278-79, Mar. 21, 1980.

19. — *House of Assembly Debates*, col. 5149, Apr. 30, 1980.

20. Act 107 of 1979.

21. 79 *House of Assembly Debates*, col. 972, Feb. 19, 1979.

22. Republic of South Africa Commission of Inquiry on the Constitution, Interim Report 6 (Chairman, Hon. A.L. Schlebusch, M.P.) (unpublished pamphlet).

23. REP. S. AFR. CONST., 5th Amend., Act 101 of 1980.

Republic. This legislation creates a nominated President's Council, with advisory powers, whose membership is confined to Whites, Coloreds, Asians, and Chinese. By implication, Blacks are still expected to exercise their political rights only in independent or self-governing homelands.

At present there appears to be a lull in the implementation of the homelands policy. This may be ascribed to a number of factors. First, there is currently no self-governing homeland willing to opt for independence. Ciskei, which was widely believed to be the next in line for independence, appears to be reconsidering its position in the light of the Quail Commission Report which labelled independence an "unattractive option" unless a number of strict conditions are met. These included the condition "that citizenship on satisfactory terms is negotiated which gives non-resident Ciskeians the choice of either Ciskeian or South African status or both."²⁴ Second, aspirant independent homelands appear to have been deterred from opting for independence by the failure of Transkei, Bophuthatswana, and Venda to secure international recognition.²⁵ Third, the South African Government is awaiting the report of a commission of inquiry on the consolidation of the homelands, under the chairmanship of Mr. H.J.D. van der Walt, M.P., before pressing ahead with the creation of new independent homelands. As the Prime Minister has indicated that the government is prepared to consider a consolidation involving more land than that set aside in the 1936 Land Act, this commission's report may have far-reaching implications.²⁶

It is not impossible that the Botha Government is reconsidering the homelands policy in the light of altered circumstances. Mr. Botha has spoken repeatedly in the past months of a "constellation" of states for southern Africa, but as yet he has declined to spell out the full implications of such an arrangement.²⁷ Such a constellation or confederation of states is, of course, compatible with a policy of acceleration of independence for self-governing territories. This was emphasized by Mr. van der Walt, Chairman of the Consolidation Commission, in May 1980. Speaking during the vote on the Department of Co-operation and Development, he said:

The stated policy and priorities of the Government are to develop the various national States into full-fledged States The National Party has a specific policy, a policy which amounts to a division of power [W]e cannot share power in a unitary State in South Africa. Therefore the National Party's policy of the division of power gives rise to the Black national States.

. . . .

24. CISKEI COMMISSION, *THE QUAIL REPORT* 127 (1980). *But see* Postscript to this article, page 36 *infra*.

25. *Id.* at 120-23.

26. 33 *SURVEY OF RACE RELATIONS IN SOUTH AFRICA* 302 (1979).

27. For a general discussion of this proposal, see *THE CONSTELLATION OF STATES* (W. Bretenbach ed. 1980).

The effect of the National Party's policy . . . will require a further thorough investigation into the confederal approaches in order to achieve what we would like to achieve. We shall have to determine what that would involve for us. If that is indeed our policy, the system of a constellation of States on a confederal basis could only develop to its full potential if we were dealing with independent States in which everyone sharing in that option is equal.²⁸

This statement must, however, be compared with statements by Mr. P.W. Botha himself suggesting that the government might be prepared to accept a confederation comprising independent homelands and a South Africa which would include non-independent homelands.²⁹ This suggests that some form of participation may yet be envisaged for Blacks attached to non-independent homelands in the South African political system itself, a possibility that derives some support from the recent recognition on the part of the government of the permanency of the urban black community in the Republic.

The above examination of the present situation shows that it is at least possible that the Botha Government is not irrevocably committed to the pursuit of the Verwoerd/Vorster homelands ideology envisaging a South Africa in which there are no black nationals with claims to participation in the Republic's political system. On the other hand, the homelands legislative structure, which has been augmented since 1978, continues to show support for this ideology. In these circumstances the outside observer can only conclude that Dr. C.P. Mulder's statement of February 7, 1978 continues to reflect long-term National Party policy.

II. HOMELANDS INDEPENDENCE

To date three homelands have become independent: Transkei (1976), Bophuthatswana (1977), and Venda (1979). In all three instances the same procedure has been followed for the granting of independence.³⁰ The South African Parliament passed a statute providing for the independence of the territory with effect from the day of independence; and the legislative assembly of the territory itself enacted a constitution which became effective on the date of independence. The three independence-conferring statutes were substantially similar in content, but the constitutions adopted by the new states varied in form and substance.

A. *Independence-Conferring Statutes*

The standard form of independence-conferring statute is the concise Status of Transkei Act 100 of 1976, which served as a model for subse-

28. ____ *House of Assembly Debates*, cols. 5737-38, May 7, 1980.

29. ____ *House of Assembly Debates*, col. 250, Feb. 6, 1980; ____ *House of Assembly Debates*, cols. 5162-63, Apr. 30, 1980 (Mr. P.W. Botha); ____ *House of Assembly Debates*, cols. 577-78, May 7, 1980 (Dr. P.G.J. Koornhof).

