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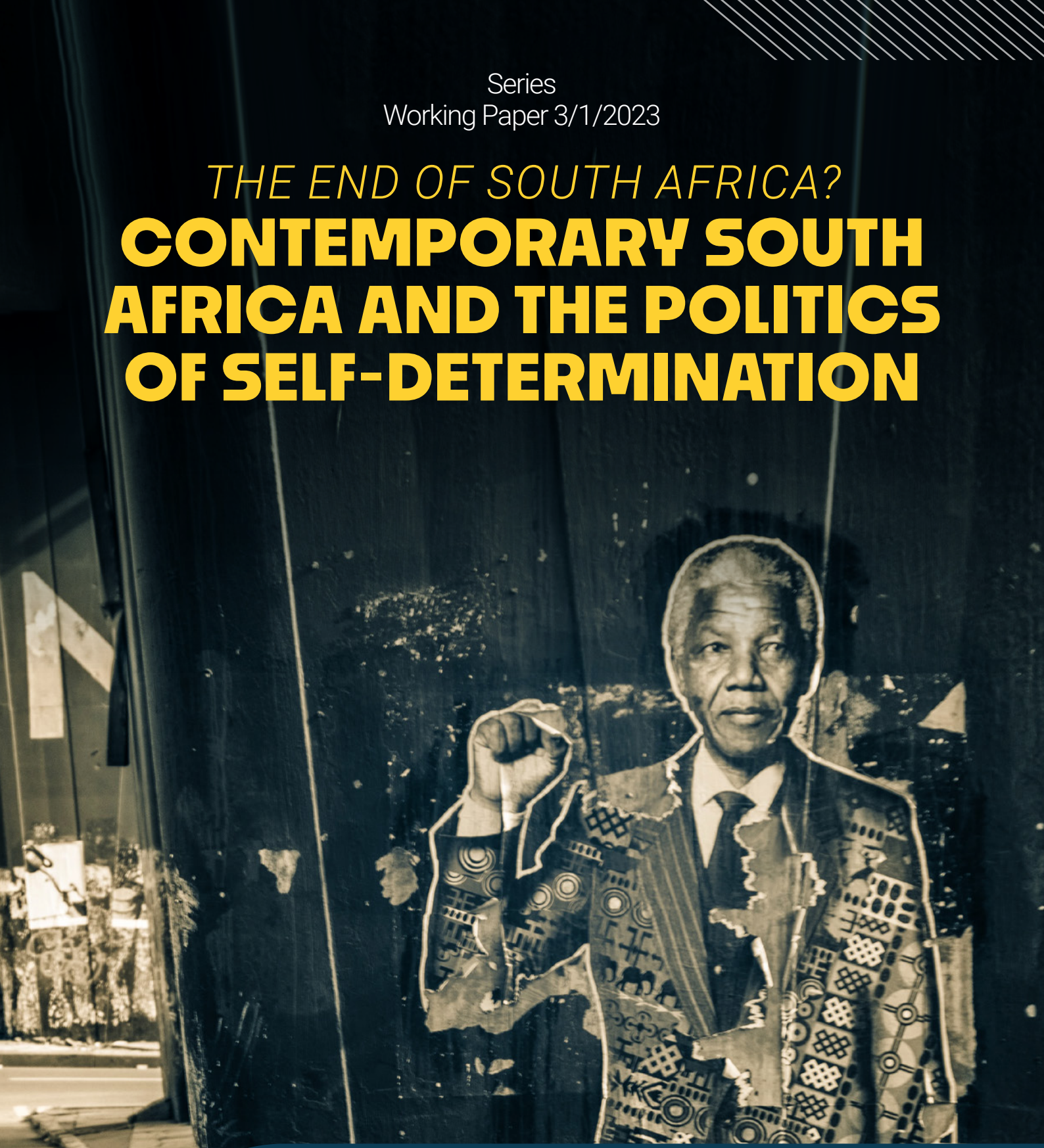
THE END OF SOUTH AFRICA?

CONTEMPORARY SOUTH AFRICA AND THE POLITICS OF SELF-DETERMINATION



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BELGRADE INTERNATIONAL LAW CIRCLE

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PREFACE

Political commentary in South Africa today is preoccupied with elections and with the electoral future of the African National Congress, in particular. This is not surprising as the ANC's support has been dropping consistently since 2009 and many predict that in 2024 the party will not secure enough of the vote to form a government alone. Less well covered, no less in academic circles as by journalists, are substantial or ideological changes, especially related to the most fundamental question of the day: the integrity of South Africa as a state. This paper considers, the politics of self-determination and asks if in South Africa today all political tendencies accept South Africa as the exclusive and legitimate unit of politics.

The report is written by a group of eminent international scholars from Serbia, where the experience of the break-up of Yugoslavia is both fresh in living memory and for whom politics in Serbia and across the (southern) Balkans happens in the shadow of that war.

The idea of South Africa is blowing in the wind. Many of the institutions intended to transform the promise of a non-racial democracy into a concrete reality are in tatters. Public commentary tirelessly laments the corruption and ineptitude of our leaders and of our administrators. Yet the problem lies not only with what we can see and touch. It is in the air that we breathe, an increasingly foul pestilence that overcomes people and institutions. What is this air? It is the ideas and values that circulate between us, that fire our imaginations and our passions and that draw the lines between friends and enemies. We pay hardly any attention to these 'normative conditions of institutions', as if public life breathes in a vacuum.

We are in the midst of an epochal change in South Africa.

One of the enduring paradoxes of the African National Congress, especially as the organisation evolved from the mid-1950s, is that in the name of 'nationalism' it endorsed a profoundly non-national vision of South Africa.

This report observes, I believe for the first time, an important disappearance in the ANC's political language. The term 'self-determination' vanishes from its lexicon in the 1950s. Elsewhere, across Africa and Asia, colonised people fought for self-determination from European empires. This was a term with a long provenance in European conceptions of political community, invented to give legitimacy to popular appeals largely from Slavs, Greeks and German-speakers for independence from European continental Empires – the Austro-Hungarian Empire, for example, or the Ottoman Empire. As it became a principle and later a right of international law, African movements seized on it as a route to their own independence despite misgivings about its deep roots in European nationalism.

Here in South Africa, however, the ANC and its congress allies struggled for National Democracy, not for self-determination. The Pan Africanist Congress split with the ANC precisely on this point.

Instead, the language of self-determination was appropriated by the National Party, who from the 1960s and 1970s framed Apartheid as a project of decolonisation. The purpose of Grand Apartheid, the NP declared, was to give self-determination to Africans in their own ethnic states. The Union of South Africa, they

Image credit: Tembinkosi Sikupela via Unsplash

proposed, was an Imperial abomination, an artificial political community that threw diverse people together in an unnatural unity. The order of the world was distinct nations in their own territory. The idea was not so far-fetched from an international perspective. The post Second World War consensus, the great historian Tony Judt tells us, was founded on the idea that homogenous nations should reside in their own territories - driving a post-war exchange and movement of populations unprecedented in human history.

Since 1955 and especially since 1969 the African National Congress refused such ethnic republicanism. Instead, it insisted over and over again that 'South Africa belongs to all who live in it, black and white'. In other words, the ANC accepted that anti-colonial freedom in South Africa would not be achieved through the self-determination of Blacks in relationship to whites. There is no doubt that South African communists played a decisive role in blunting the nationalist tendencies in the ANC. This fluid and plural vision of South Africa, however, also resonated with African pre-colonial traditions.

If we compare, for example, European society at the Cape in the 18th and early 19th century with Nguni societies prior to Shaka, what is striking in the latter is their political sophistication by modern standards. Whereas the Cape under Company control knew the rule of law capriciously, Nguni society was rule-bound. Whereas European society could not handle those who were different, Nguni societies easily integrated strangers. Whereas Cape society was slave-owning, this was a practice largely unknown amongst the Mthetwas, the Zulus and the Ndwandwe. The Cape chronicles are full of stories of European ship-wreck survivors travelling amongst peaceful, orderly societies. Strangers were easily absorbed into these societies, rising as in the case of John Dunn, even into positions of chieftainship.

This, I believe, was the constitutional promise of 1996. South Africa was a plural society given shape through colonial wars, racist violence and capitalist exploitation. Instead of turning away from this history, modern South Africa would be made by transforming it. This was not a naïve story of rainbowism, of whites and blacks holding hands whilst singing kumbayah. It referred to the hard work of state building and creating a new type of economy. Both of these are historical projects.

We do not need to be drawn into whether the project is working or not. It is plainly in crisis and there is a growing literature that tries to explain why, the suggested reasons ranging from neoliberal policy sell-outs in the 1990s to the rise of political-business mafias that captured the state. But there is more to the current crisis than organisational failure.

Many of the people that staff and run the institutions of South Africa's modern constitutional state, from political parties to parliamentary officers, to government officials, to business leaders, do not share the normative values that underpin them. On the contrary, what is striking about contemporary South Africa is to the length to which politicians, officials and so on have gone to repurpose public institutions to achieve other ends.

It is quite possible that the idea of South Africa as a plural social democracy is untenable, that the kind of solidarity required to make it work is simply beyond what is possible in a heterogeneous society. This is certainly the global mood again today, as northern borders strain to keep out foreigners and (darker skinned) refugees. In South Africa, though, the growing repudiation of non-racial democracy comes with a very sharp sting. There are growing assertions here of nationalism as *self-determination for Africans*. This is not necessarily an Apartheid reflex, though it often sounds like one. The nation of Africans invoked by elements of the African National Congress, the Economic Freedom Fighters and other parts of civil society is not the nation of Zulus and Xhosas and Sothos of the Apartheid period. What these appeals do share, however, is a willingness to redraw the limits of South Africa to enclose supposedly homogenous populations at the exclusion of others. The new politics of self-determination puts the future of South Africa as a unitary state and as a constitutional democracy on guard.

Ivor Chipkin
Director, NSI

INTRODUCTION

This paper tries to anticipate the way that South African politics might develop in the near future. We do this by taking seriously political ideas and terms and their capacity to shape political action, especially when they are expressed institutionally in political movements or political parties. In this regard, the paper is different to most other political analysis, which is essentially commentary on electoral trends and on personalities, coalitions and alliances between political players. This paper is interested in one particular phrase: self-determination.

Breyten Breytenbach's poem 'Words Against the Clouds' starts like this:

> —'shoe' 'desert rose' 'mud'—
> (luck wanted
> that I could today pick up a few words
> for you
> to be able to describe
> that one doesn't only walk and think about
> nothing on the ground,
> but also about words in their meaning
> be seen, between toilet rolls, images, fossilised fish
>
> (don't step on the wrong words!
> 'laying the terror of mines,' you once said
> 'is in the delayed action; plant your bomb
> and one day, much later, someone
> who you don't know
> is blown sky high'
> so the word also becomes flesh.
> ...

This report will focus on the politics of self-determination, which since the end of the Second World War fundamentally shaped world politics, conjuring onto the stage of history dozens of new states from European empires. More recently, in the 1990s, the politics of self-determination once again re-arranged global cartography as the Soviet Union collapsed and Yugoslavia disintegrated. The current war in Ukraine takes place precisely in the terrain of such a politics. In South Africa, the politics of 'self-determination' underwent an unusual transformation. It was appropriated by the National Party, not to bring into existence free African people, but to further justify their colonisation. For this reason it has had an ambivalent reception in South Africa, often associated with retrogressive attempts to prevent or delay democratisation. This is how it was largely received in 'progressive' circles in South Africa in the 1990s when it was invoked sometimes by the Inkatha Freedom Party and by defenders of the homeland system.

Nonetheless, and this is the argument of this report, the politics of self-determination remains alive in South Africa and is growing in authority, even when this term itself is not explicitly referenced. This is why it is so important to give to look at this term with clarity and rigour in the current situation.

More precisely, we are looking for the 'proper' interpretation of the right of *self-determination of peoples* as one of the principles of international law. It is impossible to grasp the meaning of any word without the context in which it is being used and in this study this context is provided by the system of international law. Moreover, the implementation of the legal principle is also determined by the local or geographical context. That is one of the reasons why the focus of this study is on investigating the way in which the right of self-determination of peoples, as a concept of international law, has been used in key historical moments of the Republic of South Africa.

It is especially topical now as South Africa enters unpredictable times associated with growing political instability. Not since the 1990s has the country been wracked by organised political violence that, seemingly, takes aim at the very authority of the government of the day. In the 1990s, such violence was sometimes associated with calls for self-determination, at least amongst far-right Afrikaner nationalist groups and amongst Zulu nationalists in KwaZulu-Natal. While the term has not resurfaced recently, nor does it figure strongly in the repertoire of contemporary South African political movements and parties, the concept is at the heart of African nationalist politics, at least since the 1950s and perhaps earlier. If it does return to the South African political lexicology, it will be a sign that the 'idea' of South Africa is no longer the exclusive that of how the territory of South Africa should be arranged politically.

Marti Koskenniemi, a leading international law scholar, has reminded us that words are politics. He has also noted that 'the discourse of national self-determination contains little that is self-evident or on which everyone can agree. Disagreements reflect political priorities and partisan positions'.[1] But does this mean that every single interpretation of the right of self-determination of peoples is equally persuasive, in every context and before any legal or political forum?

It is impossible to answer these questions in a political vacuum. Instead, we will approach an answer by considering the influence of this concept, the right of self-determination, in the political traditions of South African political movements during the past hundred years. One of our main conclusions is that nation-building in South Africa and the development of the right of self-determination of peoples in international law had separate but parallel tracks. This means that one cannot conclude that the implementation of the right of self-determination determined the political destiny of South Africa in the way it did in some other countries such as Yugoslavia. Nonetheless, we will see that the politics of self-determination is alive at the heart of nationalist politics in South Africa today. In order to explore this presumption, we devised several focal points in these parallel historical paths: the period around World War I; the post-World War II period and the period at the end of the 20th century followed by contemporary events.

Each chapter of the study will cover a distinct period in which the circumstances of South Africa and the contemporary notions of self-determination will be presented. The first chapter after this introduction is dedicated to the development of the self-determination of peoples from political principle to an accepted right and to the foundation of South Africa as a modern country. The second chapter deals with self-determination in the period of apartheid, and the third chapter encompasses key lessons of the internal and external dimensions of the right of self-determination and its significance for modern South Africa.

The chapters will describe the theoretical foundations of self-determination at different times and connect these stages of development with happenings in South Africa. They will explore whether and to what extent the claim for self-determination was present in nation-building in South Africa.

As will be seen, many different groups from South Africa, but also some groups coming from outside, used the discourse of the right of self-determination to legitimise their political agendas in this country. Some others decided not to do that. But the key question today is whether the right of self-determination is a 'fossilised fish' or a 'planted bomb with delayed action' in contemporary South Africa. If the right of self-determination has not been extensively used for nation-building in South Africa, can it be used for nation-destroying?

[1] Martti Koskenniemi, 'National Self-Determination Today: Problems of Legal Theory and Practice' (1994), *International and Comparative Law Quarterly*, 43 (1994): 244.

01 FROM PRINCIPLE TO RIGHT: HISTORICAL DEVELOPMENT OF SELF-DETERMINATION

Not many concepts are as difficult to define, mould and fully grasp as the right of self-determination of peoples. Even more, all three elements of the syntagm 'right of self-determination of peoples' are challenging to understand. Namely, should it be regarded as a Right or a Principle, what does Self-determination encompass (interior and exterior dimensions), and who are the People? To shed light on these three elements we need to look back in history and explore the development of the concept.

Self-determination started off as a political concept and has been an issue connected to the emergence of nation-states in Europe.[2] Although its roots are in the Renaissance and French Revolution,[3] the real and noticeable beginning of this principle is at the end of the 19th and the beginning of the 20th century in Europe. The philosophy of this concept was developed by two notable political leaders at the beginning of the century – Vladimir Lenin and Woodrow Wilson. Self-determination quickly came to be regarded as the new key to solving problems and reshaping the political map of the Old Continent after the Great War.

The crucial points in the historical overview of the development of self-determination can be focused on two periods: the World War I and post-World War I period of nationalism; the post-World War II period with decolonisation at its core. These two periods are important because they also point to a time when self-determination as a right began to take the place of self-determination as a principle. Therefore, the two periods will be discussed in this section, firstly by explaining the standing of self-determination followed by an overview of the relevant events that transpired in South Africa.

[2] David Raič, *Statehood and The Law of Self-Determination, Leiden*: Kluwer Law International (2002): 177.

