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Minderhede in Suid-Afrika se reg op selfbeskikking in die 21e eeu

South African minorities' right to self-determination in the 21st century

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Good day honourable participants. First of all I would like to extend my gratitude to the organisers of this symposium for affording me with the opportunity to make a contribution towards the discussions of this important topic.

For the benefit of our non-Afrikaans speaking participants, I have decided to present this topic in English. However, if you have any questions, please do not hesitate to pose them in Afrikaans.

This presentation is loosely based on my LLM dissertation titled "*Contemporary issues in the law of secession and external self-determination beyond decolonisation and dissolution*" which was submitted for an LLM degree at the University of Kent in the United Kingdom. As the title suggests, the focus is particularly placed on external self-determination.

As a preliminary remark, I would like to draw your attention to the fact that there is a right to self-determination *per se*, the manner in which this is exercised depends on practical issues in any given situation. The distinction drawn between internal and external self-determination, is somewhat artificial, but assists in distinguishing between the various forms the right to self-determination can adopt.

Internal self-determination refers to limited forms of autonomy within a state, for example autonomy on language and cultural aspects, or limited autonomy over a specific region. One such an example is Friesland in the Netherlands. Another example of internal self-determination, in an extreme form, is Scotland.

External self-determination refers to secession – this is where a people (or "volk" in Afrikaans) within a nation state wishes to become 100% autonomous and where a new state or country is created with complete territorial sovereignty. Recent examples of the exercise

of external self-determination include Kosovo and South Sudan – both these newly created countries have full autonomy and territorial sovereignty, just as any other country.

Internal self-determination is less contentious than external self-determination and therefore this address will focus in particular on external self-determination.

Before discussing the technical aspects of the right to self-determination and external self-determination in particular, I wish to provide you with a brief overview of the discussion that follows:

Firstly, I will discuss the right to self-determination in international and regional law as well as its manifestation in South African law.

Secondly, I will discuss perceived obstacles that prevent the exercise of external self-determination.

Thirdly, we will look at guidelines to ensure the legal and recognised exercise of external self-determination, particularly within the South African context.

1. Self-determination in international and regional law and its manifestation in South African law

In international law, the right to self-determination is confirmed in article 1 of the International Covenant on Civil and Political Rights which has been signed by South Africa on 3 October 1994 which was ratified on 10 December 1998. The South African government is therefore legally bound by the Covenants provisions. It reads as follows:

> "1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
>
> 2. All peoples may, for their own ends, freely dispose of their natural wealth and without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
>
> 3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination,

> and shall respect that right, in conformity with the provisions of the Charter of the United Nations."

Apart from the right to self-determination now being widely recognised by the international community, and confirmed in international law through its inclusion in legally binding agreements such as the aforementioned covenant on civil and political rights (there are various other international legally binding documents confirming the right), the right to self-determination has also attained the status of an *erga omnes* and *ius cogens* norm.

Erga omnes means that it is an obligation that is owed to the international community as a whole, and *ius cogens* means that it is a peremptory norm of international law. The latter means it trumps other rights and obligations in international law.

Apart from the express **right** to self-determination there is a further point that warrants explanation. Various academics and commentators argue that secession is prohibited under international law. This is simply not the case.

Apart from the fact that there is no source of international law that prohibits secession, the recent secession of Kosovo and South Sudan and the international community's acceptance thereof also point to the fact that secession is by no means prohibited under international law. Furthermore, according to the *Lotus*-principle under international law, that which is not prohibited, is allowed.

On a regional level, a legal basis for the right to self-determination can also be found in the African Charter on Human and Peoples' Rights in article 20:

> "1. All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.
>
> 2. Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community.
>
> 3. All peoples shall have the right to the assistance of the State Parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural."

In the South African context, the right to self-determination is guaranteed in section 235 of the South African Constitution. It reads as follows:

> "The right of the South African people as a whole to self-determination, as manifested in this Constitution, does not preclude, within the framework of this right, recognition of the notion of the right of self-determination of any community sharing a common cultural and language heritage, within a territorial entity in the Republic or in any other way, determined by national legislation."

This section makes it abundantly clear that the right to self-determination does not only vest in the South African nation **as a whole**, but in **peoples** who share a **common cultural and linguistic** heritage. It provides for internal self-determination by stating "within a territorial entity in the Republic" but then continues to state "or in ***any*** other way". Although arguments have been advanced to state that section 235 prohibits secession, it is important to point out that this is simply not the case. Not only does the wording of section 235 not lend itself to such a restrictive interpretation, but the respected Prof John Dugard in his book entitled: *International law: A South African Perspective* poses the following rhetorical question: "Does it mean that all options – including secession – remain open …?" Furthermore, section 235 of the Constitution is to be interpreted in accordance with international law, in terms of section 233 of the Constitution which reads as follows:

> "When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."

