UTI POSSIDETIS VERSUS SELF-DETERMINATION: ORANIA AND AN INDEPENDENT "VOLKSTAAT"

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1. INTRODUCTION

The rights of minority groups to self-determination and secession has become one of the most controversial norms of international law, especially since the "completion" of the decolonization wave which swept over the various continents, countries and islands of the globe. *Uti possedetis* or the principle of territorial integrity in international law demands that caution should be exercized not to disrupt the territorial integrity of a state (Knop 2002:171). Self-determination is therefore handled with caution, because it is a gravitational pull that potentially fragments national states and creates instability in the international order.

Historically the notion of self-determination in international law is normally attributed to Woodrow Wilson, and as Klabbers (2006:187) indicates, Wilson's own secretary famously warned that self-determination is a notion that is loaded with dynamite. Self-determination can potentially lead to fragmentation of states and instability in the international order.

In spite of its controversial cloak, self-determination remains the vision of many cultural and religious minorities that are trapped in larger states. In every modern state in the world there are at least one or more minority groups that strive for self-determination. In South Africa the drive for self-determination is particularly strong amongst a faction of the Afrikaner community.

In post-apartheid South Africa the 1993-Constitution made provision for political and cultural autonomy of Afrikaners in a "volkstaat". A Volkstaat Council was founded and research was done to establish the viability of such an initiative. However, this constitutional initiative occurred in tandem with the decline in support for the Freedom Front, and as a result it petered out in obscurity. The mantle of Afrikaner autonomy and self-determination then shifted to the Orania Movement to obtain self-determination and ultimately its bigger brother, secession.

The Orania Movement trekked to form a lager enclave on the banks of the Orange River in the Northern Cape. The dream and vision of the Orania Movement is to establish

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and maintain a viable Afrikaner community that can receive *de facto* and ultimately *de jure* recognition as an independent autonomous unit in the broader South Africa.

The aim of the article is to investigate and outline the prevailing position in international law concerning the self-determination rights of minority groups that are trapped in states and whether this could ultimately lead to a right to secession. In order to deal meaningfully with the topic the discussion will be arranged in the following manner: The first section will attempt to define self-determination and the problematic situation of minority groups in the world. The discussion will then focus on international law's problematic capacity to embrace the plight of minorities who wish to feather their own nests. This will be followed by an outline of the development path of self-determination through the advisory opinions of the International Court of Justice. Next an attempt will be made to formulate a workable strategy for minority groups in their battle for stronger recognition with special reference to (an) Afrikaner minority group(s). The article will end with a case study of the Orania Movement's strategy towards self-determination.

2. MINORITY GROUPS AND SELF-DETERMINATION

Akehurst (1987:291) defines self-determination as "the right of a people living in a territory to determine the political and legal status of that territory". Wallace (2002:62) emphasizes the will of the people of the territorial unit by referring to self-determination as a concept whereby the political future of a non-independent territory is determined according to the wishes of its inhabitants.

Historically the United Nations (UN) Charter of 1945, sections 1(2) and 55 made provision for the realization of the right to self-determination. Section 1(2) states that one of the purposes of the UN will be to develop friendly relations on the basis of *inter alia* the principle of self-determination (Manganye 1994:50-51).

The right to self-determination is also prevalent in more recent treaties and covenants. Section 1 of the two International Human Rights Covenants makes provision for the fact that "all people 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" (s 1(1) (International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic and Social Rights (ICESCR)). This position is supported by the African Charter on Human and Peoples' Rights (1981) that sees self-determination from a decolonization perspective "as a right to free (colonized and oppressed) people from the bonds of oppression" (s 20(2)).

As indicated, political self-determination is a principle whereby a non-dependent territory articulates its right to self-determination in accordance with the goals of the respective inhabitants (Wallace 2002:62). Self-determination

gained a strong momentum in the decades following the Second World War when decolonization was pursued with great alacrity. The right to self-determination was incorporated in international treaties and as a result has generally been accepted as part of customary international law (McCorquodale 1994:859; Wallace 2002:62). The Declaration on the Granting of Independence to Colonial Territories and Peoples cemented the principle in paragraph 2 which stipulates that all people have a right to self-determination to freely determine their political status and economic, social and cultural development.