30. For a discussion of this subject, see Dugard, *Transkei Becomes Independent*, 30 ANNUAL SURVEY OF SOUTH AFRICAN LAW, 26 (1976); Booysen, Wiechers, van Wyk, & Bretenbach, *Comments on the Independence and Constitution of Transkei*, [1976] S. AFR. Y.B. INT'L L. 1.

quent grants of independence to Bophuthatswana and Venda. It provided, *inter alia*:

1. Transkei is 'hereby declared to be a sovereign independent State and shall cease to be part of the Republic of South Africa' (section 1);

2. Any law in force in Transkei prior to independence shall continue in force in Transkei until repealed or amended by the competent authority in Transkei (section 2);

3. All treaties binding on the Republic prior to independence of Transkei and capable of being applied to Transkei shall be binding on Transkei, but the Government of Transkei may denounce any such treaty (section 4);³¹

4. All agreements entered into between the Government of the Republic and the Government of Transkei before independence shall remain in force as international treaties (section 5);

5. Every person falling into certain defined categories shall be a citizen of Transkei and shall cease to be a South African citizen (section 6).³²

B. *Homelands Constitutions*

The Transkei Constitution³³ is modelled substantially on that of South Africa. The President of Transkei has powers similar to those of the State President of South Africa and is advised by an Executive Council composed of Ministers of State. He is not therefore an Executive President *de jure*, but since Chief Kaiser Matanzima became President of Transkei in 1979 it appears that he has played an important *de facto* political role which goes beyond that contemplated by the Constitution. The Parliament of Transkei, which is declared to be a sovereign legislature, consists of the President and a single house designated as the National Assembly. The Assembly has 150 members, comprising 75 chiefs and 75 elected members.

The Republic of Bophuthatswana Constitution Act³⁴ differs substantially from that of Transkei. The Head of State is the President, who is also executive head of the government. The legislature—the National Assembly—comprises forty-eight nominated members, forty-eight elected members, and three members designated by the President who must be persons with special knowledge or experience, but need not be citizens of Bophuthatswana. Significantly, the constitution contains a bill of rights modeled on the European Convention on Human Rights, which guarantees equality before the law and the most fundamental human freedoms.

31. For additional treatment of the subject of succession to treaties, see Dugard, *Matters Affecting Succession*, 30 ANNUAL SURVEY OF SOUTH AFRICAN LAW 26 (1976).

32. This citizenship provision is fully examined in section III *infra*.

33. REP. TRANSKEI CONST. ACT OF 1976, reprinted in 15 INT'L LEGAL MAT. 1136 (1976). The Constitution is closely examined by Booysen *et al.*, note 30 *supra*.

34. See Wiechers & van Wyk, *The Republic of Bophuthatswana Constitution*, [1977] S. AFR. Y.B. INT'L L. 85.

The Republic of Venda Constitution Act³⁵ provides for an Executive President and a National Assembly, the latter which is to constitute the "sovereign legislative authority." The National Assembly is to comprise forty-two nominated members (chiefs and designated members), forty-two elected members, and three members nominated by the President by reason of their special knowledge or experience. Like the Transkei Constitution, this constitution contains no bill of rights.

C. *Treaties*

South Africa entered into a number of agreements with each homeland prior to its independence. Broadly, these agreements³⁶ deal with matters affecting agriculture, forestry, economic and industrial development, the accession of officials, the employment of the new state's citizens in the Republic and vice versa, educational aid, defense, the supply of electricity, health services, travel documents and ports of entry, mining rights, postal and telecommunication services, welfare institutions, public roads, transportation, air services, and railways. The non-aggression pacts concluded with each independent homeland are of special interest. In these agreements, the parties renounce the use of force in their relations with each other and agree that neither party shall allow its territory to be used as a base by any state, government, organization, or person for military, subversive, or other hostile actions against the other party. Extradition agreements have also been entered into between South Africa and each independent homeland.³⁷ These agreements follow the normal pattern and exclude the extradition of political offenders.

III. HOMELANDS AND CITIZENSHIP

A. *Citizenship and Nationality*

There is much confusion in South Africa today over the policies of the South African Government with respect to citizenship. In part this confusion results from the failure of legislation to draw a distinction between "nationality" and "citizenship." Neither the South African Citizenship Act 44 of 1949, nor the Black States Citizenship Act 26 of 1970, which together constitute the governing "citizenship law," draws any such distinction, and both use the term "citizenship" where "nationality" would be more correct.³⁸

35. The text is reprinted in *CONSTITUTIONS OF DEPENDENCIES AND SPECIAL SOVEREIGNTIES* (A. Blaustein & E. Blaustein eds. 1977).

36. The agreements with Transkei are published in Government Notice 1976, Government Gazette 5320, Oct. 22, 1976 (Regulation Gazette 2384); Government Notice 2496, Government Gazette 5823, Dec. 6, 1977 (Regulation Gazette 2569); Government Notice 2014, Government Gazette 6652, Sept. 12, 1979 (Regulation Gazette 2861).

37. Transkei: Proclamation R329, Government Gazette 5813, Nov. 25, 1977 (Regulation Gazette 2565); Bophuthatswana: Proclamation R375, Government Gazette 5846, Dec. 30, 1977 (Regulation Gazette 2582); Venda: Proclamation R210, Government Gazette 6652, Sept. 12, 1979 (Regulation Gazette 2861).

38. For further views on this subject, see Barrie, *A Legal View of Transkeian Recognition and So-called Statelessness*, 33 *POLITIKON* 1 (1976); Dean, *A Citizen of Transkei*, 11 *COMP. & INT'L L.J. S. AFR.* 57 (1978); Heyne, *A Transkeian Citizen of South African Na-*

Nationality³⁹ is essentially a term of international law and denotes that there is a legal connection between the individual and the state. In practice this means that a South African national may travel on a South African passport and is entitled to protection by the South African Government if he is injured in another country. Citizenship, on the other hand, is a term best used to describe the status of an individual who enjoys civil and political rights in a particular state.⁴⁰ In South Africa, Blacks are not really citizens since they do not exercise full civil and political rights in the central political process. In order to overcome this injustice, the South African Government has resorted to the device of giving Blacks citizenship, that is, political rights, in the homelands.

The present situation can be summarized in the following way: all white, colored, and Indian South Africans are South African nationals. Similarly, all black South Africans who are not ethnically connected with Transkei, Bophuthatswana, or Venda are South African nationals. Within South Africa there are, however, different types of citizens: those who exercise political rights in the central political process (Whites); those whom the government plans to incorporate into the central political process (Coloreds and Indians); and those who have political rights in the non-independent homelands (Blacks). From this it will be seen that nationality is a wider concept than citizenship. All South Africans are South African nationals, but Blacks and Whites enjoy different citizenship rights.