In addition, when the Constitutional Court was called upon to certify the Constitution of South Africa, it also confirmed that the permissive door of territorial self-determination was left ajar, meaning that secession is not excluded or prohibited. Furthermore, even if the South African Constitution prohibited secession, which it does not (it is a permissive provision), the effect internationally speaking would be irrelevant, as states cannot limit internationally recognised rights.

From the aforegoing discussion, it is evident that there is an internationally, regionally and nationally recognised right to self-determination. Whether this results in internal or external self-determination is dependent upon the specific intricacies of each situation. More importantly, secession is not prohibited under international or national law, subject to it being exercised in accordance with certain legal principles which I will discuss later on.

2. Perceived obstacles to secession

I call these obstacles "perceived obstacles" because what should become apparent from this part of the discussion is that the various arguments raised against secession, are based on a precolonial and pre-dissolution (i.e. before the dissolution of the Soviet Union) understanding of self-determination and secession. Whilst some of the arguments plainly do not hold any ground, others are archaic and irrelevant in the 21st century.

The first perceived obstacle relates to the definition of "peoples". In terms of international law, "peoples" have a right to self-determination. Various academics have argued that "people" means "nation" and that only nations as a whole (such as all the people as a whole in South Africa) would have a right to self-determination. This is plainly not true.

Firstly, if the drafters of agreements such as the Covenant on Civil and Political Rights intended to refer only to nations as a whole, that is what they would have said (this is a basic principle of the interpretation of statutes). Conversely, if they only wanted to refer to colonial peoples, that is what they would have said. The African Charter is proof of this: it states that the right belongs to all people and then goes on to recognise colonised or oppressed people in particular.

Secondly, events over the past decades have proven that peoples within nation states **can** exercise their right to self-determination (see for example Kosovo, South Sudan and Scotland). Thirdly, UNESCO has provided a widely accepted definition of "peoples". A people (or "volk" in Afrikaans) is a group of human beings who share:

i. A common historical tradition;
ii. Racial or ethnic identity;
iii. Cultural homogeneity;
iv. Linguistic unity;
v. Religious or ideological affinity;

vi. Territorial connection;
vii. Common economic life.

By no means does this definition point to nations as a whole. It cannot be, because a nation like South Africa is a prime example where heterogeneity is apparent just by looking at the fact that we have 11 official languages.

The second perceived pitfall that is widely argued for is the Latin maxim *uti possidetis, ita possideatis,* meaning as you possess, so may you possess or which roughly translates to 'you may keep what you had'. This maxim was particularly applied in the colonial context. The rule of *uti possidetis* was applied in the colonial context to ensure that decolonisation took place in an orderly fashion. Until recently, it was held to be one of the primary legal principles that had to be applied in cases of external self-determination and secession.

The *uti possidetis* rule has been applied in the past in order to limit border conflicts. However, arbitrary borders drawn by colonialists were a particularly big source of ethnic and border conflicts. Why uphold a principle that in its essence already gives rise to conflicts, if the very reason for purporting it is to *limit* those conflicts? Higgins puts it as follows:

> "The principle of *uti possidetis* provides that **states** accept their inherited colonial boundaries. It places no obligation upon minority groups [or indigenous peoples or other distinct peoples] to stay a part of a unit that maltreats them or in which they feel unrepresented. If they do in fact establish an independent state, or join with an existing state, then that new reality is one which, when its permanence can be shown, will in due course be recognized by the international community."

Another academics suggest that 'the principle of *uti possidetis juris* is of questionable legitimacy as a limitation on the right of self-determination. It should only apply, if at all, in (the now very few) situations of decolonisation.'

This was also confirmed by the International Court of Justice where they specifically indicated that it is to ensure stability where **the administering power withdraws**:

> "[Uti possidetis] is a general principle, which is logically connected with the phenomenon of obtaining independence, wherever it occurs. Its obvious purpose is to prevent the independence and stability of new states being endangered by fratricidal struggles provoked by the changing of frontiers following the withdrawal of the administering power."

The third perceived obstacle relates to the territorial integrity of states. Secession was always thought to involve the clash of two international law principles; the right to self-determination and the territorial integrity of the state. The territorial integrity of states is a well-established rule of international law. The General Assembly confirmed this in paragraph 6 of Resolution 1514 (XV) where it reiterated that 'Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purpose and principles of the United Nations'.