However, self-determination as a right progressively lost its momentum during the last decade or two before the turn of the century. This shift in emphasis of the right of minorities to self-determination will be discussed in a subsequent section.

The problem with minority groups is twofold: Firstly, there are "too many of them" and secondly, international and national decision makers decided to follow the route of the *uti possidetis* principle, in other words not to compromize the geographical integrity of new born states during the decolonization phase by ignoring the plight of minority groups.

The resulting problem therefore is that minorities predominantly find themselves geographically trapped and confined inside the parameters of states as set by colonial masters. Anaya (1991:406) calculated that roughly 5 000 discrete ethnic or national groups, who define themselves in a significant way by reference to history, find themselves as an enclave within the confines of a larger state. As Anaya (1991:406) indicates, this figure of 5 000 significantly dwarfs the approximately 176 independent states in the world.

The enormity of the number of minority groups and the consequences of the potential realization of self-determination and ultimately secession on the international legal system is enormous. Historical sovereignty claims form a pattern and a legacy which could have a detrimental impact on international stability. As Anaya (1991:407) puts it: "If international law were to fully embrace ethnic autonomy claims on the basis of the historical sovereignty approach, the number of potential challenges to existing state boundaries (could) bring the international system into a condition of legal flux and make international law an agent of instability rather than stability."

The problem is where self-determination should begin and end. The majority of minority groups have the right to form a separate state (Jackson and Jackson 1997:227) but the net effect will be that it will have a major impact on stability and threaten the stability of other democracies. It is a matter of *uti possidetis* or state integrity versus the power aspirations of self-determination of minorities.

However, there are other avenues available for minorities that are confronted with the overemphazising of the *uti possedetis* principle. The article wishes to explore alternative venues and these will be outlined further on.

3. SELF-DETERMINATION THROUGH THE CASES: THE SHIFT FROM A SUBSTANTIVE RIGHT TO A PRINCIPLE

In the context of historical sovereignty, self-determination in positive international law was to a large extent dominated by the global wave of decolonization. The International Court of Justice (ICJ) still seemed to confirm in its advisory opinion on Namibia, *South West Africa, Advisory Opinion ICJ Reports 1971,* the existence of the right to self-determination based on the historical sovereignty approach. The words of the Court displayed a conception of self-determination that amounts to a substantive right that accrues to people or to non-governing territories (Klabbers 2006:191). However, the suggestion was strong that the impetus for self-determination as an inalienable substantive right was decolonization (Wallace 2002:62-63; Klabbers 2006:191).

However, the optimism created in the *Namibia* case that self-determination was a substantive enforceable right was dampened by the opinion that the ICJ articulated in *Western Sahara, Advisory Opinion, ICJ Reports 1975*. The Court was not asked to determine the right to self-determination of the Western-Saharan people, but to furnish the General Assembly with an opinion on the legal ties of Morocco and the Mauritanian entity with the territory (Knop 2002:159-161). Significantly the Court departed from its previous stance on self-determination as a right, but instead spoke of the principle of self-determination (Klabbers 2006:195).

The vigilance of governments after *Western Sahara* to incline to any jargon that relates to the rights of minority groups to self-determination was evident. This has much to do with this departure of self-determination as a right, to self-determination as a principle. The International Labour Convention's working group (ILO Convention 169) encountered this problem on numerous occasions. Governments were vigilant in their opposition of any terminology which might create the impression that a right to secession exists (Knop 2002:220).

The Court also addressed self-determination during 1975 in the *East Timor (Portugal v Australia) ICJ Reports 1995*. The Court drew the important inference in *East Timor* that the principle of self-determination exists in positive international law and in addition attributed an *erga omnes* character to self-determination (Klabbers 2006:196).

The importance of the Court's deliberations was twofold: Firstly, it was a reaffirmation of self-determination as a principle in international law, rather than a right. Secondly, the principle of self-determination has an *erga omnes* character, in other words the obligation to acknowledge that the self-determination principle applies not only to treaty partners, but also to the international community.

It is also evident that the international will of international organizations, such as the United Nations and the International Court of Justice, has progressively lost its vigour to support self-determination as a substantive right that could eventually

materialize in succession. The ICJ has since the "completion of the decolonization process" and its advisory opinion in *Namibia* taken a step back. In the *Western Sahara* opinion the ICJ was not even prepared to give any substance to the *Western Sahara* case. The ICJ departed from the *Namibia* conception that self-determination was a substantive enforceable right to providing the United Nations with elements of the legal character of self-determination (Anaya 2006:193).