[3] Christian Walter, Antje von Ungern-Sternberg and Kavus Abushov, *Self-Determination and Secession in International Law*, Oxford: Oxford University Press (2014): 2.

1.1 WORLD WAR I

Vladimir Lenin and Woodrow Wilson were two crucial figures who lifted the concept of self-determination from national politics to the international arena, albeit on different grounds. After some uncertainties and intra-Marxist debates[4] Lenin and the Bolsheviks adopted the radical view that 'every people had a right to political independence, to sovereignty'.[5] For Lenin self-determination of nations meant 'the political separation of these nations from alien national bodies, and the formation of an independent national state'.[6] That 1917 view of self-determination also meant that it had to be recognized that 'all the nations forming part of Russia [have a right] to freely secede and form independent states'.[7] Naturally, both Lenin and Stalin were aware of what application of this principle meant, and very quickly Lenin emphasised that '...the right of nations freely to secede must not be confused with the advisability of secession by a given nation at a given moment. The party of the proletariat must decide the latter question quite independently in each particular case...'.[8]

On the other side of the world, Woodrow Wilson was a proponent of liberalism. This means that Wilson's idea of self-determination is rooted in the Anglo-American 'tradition of civic nationalism: that is, for Wilson self-determination meant the right of communities to self-government'.[9] Thus, Wilson mainly spoke about democracy, self-government, and the fight against autocracy. However,

[4] For example, Lenin criticises Rosa Luxemburg, the Polish-German Marxist philosopher, on her 'sin of abstraction and metaphysics' when it comes to self-determination. Lenin goes on to say that she does it 'without anywhere clearly and precisely asking herself whether the gist of the matter lies in legal definitions or in the experience of the national movements throughout the world': Vladimir Ilyich Lenin, 'The Right of Nations to Self-Determination', https://www.marxists.org/archive/lenin/works/1914/self-det/ch01.htm. Should say when website consulted [5] Lenin 1917, in Jörg Fisch, *The Right of Self-Determination of Peoples, The Domestication of an Illusion*, Cambridge: Cambridge University Press (2015): 119.

[6] Ibid. n. 4.

[7] Ibid. n. 5, 120.

[8] Gordana Vlajčić, *Jugoslavenska Revolucija i Nacionalno Pitanje* (1919-1927), Zagreb: Globus (1987): 75.

[9] Allen Lynch, 'Woodrow Wilson and The Principle Of 'National Self-Determination': A Reconsideration', *Review of International Studies*, 28 (2002): 424.

with the rising popularity of Lenin's interpretation of the right of self-determination 'Wilson decided to accept the words, but not what they stood for'. [10] After he became aware of differences in concepts of nationalism, Wilson notably limited the application of the principle.[11]

It is increasingly clear now that the seemingly great Wilsonian Moment is not without stains. Wilson's view of self-determination was based on the idea of making self-determination safe for empires and effectively recasting 'self-determination as a racially differentiated principle, which was fully compatible with imperial rule'.[12]

After the victory of the Allies in World War I, Wilson announced his Fourteen Point Plan for Europe. In it, Wilson did not explicitly mention either self-government or self-determination, but alongside other allied leaders he did reshape borders in Europe at the Paris Peace Conference. They applied the idea of self-determination to people of defeated empires – dissolving Austro-Hungary and the Ottoman Empire along lines of nationality. In old states being divided and new states being formed, consideration was given to the principle of nationality.[13] Consequently, national and territorial claims of Belgium, Italy, France and Poland were recognised.[14] For some of the Balkan states, instead of self-determination their relations were to be '...determined by friendly counsel along historically established lines of allegiance and nationality'.[15] Finally, nothing in Wilson's Fourteen Points was intended to end colonial rule and apply self-determination to non-European and non-white people.

Allied leaders thus decided that the principle of self-determination could not be applied outside Europe for it would have allegedly disturbed the world order too much.[16] Consequently, all the colonial territories were denied application of the principle of self-determination, and it stayed confined to Europe. The New States included Czechoslovakia, Poland, and Yugoslavia.[17] However, this came with certain problems because of the uncertainty of who was eligible for self-determination and who was not. For instance, Germans who now found themselves living in the newly formed Czechoslovakia could not choose, but inhabitants of the Schleswig area (between Germany and Denmark) held a plebiscite and decided in which country they wanted to live. The seemingly arbitrary application of the principle of self-determination was deeply connected to the extreme vagueness of the principle and its tension with other principles, particularly states' rights.

Although self-determination had once again emerged within international legal thought, the self-determination of peoples remained just a principle and it was still outside the scope of international law at this point, where sovereignty remained supreme. The newly created League of Nations considered the concept of self-determination and its Commission of Rapporteurs, in relation to the Aaland islands,[18] stated that the principle 'is not, properly speaking, a rule of international law...'.[19] Since self-determination was not part of international law, there was no chance that it could negate two of the most important rules at the time: territorial integrity and sovereignty.

[10] Miloš Hrnjaz, *'Yugoslavia and Self-Determination of Peoples: The Power to Create and The Power to Destroy'*, Journal of Regional Security, 14 (2019): 7.

[11] Erez Manela, *The Wilsonian Moment:* University of Simon Fraser Library (2014): 8.

[12] Adom Getachew, *Worldmaking After Empire:* The Rise and Fall of Self-Determination Princeton: Princeton University Press (2019): 40.

[13] Rhona K. M Smith, *International Human Rights Law,* 9th edn, Oxford: Oxford University Press (2020): 332.

[14] Getachew, *op. cit.,* pp. 50-51.

[15] 'Address To a Joint Session Of Congress On The Conditions Of Peace ["The Fourteen Points"] | The American Presidency Project' (Presidency.ucsb.edu, 2022) <https://www.presidency.ucsb.edu/documents/address-joint-session-congress-the-conditions-peace-the-fourteen-points> *accessed 3.8. 2022.*

[16] Mitchell A. Hill, 'What the Principle of Self-Determination Means Today,' *ILSA Journal of International & Comparative Law:* 1, 1, Article 6 (1995): 122.

[17] For a detailed analysis of the use of self-determination in the case of Yugoslavia see Hrnjaz, above, n. 10.

[18] Aaland Islands is an archipelago that was inhabited by ethnic Swedes but won by the Russian Empire in one of the Russian-Swedish wars. As the map of Europe was being redrawn after WW1, the inhabitants wanted to join Sweden and the claim was brought to the League of Nations which formed a Commission of Rapporteurs.

[19] *The Aaland Islands Question Geneva:* League of Nations (1921). B7/21/68/106[VII], p. 3.

1.1.1. WHAT WAS HAPPENING IN SOUTH AFRICA AT THE TIME?

The Year 1910 witnessed the creation of the Union of South Africa from the Cape Colony, Natal, Transvaal and the Free State. It was to be a white union with the white population in control of the state. The main political question was the relations between the two segments of the white population – Afrikaners and English-speakers: 'Should they forget the past, reconcile their differences, and work together to form a single white South African "nation", or should each ethnic community struggle to control the political system as a means of advancing its particular interests?'[20]

The general election of 1910 marked the acceptance of South Africa's membership in the British Empire but with calls for ever-greater autonomy. However, this was not completely in line with the thinking of all Afrikaners.

The National Party (NP) was formed in 1914 and was 'committed to protecting the cultural and economic interests of Afrikaners and dissociating South Africa from the empire'.[21] In 1913 the Natives Land Act prohibited Africans from obtaining land outside the reserves from people who were not Africans, and the reserves represented 7% of the country's total land area.[22] The African reserves were destined to be transformed into what were referred to as 'homelands' for all Africans during apartheid.[23] South Africa was divided into white-owned and African-owned land.

The African response to segregation legislation and policies was the formation in 1912 of the South African Native National Congress (SANNC), which was renamed the African National Congress (ANC) in 1923. Its founders

[20] Leonard Monteath Thompson, *A History of South Africa*, 3rd edn, New Haven, Conn.: Yale University Press (2001): 155.

[21] *Idem*., p. 158.

[22] Nancy L Clark and William H Worger, *South Africa: The Rise and Fall Of Apartheid*, 2nd edn, London: Routledge (2013): 22.

[23] Thompson, above, n. 21, p. 164.

called 'not for an end to British rule but for respect for the concept of equality for all, irrespective of colour'. They believed that their aims could be achieved through dialogue with the British.[24]

When World War I started it was expected that South Africa, as a self-governing British dominion, would join in on the side of Britain. The British called for South African forces to conquer South West Africa, which was a German protectorate.[25] However, those Afrikaners who 'had hoped to use Britain's distractions as an opportunity to regain their independence', rose in rebellion.[26] The government suppressed the uprising.

During World War I, despite militant strikes by white workers, intermittent resistance by the black population and other confrontations, the 'racial question' still covered only relations between Afrikaners and English-speaking white South Africans.[27] This was also the time when Lenin and Wilson brought attention to the question of self-determination and

> During the early 20th century, after the First World War to be precise, African students such as Z. K. Matthews rebelled against gross injustices perpetuated in the name of peace and democracy by leaders of powerful countries such as the United States. Matthews wrote: *When President (Woodrow) Wilson (of the US) published his 14 Points, the phrase, "self-determination for small nations" caught the ears of Africans. Did the "nations" to which he referred include us? Did they mean us, the black peoples of Africa, too? At Fort Hare we talked of little else. The consensus was that the makers of the world did not count us as a nation or as part of any nation... We lived in South Africa, but we were not regarded as part of the South African nation. Indeed when white leaders spoke of the nation of South Africa, they meant only the white nation. When they gave population figures of the nation, they only gave the number of Europeans.*[28]

The ANC (at the time the SANNC) sent a deputation to the Paris Peace Conference, and although they were not actually admitted to the conference, they called 'for the principles of self-determination to be extended to colonised peoples and not only to Europeans'. Nevertheless, the ANC was not the only organisation from South Africa that sent representatives to the Paris Peace Conference. J. B. M. Hertzog and his National Party (NP), mainly representing the interests of Afrikaners, sent a delegation to Versailles to 'press for international recognition of the right of self-determination for the citizens of the Transvaal and the Free State'. Thus, the concept of self-determination has always had the potential to be invoked by different groups with very different political goals. This idea was heavily used by Afrikaner nationalists, especially Afrikaner republicans, to portray Afrikaners and whites more broadly (starting in the 1960s) and black people specifically (starting in the 1970s) as nations entitled to self-determination in their own states, homelands, known pejoratively as bantustans.[31]

After the end of World War I, relations between the two 'white nations' seemed to be on track. The South Africa Act had made both English and Dutch official languages, and a constitutional amendment replaced Dutch with Afrikaans in 1925. Parliament even created a hybrid flag, adding the Union Jack and the flags of the former Boer republics to an old version of the Dutch tricolour.[32]

[24] Clark and Worger, above, n. 23, p. 24.

[25] Thompson, above, n. 21, p. 159.

[26] *Idem*.

[27] Thompson, above, n. 21, p. 157.

[28] Sifiso Mxolisi Ndlovu, 'The African National Congress and Internationalism, The Early Years', *The Thinker*, Vol. 59, p. 75 (2013).

[29] Clark and Worger, above, n. 23, p. 25.

[30] Clark and Worger, above, n. 23, p. 28.

[31] See 2.2 below: Self-determination claims by the proponents of apartheid.

[32] Thompson, above, n. 21, p. 160.

1.2 POST-WORLD WAR II

Before the end of World War II, it was still unclear whether self-determination had even started becoming a part of international law, or whether it was just a political tool used by great powers. However, the end of the war created enough momentum to change many of the ideas of the pre-war world. Self-determination developed from a political principle and acquired the status of a legal right.[33] This legal dimension was applied during the process of decolonisation. In brief, this was a new wave of thinking and political action calculated to free humans and their societies from their ties to empires, and unlike the post-World War I period, this wave spread outside Europe. In doing so, self-determination became a legal basis for the process of decolonisation, giving the 'right' to independence to peoples under colonial rule.[34]

The attribution of the legal feature to self-determination can be tracked by tracing the insertion of this right in several international law instruments. We will present the relevant documents in order to understand self-determination in legal terms.

[33] Milena Sterio, *The Right to Self-Determination Under International Law: 'Selfistans', Secession, And the Rule of The Great Powers*, London: Routledge (2013): 10.

[34] Mitchell A. Hill, *op. cit*., p. 122.

1.2.1. UNITED NATIONS CHARTER

The Charter of the United Nations, which created a new universal international organisation, was adopted in San Francisco in 1945. Self-determination is expressly mentioned in two articles of the UN Charter: Articles 1(2) and 55. This is the first time that self-determination was expressly mentioned in formal sources of international law. Even though Woodrow Wilson's proposal to include the principle of self-determination in the Covenant of the League of Nations had been defeated,[36] self-determination found its place in the UN Charter, although in a limited way.[37]

In Article 1(2), it is stated that one of the purposes of the United Nations is:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

1. higher standards of living, full employment, and conditions of economic and social progress and development;

2. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and

3. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

In Article 55, it is stated that:

> To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.

Here we still see the deliberate use of 'principle' rather than a 'right' when it comes to self-determination. Although UN member states have the responsibility to achieve the purposes of the United Nations, where self-determination clearly fits in, the Charter does not impose direct legal obligations to enable self-determination, but rather to 'allow minority groups to self-govern as much as possible'.[38] No definition of self-determination was provided either; there was no guidance for understanding or applying self-determination, and no forms of self-determination were mentioned. But what is important is that self-determination found its place for the first time in a multilateral treaty which signalled the 'maturing of the political postulate of self-determination into a legal standard of behaviour'.[39]

The question of which means might be used to achieve self-determination was also left open. Higgins points out that the provisions of the Charter rather referred to the mechanisms established with the aim of empowering the inhabitants of non-self-governing territories to pursue their political aspirations. Although it was likewise not prohibited under international law, no explicit basis could be found in the text of the UN Charter for arguing that such self-determination had to be pursued through the granting or achieving of political independence.[40]

[36] Sterio, above n 34, p. 10.

[37] Antonio Cassese, *Self-Determination of Peoples: A legal reappraisal*, Cambridge: Cambridge University Press (1995): 37.

[38] Sterio, above n 34, p. 10.

[39] Cassese, above n 38, p. 43.

[40] Rosalyn Higgins, *Problems and Process: International Law and How We Use It*, Oxford: Oxford University Press (1995): 112-113.

At best, it could have been argued that such external self-determination for a territory was one of the possible aims to be fostered by the state that had been mandated with its governance through the trusteeship system. Taking this into account, pursuant to international law, the right of self-determination was initially recognised as a principle of the determination of the internal political order in instances of colonial rule.

We will now explore further developments which resulted in a progressive widening of the scope of the right of self-determination. The narrative that 'self-determination was not prohibited' moved towards (1) 'self-determination being an obligation in the decolonisation process, and a right of the dominated peoples' as a right of the collective, and (2) 'a human right in the process of the decolonisation of a people' as a right of the individual.[41]

Through its development in customary law and through international jurisprudence, the right of self-determination came to be an *erga omnes* principle.[42] It thus became a right a people could invoke towards all actors of the international community, and an obligation all actors had an interest in upholding.[43]

[41] Ibid., pp. 114-115. Point (2) was enshrined in Article 1 common to both Human Rights Covenants of 1966, the Helsinki Final Act and the African Charter on Human and Peoples' Rights.

[42] *Case Concerning East Timor (Portugal v Australia)*, International Court of Justice (ICJ), 30 June 1995, §29. See Jan Klabbers, *International Law*, 2nd edn, Cambridge: Cambridge University Press (2017).

[43] *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, International Court of Justice (ICJ), 5 February 1970, §33. See also Jochen A Frowein, "Obligations erga omnes", Max Planck Encyclopaedia of Public International Law, available at: https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1400?prd=EPIL.

1.2.2 DECLARATION ON THE GRANTING OF INDEPENDENCE TO COLONIAL COUNTRIES AND PEOPLES

The United Nations General Assembly Declaration on the Granting of Independence to Colonial Countries and Peoples (1960 Declaration),[44] famously proclaimed that there must be an end to colonialism and reaffirmed that

2. All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

The 1960 Declaration gives substance to the UN Charter's provision of the right of self-determination. Even though self-determination was mentioned as a right for the very first time, the Declaration puts two important internal limitations on this right. One is that self-determination applies to peoples under alien subjugation, domination and exploitation (Declaration, 1). The other internal limitation is the overriding obligation to respect territorial integrity (Declaration, 7). The external limitation of the Declaration is that, although it is driven by the imperative to end colonisation, it is not legally binding on the subjects of international law.