However, even though governments readily claim the principle of territorial integrity in an attempt to curb secessionist movements, Crawford concluded that individuals or groups of individuals are not bound by the principle of territorial integrity:

> "[T]he reason why seceding groups are not bound by the international law rule of territorial integrity is not that international law in any sense favours secession. It is simply that such groups are not subjects of international law at all, in the way that states are, even if they benefit from certain minimum rules of human rights and humanitarian law".

This was confirmed by the International Court of Justice (ICJ) in 2010 when it ruled that the principle of territorial integrity is limited to the relations between states (Kosovo Advisory Opinion). Hilpold also argues that territorial integrity is directed at the protection from infringements by other states and 'surely no directed against changes coming from the inside'.

A further argument against the territorial integrity defence was articulated in a separate opinion by Judge Cançado Trindade in which he concluded that states cannot invoke the principle of territorial integrity where the state has grossly violated human rights of the people asserting a right to external self-determination. This is also asserted by McCorquodale when he argues that a state can only claim territorial integrity if it internally provides for self-determination. According to Simpson, the aim of territorial integrity is to

'safeguard the interests of the people living in that territory.' The defence of territorial integrity is thus only legitimate as long as the interests of all people living within the territory are fulfilled. Territorial integrity is therefore relative in the face of human rights violations and the fact that the principle can ordinarily only be invoked in relation to infringements by other states, and not by peoples living within the state in question.

It becomes evident that the argument that secession would violate the territorial integrity of a state is no longer a valid argument, since only states can violate the territorial integrity of another state under international law, and not individuals. Furthermore, the state cannot assert territorial integrity and sovereignty when it is violating the human rights of those exercising self-determination.

3. Guidelines for secession

1.1. Requirements for statehood

Firstly, it is important to identify the requirements for statehood, since secession would, when successful, ultimately result in the creation of an independent state. Article 1 of the Montevideo Convention provides that 'The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) a government; and (d) the capacity to enter into relations with other states.'

The above criteria can be seen as prerequisite to any successful secession of territory of which statehood will be recognised by other sovereign states. Some of the requirements set out in the Montevideo Convention merit further explanation.

Firstly, the requirement of a permanent population refers to a stable community. However, there are no standards regarding the size of the population; there is no prescribed minimum quantity of humans that need to inhabit the territory. Moreover, the society forming the population need not be homogenous.

Secondly, the defined territory need not be final. The ICJ in the *North Sea Continental Shelf* case held that there was 'no rule that the land frontiers of a State must be fully delimited

and defined', however it has been argued that the territory should be 'reasonably well defined'.

The German-Polish Arbitral Tribunal held that 'In order to say that a State exists […] it is enough that this territory has a sufficient consistency, even though its boundaries have not yet been accurately delimited, and that the State actually exercises independent public authority over that territory'.

The size of the territory also does not matter – see for instance Monaco, Vatican City, Liechtenstein and Andora.

The requirement of a government proposes that the government of the putative state should be in effective control of the territory and population by the time it secedes from the parent state.

In order for a people to successfully secede from a parent state, the above requirements have to be present.

1.2. Recognition

The importance of the recognition by the international community of a seceding state cannot be overemphasised. As mentioned earlier, successful secession results in the creation of a new independent state. However, this entity needs to be recognised by the international community (even if it is only one state other than the parent state) – since without recognition, a state cannot enter into interstate agreements with other states.

In numerous cases, such as in the case of Biafra and Katanga, the failure to receive international recognition has led to the subsequent failure of the secession. Recognition is heavily reliant on international politics – this is illustrated by the case of the widely recognised state of Kosovo, compared to the questionable status of Abkhazia. If recognition were only a question of international law, both states should be equally recognised if one follows a doctrinal approach.

The case of Somaliland also serves as an example where it becomes clear that recognition is not only a question of international law, but also of international relations. Somaliland declared its independence in May 1991 after 97% of the constituents approved the provisional constitution and independence. Somaliland is a representative democracy and held its first municipal and presidential elections in 2003. A UNHCR report concluded that the central administration of Somaliland maintains functional control. The country has international relationships with Ethiopia and liaison offices in Ethiopia, US and UK. However, it has not been recognised by a single state – despite the fact that it is a fairly stable and democratic country which fulfils all the criteria of the Montevideo Convention.

A further example of how recognition relies on international relations is the case of Nauro, where this state received US $ 50 million in aid from Russia to recognise the statehood of Abkhazia.