Western Sahara as an independent entity has since not progressed much. The United Nations does not even recognize it as a country, although it is nevertheless recognized by more than 70 countries worldwide and by the African Union. Western Sahara has an elected president, prime minister and local representatives, but its legitimacy stretches only as far as the Security Council allows it. Farouky describes the Western Sahara as a state "deserted in Western Sahara" (*Africa and Democracy*, 6 March 2006).

The international trend that self-determination as a substantive right was on the decline, was reconfirmed in domestic law. The Supreme Court in Canada, in its opinion on the possible secession of Quebec, was adamant that self-determination falls short of secession. It was evident that the principle of *uti possedetis* (consolidated state integrity) was regarded more important than fragmental secession.

The predominant status of the sovereignty of states and the strong emphasis on maintaining state integrity as in the principle of *uti possedetis* in international law were also reflected in the findings of the Banditer Committee (Arbitration Committee of the International Conference on Yugoslavia).

The Banditer Committee stressed that self-determination, whatever the circumstances, must not involve territorial changes except where the state concerned agrees (Wallace 2002:66).

In making sense of the somewhat conflicting views on self-determination, Klabbers (2006:198) suggests that self-determination is not a substantive right that would eventually lead to secession for minority groups, but that self-determination must rather be viewed in its limited form as a principle. The resulting challenge is therefore to engineer a strategy based on self-determination status as a principle.

This does not entail that minority groups are without rights, and that they are forever trapped in the confinement of majority dominance in a state. However, it may translate to the fact that minorities will have to settle for a lesser solution, namely the human rights approach to self-determination. The human rights approach to self-determination should not be underestimated, because it is supported by authoritative charters, covenants and declarations in international law.

The principle of self-determination could also be grounded in the human rights approach, especially in the concept of cultural integrity (Anaya 2001:401). Cultural survival as a human right is fundamentally embedded in the United Nations Charter (sections 13, 55, 57 and 73), Section 27 of the Civil and Political Rights Covenant,

the Covenant against Genocide and the UNESCO Declaration of Principles of Cultural Cooperation.

The Declaration on the Guidelines on the Recognition of Eastern Europe and the Soviet Union was signed by the European Economic Council in December 1991 and demanded that the rule of law, democracy and human rights must be adhered to (and also) guarantees for the rights of ethnic and national groups and minorities (Wallace 2002:66). States are required to adhere to and comply with international human rights and the rights of minorities.

The open-ended nature of human rights sometimes amounts to vague, unenforceable norms. However, recently, internationally and also in South Africa, the Constitutional Court's decisions progressively turn human rights into procedural rights, in other words, concrete steps to obtain these rights.

Especially in South Africa human rights are becoming more and more procedural rights, a right to be heard and a right to be taken seriously (Soobramoney v Minister of Health, KwaZulu-Natal 1998; Government of the Republic of South Africa and Others v Grootboom and Others 2001; Minister of Health and Others v Treatment Action Campaign and Others).

Klabbers (2006:203) makes the important observation that self-determination as a procedural right could also be applied to minority groups that are not territorial. This means that procedural rights imply that the minority groups must take part in decisions that will impact on them. The process is therefore inclusive rather than exclusive. Klabbers (2006:203) refers to Hannah Arendt's dictum, "the right to have rights".

It is evident that the prevalent position in international law that the *uti possedetis* is considered a more important principle than a right to self-determination, will be a disappointing one for minority groups. However, jettisoning self-determination as a substantive right that could eventually lead to secession in favour of the next best option of self-determination as a procedural right, is not without advantages.

Minority groups trapped in the confinement of states can rely on the authority of international and foreign law on human rights, that self-determination entitles one to a procedural right. Self-determination in this regard means that the communal aspect of the groups and their cultural identity must be respected. It is a procedural guarantee (Klabbers 2006:203) and the right to be heard is invaluable. It falls short of a right to secession, but it is replaced with the right to be taken seriously.

Anaya (2001:409) also emphasizes that self-determination must not be equated with the right to secession and independent statehood. Self-determination as a principle could mean the demand for something less than secession, like the right of cultural groupings to be taken seriously, to exist as a group, and to develop according to their distinctive characteristics.