The Declaration is not legally binding because it was adopted in the form of a General Assembly resolution and the General Assembly has limited powers in affairs that are not 'household matters'. In certain circumstances binding decisions of the General Assembly are undisputed, such as its power to have the final say about the admission of new member states,[45] powers relating to budgetary issues,[46] and the power to suspend rights and privileges.[47] For that matter 'there is no explicit law-making power to be found in the Charter, and no tribunal has ever reached the conclusion that the General Assembly has a general implied power to make law.'[48] On the other hand, the General Assembly's resolutions are not at all irrelevant. They can be seen as evidence of *opinio iuris*, which is an essential element of a custom as a source of international law representing the opinion of states that something amounts to legal obligation. Nevertheless, in order for custom to exist *opinio iuris* needs to be accompanied by state practice.

[44] United Nations, General Assembly, *Declaration on the Granting of Independence to Colonial Countries and Peoples*, 1514 (XV) (14 December 1960), available at: https://undocs.org/Home/Mobile?FinalSymbol=A%2FRes%2F1514(XV)&Language=E&DeviceType=Desktop&LangRequested=False *accessed 02.07.2022.*

[45] United Nations, *Charter of the United Nations* (adopted 26 June 1945, entered into force 24 October 1945), 1 UNTS XVI (UN Charter), Article 4. Available at: https://treaties.un.org/doc/publication/ctc/uncharter.pdf, *accessed 02.07.2022.*

[46] UN Charter, Article 17.

[47] UN Charter, Article 5.

[48] Jan Klabbers, *An Introduction to International Institutional Law* Cambridge: Cambridge University Press (2002): 207.

1.2.3. SELF-DETERMINATION BECOMES A HUMAN RIGHT

The *right* of self-determination was for the first time defined and guaranteed as a human right in international law in 'twin covenants' in 1966, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Drafted at a time when decolonisation was an imperative, Article 1 is identical in both covenants:

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 resources 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.

The common Article 1 to both the ICCPR and the ICESCR contains the right of self-determination of *all peoples* and presents us with the constant challenge of identifying who the peoples are.

KEY POINTS

- There is no single, universally acceptable definition of self-determination, but it can be understood as the right of all peoples to freely determine their political status and freely pursue their economic, social and cultural development.
- Self-determination originated as a concept for Europe and European interests at the end of the 19th and the beginning of the 20th centuries, primarily as a political principle.
- After World War I the principle of self-determination was consciously not applied outside Europe and colonial territories were denied self-determination.
- In 1945, with the United Nations Charter, self-determination evolved from a political principle to a legal principle, but it would not become a right until the United Nations General Assembly *Declaration on the Granting of Independence to Colonial Countries and Peoples* in 1960, and two 'twin covenants', the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1966.
- It is a constant challenge to identify who are the 'people' who have the right of self-determination.

1.2.4. WHO ARE THE PEOPLE(S)?

The right of self-determination is different from mainstream human rights not only by its development history but also by its collective character. It is the right of *all peoples* rather than the right of *everyone* or *every* or *all persons*. It is now clear that 'in no case … can the right of self-determination be conceived as an *individual right*. On the contrary, Art. 1 [of the International Covenant on Civil and Political Rights] guarantees an *exclusively collective right of peoples…*'.[49] However, Art. 1 ICCPR does not offer us any leads as to who the beneficiary is, that is, who the peoples are. As a matter of fact, no international treaty has defined the term 'people' and that may well have to do with the fear of many claims of secession and independence for groups which would fulfil the definition set by international law. The African Commission on Human and Peoples' Rights is also aware of the controversy that defining 'people' brings and stated that 'the drafters of the Charter [African Charter on Human and Peoples' Rights] refrained deliberately from defining it.'[50]

After World War I and during the decolonisation process, the determination of who is the beneficiary of the right of self-determination differed. In particular, after World War I the beneficiaries of the right of self-determination were ethnic or linguistic groups that were until then an integral part of large empires (Austro-Hungary, Ottoman Empire), of course with all the limitations previously mentioned.

However, there was a trend during the period of decolonisation to use the term 'peoples' for the 'entire inhabitants of a colonial territory to exercise the right to self-determination. Attempts to exercise self-determination on the basis of ethnic origin, language or religion were generally unsuccessful.'[51] Rather than a specific ethnic group, the entire population residing within the boundaries was the beneficiary of the right of self-determination. The concentration on territory[52] was the result of the application of the concept of *uti possidetis juris*[53] — which refers to the inviolability of borders except with mutual consent.

Nevertheless, by applying *uti possidetis* a situation arose in which state borders do not coincide with ethnic or, in the case of Africa, tribal affiliations. Even the Organisation of African Unity (OAU) emphasised safeguarding the new independence of states in Africa by accepting the uti possidetis principle 'despite the arbitrary way in which boundaries were drawn under colonisation'.[54]

The borders established by the colonial powers, which became interstate borders after independence, did not take into account ethnic homogeneity. Are ethnic or linguistic groups once again bearers of the right of self-determination? Who are the people that have the right of self-determination? What characteristics should a group of people have to be qualified as a 'people'?

The authors in international law have come up with subjective and objective elements for peoplehood. Subjectively there is a 'commonly held belief, by all members of a group, that they constitute a unit and that they share a common history, language, culture, heritage, and political aspirations. The objective elements examine whether members of a particular group share commonalities, such as … language, culture, ethnicity, political will… [and] whether a group has a claim to a particular delineated territory.'[55]

[49] Manfred Nowak, U.N. *Covenant on Civil and Political Rights*, Kehl, Germany; NP Engel (2005): 15.

[50] African Commission, *Kevin Mgwanga Gunme et al v Cameroon*, Communication 266/03, 27 May 2009, §169.

[51] Helen Quane, *The United Nations and The Evolving Right to Self-Determination*, Cambridge: Cambridge University Press on behalf of the British Institute of International and Comparative Law (1998): 551-552.

[52] Although the United Nations strongly favoured the territorial conception of self-determination, Quane shows that 'while the United Nations generally interpreted the term "peoples" to refer to the entire inhabitants of a colonial territory it was prepared occasionally to depart from this interpretation to reflect the wishes of the peoples concerned': Quane, *supra*, p. 552.

[53] See 3.2.2. *Uti possidetis* as both anchor and catalyst of secession.

[54] Rachel Murray, *The African Charter on Human and Peoples' Rights*, Oxford: Oxford University Press (2019): 497.

[55] Milena Sterio, "Self-determination: historical underpinnings", in *Secession in International Law*, Cheltenham, UK: Edward Elgar Publishing (2018): 10.

In the absence of a universally accepted definition, the United Nations Educational, Scientific and Cultural Organization (UNESCO) came up with the following characteristics that were amongst those mentioned as inherent in a description (but not definition) of a 'people'.[56]

1. A group of individual human beings who enjoy some or all of the following common features:
   (a) a common historical tradition;
   (b) racial or ethnic identity;
   (c) cultural homogeneity;
   (d) linguistic unity;
   (e) religious or ideological affinity;
   (f) territorial connection;
   (g) common economic life;

2. The group must be of a certain number who need not be large (e.g. the people of micro States) but must be more than a mere association of individuals within a State.

3. The group as a whole must have the will to be identified as people or consciousness of being a people – allowing that groups or some members of such groups, though sharing the foregoing characteristics, may not have the will or consciousness; and possibly;

4. The group must have institutions or other means of expressing its common characteristics and will for identity

UNESCO experts declined to qualify this as a definition and spoke of characteristics. The inability to find one universal definition 'highlights that no completely objective criteria can be found to identify what is a 'people'.'[57] Since the stress seems to be on the subjective elements and since self-identification can change, a definition of 'peoples' would need to be flexible.

In the African context the growing jurisprudence of the African Commission and the African Court has applied the term 'people' as encompassing the entire population of a state,[58] specific ethnic group[59] and indigenous people.[60] The African Court stated that 'people' covers 'not only the population as the constituent elements of the State, but also the ethnic groups or communities identified as forming part of the said population within a constituted State . . . provided such groups or communities do not call into question the sovereignty and territorial integrity of the State without the latter's consent.'[61]

The African Commission has specified that if a group of people has 'a common historical tradition, a racial or ethnic identity, cultural homogeneity, linguistic unity, religious and ideological affinities, territorial connection, and a common economic life, it may be considered to be a "people". Such a group may also identify itself as a people, by virtue of their consciousness that they are a people.'[62]

The applicability of self-determination to South Africa is also dependent on the perception of the 'people' it is supposed to apply to, and we will explore this in a later section. The question of who may qualify as 'people' in international law will remain highly controversial and open to debate until a substantive ruling on the matter comes either from the UN Human Rights Committee under ICCPR, the African Commission or the African Court.

[56] UNESCO, International Meeting of Experts on Further Study of the Concept of the Rights of Peoples (1989), SHS.89/CONF.602/7, Paris. Available at: https://unesdoc.unesco.org/ark:/48223/pf0000085152.locale=en *accessed 02.07.2022.*

[57] Robert McCorquodale, *'South Africa and the Right to Self-determination'*, South African Journal on Human Rights 10, 1 (1994): 11.

[58] Communication 147/95 and 149/96, Sir Dawda K Jawara v The Gambia, 11 May 2000, para 72.

[59] S. A. Dersso, 'The jurisprudence of the African Commission on Human and Peoples' Rights with respect to peoples' rights', *African Human Rights Law Journal*, 6 (2006): 358–381, at 362.

[60] Resolution on the Rights of Indigenous Peoples' Community in Africa, ACHPR/Res.51, 6 November 2000.

[61] Murray, above n 56, p. 487.

[62] Communication 266/03, Kevin Mgwanga Gunme et al v Cameroon, 27 May 2009, para 170.

1.2.5. DECLARATION ON PRINCIPLES OF INTERNATIONAL LAW CONCERNING FRIENDLY RELATIONS AND COOPERATION AMONG STATES IN ACCORDANCE WITH THE CHARTER OF THE UNITED NATIONS

The United Nations General Assembly Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations (1970 Declaration) is perhaps the most extensive of the documents dealt with so far when it comes to self-determination. The 1970 Declaration was adopted by the General Assembly without voting, and it proclaimed the 'principle of equal rights and self-determination of peoples' which 'every State has the duty to promote, through joint and separate action' amongst other things, bringing 'a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned'. However, the 1970 Declaration also contains a disclaimer of sorts that 'nothing … shall be constructed as authorising or encouraging any action which would dismember or impair … the territorial integrity or political unity of sovereign and independent States'. There is one important distinction here. The drafters of the 1970 Declaration had in mind the apartheid system in the Republic of South Africa, which was at its height at the time.[63] The concept of self-determination was expanded to include and decry apartheid.

The 1970 Declaration seems to have confirmed the internal aspect of self-determination by referring to the observance of human rights and fundamental freedoms, noting that the people in question must possess *a government representing the whole people belonging to the territory without distinction as to race, creed or colour*.

Here is the emergence of what came to be known as *internal* self-determination which rests on democratic criteria of having everyone equally represented in the government and state management, without excluding any group. This is especially important in the case of South Africa in which not just any group, but the majority group was officially excluded from participation in the government of the state.

Bearing in mind that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well a denial of fundamental human rights, and is contrary to the charter.
…
The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.
…
Nothing in the foregoing paragraphs shall be construed as authorising or encouraging any action which would dismember or impair, totally or in part the territorial integrity or political unity of sovereign or independent states conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above, and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed, or colour. [italics supplied]

[63] See, for example, Samuel Moyn and Umut Özsu, 'The Historical Origins and Setting of the Friendly Relations Declaration', in Jorge E Viñuales, ed., *The UN Friendly Relations Declaration at 50: An Assessment of the Fundamental Principles of International Law* Cambridge: Cambridge University Press (2020): 36.

1.2.6. PRINCIPLE CONFIRMED: THE INDEPENDENCE OF SOUTH-WEST AFRICA (NAMIBIA)

The International Court of Justice (ICJ) dealt with the issue of self-determination in the context of South Africa's conduct in South-West Africa (hereinafter: Namibia).[64] The legal status and consequences of South Africa's actions in regard to Namibia were the subject of six pronouncements of the ICJ. The culminating step was the Security Council's request for an advisory opinion, having declared that the South African presence in Namibia was illegal.[65] The ICJ Advisory Opinion was delivered in 1971. In this, the Court again affirmed that South Africa was in breach of its international law obligations due to apartheid policies having been extended to Namibian territory. The argumentation of the South African Government and the Court in this judicial proceeding is worth analysing.

A brief overview of South African rule over Namibia is useful. The territory of Namibia was occupied by South Africa during World War I, having defeated the Germans. Although not succeeding with its intention to annex the territory, Namibia was entrusted to South Africa as a C mandate pursuant to the Mandate System established by the League of Nations, following the 1919-1920 Paris Peace Conference.[66] According to the mandates classification, C mandates depicted territories that were to be administered by the mandatory state as if they were integral to their own territory.[67] C mandates thus stipulated comparatively broader powers than for other mandate categories. However, in any case, and regardless of the classification, the mandate system also incurred an obligation for the mandate state to foster the inhabitants' well-being and social progress. Likewise, the mandate was accompanied by the supervision of the League's Council, which presumed the obligation of the mandate state to regularly report on its administration of the mandated territory. Finally, the mandate state was barred from annexing the territory over which it exercised a mandate.[68] Indeed, as one of the corollaries to the case, the ICJ dealt with the questions related to the nature of and the objectives behind the international mandate system as well as the ensuing obligations of the entrusted states.

The South African government proposed that a plebiscite be held in Namibia, to allow its inhabitants to determine whether they wished to be no longer governed by South Africa.[69] Further, while recognising that Namibia was a mandated territory, it invoked the intention of the participants of the Paris Peace Conference to argue that the territories conferred as C mandates were different from others and factually amounted to being annexed by the trustee.[70]

Based on the changes in the institutional structure of the League of Nations and later of the United Nations, the government of South Africa at the time argued that the mandate system over South West Africa had ceased. Further, it underlined that, even if the mandate system continued to be in effect, the supervision mechanism of the mandates and its obligations of regular reporting to it no longer served to benefit the effective administration of the entrusted territory.[71] Finally, South Africa claimed that four cumulative factors justified its title to the territory of Namibia: '1) its original conquest; 2) its long occupation; 3) the continuation of the sacred trust basis agreed upon in 1920; and 4) because its administration is to the benefit of the inhabitants of the Territory and is desired by them.'[72]

[64] *Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia*, International Court of Justice (ICJ), 21 June 1971.

[65] Gay J. McDougall, 'International Law, Human Rights, And Namibian Independence' *Human Rights Quarterly*, 8 (1986): 450.

[66] *Idem*., p. 444.

[67] *Ibid*., p. 445, fn. 6.

[68] *Ibid*., p. 445.

[69] *Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia*, International Court of Justice (ICJ), 21 June 1971, §16.

[70] *Idem*., §45.

[71] *Ibid*., §§77-80.

[72] *Ibid*., §82.

The Court rebutted the Government's claims. It invoked its previous 1950 Namibia Advisory Opinion to underline that the cornerstones of the mandate system were respect for the 'well-being and development of [the] people [living under its mandate] and the prohibition of annexation of that territory.[73] Likewise, the Court confirmed that the mandate system conferred to certain states was not uncircumscribed and came accompanied by international supervision.[74]

The Court finally reiterated the standing accorded to the principle of self-determination in international law as enshrined in the UN Charter, and underlined this right in the context of the people of Namibia.[75] The Court underlined that the scope of the principle of self-determination pursuant to the United Nations Charter included territories subjected to a colonial regime.[76] It likewise reiterated that the principle of self-determination of mandated territories and their peoples was to take precedence in interpreting the nature of the relationship between the trustee and the mandate.