When a homeland becomes independent the persons connected with it become nationals of the new state. This is in essence what happened when Transkei, Bophuthatswana, and Venda became independent. All persons who had previously been "citizens" of these homelands, or who were ethnically or linguistically connected with them, however remotely, ceased to be South African nationals. By losing their nationality in this way Blacks connected with Transkei, Bophuthatswana, and Venda not only lost their right to exercise the privileges of South African nationality (such as diplomatic protection and passports), but in addition they lost all claim to participate in the central political process in South Africa as

tionality, 26 *TYDSKRIF VIR HEDENDAAGSE ROMEINS-HOLLANDSE REG.* 44 (1963); Norman, note 2 *supra*; Olivier, *Bophuthatswana Nationality*, [1977] *S. AFR. Y.B. INT'L L.* 108; Olivier, *Statelessness and Transkeian Nationality*, [1976] *id.* at 143; Venter, *Bantoe Burgerskap en Tuisland Burgerskap*, 38 *TYDSKRIF VIR HEDENDAAGSE ROMEINS-HOLLANDSE REG.* 239 (1975).

39. For a clear analysis of the distinction between nationality and citizenship, see Koessler, "Subject," "Citizen," "National," and "Permanent Allegiance," 56 *YALE L.J.* 58 (1946). See also P. WEIS, *NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW* 4 (2d ed. 1979).

40. According to Koessler:

'Citizenship' in modern usage is not a synonym of nationality or a term generally used for the status of belonging to a state, but means specifically the possession by the person under consideration, of the highest or at least of a certain higher category of political rights and (or) duties, established by the nation's or state's constitution.

Koessler, *supra* note 39, at 63.

full South African citizens at some future date. The main objection to denationalization of the kind that occurred when Transkei, Bophuthatswana, and Venda became independent is thus that Blacks become foreigners in South Africa with as little claim to participation in the political process in South Africa as visiting Germans or Malawians. This objection to homelands independence was eloquently stated by Bishop Desmond Tutu shortly before Transkei became independent:

Overnight they will become foreigners in what for many of them has been the land of their birth and be forced to adopt the citizenship of a country that many do not know at all and in whose creation they have played no part at all. They have contributed in their various ways to the prosperity of this beloved South Africa and now it seems at the stroke of a pen they will forfeit a cherished birthright.⁴¹

An emotional argument, perhaps. But it captures the real mood of Blacks toward independence and it is one that unites both urban and homeland Blacks in their opposition to the National Party Government.

Government policy toward Coloreds, Indians, and Blacks in South Africa appears to be as follows. Coloreds and Indians will be accommodated in some new political dispensation which will give the appearance of political participation. Thus they will become full nationals and citizens. Blacks, on the other hand, cannot be given political rights in South Africa so they cannot become full citizens of South Africa. Consequently, they must be forced to become nationals, with full citizenship rights, of some new state. In the fullness of time, if government policy succeeds, all homelands will become independent and there will no longer be any black nationals in South Africa with claims to political rights. Blacks, particularly urban Blacks, will thus occupy the same position politically as, for example, British nationals in South Africa who retain their British nationality and therefore cannot vote in South Africa.⁴² This will allow the South African Government to argue that there are no black South Africans, that all Blacks in South Africa are foreigners in much the same way as there are foreign migrant workers from Turkey in Germany and from Algeria in France. This will be the argument used to counter hostile attacks from the international community over the denial of political rights to Blacks in South Africa.

B. *Citizenship and the Independence-Conferring Statutes*

All three independence-conferring statutes contain a provision (section 6) which reads as follows:

41. Rand Daily Mail (Johannesburg), May 1, 1976, at 6.

42. A denationalized black South African is in fact worse off than a British national. While the latter may become a South African national by Naturalization, the former will not be able to do so, since only a person who "is likely to become readily assimilated with the European inhabitants of the Republic" is eligible for citizenship by naturalization. Sec. 4(c)(b) of the Aliens Act 1 of 1937, read with sec. 10(1)(c) of the South African Citizenship Act 44 of 1949. See van Wyk, *The Ebb and Flow of South African Citizenship*, [1978] S. Afr. Y.B. INT'L L. 148.

Every person falling in any of the categories of persons defined in Schedule B shall be a citizen of the Transkei [Bophuthatswana, Venda] and shall cease to be a South African citizen. . . .

. . . .
No citizen of the Transkei [Bophuthatswana, Venda] 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.

Schedule B varies according to the ethnic composition of each homeland. Schedule B of the Status of Transkei Act 100 of 1976 provides:

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

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

Schedule B of the Status of Venda Act 107 of 1979, which is substantially similar to that of Bophuthatswana, provides:

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

- (a) every person who was a citizen of Venda in terms of any law at the commencement of this Act;
- (b) every person born in or outside Venda, either before or after the commencement of this Act, of parents one or both of whom were citizens of Venda at the time of his birth, who is not a citizen of a territory within the Republic of South Africa and is not a citizen of Venda in terms of paragraph (a);
- (c) every person who has been lawfully domiciled in Venda 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 Venda by the competent authority in Venda;

(d) every South African citizen who is not a citizen of a territory within the Republic of South Africa, is not a citizen of Venda in terms of paragraph (a), (b) or (c) and speaks a language used by members of any tribe which forms part of the population of Venda, including any dialect of any such language;

(e) every South African citizen who is not a citizen of a territory within the Republic of South Africa and is not a citizen of Venda in terms of paragraph (a), (b), (c) or (d) and who is related to any member of the population contemplated in paragraph (d) or has identified himself with any part of such population or is culturally or otherwise associated with any member of such population.