Anaya (2001:410) still acknowledges obstacles for cultural autonomy on the road ahead, especially the emphasis that international law places on the integrity of states. However, recent developments such as the draft Universal Declaration on the Rights of Indigenous People developed by the working group of the UN Human Right Commission, and the ILO Convention on Indigenous Tribal People adopted by the 1989 International Labour Conference address indigenous peoples' right as the right of collectivities. In addition the African Charter on Human and Peoples' Rights shifts the emphasis away from individual rights to group rights and peoples' rights.

This human rights approach transcends the obstacle that *uti possedetis* places in its path. In the opinion of McCoroudale (1994:862) the human rights approach allows a customary international law in a terrain where broader values than state sovereignty are taken into account.

4. SELF-DETERMINATION IN POST-APARTHEID SOUTH AFRICA

Self-determination that could lead to secession was very much on the agenda for a segment of the Afrikaners or (right-wing) whites, who was represented at the negotiations leading up to the formulation of the interim 1993-Constitution. Concessions were made for limited self-determination with the establishment of a Volkstaat Council, as an advisory body, to sell the idea or concept of a cultural enclave to the Constitutional Assembly. The Constitutional Assembly was in the process of drafting the final constitution. The grand idea of this constitutional initiative was to give effect to the establishment of an ethnic or cultural volkstaat for Afrikaners. The provisions concerning a volkstaat were amended in the interim Constitution during 1994 (Basson 1995:253).

The importance of the amendment was that it added a 34th Constitutional Principle (the constitutional principle was binding on the Constitutional Assembly) and also made provision for the notion of self-determination by any community sharing a common cultural and language heritage, whether in a territorial entity within the Republic or in any other recognized way.

The acceptance of self-determination as a right, during the interim period before the acceptance of the (final) 1996-Constitution, was not without constitutional significance. However, the lack of political energy and support for such an initiative in the broader Afrikaner community was evident. The preoccupation with territory and the failure to find a suitable enclave, where proven (substantive) support exists (the Freedom Front polled only 2% of the overall vote) spelled the end of this short dream for Afrikaner or white self-determination.

The 1996-Constitution did not make provision for a volkstaat in the same manner as the interim Constitution. However, general provisions of the Constitution, section 235, made provision for a right to self-determination. (Section 235 will be

discussed in more detail in the next subsection.) In addition, provision was also made in section 31 for the rights of cultural, religious or linguistic communities to enjoy their cultural heritage and to form, join and maintain cultural, religious and linguistic associations and the other organs of civil society (section 31 (1)(a) and (b)).

The Constitution also established two Commissions: the Human Rights Commission (section 184) and the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (section 185).

Section 185(1)(c) allows the Commission to recommend the establishment or recognition of a cultural or other council for a community or communities. The protection of cultural rights through the right of association is a very limited form of self-determination and falls far short of the idea of a territorially based enclave.

The mechanisms and provisions outlined above are the parameters in the Constitution which cultural and linguistic minorities have to follow to fulfil their aspirations. The viability and/or limitations of each will be discussed below.

5. ORANIA AND SELF-DETERMINATION

Orania was born out of a dream or a vision to create an autonomous political and economic homeland for the Afrikaner people. The intermediate goal was self-determination and in the longer term, hopefully secession.

Forty Afrikaner families bought a dilapidated town on the banks of the Orange River for R1,5 million and added more arable land to the existing town. According to the *Mail and Guardian* (1 November 2005), one of the founding fathers, Carel Boshoff, envisaged 60 000 residents after 15 years in a volkstaat which stretches from Orania to Namaqualand and the West Coast. However, the grim reality was that a much smaller influx of Afrikaner people took place and a restricted number decided to reside in this Afrikaner enclave.

The aim of Orania is to create a geographic space in which the Afrikaner can govern himself and preserve his cultural heritage without being in conflict with any other group (*National Vanguard*, 8 July 2004). Although the Orania Movement strives for (more) local autonomy its structural authority is restricted to that of a local council, which falls outside the constitutional and statutory provisions provided for by the Constitution and statutory law.