Given that 'South Africa had failed to fulfil its obligation in administering the mandated territory and had not ensured the moral and material well-being and security of the indigenous inhabitants of Namibia', as determined by the General Assembly and reiterated by the ICJ,[77] the mandate had come to an end. This was because the mandate was revocable in cases where flagrant and gross breaches of the mandate system were found.[78] South Africa posed two counter-arguments. Firstly, it asserted that the mandate system was absolute and non-revocable in all cases.[79] Secondly, it contested the finding that it acted in flagrant breach of the system.[80]

The Court likewise found that South Africa was acting in breach of its international law obligations insofar as it applied a policy of apartheid in administering the territory of Namibia. Regardless of the South African government's contentions as to the purpose of such policies and its claims that such legislative and administrative acts were for the benefit of the mandated territories, the Court found no need to determine the Government's motives. It adduced sufficient evidence as to the policy of racial and ethnic segregation pursued by the South African government and the ensuing limitations on the peoples' exercise of human rights.[81] A notable example of such discriminatory policies imposed by South Africa was the Odendaal Plan which proposed the institution of homelands for each ethnic group as a way to pre-empt and reduce ethnic conflicts.[82] In addition, such policies were deemed to have constituted *de facto* annexation, given that legal action was taken to grant South African citizenship to Namibian inhabitants; that the territory was deemed to be one of the provinces of the Republic of South Africa; as well as that such practices were merely an extension of South African rule in its home territory, including the Bantustan policy.[83]

[73] *Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia*, International Court of Justice (ICJ), 21 June 1971, §45.

[74] *Ibid*., §§47-51.

[75] *Ibid*., §45.

[76] *Ibid*., §52. Indeed, Klabbers also confirms that the ICJ referred to the principle of self-determination in order to explain the decolonisation process. See Jan Klabbers, The Right to Be Taken Seriously: *Self-determination in International Law, Human Rights Quarterly*, 28, 1 (2006): 191.

[77] *Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia*, International Court of Justice (ICJ), 21 June 1971, §93.

[78] *Idem*., §§100-101.

[79] *Ibid*., §97.

[80] *Ibid*., §104.

[81] *Ibid*., §128-131.

[82] Christo Botha, 'The Odendaal Plan: 'Development' for colonial Namibia', Namibweb, available at: https://www.namibweb.com/oden.htm *accessed 11.06.2022*. The application of such discriminatory policies has been deemed a threat to the international order. See 'United Nations, Self-Determination and The Namibia Opinions', *The Yale Law Journal*, 82, 3 (1973): 548-549.

[83] McDougall, above n 67, pp. 446-447.

1.2.7. SELF-DETERMINATION AND THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS

Bearing in mind the turbulent history of the African continent when it comes to colonisation and alien subjugation, it is only natural that the African Charter on Human and Peoples' Rights (African Charter) contains more comprehensive provisions on self-determination and related rights. Pursuant to 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.

Thus, not only did all people have the unquestionable and inalienable right of self-determination, but colonised or oppressed peoples had the right to free themselves and all peoples have the right to obtain the assistance of other African Charter State Parties for liberation from foreign political, economic or cultural domination. Article 21 provided details when it came to natural wealth and resources, which can be important for the internal aspect of self-determination.

However, the Organisation of African Unity wanted to safeguard the new independence of the African states and peoples. Though self-determination was accepted as a right, it was accepted 'in terms of decolonisation [which] would still have to satisfy the principle of *uti possidetis*, despite the arbitrary way in which boundaries were drawn under colonisation; and in other contexts, self-determination was only going to be permitted if it did not challenge State sovereignty.'[84]

Since the Republic of South Africa is a State Party to the African Charter on Human and Peoples' Rights and a part of the African regional human rights protection and adjudication mechanism (African Commission, African Court), it is necessary to explore the general practice of these bodies on the question of self-determination, bearing in mind their habit of reiterating their previous decisions. Details concerning the context of the Republic of South Africa will be discussed in the following chapters.

In its first interstate case dealing with the right to self-determination – *Democratic Republic of Congo v Burundi, Rwanda and Uganda* – the African Commission found that a number of rights had been violated. The case was about the massive human rights atrocities carried out in Congo by the armed forces of Burundi, Rwanda and Uganda. The Commission found that amongst others there had been 'a flagrant violation of the right to the unquestionable and inalienable right of the peoples of the Democratic Republic of Congo to self-determination provided for by Article 20 of the African Charter, especially clause 1 of this provision.'[85]

State Parties to the African Charter have considered that Article 20 covers issues such as 'elections, representation in the legislature including devolution, as well as non-discrimination',[86] which would fall under the category of *internal* self-determination, as well as 'claims for secession',[87] which would fall under the category of *external* self-determination. For a fuller discussion of the ideas of 'internal' and 'external' self-determination, please see Section 1.3.

The African Commission stated that Article 20 of the Charter 'has a particular historical context in the sense that it is one of the provisions of the Charter that was aimed at addressing the situation of Africans who remained under colonial domination at the time the Charter was drafted.'[88] The idea of applying self-determination in the context of decolonisation is neither new nor controversial. Nevertheless, the African Commission has 'consistently upheld the principle of *uti possidetis* and that self-determination will only be

[84] Murray, above n 56, p. 497.

[85] African Commission, *Democratic Republic of Congo v Burundi, Rwanda and Uganda*, Communication 227/99 (2003), §68. See also §77.

[86] Murray, above n 56, p. 499.

[87] *Idem*.

[88] African Commission, *Front for the Liberation of the State of Cabinda v Republic of Angola*, Communication 328/06 (5 November 2013).

exercised within the inviolable national borders of a State party by taking due account of the sovereignty of the State".[89]

The African Commission denied any support to secession in its first case on *external* self-determination – *Katangese Peoples' Congress v Zaire*.[90] The African Commission held that self-determination could be exercised in many forms, such as 'independence, self-government, local government, federalism, confederalism, unitarism or any other form of relations that accords with the wishes of the people'[91] but that it was obliged to 'uphold the sovereignty and territorial integrity of Zaire'.[92] The African Commission dismissed the case since there was an 'absence of concrete evidence of violations of human rights to the point that the territorial integrity of Zaire should be called to question'[93] and an 'absence of evidence that the people of Katanga are denied the right to participate in government'[94] concluding that 'Katanga is obliged to exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire',[95] in other words: *internal* self-determination. Nevertheless, the African Commission did leave some space for certain situations where it might consider legitimate causes where the right to (*external*) self-determination could prevail over the obligation to respect territorial integrity: when there is concrete evidence of violations of human rights and evidence that the people in question are denied the right to participate in government. These conditions became known as the Katangese test.

The African Commission dealt with the question in other cases as well. In the case of *Kevin Mgwanga Gunme et al v Cameroon*, the Commission found itself 'unable to envisage, condone or encourage secession, as a form of self-determination for South Cameroons … [because it will] jeopardise the territorial integrity of the Republic of Cameroon'.[96] It did not pass the Katangese test.

In contrast, the African Commission saw a referendum in Western Sahara as a means to resolve 'the question of the right to self-determination of the Sahrawi People',[97] noting human rights abuses in this occupied territory and considering it 'a matter of de-colonisation.'[98] In the case of the independence referendum in Southern Sudan, the African Commission stated that it was a 'good example of the exercise of a people's right to self-determination as provided for in Article 21 of the African Charter.'

Finally, in support of a stance that can only be interpreted as discouraging *external* self-determination, the African Commission stated that claims of indigenous peoples can be exercised only in modalities 'which are compatible with the territorial integrity of the Nation States to which they belong.'[100] In the same spirit the Commission stated that peoples' right to (*internal*) self-determination encompasses the 'management of their internal and local affairs and their participation as citizens in national affairs on an equal footing with their fellow citizens without it leading to a total territorial break up'.[101] This (*internal*) right of self-determination should be understood as 'encompassing a series of rights relative to the full participation in national affairs, the right to local self-government, the right to recognition so as to be consulted in the drafting of laws and programs concerning them, to a recognition of their structures and traditional ways of living as well as the freedom to preserve and promote their culture.'[102]

[89] Murray, above n 56, p. 501.
[90] African Commission, *Congrès du peuple katangais v Democratic Republic of the Congo*, Communication 75/92 (22 March 1995).
[91] *Idem*., §4.
[92] *Ibid*., §5.
[93] *Ibid*., §6.
[94] *Ibid*.
[95] *Ibid*.
[96] African Commission, Communication 266/03, *Kevin Mgwanga Gunme et al v Cameroon*, 27 May 2009, §190.
[97] Murray, above n 56, p. 502.
[98] African Union, Report of the Fact-Finding Mission to the Sahrawi Arab Democratic Republic (24–28 September 2012), available at: https://atlas-of-torture.org/api/files/15629220768425r0477apdw.pdf, *accessed on 30.06.2022*.
[99] African Commission, The 30th Activity Report of the African Commission on Human and Peoples' Rights, EX.CL/717 (XX), §247. available at: https://www.achpr.org/public/Document/file/English/achpr49_actrep30_2011_eng.pdf, *accessed on 30.06.2022*.
[100] African Union, Advisory Opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples, adopted by the African Commission on Human and Peoples' Rights, at its 41st Ordinary Session held in May 2007 in Accra, Ghana (2007), §22. available at: https://www.achpr.org/public/Document/file/Any/un_advisory_opinion_idp_eng.pdf *accessed 29.06.2022*.
[101] *Idem*., para. 26.
[102] *Ibid*., para. 27.

1.3 BEYOND DECOLONISATION? EXTERNAL AND INTERNAL DIMENSIONS OF SELF-DETERMINATION

One of the most pressing issues in contemporary international law on the right of self-determination is whether it extends beyond decolonisation, and if it does, what are its dimensions. Having in mind the treaties and international instruments discussed, as well as their negotiating records, many scholars have concluded that self-determination seems to be limited to contexts of decolonisation. The international community's worry about the possible negative consequences on existing state borders played a major role.[103] Scholars argued that state practice when the 1970 Declaration was adopted can only support the idea of self-determination in the context of decolonisation.[104] For them it was 'unclear in international law whether the right to self-determination exists outside of the decolonization paradigm and … what its parameters may be.'[105]

That self-determination is not limited solely to the decolonisation context can be argued from several angles. First, the common article 1 to ICCPR and ICESCR applies to 'all peoples' and does not restrict its application to decolonisation. Second, the 1970 Declaration clearly expands the application to situations of 'alien subjugation, domination and exploitation … as well as a denial of fundamental human rights', which as already shown has to do with the apartheid system in the Republic of South Africa. Third, although it was very reserved about situations that are not clear-cut decolonisation, the UN General Assembly adopted Resolutions 2787 (XXVI) in 1971, 3089D (XXVIII) in 1973 and 3210 (XXIX) in 1974 about Palestinians, while the UN Security Council adopted Resolutions 216 and 217 in 1965 about the situation in Southern Rhodesia, denouncing the right of the racist minority to proclaim independence.

To answer this newly pressing question and wanting to reconcile the view that self-determination should not legitimise secession while yet admitting that there might be situations where groups of peoples are suffering oppression, state practice and scholars discerned two aspects of self-determination: *external* and *internal*.

External self-determination implies the right of people to secede from an existing state and establish a sovereign and independent state, or freely associate or integrate with another independent state. Some authors consider that the *external* dimension of self-determination is only possible when and if the internal aspect is not satisfied. Should the people's human rights and local autonomy claims not be satisfied, as Klabbers underlines, the exercise of the right to *external* self-determination may open as an option.[106]

Internal self-determination is based on a democratic principle of participation and can be regarded as people's right to live in a state in which all groups of people are equally represented in the general government and can choose their own political status and govern their own political life.[107] Through its internal aspect, self-determination stopped 'being a principle of exclusion (secession) and became one of inclusion: the right to participate.'[108] Internal self-determination is usually exercised through participation and autonomy over certain policies or territories.

[103] See, i.e., Report of the Special Committee on Principles of International Law Concerning Friendly Relations and Co-operation among States, UN GA Res. 25th Sess., at 99, 98, UN Doc. A/8018 (1970).

[104] D.L. Horowitz, 'A Right to Secede?' in Stephen Macedo and Allen Buchanan, eds, Secession and Self-Determination, New York: New York University Press (2003): 60.

[105] Sterio, above n 57, p. 19.

[106] Jan Klabbers, 'The Right to Be Taken Seriously: Self-determination in International Law', Human Rights Quarterly, 28, 1 (2006): 204.

[107] The Supreme Court of Canada in the Quebec case defined internal self-determination as 'pursuit of its political, economic, social and cultural development within the framework of an existing State' (Secession of Quebec, para. 126).

[108] Franck 1992, in: Hurst Hannum, '*Self-Determination in the Post-Colonial Era*', in: Donald Clark, Robert Williamson (eds.), Self-Determination: International Perspectives, London: MacMillan and St. Martin's Press, 1996.

Consequences of *external* self-determination are more shocking and disturbing to sovereignty-obsessed states since their territorial integrity is in question. That is why 'one of the perceived advantages of the internal aspect of the people's right to self-determination was that it could avoid the trap of binary selection between self-determination of peoples and the territorial integrity of states.'[109]

Higgins illustrates the trend of interpretation of self-determination not only in instances of colonised territories, but also in areas placed under foreign domination, both in terms of alien domination (e.g., domination by a minority in an independent South African state) and occupation (i.e., the exercise of control over a territory during and/or after military hostilities).[110] Initially explicitly stated in these terms in the non-legally binding 1970 UN Declaration on Friendly Relations, the right of self-determination of this somewhat broader scope was also embodied in Article 20 of the African Charter.[111] She further shows that pursuant to contemporary international law it is erroneous to juxtapose dependence and self-determination, seeing that it would lead to equalising the independent status of a people with their self-determination. She rather points to the substantive qualities of the people's status and puts forward 'a representative government' as the decisive factor triggering the legal right to secession. That is, Higgins argues that what should be juxtaposed instead is the right to secession and the representative nature of the governing regime.[112] Along similar lines, she points out that, even after achieving independence, the right of self-determination does not cease to exist, but continues through the people's right to influence the shape of their political and economic system, albeit within the confines of their states.[113] McCorquodale goes in a similar direction, arguing in the case of South Africa that so long as it was a state represented by, and representative of, all its inhabitants in an non-discriminatory manner, its 'sub-peoples' would not hold a right to secession.[114]

The right of self-determination undoubtedly exists in a postcolonial context as well. What is disputable is the domain of that right and who the beneficiary may be, but it may not be considered as a right to be exercised only once or in certain circumstances. Manfred Nowak concludes that it 'follows from the permanent character expressed … that self-determination is not consumed with the attainment of political independence but rather must be exercised, asserted and perhaps renewed or redefined in a continual process.' [115] Thus, the right of self-determination extends beyond the context of decolonisation and can be applied to independent states that were once colonies.

[109] Hrnjaz, above n 11, p. 23.

[110] Higgins, above n 41, pp. 115-116.

[111] See 1.2.7. Self-Determination and the African Charter on Human and Peoples' Rights.

[112] Higgins, above n 41, pp. 117-118.

[113] *Idem*., p. 123.

[114] McCorquodale, above n 59; Nowak, above n 51, pp. 22-23.

[115] Nowak, above n 51, p. 16.

1.3.1. WHAT WAS HAPPENING IN SOUTH AFRICA AT THAT TIME?

South Africa became a fully sovereign state after the 1934 *Status of the Union Act*. Following the now well-established track of exclusionist policies, the 1936 *Natives Representation Act* had immense consequences on Cape Province Africans, giving them the right only to elect three white people who would act as their representatives in the House of Assembly in Parliament. In all four provinces, Africans could indirectly elect a total of four white representatives. Finally, the Act created a Natives Representative Council, with advisory powers.[116] It was followed by the 1936 Native Trust and Land Act and the 1937 Native Laws Amendment Act.

World War II caused 'a seismic shift in South African society' mainly through the expansion of manufacturing and rising immigration of both whites and blacks to the towns.[117] The tensions in the system 'intensified during World War II, when South Africa participated on the side of Great Britain and its allies, to the dismay of numerous Afrikaners.'[118] The United Party split on the question of support for the British declaration of war on Germany.

During the war, the ANC resurfaced as the leading African oppositional group in South Africa. The vocabulary of democratic rights, citizenship, and national self-determination was prominent in publications such as *Africans' Claims in South Africa and the Atlantic Charter from the Standpoint of Africans*, which was approved as official ANC doctrine in 1943.[119] Z.K. Matthews was a notable intellectual and ANC politician and 'lent his active support to the writing of the ANC's 1949 Programme of Action.'[120] When writing about his political role in the period 1953-1955 he emphasised that those critics who pointed to the ANC as either 'anti-white or a subversive organisation which is out to overthrow the government of the country and to substitute for it some kind of anarchic regime' actually come from those who refuse to recognise the new spirit of self-direction and self-determination which is abroad in the New Africa … The African people, like any other group, claim the right to do all in their power to safeguard their interests and to make sure that they are not regarded by any group, however powerful, as mere means to the ends of others. In making these claims we are not inspired by any ill-will towards any group, white or non-white. On the contrary, the African National Congress is prepared to work with any group for the achievement of a more united South Africa, provided only that this co-operation is based on the principle of equal rights for all. To demand equal rights for all is, we know, regarded as the greatest heresy in certain South African circles.[121]

The ANC's turn to a non-racial policy is detectable and even more notable is that it is connected to the principle of self-determination.