Despite this uncertainty, it is of utmost importance to recognise that there is a duty of non-recognition in international law if the creation of the putative state is a result of a violation of a peremptory norm of international law. In other words if the new state commits human rights violations, commits acts of aggression (i.e. where the secessionist state is militant towards the parent state), where the proposed regime is undemocratic or where there is racial discrimination, the international community has a duty **not** to recognise the putative state..

1.3. The proposed guidelines for secession

Various authors have proposed guidelines for secession. These guidelines include: (i) the existence of a people; (ii) the existence of a territorial bond between the people and the territory; (iii) violation of the indirect or direct right to self-determination of said peoples (which includes widespread human rights violations); and (iv) the exhaustion of effective internal remedies. Other guidelines include the use of (a) peaceful methods for resolving the

dispute must have been exhausted; (b) proof that those making the claims for self-determination of a people represent the will of the majority of those peoples; and (c) the use of force and a claim to independence is a tool of last resort.

The Council of the European Communities in the Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union of 16 December 1991 articulated their 'readiness to recognise' a state if it is based on democratic principles, accepted appropriate international obligations which in my opinion would include human rights obligations and guaranteed the rights of minorities living within the territory.

David Raič has identified various reasons why the secession of Chechnya was unsuccessful:

- There was no denial of a right to internal self-determination (Russia was prepared to grant Chechnyans substantial autonomy);
- The claim for secession was not brought under international law (self-determination) but under Soviet Law;
- Chechnyan elections have been reported to be unfair;
- It is questionable whether secession was actually the will of the people (declaration of independence needs not be made on behalf of the holders of the right to self-determination).

The reasons why Abkhazia was unsuccessful according to Raič are:

- The seceding population did not constitute a clear majority in Abkhazia;
- Absence of human rights violations;
- Georgia was willing to grant autonomy;
- The Abkhazians themselves have been accused of violating human rights.

Based on the works of other authors and examples of both successful and unsuccessful secession attempts, I have compiled a list of guidelines necessary for successful secession:

1.3.1. Negotiation and agreement

It is fairly accurate to say that secession by agreement is one of the simplest ways of seceding. An example where secession has been based on agreement is the former Czechoslovakia, which is now known as the Czech Republic and Slovakia. The first step for a secessionist movement would therefore be to enter into negotiations with the state that it aims to secede from. However, if the parent state is unwilling to negotiate an agreed

secession with the secessionist movement, various other criteria need to be fulfilled in order for the secession to not violate international law and to, insofar possible, guarantee that the secessionist state gains international recognition.

1.3.2. Existence of a distinct 'people'

Since the right to self-determination belongs to a 'people' – it is first and foremost necessary that the seceding group constitutes a 'people' as defined by UNESCO. In 1971, Bangladesh became independent from Pakistan, and it was recognised as a state by more than 50 other states within four months. Nanda explains the reasons why the Bangladeshi people could secede. Firstly, they constitute a distinct people and secondly the 'state of mind' of the Bengali people to be independent illustrates their separateness. From this, two requirements for secession can be deduced; there must be an objectively determined distinct people, and secondly, there must be a subjective ethos, which indicates the people's "we-consciousness".

1.3.3. Lack of effective participation or human rights violations

This requirement is not essential, but rather recommended. This is because remedial secession, where the people wishing to secede are subjected to human rights violations and cannot effectively participate politically, is more widely recognised as a legitimate basis for secession. However, various examples can be listed where people have not suffered human rights violations, but still strive to secede. One such an example is Scotland.

1.3.4. Connection to territory

A people wishing to secede, must have a certain connection to the territory that will be separated from the parent state. Brilmayer states that '[t]he two supposedly competing principles of people and territory actually work in tandem.' She continues: '[m]y thesis is that every separatist movement is built upon a claim to territory, usually based on an historical grievance, and that without a normatively sound claim to territory, self-determination arguments do not form a plausible basis for secession.' Ten years later, she confirms her own thesis again:

> In evaluating secessionist claims specifically, there are two different aspects of the claim on which one might focus. Traditionally, theorists had

> focused on the cohesiveness of the group asserting the claim - whether the group in question was a distinct 'people' in the religious, linguistic, or ethnic sense. There is another issue at stake, however: the objective validity of the claim that the particular group espouses. Thus (as I argued ten years ago) the claim to a particular piece of territory will be more or less convincing depending on the existence (or nonexistence) of a historical claim to land.

Brilmayer thus suggests that two aspects should be taken into account when determining whether a secessionist movement has a valid claim; the one will focus on the identity of the group, in other words, whether they constitute a distinct people; and the other is whether the claim can be objectively justified based on 'historical fact, legal reasoning, moral argumentation, and so forth.'