The grim reality is that Orania still forms part of a larger municipality and has to pay taxes to the national government. The local council, the Orania Representative Council, is presently negotiating with the South African government for full municipal status. This is in accordance with a Supreme Court decision in 2000 that the government and Orania should reach an agreement on the latter's municipal status. However, the government insists that Orania should fall under the broader municipal structure in the Northern Cape.

At present the Orania Movement adopted a multipronged strategic approach to realize their vision of self-determination:

- To turn their *de facto* status at present into a *de jure* status.
- To apply for full municipal status on the basis of the Supreme Court ruling that an agreement should be reached between the Orania Movement and government.
- To petition the government for the implementation of section 235 that allows for self-determination.

Each of the strategies will be outlined and discussed in the following subsections.

5.1 Turn the *de facto* status at present into a *de jure* status

The Orania Movement claims at present to enjoy *de facto* recognition which they wish to strengthen through municipal status to ultimately an application based on section 235 to obtain *de jure* recognition (Chief Executive Official Orania Movement, 8 May 2006).

De facto and *de jure* recognition symbolize the status that aspiring states strive for in their drive for full statehood. International law does not require a state to recognize another entity as a state, it is rather left to the judgment of individual states. The United States traditionally looked at the establishment of certain facts: "These facts include effective control over a clearly-defined territory and population; an organized governmental administration of that territory; and a capacity to act effectively to conduct foreign relations and to fulfill foreign obligations" (Von Glahn 1981:93).

Obviously the Orania Movement's present claim of enjoying *de facto* recognition amounts to a lesser status. However, the distinction that Wallace (2002:81) draws between *de facto* and *de jure* may be helpful to distinguish between them. Wallace (2002:81) summarizes the difference as follows: "An entity recognized as *de facto* is one which *manifested* most of the attributes of sovereignty, whereas a *de jure* displayed all the characteristics of sovereignty" (added emphasis).

The *de facto* recognition that Orania at present enjoys does not add up to the classic requirements or attributes of sovereignty. Their *de facto* recognition is more in line with a factual recognition as it would apply to any other private entity in South Africa. The Orania settlement, as a private entity, displays similar characteristics as any private company in South Africa under national (governmental) administration. In this manner Orania's status is not dissimilar to any large privately owned company. In terms of governmental structures Orania's administration displays the nature of domestic arrangements and regulations which function under the broader ambit of the South African Constitution.

5.2 Application for full municipal status

In line with its strategy to build upwards from full municipal status to full self-determination, on the basis of section 235, the Orania Movement strives for full

municipal status. Orania wants its own independent municipality instead of falling under the larger country district. The Cabinet has still to react and rule on this issue (*Mail and Guardian*, 4 May 2006).

In my opinion this less than ambitious approach conflicts with the ultimate drive for self-determination. The application for municipal status acknowledges that Orania is still part of the greater South Africa. (It is very difficult to occupy two chairs, you are part or you are not part of the South African state.) Furthermore, if the ruling ANC party allows Orania to obtain full municipal status it reduces Orania's claim towards *de facto* and *de jure* status. In terms of status Orania will then be no different from third tier municipal structures that are spread all over South Africa.

Strategically this will be a step backwards, in spite of the intended strategy to build structurally upwards again, from municipal status to provincial status and ultimately to gain self-determination. This will indeed be a very difficult goal to achieve.

5.3 Application for self-determination under section 235

The most powerful section in the Constitution pertaining to self-determination, is section 235 that recognizes the right (not the principle) of self-determination. This right of self-determination applies to any community sharing a common cultural and language heritage within a territorial entity in the Republic, or in any other way. However, the right to self-determination contained in section 235 is partly nullified by the sting in the tail, the proviso that ends the sentence: "determined by national legislation".

The proviso, "determined by national legislation", translates to the fact that self-determination will be subservient to the political process inside the body politic of the country.

Constitutionally, the idea of self-determination that could ultimately culminate in secession, is highly improbable. Historically the downsizing of the principle of self-determination from a volkstaat, specifically for an Afrikaner minority in the interim Constitution, to a general local cultural council, is ample indication that self-determination is being watered down. The grim reality is that section 235 is subservient to the founding provision of the Constitution and the political domination of the majority ruling party. The founding provision of the Constitution, section 1, stipulates: "The Republic of South Africa is one, sovereign, democratic state…" The founding provision is further strengthened by section 41(1)(a) that stipulates that all spheres of government must "preserve the peace, the national unity and the *indivisibility* of the Republic" (my emphasis). This stipulation pre-empts any suggestions or hopes of subdividing the country.