Paragraph (a) in these schedules requires a special explanation. Prior to Transkeian independence "every Xhosa-speaking Bantu person in the Republic" not belonging to another homeland (for example, Ciskei) was a "citizen" of Transkei in terms of section 7 of the Transkei Constitution Act 48 of 1963. Similarly, before Venda and Bophuthatswana became independent, every person connected with the homeland in question by language, culture, or race became a "citizen" of that homeland in terms of section 3 of the Black States Citizenship Act 26 of 1970. Consequently, prior to independence all persons linguistically or culturally connected with the homeland were already *citizens* of the territory but *nationals*⁴³ of South Africa. On independence such persons became both citizens and nationals of the homeland and ceased to be South African nationals.

The independence-conferring statutes carefully refrain from depriving persons of South African nationality on grounds of race. Instead they prescribe language and culture as the criteria for denationalization.⁴⁴ There can, however, be no doubt that in practice they are intended to apply to Blacks only as this accords with declared government policy. Certainly there is no known instance in which a white, colored, or Asian person connected with Transkei, Bophuthatswana, or Venda has been deprived of his nationality since the conferment of independence on these states.

The Status of Bophuthatswana Act differs from the other two independence-conferring statutes in that it provides that a citizen of Bophuthatswana may renounce his citizenship after independence on

43. This is made clear by section 3(4) of the Black States Citizenship Act 26 of 1970, which reads in pertinent part:

A citizen of a territorial authority area [homeland] shall not be regarded as an alien in the Republic and shall, by virtue of his citizenship of a territory forming part of the Republic, remain for all purposes a citizen of the Republic and shall be accorded full protection according to international law by the Republic.

44. Olivier, *Statelessness and Transkeian Nationality*, *supra* note 38, at 152-54, emphasizes this point, but takes no account of the practical implementation of these statutes.

conditions agreed upon between the governments of South Africa and Bophuthatswana.⁴⁵ This measure, envisaging a reversion to South African nationality, has been rendered largely unnecessary by a 1978 amendment to the Black States Citizenship Act which allows a national of an independent homeland to recover his South African nationality by becoming a citizen of a non-independent homeland.⁴⁶ Reversion to South African nationality in such a case is, however, contemplated only as a temporary measure which will continue until the homeland whose citizenship he has acquired itself becomes independent.⁴⁷ By December 31, 1979, 1,474 persons had regained their South African nationality in this way.⁴⁸

C. Denationalization on the Ground of Race as a Violation of International Law

Although traditional international law regards both the conferment of nationality and the withdrawal of nationality as falling within a state's domestic domain, in recent times it has been authoritatively argued that "denationalization measures based on racial, ethnic, religious, or other related grounds are impermissible under contemporary international law."⁴⁹ This view is disputed by some South African writers.⁵⁰ Nevertheless it is a widely accepted emerging norm or customary rule which derives support from:

1. the widespread opposition to the 1941 Nazi decree which denationalized German Jews;⁵¹
2. Article 15 of the Universal Declaration of Human Rights,⁵² which declares that 'no one shall be arbitrarily deprived of his nationality';
3. Article 5(d)(iii) of the International Convention on the Elimination of All Forms of Racial Discrimination,⁵³ in which states undertake to guarantee the right of everyone, without distinction as to race, equality before the law, 'notably in enjoyment of the right to nationality'; and
4. Article 9 of the Convention on the Reduction of Statelessness,⁵⁴ which provides that a 'Contracting State may not deprive any person or group of persons of their nationality on racial, ethnic, religious or

45. Sec. 6(3), Status of Bophuthatswana Act 89 of 1977.

46. Sec. 1 of the Black States Citizenship Amendment Act 13 of 1978, amending sec. 3 of the Black States Citizenship Act 26 of 1970.

47. 72 *House of Assembly Debates*, cols. 558, 560, 579, Feb. 7, 1978.

48. — *House of Assembly Debates*, Questions, col. 327, Mar. 10, 1980.

49. McDougal, Lasswell, and Chen, *Nationality and Human Rights: the Protection of the Individual in External Arenas*, 83 *YALE L.J.* 900, 958 (1974). See also P. WEIS, *supra* note 39, at 123, 125, 126.

50. Barrie, *supra* note 38, at 34; Olivier, *Statelessness and Transkeian Nationality*, *supra* note 38, at 147, 154.

51. Mann, *The Present Validity of Nazi Nationality Laws*, 89 *L.Q. REV.* 194, 199-200 (1973).

52. G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948).

53. *Opened for signature* Mar. 7, 1966, entered into force Jan. 4, 1969, 660 U.N.T.S. 195, reprinted in 5 *INT'L LEGAL MAT.* 352 (1966).

54. Convention on the Reduction of Statelessness, Aug. 29, 1961, art. 9, U.N. Doc. A/Conf. 9/15 (1961). This convention has not entered into force.

political grounds.'

As shown above, none of the independence-conferring statutes expressly provides for denationalization on the ground of race, but by implication they are designed to apply to Blacks only. And this is borne out by their implementation in practice. Consequently, it is highly arguable that the compulsory denationalization of some seven million persons⁵⁵ connected with Transkei, Bophuthatswana, and Venda by the South African legislature violates international law. Certainly this factor contributed to the non-recognition of the homelands in question as independent states.

D. *Homelands Independence and Statelessness*

That contemporary international law disapproves of statelessness is shown by attempts to prevent it through multilateral conventions. Most important is the Convention on the Reduction of Statelessness,⁵⁶ which was opened for signature in 1961 but has not yet come into force. Other treaties are the Convention Relating to the Status of Stateless Persons,⁵⁷ the Convention Relating to the Status of Refugees,⁵⁸ and the Protocol Relating to the Status of Refugees.⁵⁹ South Africa is not a party to any of the above conventions save for the Convention Relating to the Status of Stateless Persons.⁶⁰

As far as the South African Government is concerned, statelessness does not occur as a result of denationalization caused by homelands independence. This argument is premised on the fact that the independence-conferring statutes all confer the nationality of the newly independent state upon persons deprived of their South African nationality.⁶¹ The South African Government might even argue that in granting independence it has complied with the spirit of Article 10 of the Convention on the Reduction of Statelessness, which provides:

- (1) Every treaty between contracting states providing for the transfer of territory shall include provisions designed to secure that no person shall become stateless as a result of the transfer
- (2) In the absence of such provisions the contracting state to which territory is transferred or which otherwise acquires territory shall confer its nationality on such persons as would otherwise become stateless as a result of the transfer or acquisition.