Sovereignty prior to colonisation is one of the strongest forms of proof of a people's historical connection with a particular territory. The group wishing to exercise external self-determination also needs to be the permanent occupier of the specific territory in terms of the Montevideo Convention. For instance, Afrikaners, as a people, exercised sovereignty over the two former Boer Republics of the Orange Free State and the Zuid-Afrikaansche Republiek (or Transvaal, which included a part of Northern Natal at the time of British colonisation in 1902). It is therefore within the borders of the former Boer Republics, that the Afrikaner would have the strongest territorial connection. Furthermore, they are also for the most part, the current permanent occupiers of the former Boer Republics. In the case of the Khoisan, their historical territorial connection would be in large parts of the former Cape colonies.

It is important to note that with regards to the requirement of a connection to territory, where a people constitute a minority within the borders of a parent state, they must form a majority within the specific territory identified for purposes of secession. The borders would therefore have to be drawn in a manner which would result in the group in question forming a majority within the borders of the territory where a claim of independence is launched, or at least be a majority at the time of declaring independence. This is because, when a referendum and democratic elections are held, this group needs to form a majority within the territory, for obvious reasons.

1.3.5. Will of the people and democracy

It has been reiterated on numerous occasions and by various authoritative sources, that a claim of self-determination must be based on the will of the people exercising that right. In the *Western Sahara* case, the International Court of Justice also focussed on the will of the people, arguing that the freely expressed will of the people is a '*sine qua non* of all decolonisation'. In various other cases, secession was based on the democratic will of the people to secede – examples include East Timor, Eritrea, Kosovo and Sudan.

There is however much debate among academics over who should participate in the plebicite for secession. Various options include: a) All elligible voters of the parent state; b) only the members of the people wishing to secede; c) all eligible voters within the defined territory or d) only members of the people wishing to secede who reside permanently within the borders of the defined territory. In my opinion, the logical approach would be that all eligible voters within the identified territory should vote in the referendum. This is confirmed by the recent secession of Kosovo and South Sudan, as well as by the recent referendum held in Scotland.

1.3.6. Peaceful means

Article 2(4) of the UN Charter prohibits states from resorting to the threat or use of force against another state. It does not provide for a prohibition against the threat or use of force by a people claiming self-determination per se but there is a presumption that the use of force is illegal, unless it is in self-defence. The prohibition against the use of force is also a *jus cogens* norm. A violation of a *jus cogens* norm is not only a violation of international law but can also result in a duty of non-recognition as discussed earlier. According to Shaw the use of force to suppress self-determination is unacceptable under international law. States can therefore not use disproportionate force against self-determination movements. Should the state however resort to the use of force in an attempt to curb the self-determination movement, said movement can seek assistance from the international community and act in self-defence.

1.3.7. Guarantees for human rights and minority protection

There are various reasons why the international community may not recognise a putative state; one of these scenarios is likely to occur when the secessionist movement violates the rights of others living within the state. This thus requires the secessionist movement and those claiming the right to self-determination to refrain from discrimination on the prohibited grounds and from violating the human rights of other peoples, including their right to self-determination. Furthermore, other inhabitants cannot be left stateless as a result of the secession.

Racial discrimination in particular and acts of apartheid, as well as violations of other *jus cogens* norms may place a duty of non-recognition on other states, which will result in the putative state never having international recognition.

1.3.8. Feasibility, practicality and stability

The final guideline could just as well have been the first – in order for external self-determination in the form of secession to be successful, it must be feasible and practically possible. The seceding group must also have the capability to secede with a reasonable prospect of success and effectiveness. The requirement of effectiveness is of particular importance, since successful secession is rather a question fact than a question of law.

This guideline also requires that the remainder of the population that is not seceding, experience minimal disruption. It follows that secession should not create bigger friction than the status quo, and the stability of the region must also be taken into account. The secession should therefore aim to minimise possible negative effects. Furthermore, the group that wishes to secede should only claim a share of the territory and resources that is proportional to the number of persons living within the seceding territory. Tideman suggests that those people seceding should have the right to a share of territory which is proportional to their size. This can be summed up as a requirement of reasonability in order for the secession to be legitimate.

In conclusion, I would like to summarise as follows:

1. International law recognises a right to self-determination and does not prohibit secession.

2. The South African Constitution recognises the right to self-determination and does not prohibit secession.
3. The perceived obstacles hindering secession are archaic and no longer constitute obstacles to secession.
4. There are certain guidelines that need to be followed before secession would succeed.

I thank you for your time.