The outbreak of war sparked divisions among Afrikaners, many of whom perceived ethnicity as more important than occupation and class.[122] Some Afrikaners joined the army, others tried to echo German victories through South Africa. As the war ended, many local Afrikaner organisations and branches of the National Party formed an effective coalition arguing against the British link and involvement in the world wars and appealing to ethnic and racial attitudes. Eventually, the National Party won power with the policy, *apartheid*, a term coined in the 1930s, that defined an era.

Apartheid is an extreme form of racial segregation and discrimination. In a UN report, it is defined as follows: 'A political tendency or trend in South Africa based on the general principles: (a) of a differentiation corresponding to differences of race and/or colour and/or level of civilization; as opposed to assimilation; (b) of the maintenance and perpetuation of the individuality (identity) of the different colour groups of which the population is composed, and of the separate development of these groups in accordance with their individual nature, traditions, and capabilities,

[116] Thompson, above n 21, p. 161.

[117] Robert Ross, Anne Kelk Mager, Bill Nasson (eds), *The Cambridge History of South Africa - Volume 2* Cambridge: Cambridge University Press (2010: 314.

[118] Thompson, above n 21, p. 157.

[119] Ross, Mager, Nasson, above n 119, p. 52.

[120] South African History Online, Zachariah Keodirelang Matthews, available at: https://www.sahistory.org.za/people/zachariah-keodirelang-matthews *accessed 02.07.2022*.

[121] Z.K. Matthews, *Freedom for my people: The autobiography of ZK Matthews, 1901–1968*, Cape Town: David Phillip (1983): 171.

[122] Thompson, above n 18, p. 183.

as opposed to integration.'[123] The goal of apartheid is not only to 'to maintain, as before, non-whites in an inferior status, but to eliminate them totally from any kind of participation in the political, social, economic and cultural life of the country, and ultimately achieve complete territorial separation.'[124] This is the difference between apartheid and the practices of white supremacy that existed before 1948 but were based on the premise of territorial unity. However, apartheid 'rejects the idea of territorial unity and maintains that the policy of "separate development" is the only effective guarantee of white domination.'[125] To sum up: 'Apartheid requires therefore a gradual elimination of all points of contact between the races, while at the same time the necessary assistance will be rendered to the non-whites in order to enable them to obtain a certain level of prosperity in their own sphere'.[126] Apartheid practices are in legal terms encapsulated in its definition in the 1976 International Convention on the Suppression and Punishment of the Crime of Apartheid.

The next chapter will explore to what extent the struggle against apartheid was cast in the language of decolonisation as self-determination.

KEY POINTS

- There is a constant friction between the right of self-determination of peoples and the sovereignty/territorial integrity of a state.
- In 1970 with the United Nations General Assembly *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of United Nations* the concept of self-determination expanded from covering colonialism to also covering apartheid.
- The International Court of Justice dealt with the issue of self-determination. This directly concerned South Africa regarding its conduct in South-West Africa/Namibia where the Court affirmed that South Africa was in breach of its international law obligations due to the extension of apartheid policies to Namibian territory.
- The African Charter on Human and People's Rights has a comprehensive provision on self-determination which has been a subject of scrutiny by both the African Commission and the African Court of Human and Peoples' Rights.
- The African Commission set out the *Katangese test*. This determined when the right to self-determination could prevail over the obligation to respect territorial integrity, that is, when there is concrete evidence of violations of human rights and evidence that the people in question are denied the right to participate in government.
- Two dimensions of self-determination developed: the external and internal dimensions.
- The external dimension implies the right of people to secede from the existing state and establish a sovereign and independent state, which can freely associate or even integrate with another independent state.
- Internal self-determination is based on a democratic principle of participation and can be regarded as people's right to live in a state in which all groups of people are equally represented in the general government and can choose their own political status and govern their own political lives.

[123] Report of the United Nations Commission, 1953, op. cit., paras. 402-422.

[124] United Nations Economic and Social Council (ECOSOC), *Interim report submitted by the Special Rapporteur, Mr. Hernan Santa Cruz, Special study of racial discrimination in the political, economic, social and cultural spheres*, E/CN.4/Sub.2/301 (24 June 1969), §367, available at: https://digitallibrary.un.org/record/3823050?ln=enm *accessed 22.06.2022*.

[125] *Idem*., §368.

[126] *Ibid*., §365.

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2. SOUTH AFRICA AND SELF-DETERMINATION – THE APARTHEID ERA

2.1 SELF-DETERMINATION CLAIMS IN THE FIGHT AGAINST APARTHEID

The post-World War II period in South Africa was marked by apartheid and the struggle against it. It is, therefore, necessary to establish to what extent this struggle was embedded in the argument stemming from the right of self-determination of peoples and whether the argument was used by the international community and internal actors.

The literature presents two approaches according to which one could position apartheid in relation to the right of self-determination: the human rights approach and the decolonisation approach.[127] The human rights approach is limited to insisting upon granting the full enjoyment of civil and political rights to the oppressed, while not questioning the legitimacy of the Republic of South Africa as such.[128] This is the approach that for the most part was used by the UN. On the other hand, the decolonisation approach is more comprehensive in that it 'address[es] human rights concerns, but … also encompass[es] additional national and international obligations.'[129] In this interpretation colonialism is regarded as a threat to world peace and stability, the use of force in fighting it is tolerated and considered as an international armed conflict. Thereby third states are not hampered from intervening and 'the international community is required not to recognize as legally valid the acts of the colonial power.'[130] However, the most important reason why this approach is of concern for this research is that at the core of decolonisation lies the self-determination principle: 'The fundamental principle of decolonisation is the right of self-determination of all peoples.'[131] Therefore, if apartheid is approached from the perspective of decolonisation, the right of self-determination gains prominence. In the human rights approach, self-determination is regarded as but one of the rights from the palette; in the decolonisation approach self-determination becomes the central issue.

Klug proposed that the struggle against apartheid should not be positioned only in a mainstream human rights approach but rather in a decolonisation approach, claiming that 'apartheid is a special form of colonialism. An analysis of the history and structure of South Africa demonstrates that the struggle against apartheid is more aptly characterized as a struggle for self-determination.'[132] In that ambit the black majority is deprived of its right of self-determination and should be enabled to enjoy it. In Klug's words, 'Recognition of the existence of the peoples' right of self-determination makes it obvious that apartheid cannot be reformed or even abolished by the present regime in South Africa. Only the exercise of the right of self-determination by the black majority will be acceptable as a resolution to the present state of colonial domination.'[133]

Summers explains that the right of peoples under foreign domination or alien subjugation to self-determination also encompasses people under racist regimes, such as South Africa. 'Thus', he says, 'in the Colonial Independence Declaration … of 1960, and especially in the Friendly Relations Declaration … of 1970, the satisfaction of self-determination was defined as the absence of distinctions of "race, creed and colour". This also meant that the right of self-determination under those instruments was not limited to peoples under a colonial regime but also to those under "racist *régimes*", a category which was effectively equated to apartheid South Africa.'[134] Moreover, for Summers this type of self-determination was actually an overspill from colonial self-determination,[135] thereby closing the circle in the relation between self-determination, colonialism and apartheid. In his words, the 'rationale of anticolonial nationalism extended self-determination to those regimes. This was despite the fact that South Africa was an independent state.'[136]

In UN practice one can also find traces of this anticolonial approach to the fight against apartheid. In 1980 Hector Gros Espiell, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, concluded that 'racial discrimination and apartheid lie at the very root of the denial of the right of peoples under colonial and alien domination to self-determination.'[137]

[127] Christos Theodoropoulos, 'The Decolonization Approach to the Eradication of Apartheid', *University Journal of International Law and Politics*, 18 (1986): 899-920.

[128] *Idem*., p. 901.

[129] *Ibid*., p. 910.

[130] *Ibid*., p. 911-912.

[131] *Ibid*., pp. 908-909.

[132] Heinz Klug, 'Self-Determination and the Struggle Against Apartheid', *Wisconsin International Law Journal,* 8 (1990): 298.

[133] *Idem*., pp. 251-299, 298, 299.

[134] James Summers, *Peoples and International Law*, Brill: Nijhoff (2014): 114.

[135] *Idem*., p. 537.

[136] *Ibid*., p. 538.

[137] Hector Gros Eapiell, *The right to self-determination: Implementation of United Nations resolutions*, E/CH.4/Sub.2/405/Rev.1, (January 1979), §169. Available at: https://digitallibrary.un.org/record/13664/files/E_CN-4_Sub-2_405_Rev-1-EN.pdf, *accessed 02.07.2022.*

Even though the UN did call for respect for the right of self-determination in its condemnation of apartheid, it seems that it did not fully articulate all the consequences stemming from the previously presented decolonisation approach. The UN condemnation of apartheid consisted of abundant if repetitive claims in the General Assembly and in Security Council resolutions.[138] In these resolutions, it is underlined that 'the South African government is breaching the right of self-determination by its policy of apartheid, including the setting up of black "homelands".' [139]

While the international community, reflected in the practice of different UN bodies and agencies, did address the issue of self-determination in the context of apartheid in South Africa, the internal actors that struggled against it were much less inclined to base their claim on this right.

The internal struggle against apartheid is often depicted as civil and largely non-violent resistance spearheaded by the ANC.[140] In that struggle, though claims for self-determination of the black majority are not easily detected, they do appear. In the December 1949 ANC Programme of Action, it was stated that: 'Like all other people the African people claim the right of self-determination. With this object in view, in the light of these principles we claim and will continue to fight for political rights…'.[141] On the other hand, in the 1955 Freedom Charter there was no explicit mention of the right to self-determination. However, it can be said that the language used is actually very close to what self-determination in practice strives to achieve. The Freedom Charter proclaims that 'The people shall govern!' and that 'The people shall share in the country's wealth!' When these slogans are contrasted with the wording of Article 1 of the ICCPR (which was adopted some 10 years after the Freedom Charter) similarities can be detected. Where the Freedom Charter says that 'All people shall be entitled to take part in the administration of the country', the ICCPR says that by virtue of the right of self-determination the people 'freely determine their political status and freely pursue their economic, social and cultural development' (1 (1) ICCPR); where the Freedom Charter says that 'the national wealth of our country, the heritage of all South Africans, shall be restored to the people', the ICCPR explains that 'All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation' (Article 1(2) ICCPR); finally, when under the slogan 'There Shall Be Peace and Friendship!' the Freedom Charter proclaims that 'the people of the protectorates - Basutoland, Bechuanaland and Swaziland - shall be free to decide for themselves their own future' and 'the right of all people of Africa to independence and self-governance shall be recognised': the ICCPR echoes this, declaring that 'The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realisation of the right of self-determination, and shall respect that right.' This last statement, especially, influenced Landsberg's conclusion that 'the principles of self-determination and solidarity thus loomed large in ANC foreign policy from its very foundation years.'[142] He perhaps too readily concludes that '[f]rom its very inception, the ANC defended the international praxis of self-determination, liberation, internationalism, international solidarity, world peace, African unity, the African Renaissance and an African Agenda.'[143]

[138] For an overview of UN reactions until 1968 see: ECOSOC, above n 81, §§567-606; 613-620. For the detailed timeline see: The United Nations - Partner in the Struggle against Apartheid, available at: https://www.un.org/en/events/mandeladay/un_against_apartheid.shtml *accessed 03.07.2022*; Ibrahim J. Gassama, 'Reaffirming Faith In The Dignity Of Each Human Being: The United Nations, NGOs, and Apartheid' *Fordham International Law Journal*, 19 (1996): 1464-1541.

[139] McCorquodale, above n 59, p. 12, footnote omitted.

[140] For an overview of tactics and actions see: Lester R. Kurtz, 'The Anti-Apartheid Struggle in South Africa (1912–1992)', International Center on Nonviolent Conflict, 2010.

[141] African National Congress, Policy Documents 1949: 38th National Conference: Programme of Action: Statement of Policy Adopted (17 December 1949), available at: https://www.anc1912.org.za/policy-documents-1949-38th-national-conference-programme-of-action-statement-of-policy-adopted/ *accessed 02.07.2022*.

[142] Chris Landsberg, '100 Years of ANC Foreign Policy', *The Thinker*, [2010]: 25.

[143] Chris Landsberg, 'Diplomacy for Self-Determination: A Century of ANC Foreign Policy', in Kondlo Kwandiwe, Saunders Chrisini, Zondi Siphamandla (eds), *Treading the waters of history: Perspectives on the ANC*, Pretoria: Africa Institute of South Africa (2014): 130.

What disrupts this picture of self-determination as the bedrock of ANC policy is that, with few exceptions, there was no direct reliance on self-determination by the ANC, either as a right or a principle. Further compromising the claim that the ANC insisted on self-determination is that the turn from Programme of Action principles (where self-determination was directly mentioned) to Freedom Charter principles (where only nuances of self-determination could be traced) provoked dissatisfaction among ANC members which resulted in the formation of the Pan Africanist Congress (PAC) in 1959. The split happened because the ANC turned to the concept of a multi-racial, or even non-racial society, while the PAC rejected 'multi-racialism because it wishes to focus attention on individuals rather than groups, and considers that Africans should build up their bargaining power before they negotiate with others.'[144] Therefore, the PAC came to be the 'more radical alternative',[145] dissatisfied with the lessening of ANC nationalist predispositions and underlining African racial identity.[146]

In contrast to the ANC, the PAC's claim to self-determination was explicit. The 1969 PAC constitution states that one of its aims and objectives is to 'to fight for the overthrow of White domination, and for the implementation and maintenance of the right of self-determination of the African people.'[147] This right is also emphasised in the Report of the National Executive Committee of the PAC, Submitted to the Annual Conference in December 1959: '... your Congress has been able to forge ahead in its determined effort to realise our noble aspirations in our lifetime, namely, to unite and rally the African people into one national front on the basis of African nationalism, and to fight for the implementation of the right of self-determination for the African people.'[148]

With the formation of the PAC, it can be seen how claims to self-determination faded in the ANC and bloomed in the PAC. We might even conclude that self-determination was not the inherent and central claim of the ANC,[149] but that its core aims are better explained by turning to the credo of a non-racial South Africa described in 1991 as the 'united, democratic, non-racial and non-sexist South Africa, a unitary State where a Bill of Rights guarantees fundamental rights and freedoms for all on an equal basis.'[150] Therefore, even though it could be claimed that the ANC in certain periods did rely on the principle of self-determination, after the adoption of the Freedom Charter and the turn to the discourse of a non-racial South Africa it is hard to insist that the ANC based its actions on self-determination.

[144] O'Malley - The Heart of Hope, The Pan-African Congress, available at: https://omalley.nelsonmandela.org/omalley/index.php/site/q/03lv02424/04lv02730/05lv03002/06lv03003.htm accessed on 02.07.2022. Chipkin has argued that during this period another term became central in the ANC's discourse - national democratic revolution, reflective of the growing influence of the Communist party and of Soviet terms and expressions: Chipkin (2022), 'The Topography of Power' in Ferial Haffajee, *Days of Zondo: Maverick, 451. Tom Lodge makes a related argument in Red Road to Freedom: A History of the South African Communist Party 1921 - 2021*, Johannesburg: Jacana Media.

[145] Tom Lodge, 'Revolution Deferred: From Armed Struggle to Liberal Democracy: The African National Congress in South Africa', in *Conflict Transformation and Peacebuilding - Moving from Violence to Sustainable Peace*, London: Routledge (2009): 157.

[146] *Idem*. It might not come as a surprise to note that many ANCYL members left the ANC and joined the PAC, possibly because it now better encapsulated the African nationalism that was at the core of their agenda. See African National Congress, 'Policy Documents 1948, ANC Youth League Basic Policy Document', 2 August 1948, available at: https://www.anc1912.org.za/policy-documents-1948-anc-youth-league-basic-policy-document/, *accessed 02.07.2022*.