55. The 1978 population estimates for the three territories were: Transkei, 4,142,800; Bophuthatswana, 2,219,600; and Venda, 473,200. 33 SURVEY OF RACE RELATIONS IN SOUTH AFRICA 71 (1979).

56. Note 54 *supra*.

57. Convention Relating to the Status of Stateless Persons, Sept. 28, 1954, 360 U.N.T.S. 117. This convention came into force in June 1960.

58. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137. This convention came into force in April 1954.

59. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267.

60. Van Wyk, *The South African Passport*, [1976] S. AFR. Y.B. INT'L L. 212, 221.

61. See Olivier, *Statelessness and Transkeian Nationality*, *supra* note 38, at 154.

Two arguments may, however, be raised in support of the view that homelands independence results in statelessness. First, it may be argued that a black person who has never lived in the independent homeland lacks the necessary "genuine link" or "social fact of attachment" prescribed as a requirement for the bond of nationality by the International Court of Justice in the *Nottebohm* case.⁶² Such a person would not become a national of the newly independent state, but would nevertheless cease to be a South African national. Under international law he would therefore be stateless. Second, independent homelands are inevitably doomed to non-recognition. Consequently, third states will not recognize their competence to protect their "nationals" abroad, as their very existence is denied. At the same time, South Africa is unlikely to exercise any diplomatic protection over them. Thus for practical purposes, nationals of Transkei, Bophuthatswana, and Venda are stateless. They are no longer South African nationals and their own states are unrecognized. By promoting such a situation, in the knowledge that independence will not be accompanied by recognition, it may be argued that the South African Government is creating a large-scale situation of statelessness.

E. Privileges Retained by Denationalized Persons with Special Reference to "Section 10 Rights"

All three independence-conferring statutes provide in section 6 that no citizen of the Transkei, Bophuthatswana, or Venda, resident in the Republic of South Africa at the time of independence, "shall, except as regards citizenship, forfeit any existing rights, privileges or benefits."

This provision is generally viewed as preserving the so-called section 10 rights of denationalized Blacks. Section 10(1) of the Blacks (Urban Areas) Consolidation Act of 1945⁶³ prohibits every Black from being in any prescribed urban area for more than seventy-two hours unless:

- (a) he has resided in that area continuously since birth; or
- (b) he has worked continuously in that area for the same employer for ten years; or he has lawfully resided continuously in that area for at least fifteen years; or
- (c) the Black is the wife, unmarried daughter or minor son of a male falling under (a) or (b); or
- (d) permission has been granted for him to be in the area by a labour bureau.

As employment opportunities outside the cities are limited, those Blacks who qualify to remain permanently in an urban area in terms of section 10(1)(a), (b), or (c) constitute a privileged class. These rights are becoming even more precious as government policy makes its increasingly diffi-

62. (*Liechtenstein v. Guatemala*), [1955] I.C.J. 4, 23. Weis states: "The tendency to assimilate *de facto* stateless persons . . . to *de jure* stateless persons, is further evidence of the importance of the question whether the nationality which an individual possesses in law is effective." P. WEIS, *supra* note 39, at 202.

63. Act 25 of 1945, as amended. Section 10 in its present form was first inserted in 1952.

cult for rural Blacks to acquire section 10(1) rights. This is because rural Blacks are generally admitted to urban areas by labor bureaus under section 10(1)(d) for one-year contract periods only and, although this contract period may be renewed, the technical interruption in employment prevents a rural Black from acquiring rights under section 10(1)(b).⁶⁴ Section 10(1) is not constitutionally guaranteed, but it has acquired a special status in the black community as it offers a semblance of security in an insecure world. Hence the saving provision in section 6 of the independence-conferring statutes is of great importance.

Although section 6 does preserve the "section 10 rights" of Transkeians, Bophuthatswanans, and Vendans who were alive at the time of independence, it does not extend its protection to the children of such persons born in South Africa after independence. This is the result of a 1978 amendment⁶⁵ to the Blacks (Urban Areas) Consolidation Act which places the children of denationalized persons in the position of foreigners in respect of their right to remain in urban areas. This enactment seriously undermines recent initiatives of the government to give greater security to urban Blacks.

In 1978 the government, which has vigorously opposed the granting of freehold rights to Blacks in urban areas, introduced a major concession: home ownership on a ninety-nine year leasehold basis. According to this scheme, Blacks who qualify to remain in urban areas in terms of section 10(1)(a) or (b) may obtain ninety-nine year leasehold rights to property in such areas.⁶⁶ This plan is designed to afford permanency of residence to black urban dwellers, but it has been seriously undermined by the fact that the children of denationalized Blacks will apparently not be able to take advantage of the lease.⁶⁷ As the veteran civil rights parliamentarian, Mrs. Helen Suzman, M.P., stated when this matter was debated in Parliament: "The child born after independence . . . is not a South African citizen and therefore cannot enter or be in a prescribed area. How can that person then acquire rights of leasehold when . . . that person may not even be in the area?"⁶⁸ Government spokesmen insist that it is not the intention of the government to deny leasehold rights to

64. Proclamation 74, Government Gazette 2029, Mar. 29, 1968 (Regulation 13(d)).

65. Sec. 2 of the Black Laws Amendment Act 12 of 1978 amending sec. 12 of Act 25 of 1945. For a discussion of the implications of this measure, see 72 *House of Assembly Debates*, cols. 470, 519, 629, 639, 648, Feb. 6-8, 1978.