Self-determination under the provisions of section 235 of the Constitution may be an alternative, although the political will of the government makes this highly unlikely. The proviso in section 235 of the Constitution illustrates that self-

determination will be subservient to legislation. Given the legacy of ethnic territorial fragmentation of South Africa self-determination is highly unlikely.

Formally constitutions in general sometimes create the impression on the surface that self-determination and secession is a mere formality. For example, the Ethiopian Constitution in section 39 makes provision for self-determination and secession. Section 39(1) stipulates: "Every Nation, Nationality and People in Ethiopia has an unconditional right to self-determination, including the right to secession."

However, section 39(4)(a)-(e) outlines the preconditions for the right of self-determination and secession for minority groups in Ethiopia. An application for self-determination and secession includes approval by two-thirds of the members of the Legislative Council (s 39(4)(a)) and a majority vote in a national referendum (s 39(4)(b) and (c)). The diversity of groups in Ethiopia and the differences between the different clans make it highly unlikely that any minority group in Ethiopia will achieve these requirements to form an autonomous group and to secede. Formally the right to self-determination is built into the constitution, but materially (politically) it will be very hard to achieve.

During a conference held in Orania, Jakes Gerwel was asked if the ruling African National Congress was sympathetic to the idea of a "volkstaat". Gerwel responded "that the ruling party was apprehensive about 'bantustanising' South Africa again" (*Mail and Guardian*, 4 May 2006).

6. ORANIA, THE WAY FORWARD?

Does the stark reality mean the end of the road for minority communities which are trapped in a large state and who wish to follow the route of self-determination? What are the available options for Afrikaner minorities, such as the Orania movement, which strives for cultural autonomy and self-determination?

It is evident that the trend in international law is clearly in favour of *uti possedetis,* in other words to maintain state integrity over self-determination that could lead to secession and to the redesigning of state borders with the accompanying state instability.

It is also evident that international organizations such as the United Nations and the International Court of Justice have progressively lost their vigour to support self-determination that could eventually materialize in secession. The ICJ has since the "completion of the decolonization process" and its advisory opinion in *Namibia* taken a step back. As explained, the ICJ's opinion in the *Western Sahara* case was not even prepared to provide any substance to the concept of self-determination and departed from the *Namibia* conception that self-determination was a substantive enforceable right.

As indicated by the lukewarm position of the ICJ, the Banditti Commission and the Supreme Court of Canada, self-determination as a substantive right that could eventually materialize in secession, is not a realistic alternative.

Minority groups, such as the Orania Movement, should therefore redefine their strategy. It is important to tap into the prevailing sentiments and momentum in international law (which will be explained below). The strategy should be to obtain international authority to substantiate any claim to self-determination that they may have domestically. In other words, adopt a deductive approach to obtain self-determination in place of an "upward" strategy.

The Orania Movement should first establish their inalienable international right to self-determination by applying for a declaratory judgment on both the international and the domestic level. When this inalienable right or principle of self-determination is firmly established, the Orania Movement will then be in a position to negotiate for self-determination from a position of strength. However, it is important to realize that it is just a clarification, a declaratory judgment, which could be used as leverage for further negotiation. (See explanation below.) Furthermore, it is an application to theoretically establish Orania's right towards self-determination, not the right to secession.

It is obvious that self-determination is no longer obtainable through the conventional process, because of the near completion of the process of decolonization. However, there is another route available for the recognition of self-determination which is not exclusively territorially tied.

A more realistic strategic alternative for the Orania Movement is therefore to utilize the human rights approach, as indicated, by applying for a declaratory judgment to the human rights tribunals which could substantiate their right to self-determination. Cultural survival as a human right is fundamentally embedded in the United Nations Charter (sections 13, 55, 57 and 73), section 27 of the Civil and Political Rights Covenant, the Covenant against Genocide and the UNESCO Declaration of Principles of Cultural Cooperation (Anaya 1991:408).

McCorquodale (1994:857-885) also supports a human rights approach as a viable alternative for self-determination as a right in non-colonial situations and to a "peoples" approach rather than a territorial approach. Cultural homogeneity and linguistic unity form the basis of self-determination and not territory as such.