[147] Pan Africanist Congress of Azania, 'Pan Africanist Congress-Constitution, 1959', available at: https://pac.org.za/1959-constitution/ *accessed 01.07.2022*.

[148] South African History Online, 'Report of the National Executive Committee of the PAC, Submitted to the Annual Conference', December 19-20, 1959, available at: https://www.sahistory.org.za/archive/report-national-executive-committee-pac-submitted-annual-conference-december-19-20-1959 *accessed 01.07.2022*.

[149] What was happening in the ANC was that the terms and analysis of the Communist Party were coming to the fore, especially the theory of National Democratic Revolution. For an overview see The O'Malley archives, National Democratic Revolution, available at: https://omalley.nelsonmandela.org/omalley/index.php/site/q/03lv02424/04lv02730/05lv03005/06lv03132/07lv03140/08lv03145.htm *accessed 31.08.2022*.

[150] African National Congress, 'Policy Documents - Constitutional Principles for a democratic South Africa', 1991, available at: https://www.anc1912.org.za/policy-documents-1991-constitutional-principles-for-a-democratic-south-africa/, *accessed 01.07.2022*.

While the international community relied heavily on claims for self-determination for South Africa, we can conclude that they were rather feeble in South Africa itself. The ANC, as the major driving force in the struggle against apartheid, did not use the claim and while it was present in the PAC programme the influence of the PAC was less widespread. However, both the ANC and the PAC were included in multilateral international fora in which self-determination claims were present. The most notable forum in that regard was the UN, which 'accepted the decision of the OAU in 1963 on the recognition of two South African organisations - ANC and PAC - as authentic liberation movements.'[151] Therefore, it could be claimed that though the ANC did not rely on self-determination directly in South Africa, it promoted it indirectly through its participation in multilateral international fora.

Another forum, not often mentioned, in which the ANC and PAC were present is a diplomatic conference that led to the adoption of Additional Protocols to the Geneva Conventions: the 1974-1977 Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts. The conference met in Geneva with a view to adopting legally binding documents complementing the Geneva Convention which dealt with the protection of persons in armed conflicts. One incentive for the conference was the decolonisation process and the armed struggles of national liberation movements.[152] Amongst the states who were the usual participants in diplomatic conferences, the ANC and PAC were present as two of the ten 'National Liberation Movements which are recognized by the regional intergovernmental organisations.'[153]

The crux of the issue addressed at the conference was whether wars of national liberation have the character of international or non-international armed conflict. The position taken was that such wars should be deemed international. The relevant formulation referred to situations 'includ[ing] armed conflicts in which peoples are fighting against colonial domination and alien occupation and racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.' The formulation is notable because it is by no means accidental. Each notion used is there to point fingers at a particular country and situation. Therefore, the racist regime referred to was South Africa, while the people fighting against this regime were the ANC and the PAC.[154] Moreover, it is indicative that the struggle of these movements is encapsulated not only by their goal, that is, to fight the oppressor but also by their legal claims – to exercise the right of self-determination. However, not much attention was paid to understanding the notion of self-determination.[155] Even though the national liberation movements participated in the conference and were for that matter well prepared for that participation by the ICRC itself, the problematisation of the notion of self-determination was not their focus.[156]

[151] E. S. Reddy, 'United Nations and the African National Congress, Partners in the Struggle against Apartheid', South African History Online, p. 7, available at: https://www.sahistory.org.za/archive/united-nations-and-african-national-congress-partners-struggle-against-apartheid-e-s-reddy, *accessed 02.07.2022*.

[152] In 1969 the UN General Assembly stressed that special attention should be given 'to the need for protection of the rights of civilians and combatants in conflicts which arise from the struggles of peoples under colonial and foreign rule for liberation and self-determination and to the better application of existing humanitarian international conventions and rules to such conflicts.' United Nations, General Assembly, *Respect for human rights in armed conflicts*, 2597 (XXIV) (16 December 1969), p. 62. available at: https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/257/31/IMG/NR025731.pdf?OpenElement *accessed 02.07.2022*.

[153] Richard Reeve Baxter, 'Humanitarian Law or Humanitarian Politics - The 1974 Diplomatic Conference on Humanitarian Law', 16 *Harvard International Law Journal*, 16 (1975): 10.

[154] Max du Plessis, 'The Geneva Conventions and South African Law' (ISS Policy Brief 2013), available at: https://issafrica.s3.amazonaws.com/site/uploads/PolBrief43.pdf *accessed 01.07.2022*.

[155] David E. Graham, 'The 1974 Diplomatic Conference on The Law of War: A Victory For Political Causes And A Return To The "Just War" Concept Of The Eleventh Century', *Washington and Lee Law Review*, 32 (1975).

[156] Eleanor Davey, 'Decolonizing the Geneva Conventions: National Liberation and The Development of Humanitarian Law', in A. Dirk Moses, Marco Duranti, Roland Burke, *Decolonization, Self-Determination, and the Rise of Global Human Rights Politics* Cambridge: Cambridge University Press (2020): 375-396.

The focus remained on whether these wars were internal or international and what should be the status of participants in these wars.[157] More than the nature of the conflict per se, and the possible strengthening of the self-determination claim, it seems that the reason for the interest of the ANC in the conflict classification was the legal status of their combatants: 'the argument that the South African armed conflict is international was very attractive to the ANC, because of its potential for increasing the organisation's international status as well as protecting ANC members from South African criminal law.'[158] This incentive was evident in 1980 on the occasion of the signing of the declaration by Oliver Tambo, in the name of the ANC and Umkhonto we Sizwe, unilaterally adhering to the Geneva Convention and Additional Protocol I (AP I).[159] Tambo's speech makes it clear that the main reason for adherence to the Protocol was the treatment of Umkhonto we Sizwe prisoners: 'We undertake to be bound by the other relevant provisions of the Conventions. In consequence, we demand that the South African regime make a similar commitment in accordance with the present-day rule of war, to treat the combatants of Umkhonto we Sizwe as protected combatants'.[160]

The possibility that national liberation movements could be bound by Protocol I is prescribed in Article 96(3) AP I. However, it seems that the ANC did not follow the procedure envisaged in that Article: 'the declaration did not comply with the Protocol's requirements – it was handed to the president of the International Committee of the Red Cross, not the Swiss Federal Council – leaving doubt as to its validity.'[161] One possible explanation was that it was not possible to follow the procedure, as it required that the relevant national liberation movement be 'engaged against a High Contracting Party.' Bearing in mind that South Africa was not a contracting party to the Additional Protocol, the relevant legal consequences could not take place. This requirement was one of the limiting factors in the application of API, which stemmed from the treaty nature of the provision. To be applicable, the states, which were for that matter termed 'colonial, alien occupiers and racist' needed to become bound by it.[162] While the international community 'argued that they [ANC, PAC, and AZAPO] were fighting for the achievement of non-racism in South Africa, a norm integral to self-determination'[163] the apartheid government denied it and 'disregarded the Protocol, rejected being termed racist, and, until the cessation of hostilities, treated its opponents who took up arms against it as criminals and prosecuted and sentenced them accordingly.'[164] The reality of Article 1 (4) AP I was that it remained a dead letter in the case of South Africa, one of the cases for which it was explicitly tailored. The inapplicability of the provision was confirmed by the South African courts as well.[165]

[157] Even though it appeared that there was a majority needed that would adopt the rule that national liberation struggle would have the nature of international armed conflict, it was questioned whether the conflict in South Africa was fit to be considered international. 'The conflicts between the preponderantly black populations of South Africa and of Rhodesia and minority white governments seem to be internal armed conflicts. Their international character cannot be justified in the terms set by Professor Abi-Saab, because they are essentially one-power rather than two-power situations." Baxter, above n 150, pp. 1-26, 14.

[158] Neil Boister, 'The *Ius in Bello* in South Africa: A Postscript' (1991) 24 *Comparative and International Law Journal of Southern Africa,* 24 (1991): 74.

[159] Umkhonto we Sizwe or Spear of the Nation was the ANC's armed wing. For its Manifesto see: https://new.anc1912.org.za/manifesto-1961-manifesto-of-umkhonto-we-sizwe/.

[160] O'Malley - The Heart of Hope, The ANC Signs the Geneva Protocols, available at: https://omalley.nelsonmandela.org/omalley/index.php/site/q/03lv02424/04lv02730/05lv02918/06lv02928/07lv02929.htm accessed 31.06.2022. We would like to thank Ivor Chipkin for pointing out that a few years later Tambo assigned Albie Sachs to draft a Code of Conduct for ANC, for which the initial impetus was the treatment of captives held by the ANC. The Code of Conduct was, in Sachs words, 'the only equivalent of a Bill of Rights for a liberation movement in the world.' For more details consult Sachs' speech on the occasion of the Oliver Tambo Centenary Lecture in 2017 at the University of Pretoria available at: https://www.chr.up.ac.za/images/centrenews/2017/files/2017_justice_albie_sachs_tambo_part_one.pdf *accessed 16.08.2022*.

[161] du Plessis, above n 156.

[162] 'It would be naive in the extreme to expect that governments likely to be classified as colonial, alien or racist will become High Contracting Parties to Protocol I in the first place. Furthermore, no government having become a High Contracting Party would concur in a description of itself as colonial, alien or racist.' Andrew Borrowdale, 'The Law of War in Southern Africa: The Growing Debate', *Comparative and International Law Journal of Southern Africa*, 15 (1982): 42.

[163] Neil Boister and Richard Burchill, 'The International Legal Definition of The South African Armed Conflict in The South African Courts: War of National Liberation, Civil War, Or War at All?', *Netherlands International Law Revie*w, 45 (1998): 349.

[164] *Idem*., 350.

[165] *Ibid*.; Christina Murray, 'The 1977 Geneva Protocols and Conflict in Southern Africa', *International and Comparative Law Quarterly*, 33 (1984): 462-470.

The potential of Article 1 (4) AP I to act as the basis for the self-determination claim did not materialise during the apartheid era, either because the legal requirements were not met, or because the relevant actors, such as ANC, did not insist on it. It is therefore instructive to look at how the provision of Article 1 (4) AP I that contained the reference to self-determination was addressed after apartheid. It was still denied that the fight against apartheid was a fight for self-determination in terms of Additional Protocol I. Boister and Burchill remark that in general '[t]he decision by the post-apartheid courts to dismiss the application of international law was done in the name of reconciliation.'[166] These authors delve even deeper into the complex relation between self-determination and the fight against apartheid in South Africa by explaining how judges perceived any reaching out for self-determination as the promotion of 'the black-consciousness politics of AZAPO and PAC', while the prevailing narrative was that of "non-racism, the official ideology of the ANC and the "Rainbow Nation".'[167] Hence, the language of self-determination was still not welcomed in the post-apartheid era and nor did the courts turn to it. Moreover, it seems that the legal processes led before the South African courts also contribute to the conclusion that claims for self-determination did not fit easily into the ANC narrative. The conclusion that also emerges is that self-determination in the ambit of apartheid was seen as destroying the nation. It could empower the black or the white community, but it could not enable their peaceful coexistence in unity and tolerance on non-racial principles. On that note, it is important to stress how self-determination was (mis)used by the National Party.

KEY POINTS

- There is a contrast between the reliance on the right of self-determination by the international community (represented by the UN), and internal actors (especially the ANC). While the UN relied on the right of self-determination, the ANC did not.
- The links between the ANC and self-determination are hardly detectable from its participation in multilateral fora, such as the UN and the 1974-1977 Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts.
- The possible explanation is that the self-determination claim did not fit in the concept of non-racial politics pursued by the ANC, the leading liberation movement, and the fact that the government of South Africa was using the self-determination argument to justify apartheid and bantustans.

[166] Boister and Burchill, above n 165, p. 362.

[167] *Idem*. '...it was difficult for him [Judge Mahomed DP] to confirm the marriage of self-determination, which in the South African context is strongly allied to the black-consciousness politics of AZAPO and the PAC, to non-racism, the official ideology of the ANC and the "Rainbow Nation".'

2.2 SELF-DETERMINATION CLAIMS BY THE PROPONENTS OF APARTHEID

Another argument that could explain the reluctance of the ANC to rest its actions on the self-determination claim is that the NP and the apartheid government relied on it. This is noted in a 1986 speech by Tambo: 'Indeed, while talking of reforms, he [Botha] has made it plain on many occasions that he will not depart from his objective of maintaining the system of white minority domination. He, therefore, speaks consistently of so-called group rights, of the right of the white population to self-determination and of South Africa being a nation of minorities whose rights must be protected. All of these are mere euphemisms for apartheid, according to which the population must continue to be defined in racial and ethnic categories and subjected to domination by the white minority.'[168]

The idea of complete separation between the races found its most extreme application in the bantustans, the black 'homelands': Peaceful co-existence was to be achieved 'by the independent development of each people towards the full realization of its separate nationhood and the recognition of the right of each nation to govern itself in accordance with its own national traditions and aspirations.'[169] The South African government envisaged the formation of 10 tribal reserves which would eventually be given 'self-determination' or 'sovereign independence'.[170] This claim by the South African government that the Bantustan policy was actually the realisation of self-determination[171] was especially dangerous, both for the genuine application of the concept in the fight against apartheid and for the understanding of the term in more general terms.

Burke explains how the NP understood the need to speak the new language of human rights that pervaded the world after World War II and the adoption of the Universal Declaration of Human Rights. These threatened to destabilise the NP project seriously.[172] In his words: 'Within a handful of years, NP ideologues were conversant in the new internationalist phraseology, agility which had a questionable impact on global perception, but demonstrated that discourses of human welfare and emancipation had ample capacity for subversion. Apartheid, a project of essentialist, racially determined nationalism, could be, and was, translated into various internationalist dialects.'[173]

The issue is not whether the claim that Bantustan policies was in line with the right of self-determination was correct, because, as already explained, it was not.[174] The issue is to show how an international legal argument is relevant in the legitimation of particular interests and how it can be misused in that context. Burke explains how '[s]elf-determination was already part of, and arguably central to, grand apartheid's lexicon. Separate development did not have to be justified de novo. It could borrow from the legitimacy already accorded to the right to self-determination.'[175] The epitome of this approach was the publication Progress Through Separate Development whose central purpose was to demonstrate the ways in which self-determination was being enacted through separate development.[176]

[168] E.S. Reddy (ed), *Olivier Tambo and the Struggle Against Apartheid*, New Delhi: Sterling Publishers (1987).

[169] Vernon Van Dyke, 'Self-Determination and Minority Rights', *International Studies Quarterly*, 13 (1969): 240.

[170] Henry J. Richardson, 'Self-Determination, International Law and the South African Bantustan Policy', *Columbia Journal of Transnational Law*, 17 (1978): 187.

[171] 'In regard to the "homelands" policy of "separate development", the government considered that these policies were in fact an exercise of the right of self-determination. (McCorquodale, above n 58, pp. 4-30, 12); 'There has always been a strange self-determination argument buried in the white South African rationalization of apartheid' (Richardson, above n 172, p. 191); 'South Africa is almost universally condemned, in angry terms, as racist. The white government of South Africa, however, pleads innocent, and does so on the basis of an appeal to the ideas of cultural nationality and self-determination.' (Van Dyke, above n 170, p. 240); 'the South African government has attempted to imitate the process of decolonization by granting "independence" to a number of bantustans' (Heinz Klug, above n 133, p. 294).

[172] South Africa was among the 8 states that abstained from voting for the adoption of the Declaration.

[173] Roland Burke, '"A World Made Safe for Diversity": Apartheid and The Language of Human Rights, Progress, and Pluralism' in: A. Dirk Moses, Marco Duranti and Roland Burke, *Decolonization, Self-Determination, and the Rise of Global Human Rights Politics*, Cambridge: Cambridge University Press (2020): 316-339, 318.

[174] Richardson, above n 172.

[175] Burke, above n 174, pp. 316-339, 327.

[176] *Idem*., pp. 316-339, 329.

From the moment the NP captured the legal narrative of self-determination it became very hard for the other party, in this case the ANC, to use the same argument. Whether the ANC ever wanted to use the argument is debatable, however, even if it did, the term was now contaminated by its use by the NP. It needed to be stripped of these connotations before it could be used in the fight against apartheid. Thus, the NP's use of the self-determination argument to justify apartheid disabled the use of the same argument by the actors in the struggle against it. The NP's argument was flawed, and it did not convince the international community, but it did damage the reputation of the claim.