66. Sec. 6A of the Blacks (Urban Areas) Consolidation Act 25 of 1945, as introduced by sec. 2 of the Blacks (Urban Areas) Amendment Act 97 of 1978. For further material on this subject, see 32 *SURVEY OF RACE RELATIONS IN SOUTH AFRICA* 325 (1978).

67. Section 1 of the Blacks (Urban Areas) Consolidation Act 25 of 1945, as amended by section 1(d) of the Blacks (Urban Areas) Amendment Act 97 of 1978, provides that a qualified person in relation to a right of leasehold means a black person qualified to remain in an urban area in terms of section 10(1)(a) or (b) of Act 25 of 1945. As descendants of denationalized Blacks do not acquire section 10(1)(a) or (b) rights in terms of section 12(1) of Act 25 of 1945 it follows logically that they do not qualify for 99-year leasehold rights.

68. 74 *House of Assembly Debates*, col. 9252, June 13, 1978.

the descendants of denationalized persons,⁶⁹ but they have consistently refused to bring the law into line with declared intent.⁷⁰ This problem illustrates the dilemma posed by denationalization to "progressive" Nationalists determined to advance the position of urban Blacks. All reforms aimed at improving the quality of life of urban Blacks relate to the granting of greater security of residence, yet at the same time these proposed reforms are undermined by denationalization which inevitably promotes the maximum degree of insecurity.

To date, the section providing for the non-forfeiture of "existing rights, privileges or benefits" has come before the Supreme Court in only one instance and was on this occasion interpreted generously. In *Ex Parte Moseneke*,⁷¹ the Transvaal Provincial Division held that the bar to the admission of aliens or persons not lawfully admitted to the Republic for permanent residence to practice as attorneys in the Republic did not apply to a national of Bophuthatswana resident in Pretoria, as he did not forfeit any existing rights, other than citizenship, when he was deprived of his South African citizenship.

F. *Privileges Acquired by Denationalized Persons*

Under international law a state is required to accord a certain minimum standard of treatment to aliens admitted to its territory. This means that where a state has a low standard of justice towards its own nationals, an alien's position is a privileged one.⁷² This "minimum standard of civilization"⁷³ is not an exacting one and has been described as simply "the standard of the 'reasonable state,' reasonable, that is to say, according to the notions that are accepted in our modern civilization."⁷⁴ Although the precise limits of this standard are not clear, it is accepted that a state violates its international obligations, and thus incurs responsibility to the state of which the alien is a national, when it denies an alien basic human rights on the ground of his race.⁷⁵

While the "minimum standard of treatment" is scrupulously observed by the South African Government in the case of aliens from most states, it is certainly not respected in the case of Transkei, Bophuthatswana, and Venda — and possibly Lesotho, Botswana, and Swaziland. The reasons for this are twofold.

First, most of South Africa's discriminatory laws apply to Blacks *per se* and not to Blacks as South African nationals. In terms of the Population Registration Act, which governs race classification in South Africa, a "black person" (previously "Bantu") is defined as a "person who is, or is generally accepted as, a member of any aboriginal race or tribe of Af-

69. *Id.* col. 9234 (Dr. C.P. Mulder); *The Star* (Johannesburg), Mar. 2, 1979, at 3.

70. 74 *House of Assembly Debates*, cols. 9251, 9261, June 13, 1978.

71. 4 S. AFR. L. REP. 884 (1979).

72. J. BRIERLY, *THE LAW OF NATIONS* 278 (6th ed. H. Waldock 1963).

73. L. OPPENHEIM, 1 *INTERNATIONAL LAW* 350 (8th ed. H. Lauterpacht 1955).

74. J. BRIERLY, *supra* note 72, at 279-80.

75. 8 *DIGEST OF INTERNATIONAL LAW* 376 (M. Whiteman ed. 1967).

rica.”⁷⁶ This definition is referred to in a number of discriminatory statutes. Other statutes contain their own definitions of “Black” but follow the formula employed by the Population Registration Act. Thus most discriminatory laws apply *not* to black South African citizens but to any persons who are members of any aboriginal race or tribe of Africa. The following statutes, for example, affect black aliens as well as South African Blacks: the Blacks (Abolition of Passes and Co-ordination of Documents) Act,⁷⁷ which obliges Blacks to carry identity documents (passes) which must be produced on demand by a policeman; the Blacks (Urban Areas) Consolidation Act,⁷⁸ which regulates the residence rights of Blacks in urban areas; the Education and Training Act,⁷⁹ which provides for separate schools for Blacks; and the Black (Prohibition of Interdicts) Act,⁸⁰ which deprives Blacks of the right to obtain court interdicts pending a determination of their legal rights affecting residence.

It is possible, however, that Transkei, Bophuthatswana, and Venda waived the protection against discriminatory treatment afforded by the international minimum standard in their pre-independence agreements with South Africa. In the Agreement between the Government of the Republic of South Africa and the Government of Transkei relating to the Employment of Citizens of Transkei in the Republic of South Africa, it is agreed in Article 1 that:

No citizen of Transkei *engaged in Transkei for employment in the Republic of South Africa* shall enter the Republic of South Africa for the purpose of taking up employment unless
 (a) he complies with the laws and regulations relating to the admission to, residence in, and departure from the Republic of South Africa. . . .⁸¹

Similar agreements apply in respect of Bophuthatswana⁸² and Venda.⁸³ Another accord, the Agreement between the Government of the Republic of South Africa and the Government of Transkei relating to the Movement of Citizens of Transkei and of the Republic of South Africa across the Common Borders, provides in Article 1: “The movement to and the sojourn in the Republic of South Africa of citizens of Transkei . . . shall be governed by the laws and regulations governing the admission to, *resi-*

76. Act 30 of 1950, sec. 1. For a full description of the system of race classification in South Africa, see J. DUGARD, *HUMAN RIGHTS AND THE SOUTH AFRICAN LEGAL ORDER* 59-63 (1978).