Klabbers (2006:189) also stresses the point that since self-determination must at best be understood as a procedural right: "(E)ntities *have the right to see their position taken into account whenever their futures are being decided. This may not amount to a right to secede or even to a right to autonomy or self-government, but it amounts to a right to be taken seriously*" (added emphasis).

International human rights law is primarily contained in global and regional treaties and is part of customary international law and therefore binding on all states. As McCorquodale (1994:857-885) indicates, only a few states are not party to at least one treaty or instrument that deals with human rights. (South Africa is a signatory to 13 of the 14 treaties that were signed under the Human Rights

Committee.) Human Rights law has been clarified by international human rights tribunals such as the Human Rights Committee (HRC) which was established under the International Covenant on Civil and Political Rights. The latter expressly protects the right of self-determination within the human rights framework. An individual has to file an application, but as part of a larger group or community. The right of self-determination is absolutely integrated in the protection of individual (human) rights (McCorquodale 1994:872).

It seems that the (international) human rights approach to self-determination as a right is a much more viable alternative than the historical sovereignty approach. (As a matter of fact Orania has no historical claim to the specific area that they at present occupy.) As explained earlier, a working theory of human rights should be developed as a bundle of procedural rights (Klabbers 2006:202). This includes the fundamental aspect of rights: the right of a group to be heard and to be taken seriously. As Klabbers (2006) and McCorquodale (1994) indicated, this approach will sever the tie between territory and self-determination and replace it with a less restrictive alternative. Human rights as part of self-determination are extended to a group with cultural homogeneity and linguistic unity and can then be broadened to more than just a geographical settlement of people, in other words a settlement, and also individuals outside the settlement.

For example, an individual from Orania approaches the Human Rights Committee (HRC) (which was established under the International Covenant on Civil and Political Rights) for a declaratory judgment to reaffirm the right of an individual as part of a larger community to practice his/her cultural and language rights. The individual will have to establish that these rights are threatened in the present situation. This will provide authority for the extension of these rights.

The Constitutional Court could similarly be approached to clarify the cultural and linguistic rights of communities on the basis and authority of international customary law and domestic constitutional arrangements (section 31 and other relevant sections of the 1996-Constitution).

It is important to note that the Constitution, section 232, stipulates that customary international law is valid and enforceable in the Republic as law, unless it is inconsistent with provisions of the Constitution or an act of Parliament (Devenish 2000:327). The open-ended wording of the Bill of Rights in the Constitution makes it unlikely that any such inconsistency would exist with the international Bill of Human Rights.

Furthermore, as Devenish (2000:328) indicates, section 39(1) directs that South African courts must consider international law. The South African Bill of Rights was largely influenced by international human rights conventions and employed to a large extent the language and structure of these conventions. Dugard especially submits that public international law should be interpreted widely and not merely

be restricted to treaties to which South Africa was a party or rules that have been accepted by South African courts. A number of judgments in South Africa support this sentiment. In this regard the European Convention on Human Rights acts as a guide to the interpretation of the Constitution, in spite of the fact that South Africa cannot be a party to the European Convention on Human Rights (Devenish 2000:328; Dugard 1994:208-213).

Armed with the right to self-determination as a human right (but separated from the right to secession) the Orania Movement will be in a stronger negotiating position to bargain for greater autonomy with government than a modest application for municipal status. The aim of the strategy should be to obtain self-determination that fits in between full self-determination (section 235) and municipal status.

The human rights approach to the right of self-determination moves outside the confinement of being exclusively territorial. Like-minded Afrikaners could link virtually and otherwise with the vision of the Orania Movement; especially Afrikaners who were previously reluctant to join the Movement because of its territorial isolation, could be included. This could strengthen the position of the Orania Movement tremendously.

7. CONCLUSION

It is evident from the advisory opinions of the International Court for Justice that self-determination, which aspires to full status as an independent entity and secession, has fallen out of favour. This reality demands a different strategy and approach for those minority groups who strive for cultural and linguistic autonomy and that are trapped in the assimilation tendencies of large states. The article suggests the human rights approach as a viable alternative to self-determination. This strategy could also provide relief for settlements, such as the Orania Movement, whose aspirations are side-lined in spite of the fact that they were prepared to sacrifice much in order to obtain and realize their dream of autonomy and self-determination.

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