Another issue on which the South African government insisted was that its implementation of self-determination prevented wars from taking place.[177] This is especially evident from the speech of the South African representative in the General Assembly in 1967:

South Africa's policy of autonomous development is designed to benefit all the nations of South Africa. The purpose is to maintain the self-determination of all her peoples, on a basis of equal human dignity. Wherever serious potential friction is encountered in the world, it can be ascribed to some fear of domination of a certain group by another group. South Africa seeks to avoid this potential source of friction by following an evolutionary process which will enable each population group to achieve self-realization within its own sphere... The ultimate aim of South Africa's policy is therefore the creation of separate, independent and self-respecting communities which will be free from the more serious prejudices, frictions and struggles which are bound to arise under any policy of attempted forceful integration of the different nations or population groups. The policy is not based on any concept of superiority or inferiority, but on the fact that people differ particularly in their group associations, loyalties, cultures, outlook, modes of life and standards of development.[178]

It is in this context and with this loaded meaning of self-determination that South Africa approached the end of apartheid, with the claims based on the external aspect of self-determination promoted by the apartheid government.

KEY POINTS

- The struggle against apartheid was not only political but also a legal struggle and it was waged not just in terms of the application of law but also in terms of the appropriation of law and the usurpation of the legal narrative.
- The use of the self-determination claim by the NP shows how the legal term can be misused and its right use compromised.
- The self-determination claim by the NP was based on the distorted understanding of external self-determination used in a way that disrupts (territorial) unity. Therefore, even the internal aspect of the right – which might actually promote unity – is compromised: the uneasy relationship between the external and the internal aspects of the right gains prominence.

[177] *Idem*.

[178] United Nations, General Assembly, GA. XXII. A/6688 (11 August 1967), Annex, p. 7. Quoted in: Van Dyke, above n 171, pp. 223-253, 240-241.

3. CONTEMPORARY SOUTH AFRICA AND SELF-DETERMINATION

3.1 SOUTH AFRICA AND THE INTERNAL DIMENSION OF THE RIGHT OF SELF-DETERMINATION UNDER INTERNATIONAL LAW

In the historical evolution of the right of self-determination at the end of the 20th and beginning of the 21st centuries the pendulum once again shifted towards its internal aspect.[179] As noted by Strydom: 'In the post-colonial context, self-determination has lost its secessionist and political independence baggage - often referred to as external self-determination. It now denotes a form of internal legal order conducive to the protection of human rights and democratic government which allows the political, cultural, social and economic aspirations of all citizens to prosper … Thus, self-determination has developed into a right protecting the citizens from government abuse, as opposed to its former function: protecting the independence of the state against external interference.'[180] It is true that in the case of South Africa this protection of independence actually meant the 'elimination of the internal structures of domination which make the majority rightless in the land of their birth.'[181] Moreover, '[b]ecause of the internal base of colonial domination in South Africa, the struggle for self-determination materialises itself at the political level in a struggle around the constitutional order.'[182] Therefore, it does not come as a surprise that the shift in the understanding of self-determination is evident from the relevant norms of the country's Constitution, to which we will now turn.

[179] Gregory H. Fox, 'Self-Determination in The Post-Cold War Era: A New Internal Focus?' *Michigan Journal of International Law*, 16 (1995): 733-782.
[180] Hennie A. Strydom, 'Self-Determination and The South African Interim Constitution', *South African Yearbook of International Law*, 19 (1994): 50-51.
[181] Albie Sachs, 'Towards the Reconstruction of South Africa', *Journal of Southern African Studies*, 12 (1985): 55.
[182] *Idem*., 49-59, 56-57.

3.1.1. SELF-DETERMINATION IN THE SOUTH AFRICAN CONSTITUTION

The impetus to adopt the norms pertaining to the right of self-determination in the Constitution came from the same right-wing policy spectrum, albeit for different reasons. Two major political forces that influenced the inclusion of the self-determination provision were part of communities represented respectively by the Afrikaner Volksfront and the Inkatha Freedom Party (IFP), the former with its base amongst Afrikaners and the latter supported mainly by the Zulu community. The driving forces behind their claims to self-determination will be further presented below.

When the end to apartheid was in sight, its proponents did not cease to use self-determination claims, now appealing to fear for their existence in the impending black majority ruled country. They based their claim on the proposition that 'only if they build an independent state will they be able to survive as a distinct group.'[183] The loudest voice was that from the part of the Afrikaans-speaking community represented by various right-wing parties gathered around the Afrikaner Volksfront. In their claims for the vital need to achieve self-determination of white Afrikaners they turned to the existing idea of a Volkstaat. The idea dates to the 1980s and it developed when harsh criticism was being directed at the NP for not being able to fully achieve the politics of bantustans. Jaichand explains how '[t]he policy was never fully realised, and in 1985 the NP government gave up on the idea of total territorial segregation and stated that it would restore citizenship to all blacks permanently residing in white areas. In response, some critics of the NP policy change proposed that the homeland system be inverted: white Afrikaners could withdraw to a smaller area of the country and leave the rest to black majority rule.'[184] This inverted homeland policy was at the core of the Afrikaner Volksfront claims. However, there were differences inside the movement regarding the issue and the front eventually split into two: 'One faction opted to register as a political party called the Freedom Front while the other searched for the holy grail of the Volkstaat with little success and modest support from a group of supporters in the provinces of Orange Free State, Transvaal and Northern Natal.'[185]

However, the Afrikaner Volksfront was only one end of the right-wing spectrum. The other one was the Inkatha Freedom Party (IFP).[186] Their claims also rested on the need for self-determination, but the end goal was less drastic: it 'advocated autonomy within a federal structure'.[187] To a certain extent, it could be said that while the Afrikaner Volksfront insisted more openly on the external aspect of the right of self-determination, the IFP insisted on the internal aspect. However, the political position of the IFP proved to be fluid, depending on the state of deliberations on the new Constitution. It seems that its goal was to destabilise the adoption of the new Constitution and the holding of future elections. In this regard, the IFP turned to the rhetoric of external self-determination: 'The more the IFP was convinced that the ANC was not going to give in on granting more powers and autonomy to provincial governments, the more it was drawn to the language of self-determination and more specifically secession.'[188]

This shift in the argument also points to another conclusion, namely that for a minority the scope of the claim for self-determination could be dependent on the (perceived) attitude of the ruling government towards such a claim. 'This shift in attitude forms an example of how "minorities" who feel that their claims ensuring forms of internal self-determination and protection of their distinctive identity are not taken into account might be tempted to turn to stronger claims possibly implicating secession.'[189] In this case, it is again evident how the self-determination claims were used as a legitimation tool to achieve certain political goals.

[183] Mads Vestergaard, 'Who's Got the Map? The Negotiation of Afrikaner Identities in Post-Apartheid South Africa', *Daedalus*, 130, 1 (2001): 33.

[184] Vinodh Jaichand, 'Self-Determination and Minority Rights in South Africa' in Joshua Castellino and Niamh Walsh, *International Law and Indigenous People*, Leiden/Boston: M. Nijhoff Publishers (2005): 343

[185] *Idem*. It is worth noting that at Oranje, in the Northern Cape a sort of 'Volkstaat' was established in 1991 and continues to exist until this day.

[186] For a detailed presentation of the right-wing parties' claims in the formation of the Constitution process see: Nico Steytler, Johann Mettler, 'Federal arrangements as a peacemaking device during South Africa's transition to democracy, *Publius*, 31, 4 (2001): 93-106.

[187] John Dugard, 'International Law and the South African Constitution', *European Journal of International Law*, 8, 1 (1997): 81.

[188] Kristin Hernard, Stefaan Smis, 'Recent Experiences in South Africa and Ethiopia to Accommodate Cultural Diversity: A Regained Interest in the Right of Self-Determination', *Journal of African Law*, 44, 1 (2000): 31.

[189] *Idem*.

Christine Bell points out the instrumental role of the human rights narrative in the case of South Africa's wider peace agreement process. Analysing the South African case in relation to the use of Human Rights claims in peace agreements Bell notes that this case 'revealed the way in which human rights became negotiated as part of an overall political settlement in a process that involved "[n]either wholly principled, nor completely unprincipled political barter"'.[190]

This episode shows both the strength of self-determination as a legal argument in political processes as well as how delicate the line is between the internal and external aspects of self-determination. The two aspects might even be depicted as a seesaw, a relationship in which it is hard to strike the right balance and in which one aspect is always elevated at the cost of the other.

Both the Freedom Front and the IFP remained, almost until the very end, absent from the official part of the negotiation process while they maintained intensive bilateral negotiations with the relevant actors.[191] Finally, the ANC did make concessions to them in order to ensure the inclusion of right-wing parties in the process of constitution-making and the elections.

Both the Freedom Front and the IFP secured their claims via bilateral agreements with the ANC and NP: on 19 April 1994 a Memorandum of Agreement for Reconciliation and Peace between the IFP/KwaZulu government and the ANC and the NP/South African government was signed and on 23 April 1994 the Accord on Afrikaner Self-determination was signed between the Freedom Front, the ANC and the South African government/NP.

The Memorandum of Agreement for Reconciliation and Peace did not contain any express reference to self-determination; however, it rested on the principles that are inherent to the internal aspect of self-determination. In general terms, the Memorandum proclaimed that 'All the undersigned parties reject violence and will therefore do everything in their power to ensure free and fair elections throughout the Republic of South Africa';[192] in practical terms, it envisaged the recognition and protection of 'the institution, status and role of the constitutional position of the King of the Zulus and the Kingdom of KwaZulu, which institutions shall be provided for in the Provincial Constitution of KwaZulu/Natal immediately after the holding of the said elections.' [193]

This arrangement is in line with the open nature of internal self-determination bearing in mind that it is possible under a variety of regimes. In the words of McCorquodale: 'The exercise of internal self-determination can take a variety of forms, from autonomy over most policies and laws in a region or part of a State, to a peoples having exclusive control only over certain aspects of policy, for example, education, social and/or cultural matters, such as in the canton system in Switzerland.'[194] Therefore, internal self-determination needs to be given the appropriate substance depending on the relevant features and context of each state. This substance however is not without limitations. It is delineated by the request that the people have the right 'within a State to choose their political status, the extent of political participation and the form of their government (i.e. in "internal" relations).'[195] Through securing the special status of the province of KwaZulu/Natal and the position of the King, the IFP settled for an adequate form of internal self-determination that would enable it to participate in the democratic process, which is another aim of the right to internal self-determination.

[190] Christine Bell, 'Peace Settlements and Human Rights: A Post-Cold War Circular History', *Journal of Human Rights Practice*, 9 (2017): 364, citing her other work: Christine Bell, *Peace Agreements and Human Rights*, Oxford: Oxford University Press (2003): 320.

[191] While it remains outside of the scope of this study, it is important to stress the context in which this political transition took place - that of violence and civil-war conditions in the province of KZN and in parts of what used to be known as the Pretoria-Witwatersrand-Vereeniging (PWV), largely Gauteng today, especially in the East Rand townships such as Tembisa (now part of Erkhuleni) and in the Vaal triangle. For more see: Ivor Chipkin, 'Nationalism and Such: Nationalism during South Africa's Political Transition', *Public Culture*, 16, 2 (2004): 315-335. For a detailed fractographical resource consult the Chapter on Political Violence in the Era of Negotiations and Transition, 1990-1994 in the O'Malley archive available at: https://omalley.nelsonmandela.org/omalley/index.php/site/q/03lv02167/04lv02264/05lv02335/06lv02357/07lv02372/08lv02379.htm *accessed 16.08.2022*.

[192] O'Malley - The Heart of Hope, Memorandum of agreement for reconciliation and peace between the IFP/Kwazulu government and the ANC and the South African government/NP, §2. available at: https://omalley.nelsonmandela.org/omalley/index.php/site/q/03lv02039/04lv02103/05lv02120/06lv02124.htm *accessed 27.06.2022*.

[193] *Idem*., §3.

[194] McCorquodale, above n 59, pp. 7-8.

[195] Vojin Dimitrijević, *Contemporary Right of Self-determination of Peoples, The Belgrade Centre for Human Rights* (2011): 47.

It is evident from the title of the Accord on Afrikaner Self-determination that the self-determination claim was central to their request. While the internal aspect of self-determination permeates the Accord, the provisions are also open and one can find traces of the external aspect. The see-saw relation between the two aspects of the right is evident in the first two provisions of the Accord: the idea of Afrikaner self-determination includes the concept of a Volkstaat and it does not exclude the possibility of local and/or regional and other forms of expression of such self-determination.[196]

The institutional mechanism for Afrikaner self-determination was envisaged as a Volkstaatraad (a Volkstaat Council) which was to 'investigate and report to the Constitutional Assembly and the Commission on Provincial Government on measures which can give effect to the idea of Afrikaner self-determination, including the concept of the Volkstaat.'[197]

The Memorandum and Accord were part of wider concessions toward right-wing parties. These included Constitutional Principle XXXIV in which it was provided that self-determination would be ensured for a community sharing a common cultural and language heritage; that is, the establishment of the Volkstaat Council and the adaptation of the rules regarding provinces referred to above.[198] Henrard and Smis's conclusion regarding the relation between the requests based on self-determination and the arrangements agreed was 'that whereas the parties formulating claims in terms of self-determination in the run-up to the adoption of the "Interim" Constitution as well as the "Final" Constitution mainly seemed to focus on secession and thus external self-determination, the answers by the constitutional drafters were mostly in terms of internal self-determination.'[199]

The result of the bargaining with the legal term of self-determination in the political arena is the final wording of Section 235 of the Constitution which 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 to 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.

The Constitution, therefore, contains the right to self-determination of both the South African people as a whole and of communities sharing a common cultural and language heritage; it points out the internal aspect of the right (within a territorial entity in the Republic), but it contains traces of the external aspect (or in any other way). While this external aspect is limited by the wording that the right must be 'determined by national legislation', Dugard points out that 'it is not impossible that future secessionist groups may seize upon the phrase "or in any other way" to justify their claim to external self-determination.'[200] Again, the difference is notable between the normative stand of the legal claims and its possible political (ab)use.

As for the peculiar wording, in which the term minority is implied but not explicitly mentioned, this was another legacy of apartheid. The term 'minority', loaded with negative meaning, was disguised as the 'community'; and because the term 'ethnic' was also loaded with negative connotations, the term 'cultural' was used instead.[201]

[196] Ministry of Justice, Accord on Afrikaner Self-Determination between the Freedom Front, the African National Congress and the South African Government/National Party (23 April 1994), §§1- 2. Available at: https://www.justice.gov.za/legislation/constitution/history/INTERIM/TCR/ACCORD.PDF, *accessed 29.06.2022*.

[197] *Idem*., §5.

[198] "[t]he name of the province of Natal was changed to 'KwaZulu-Natal'; the legislative powers of the provinces were extended; greater powers were given to provinces over financial matters; provinces were allowed to adopt constitutions for their own legislative and executive functions boundaries, powers and functions of the provinces were entrenched", Vinodh Jaichand, above n 186, p. 358.

[199] Hernard, Smis, above n 190, p. 30, emphasis added.

[200] Dugard, above n 188, p. 82.

[201] Hernard, Smis, above n 189, p. 34.

Steyler and Mattler are quite negative in their assessment of the scope of the self-determination encapsulated in the final text of the Constitution. They posit that: 'Capturing the Constitutional Principle in a section reduced a powerful principle into a meek non-operative provision. The right to self-determination, in the legal sense, was reduced to, at most, a political claim. Any federating process along the route of self-determination would not be in the hands of any self-selected community, but will be governed by Parliament itself.'[202] At the time of the adoption of the Constitution, the Volkstaat Council also pointed to the unfulfilled expectations of some Afrikaners bearing in mind that 'Nothing concrete was given in the form of self-determination, and its achievement had been made much harder. Moreover, they claimed, the internationally recognized right to self-determination, which included the right to secession, was made subject to the discretion of Parliament.'[203]

What is remarkable about the provision is not just its wording but the fact that it was adopted at all. As Strydom notes: 'Negotiating self-determination in a society deeply scarred by the excesses of that same notion, is a daunting task.'[204] In these circumstances, it is also clear why the right was not elaborated in more detail, and why it leaves possibilities for several conflicting interpretations.