77. Act 67 of 1952, §§ 1, 3(1)(b)(ii), 13, 15.

78. Act 25 of 1945, §§ 1, 10, 12.

79. Act 90 of 1979.

80. Act 64 of 1956.

81. GN 1976, Government Gazette No. 5320, Oct. 22, 1976, at 16 (Regulation Gazette 2384). Emphasis added.

82. GN R2496, Government Gazette No. 5823, Dec. 6, 1977, at 22 (Regulation Gazette 2569).

83. GN R2014, Government Gazette No. 6652, Sept. 12, 1979, at 142 (Regulation Gazette 2861).

dence in and departure from the country. . . ."⁸⁴ There are corresponding provisions in the agreements with Bophuthatswana⁸⁵ and Venda.⁸⁶

These agreements are apparently intended to deal only with migrant laborers in, and visitors to, the Republic of South Africa from Transkei, Bophuthatswana, and Venda, but they are so widely phrased that it may be contended that they constitute an agreement between South Africa and her independent homelands to subject all the latter's nationals to South Africa's discriminatory laws.

The second reason for noncompliance with the international minimum standard probably is that the new black states in southern Africa lack the political power to insist on compliance with the standard by the South African authorities. In order to appreciate this, one has only to compare and contrast the treatment of American Blacks visiting South Africa with that of Transkei Blacks in the Republic. In this respect it should be recalled that the failure of the South African Government to accord the minimum standard of treatment to Transkeian nationals contributed to Transkei's decision to break off diplomatic relations with South Africa in 1978.⁸⁷ More recently, Prime Minister George Matanzima appealed to the South African Government to show the world that it recognized Transkei's sovereignty by treating Transkei nationals in the same way as it treats other foreigners.⁸⁸ South Africa and Transkei resumed diplomatic relations in 1980.

It might be argued that nationals of Transkei, Bophuthatswana, and Venda are placed in a privileged position *vis-à-vis* other aliens in South Africa by reason of the fact that they retain all their "rights, privileges or benefits" that existed at the time of independence in terms of the independence-conferring statutes. This is an untenable argument, as the rights, privileges and benefits that accrue to black South Africans fall short of the international minimum standard of treatment by virtue of their discriminatory nature. In any event, as shown above, there is so much uncertainty as to the scope and duration of these "existing rights, privileges or benefits" that urban Blacks can hardly draw much comfort from them. The meagre scope of the "preferential treatment" accorded to citizens of Transkei, Bophuthatswana, and Venda is apparent from the statement made in 1978 by Dr. C.P. Mulder (then Minister of Bantu Administration and Development) to the effect that such persons enjoyed "preferential treatment over foreign Blacks as to employment opportunities, extended right of entry, *viz* 14 days instead of 72 hours, admission to

84. GN 1976, Government Gazette No. 5320, Oct. 22, 1976, at 58 (Regulation Gazette 2384). Emphasis added.

85. GN R2496, Government Gazette No. 5823, Dec. 6, 1977, at 78-79 (Regulation Gazette 2569).

86. GN R2014, Government Gazette No. 6652, Sept. 12, 1979, at 17 (Regulation Gazette 2861).

87. 12 S. AFR. RECORD 34 (1978).

88. The Star (Johannesburg), Mar. 22, 1979, at 4.

RSA through any place of entry while foreigners have to enter at specific points which are manned by officials of the Department of the Interior, etc.”⁸⁹ Such “preferential treatment” makes no attempt to exempt black aliens from discriminatory and repressive laws and thus fails to meet the requirements of the international minimum standard.

One must, therefore, conclude that denationalized Blacks from Transkei, Bophuthatswana, and Venda are not accorded the minimum standard of treatment required by international law. Consequently, they get the worst of both worlds: loss of their “birthright” to participate in the government and power processes of South Africa at some future date, and denial of the standards of fair treatment which normally accrue to aliens.

G. *Deportation of Aliens*

A number of statutes confer wide powers of deportation of aliens upon the South African Government. These powers may be, and indeed already have been, used in order to remove political opponents who have been denationalized as a result of homelands independence. The two main statutory provisions which permit action of this kind are the Admission of Persons to the Republic Regulation Act and the Internal Security Act.

Section 45 of the Admission of Persons to the Republic Regulation Act empowers the Minister of the Interior “if he considers it to be *in the public interest*” to order the removal from the Republic of “any person who is not a South African citizen.”⁹⁰ The decision of the Minister as to whether such removal is or is not in the public interest “shall not be subject to appeal or to review by any court of law and no person shall be furnished with any reasons for such decision.” This provision has already been invoked against a denationalized urban dweller from Transkei. In August 1978 Mr. Pindile Mfeti, a trade unionist from Germinston who had previously been detained without trial under the security laws for 366 days, was deported to Transkei “in the public interest.”⁹¹

Section 14 of the Internal Security Act⁹² permits the deportation of a non-South African citizen who is convicted of certain offenses under this act or who is deemed by the state president to be an undesirable inhabitant “because he is a communist.” No prior notice to the person concerned is required in the latter case. To date there is no record of this act having been invoked against denationalized persons. Although little use has been made of the deportation weapon in respect of denationalized Blacks, it remains a constant threat to the security of those denationalized urban Blacks who actively oppose the South African Government.

89. 72 *House of Assembly Debates*, col. 542, Feb. 7, 1978.

90. Act 59 of 1972. Emphasis added.

91. *The Star* (Johannesburg), Aug. 2, 1978, at 5.

92. Act 44 of 1950 (formerly called the Suppression of Communism Act).

H. *Dual Nationality*

International law accepts the notion of dual nationality, according to which an individual may possess the nationality of more than one state.⁹³ If the South African Government had applied this principle to homelands independence and allowed persons connected with Transkei to retain their South African nationality while at the same time becoming nationals of Transkei, it would have avoided much hostile criticism.⁹⁴ On the other hand, that course would not have furthered the ultimate goal of a South Africa with no black South African nationals. Hence such a solution was rejected.

More recently, there have been developments in several quarters which suggest that the possibility of dual nationality has not been completely discarded. The initial impetus for this revival of interest in dual nationality came from the report of the Quail Commission of Inquiry into the future of the non-independent homeland of Ciskei. This report recommended that Ciskei should opt for independence only if "citizenship on satisfactory terms is negotiated which gives non-resident Ciskeians the choice of either Ciskeian or South African status or both."⁹⁵

The idea of a constellation or confederation of states for southern Africa,⁹⁶ which has figured prominently in the speeches of Prime Minister Botha during the past year, carries with it implications for nationality.⁹⁷ It has been suggested⁹⁸ that the government is considering a confederal South African or southern African nationality in addition to homelands nationality as a solution to the problem of denationalization which has created so much bitterness among Blacks. Presumably some form of dual nationality is contemplated in such a case, in terms of which Blacks from independent homelands will retain their South African nationality or acquire the nationality of a Confederation of Southern Africa, while at the same time becoming nationals with full citizenship rights of the independent homeland. This would be a recognizable form of dual nationality and might be acceptable to Blacks—provided that it is not presented as a final exclusion of Blacks from the South African body politic but rather as a method for maintaining the link between such persons and South Africa itself while a more viable political solution is planned. In this re-

93. 2 D. O'CONNELL, *INTERNATIONAL LAW* 685 (2d ed. 1970). Dual nationality gives rise to a number of problems with the result that some states and jurists regard such a status as undesirable. It is not disputed, however, that dual nationality is tolerated and permitted by international law. See generally N. BAR-YAACOV, *DUAL NATIONALITY* (1961); P. WEIS, *supra* note 39, at 169-204.

94. As late as 1975 a leading academic lawyer, Dr. F. Venter of the University of Potchefstroom, stated that dual nationality was a possible solution in the case of urban Africans. Venter, *supra* note 38, at 252.

95. *THE QUAIL REPORT*, *supra* note 24, at 127, para. 348(2).

96. For further information, see *THE CONSTELLATION OF STATES*, note 27 *supra*.

97. — *House of Assembly Debates*, cols. 250-51, Feb. 6, 1980.

98. For the statement by the National Party Member of Parliament for Krugersdorp, Mr. L. Wessels, M.P., see — *House of Assembly Debates*, cols. 5835-36, May 7, 1980.

spect it differs fundamentally from the concept of "associate citizenship" which is currently being mooted by the right-wing faction of the National Party. According to this suggestion denationalized Blacks will qualify for certain revocable privileges, such as passports, but will be denied any expectation of political participation in the government of South Africa. Neither the concept of "confederal nationality" nor that of "associate citizenship" has been fully spelled out so at this stage it is premature to speculate as to the extent to which either resembles traditional dual nationality.

Another factor which points in the direction of some form of dual nationality is the government's declared intention of extending the powers of the elected black local government councils, known as Community Councils. These councils, which have been established for Blacks in the main urban areas of South Africa, provide evidence of the growing acceptance of the permanency of black urban residents and constitute recognition of the fact that the homelands governments cannot adequately represent the interests of their "citizens" in the cities. Already nationals of independent homelands who are resident within the area for which a Community Council has been established enjoy the right to vote in Community Council elections.⁹⁹ This is an anomalous situation as normally aliens are denied the right to participate in local government as well as national government. If the Community Councils are to become more powerful it becomes still more anomalous to permit aliens, *viz* nationals of independent homelands, to vote for and hold office in such councils. On the other hand, if dual nationality were accorded to such persons there would be nothing unusual about the exercise of citizenship rights in local government in South Africa coupled with the exercise of full citizenship rights in an independent homeland.

IV. CONCLUSION

The issue of nationality is central to the political future of South Africa. If Blacks are accorded dual nationality when "their" homelands become independent, or are allowed to opt to retain South African nationality, this will amount to an acknowledgement that Blacks are to be considered for political rights in the South African body politic, albeit in the future. On the other hand, if the present policy of denationalization is continued, this will be seen as evidence of a determination to implement the homelands policy along the lines expounded by Dr. C.P. Mulder in his notorious statement of February 7, 1978.¹⁰⁰ The National Party is clearly locked in debate on this issue. A committee under the chairmanship of Professor Charles Nieuwoudt of Pretoria University has recently examined the matter, but the outcome of the committee's deliberations is unknown. In the meantime, the *verligte* (relatively moderate) faction of the National Party advocates some form of confederal nationality, while

99. Sec. 3(5), Community Councils Act 125 of 1977.

100. Text accompanying note 17 *supra*.

verkrampes (reactionaries) within the party press for "associate citizenship," which from the available evidence seems to be nothing more than denationalization in disguise. As the policy of denationalization is so fundamental to orthodox separate development ideology, any modification of this policy will call in question the loyalty of the present government to separate development (apartheid). This is why the future of separate development itself hinges upon the debate over the issue of nationality for Blacks in South Africa.

POSTSCRIPT

Ciskei, at present a self-governing homeland, recently elected to become independent. December 4, 1981 has been set for the inauguration of the new "state." The independence-conferring statute has yet to be enacted and it is therefore not known what agreement has been reached between the South African Government and the Ciskeian authorities on the issue of nationality. Will Ciskeians be summarily deprived of their South African nationality as has happened in the case of millions of Blacks connected with Transkei, Bophutatswana, and Venda? Or will a more equitable solution be found? The answer to these questions will not only throw light on the future of separate development, but will demonstrate the extent to which the South African Government is prepared to take cognizance of contemporary norms of international law governing nationality.