Section 235 is not the only part of the Constitution that enabled the accord between the right-wing parties and the ANC. Equally important was Section 185 which provides for a State Institution Supporting Constitutional Democracy that has been named the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities as well as Section 31 which is analogous to Article 27 of the ICCPR on the protection of minorities, or in the context of the South African Constitution, community rights.[205]

In the report to the Committee on Economic, Social and Cultural Rights the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities is defined as 'a state institution supporting constitutional democracy, mandated to promote respect for and further the protection of the rights of cultural, religious and linguistic communities; promote and develop peace, friendship, humanity, tolerance, national unity among and within cultural, religious and linguistic communities on the basis of equality, non-discrimination and free association; to promote the right of communities to develop their historically diminished heritage and to recognise community councils.'[206]

While the establishment of the Commission was a constitutional request, its formation and operationalisation was neither swift nor unambiguous: 'It took a long time before the ANC decided how it envisaged that Commission and consequently the parliamentary debates on its effectuation only started August 4, 1998'.[207] In his opening speech on that occasion Thabo Mbeki depicted the debate on the establishment of the Commission as 'one of the most important in the life of this parliament and in the country, since the birth of our democracy.'[208] He presented the need to face the complexities of the protection of any determined group in a heterogeneous society such as South Africa. He also pointed out the crux of the problem, which is not the diversity of the population per se ('the curse of the gift of diversity') but the 'legacy of the past' and 'the conflict inherently generated by the power relations which that past represents.' He spoke clearly and frankly of South Africa as 'a living society, defined by a past, away from which it seeks to evolve, away from a set of power relations based on the assumption and the entrenchment of conflict.' **

[202] Steytler and Mettler, above n 187, pp. 93-106, 100.

[203] *Idem*., pp. 93-106, 101.

[204] Strydom, above n 181, pp. 43-64, 44.

[205] Vinodh Jaichand, above n 186, p. 348; Kristin Henrard, *Minority Protection in Post-Apartheid South Africa: Human Rights, Minority Rights, and Self-Determination*, Westport, CT: Greenwood Publishing Group, (2002): 267.

[206] Committee on Economic, Social and Cultural Rights, Consideration of reports submitted by States parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights, Initial reports of States parties due in 2017, South Africa, E/C.12/ZAF/1 (April 2017), §162.

[207] Hernard, Smis, above n 190, p. 34.

[208] Department of International Relations and Cooperation – Republic of South Africa, 'Speech of Deputy President Thabo Mbeki Opening the Debate on the Establishment of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities', National Assembly (4 August 1998), available at: http://www.dirco.gov.za/docs/speeches/1998/mbek0804.htm *accessed on 22.06.2022.*

The underlying premise of this political speech is supported by the theoretical findings. Christine Bell conducted comparative research in which she concluded that 'The first and most critical determinant of whether and how human rights are addressed and institutionalised is the central deal providing for any revised political settlement as regards access to power through institutions and territory.'[209] She juxtaposes the institutions and territory and explains that 'where territorial separation is not contemplated, human rights institutions may be crucial to enabling agreement on access to government. Human rights protections are then resorted to as a means of addressing past allegations of lack of state legitimacy.'[210] She positions South Africa as the example in which '[i]t is in fact impossible to separate out the "human rights" component of the peace settlement package from its overall political package because human rights measures are an interwoven part of any attempt to reallocate power.' She claims that 'the entire process of constitutional transformation … aimed at enabling multiparty democracy … was a response to understanding past human rights abuses as related to apartheid anti-democratic measures.'[211] Relating these theoretical considerations to South African practice actually strengthens the argument that institutionalisation of human rights through institutions such as the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities is central in societies which need to remedy abusive past power relations in a unitary state.

In this context the question is whether the Commission was indeed regarded as the institutionalisation of self-determination as a human right. It seems that only the Freedom Front at the very beginning of the process in 1996 showed interest in the institution and considered it as 'the powerful organ that should insist on safeguarding self-determination as the central community right.'[212] The final arrangement of the Commission was however much less oriented towards any reference to self-determination and was more directed to envisaging the Commission as the gathering point for acclaiming common identity while respecting diversity.[213] When the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act was finally adopted, it was clear that this position prevailed. Self-determination is not mentioned in the Act, and the prevailing narrative is the one anticipated in Mbeki's speech of 'promotion of unity in diversity' and nation-building on the premise of 'a truly united South African nation bound by a common loyalty to our country and all our people.'[214]

However, the centrality of the Commission to the right of self-determination as one of the Covenants' human rights can be discerned from the reports that South Africa delivers to UN treaty bodies that monitor the implementation of International Covenants, the Human Rights Committee and the Committee on Economic, Social and Cultural Rights. In both reports, the Commission is emphasised as the institution that enables the enjoyment of the right of self-determination as expressed in Article 1 of both the ICCPR and the ICESCR.[215] Also, it is important to underline that in both reports the information provided by the South African government points out that it understands this right in its internal manifestation. The aspects that are covered by South Africa in the reports are: the right to freely determine the political status (legal framework for the elections

[209] Bell, above, n 192, pp. 358–378, 364.

[210] *Idem*.

[211] *Ibid*.

[212] Steytler and Mettler, above n 188, p. 100.

[213] *Idem*., p. 102.

[214] Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act [No. 19 of 2002], Preamble. Available at: https://www.gov.za/documents/commission-promotion-and-protection-rights-cultural-religious-and-linguistic-communities-3, *accessed on 21.06.2022*.

[215] This however is in stark contrast to the position of the Commission in the political life of South Africa in which it plays no meaningful part at all. This might point to the lack of interest in self-determination in South African political life today or to the fact that the Commission is not relevant in the ambit of this concept.

on both general and municipal level; with the mention of the status of indigenous groups); the right to freely pursue economic, social and cultural development (The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities and the reference to Article 27); the right to freely dispose of natural resources and not to be deprived of the means of subsistence (propriety over land with a special emphasis on restitution). Apart from this expected information, South Africa also provided information on the right to access and dispose of water, and the right to use, manage and protect woodlands.[216] In ICESCR the focus is along the same lines, but narrower: what is mentioned is the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, land rights and indigenous groups.

Finally, to return to the driving forces behind the self-determination arrangement in the constitutional framework, the proponents of the Volkstaat and of KwaZulu-Natal did not avail themself of its full potential in practice. The idea of the Volkstaat largely fell away, due among other things to the lack of territorial concentration of the people who might have been mobilised for self-determination. On the other hand, despite the historical and geographical concentration of the people of KwaZulu-Natal, it lacked the 'the political will to mobilise around culture and language under the umbrella of IFP.'[217] Therefore, it does not come as a surprise that today, the full meaning and potential of Section 235 remain contested. As de Villiers writes: '[s]ome may regard it as a potential time bomb; others may describe it as an olive branch that is yet to sprout its roots; while others may see it as a relic of the negotiations process that has now all but lost its relevance to contemporary South Africa.'[218]

KEY POINTS

- The legal norm of self-determination was used in the political process of Constitution-making as the legitimation tool to achieve certain political goals.
- The right-wing parties (Freedom Front and IFP) used the legal claim of external self-determination as a threat to achieve concessions regarding their interests (Volkstaat and strengthening the competences of KwaZulu-Natal).
- The line between the external and internal aspect of self-determination is a delicate one, as the group that feels that the internal aspect of self-determination will not be satisfied might turn to base its claim on its external aspect.
- In the context in which power relocation is not done through the territorial principle (e.g., federalisation), the institutions for the protection of group interests become of paramount importance.
- The full potential of the constitutional arrangement regarding self-determination (including the right as defined in Section 235, and the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities as formulated in Section 185) is not achieved in practice. It looks like a context-driven arrangement, with dormant provisions. However, they are still present, and their potential is not to be discounted in the present/future.

[216] Human Rights Committee, Consideration of reports submitted by States parties under article 40 of the Covenant, Initial reports of States parties due in 2000, South Africa, CCPR/C/ZAF/1 (November 2014).

[217] Steytler and Mettler, above n 187, p. 106.

[218] V Bertus de Villiers, 'Section 235 of the Constitution: Too Soon or Too Late for Cultural Self-Determination in South Africa' (2014), 30(3) *South African Journal on Human Rights*, 30, 3 (2014): 461.

Dugard points out the caution with which one should look at the Section 235 right to self-determination, reminding us that: 'Although the demands thus far have been for internal self-determination only, it would be unwise to dismiss the possibility that these demands may be converted into claims for external self-determination - secession - in the future. In this context, section 235 of the 1996 Constitution, which responds to the demands for internal self-determination, may yet prove to be politically dangerous.'[219]

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[219] Dugard, above n 188, p. 81.

3.2 SOUTH AFRICA AND THE EXTERNAL DIMENSION OF THE RIGHT OF SELF-DETERMINATION UNDER INTERNATIONAL LAW

Throughout the history of South Africa, different claims for secession have periodically come to the surface, oftentimes prompted by developments in the scope of the principle of self-determination pursuant to international law. Against this background, we will now demonstrate how the principle of self-determination has been both applied and invoked in different instances in the context of contemporary South Africa. We will first provide a theoretical overview of the external dimension of the principle of self-determination. We will then examine the potential role of domestic institutions as a forum for attenuating claims to secession. This overview will be coupled with examples from the contemporary political history of South Africa.

As previously mentioned, a plethora of movements has arisen within South African society, claiming their right to secession based on different kinds of argument. Given the substantial empirical evidence at hand in the South African context, it would be interesting to look in detail in the future at the numerous claims to secession and attempt to identify the elements common to the grievances of movements which claim a right to autonomy or independence. These elements include inter alia the historical background, the contemporary administrative and economic position within the Republic of South Africa and the ethnic composition of the various movements.

3.2.1.

If historically in South Africa 'self-determination' as a language of politics has generally been associated with right-wing elements and parties, at least with those who sought to defend elements of the Apartheid project, its politics remain at the core of 'liberation' politics as well. Under the influence of nationalism and Marxism-Leninism, Apartheid as a colonial formation was always conceived as a form of group domination; in this case a white, colonial population dominating a black colonised population. In the post-Apartheid period, then President Thabo Mbeki famously described South Africa as a country of 'two nations'. One of these, Mbeki said, is white and 'relatively prosperous' and 'has ready access to a developed economic, physical, educational, communication and other infrastructure'.

The second and larger nation 'is black and poor', and 'lives under conditions of a grossly underdeveloped economic, physical, educational, communication and other infrastructure'. In 2009, when Mbeki addressed parliament on the anniversary of the unbanning of the ANC in 1990, he was nonetheless optimistic that building a united nation was possible. 'We are not there yet. But no one, except ourselves, shall ensure that this dream is realized. And so, let us roll up our sleeves and get down to work, fully understanding that the task to build the South Africa for which we yearn is a common responsibility we all share'[220].

The mood in South Africa today is very different. What has been described as 'state capture' in South Africa was not simply a decline, during the Jacob Zuma period, into wild prebendalism[221]. It also betrayed a political logic that took aim at the constitutional framework. Zuma and his allies claimed that the constitution constrained the liberation of Africans in particular, an argument used to justify its subversion.

[220] Mbeki, Thabo, State of the Nation Address of the President of South Africa, Joint Sitting of Parliament (9 February, 2007) https://www.iol.co.za/news/politics/full-text-of-mbekis-state-of-nation-speech-314525).

[221] Chipkin, Ivor and Swilling, Mark, Shadow State: The Politics of State Capture, Johannesburg: Wits University Press (2018).

This argument is at the centre of a new body of 'decolonial' scholarship, which repudiates the terms of South Africa's transition from apartheid. In Joel Modiri's terms, for example, the transition was informed by the vision of the ANC's Freedom Charter, a vision of a 'multinational, multiracial society, state capitalist and liberal social democracy', which 'amounted to an egalitarian adjustment (that is, transformation)', while 'at the same time preserv[ing a] racialised socio-political and cultural order entrenched through colonial dispossession, violence, and racial subjugation (including the subjugation of African sovereignties'[222]. In the name of Azania, Modiri and others seek an 'end' to South Africa as such, as the condition for new emancipatory politics and theory. This is nothing less than the assertion of a new politics of self-determination.

[222] Modiri, Joel,'Azanian Political Thought and the Undoing of South African Knowledges' in *Theoria, Issue 168, Vol. 68, No. 3 (September 2021)*, p. 74.

CONCLUSION

Let us recall Breyten Breytenbach's poem Words Against the Clouds from the introduction of this study. The poet says '*don't step on the wrong words*!' Is the right of self-determination a 'wrong word' in the context of South Africa: one that we should avoid?

First, it is not easy to make an argument that reliance on self-determination was one of the building blocks of making a South African state. Both the ANC (SANNC) and National Party sent delegations to the Paris Peace Conference in order to seek support for their political goals. Both delegations were perfectly aware how important the new principle of self-determination was for legitimising their agendas. This was the first illustration of the fact that the openness of the concept of self-determination and the susceptibility to different interpretations of the substance of this principle/right provides fertile ground for use of this right by radically different groups, with different goals, in South Africa.

On the other hand, the right of self-determination was the main legal basis for the process of decolonisation in Africa. However, one of the main limitations of this process based on self-determination was the application of the principle of uti possidetis despite the arbitrary way in which boundaries were drawn under colonisation. This influences the understanding and the use of the right of self-determination in South Africa.

It is interesting to note that links between the ANC and the right of self-determination were hardly detectable after the Second World War. One of the possible explanations is that the right of self-determination did not fit in the concept of non-racial politics pursued by the ANC. But, probably even more relevant was the fact that even though self-determination was generally perceived as a progressive principle in the process of liberation and decolonisation and that it was used in that manner by international organizations such as the UN, the notion was actually used by the government of South Africa to justify apartheid. Even in post-apartheid South Africa certain right-wing groups tried to use self-determination in a similar way. This is probably one of the main reasons why the use of self-determination and its internal dimension is compromised in contemporary South Africa despite Article 235 of its Constitution.

The main question arising from the historical and current situation described in this paper is the relationship between the external dimension of the right of self-determination and contemporary South Africa. Is self-determination a ticking time bomb or not? Do self-determination discourses underpin the current political climate in South African society? Will the change of narrative, the current fragmentation of the ANC and the possible decline in its election results in 2024 result in strengthening nationalist claims?[223] Further, will such nationalist movements use the language of self-determination to advance their political goals, or may we expect to see a different discourse?

Marti Koskenniemi argues that one of the possible expressions of the right of self-determination is 'in the existence and free cultivation of the authentic communal feeling, a togetherness, a sense of being "us" among the relevant group.'[224] He adds that 'if, in extreme cases, this may be possible only by leaving the State, then the necessity turns into the right.'[225] We are not certain that this kind of 'right in extreme situations' has emerged in international law yet. However, as we already noted, one could conclude that the bomb starts ticking when claims based on subjective feelings of 'groupness' meet dissatisfaction over the political order of the country and economic crises and injustice in a diverse society like South Africa. South Africa would not be the first country where this kind of perfect storm occurs.

It is important to stress in this regard that there is no universal panacea for deactivation of this bomb. Separatist movements have their own specificities and require different approaches. In addition, it is crucial to work on introducing other political and economic measures in order to improve the overall situation in a complex society such as South Africa. Only then would it be possible to ask ourselves once more what is the thing that gives a sense of being 'us' in South Africa.

[223] 'The Guardian view on South Africa: the ANC is losing its grip', The Guardian, 14 July 2022, available at: https://www.theguardian.com/commentisfree/2022/jul/14/the-guardian-view-on-south-africa-the-anc-is-losing-its-grip, *accessed 30.08.2022*. 'South Africa's ANC is at its weakest, says Ramaphosa', Africa News, 29 July 2022, available at: https://www.africanews.com/2022/07/29/south-africas-anc-at-its-weakest-says-ramaphosa//, *accessed 30.08.2022*.

[224] Marti Koskenniemi, 'National Self-Determination Today: Problems of Legal Theory and Practice', *The International and Comparative Law Quarterly*, 43, 2 (1994): 246.

[225] *Ibid*.

3.1.1. SELF-DETERMINATION IN THE SOUTH AFRICAN CONSTITUTION

Let us recall Breyten Breytenbach's poem Words Against the Clouds from the introduction of this study. The poet says '*don't step on the wrong words*!' Is the right of self-determination a 'wrong word' in the context of South Africa: one that we should avoid?

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On the other hand, the right of self-determination was the main legal basis for the process of decolonisation in Africa. However, one of the main limitations of this process based on self-determination was the application of the principle of uti possidetis despite the arbitrary way in which boundaries were drawn under colonisation. This influences the understanding and the use of the right of self-determination in South Africa.

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