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2025

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Gabaphethe, Thuto . (2025). The Right to Self Determination for the Khoi-San People in the Western Cape Region of South Africa [Master's dissertation, University of the Witwatersrand, Johannesburg]. WIReDSpace. https://hdl.handle.net/10539/50123

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The Right to Self Determination for the Khoi-San People in the Western Cape Region of South Africa

By

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Submitted in partial fulfilment of the requirements for the degree of

Master of Laws by Coursework and Research Report

at the University of the Witwatersrand, Johannesburg

Date: 28 February 2025

DECLARATION

I THUTO GABAPHETHE declare that this Research Report is my own, unaided work. It is submitted in partial fulfilment of the requirements for the degree of Master of Laws (by Coursework and Research Report) at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

I have submitted my final Research Report through TurnItIn and have attached the report to my submission.

Word Count: 10 450

ABSTRACT

This research report analyses the extent to which the Khoi-San people in the Western Cape region of South Africa are entitled to self-determination under international law and South African law, and if so, which form(s) of self-determination can they exercise and under what circumstances. A human-rights centred analysis to the right is undertaken to add on to the discourse about a rearranged approach to the concept of 'self' in self-determination especially in the post-colonial context. Having considered the substance of the right under international law and South African law, the research report places the Khoi-San people as a people whose subjugation remains embedded in South Africa's history of colonisation. Within this context, the research report proposes that self-determination should be understood as more people-centred than it might have been in the colonial period. The report thereafter concludes that within this post-colonial framework, the Khoi-San people in the Western Cape region of South Africa are entitled to self-determination. Whether this entitlement is for internal or external self-determination is a question of balancing several interests which the report considers.

Key words: Self-determination; human rights; territorial integrity; Khoi-San people; people-centred

TABLE OF CONTENTS

DECLARATION …….2

ABSTRACT……..3

CONTENTS

1. **INTRODUCTION**……5-8
2. **NATURE OF THE RIGHT TO SELF DETERMINATION**

2.1 A legal right of people…….8-13

2.2 Internal self-determination

2.2.1 Meaning……..……13

2.2.2 Internal self-determination and human rights ……...14-15

2.2.3 Internal self-determination and political participation.……..15-16

2.2.4 Concluding remark on internal self-determination…….16

2.3 External self-determination

2.3.1 Meaning…….……...16-17

2.3.2 External self-determination and statehood……..17

2.3.3 External self-determination and territorial integrity……..18-19

2.3.4 Concluding remark on external self-determination……...19-20

2.4 The South African Constitution…….20-22

3. **THE ENTITLEMENT OF THE KHOI-SAN PEOPLE IN THE WESTERN CAPE REGION TO SELF-DETERMINATION**

3.1 The Khoi-San people…….22-25

3.2 External or internal self-determination……..25-29

4. **CONCLUSION**…….29-30
5. **BIBLIOGRAPHY**……31-37

1. Introduction

The right to self-determination stems from early decolonial debates.[1] Traditionally, it is understood as a principle advocating for post-colonial independence where subjugated people could govern themselves.[2] Castellino and Gilbert observe that it was 'the vehicle of choice' in the struggle for decolonisation.[3] However, the advent of the era of international human rights discourse necessitated its evolution into the post-colonial era. For example, article 1 of the United Nations (UN) Charter identifies the principle of self-determination and equal rights of peoples as amongst the UN's purpose, article 55 promotes 'respect for the principle of equal rights and self-determination among peoples', and in article 73, colonial powers undertook to develop self-governments.[4] As such, the right emerged as a counterforce to colonisation but is equally important in the post-colonial context.

In both these contexts, the law generally regulates behaviour and reflects on the ideas and preoccupations of society within which it operates.[5] The international law system in particular is mainly concerned with issues between nation states.[6] Although both Shaw and Dugard make this point, Dugard takes it further to highlight how, since World War II (WWII), several treaties have been signed to extend the protections of international law (including the right to self-determination) to individuals.[7] International instruments that recognise self-determination include the UN Charter,[8] the International Covenant on Civil and Political Rights (ICCPR),[9] the International Covenant on Economic, Social and Cultural Rights (ICESCR),[10] and the African Charter on Human and Peoples' Rights (African Charter)[11].

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[1] H Strydom, C Gevers, L Juma, G Kemp, O Ruppel, W Scholtz & F Viljoen *International Law: A South African Perspective* 2 ed (2020) 55-57; See also J Dugard, M Du Plessis, T Maluwa & D Tladi *Dugard's International Law* 9 ed (2019) 149.

[2] S Akermark 'Internal self-determination and the role of territorial autonomy as tool for the resolution of ethno-political disputes' (2013) 20 *International Journal on Minority and Group Rights* 5, 7; see also R Cole 'Revolutions in the Maghreb – resisting authoritarianism and accessing the right to self-determination and democratic governance' (2012) 45 *The Comparative and International Law journal of Southern Africa* 389, 389 -393.

[3] J Castellino & J Gilbert 'Self-determination, indigenous peoples and minorities' (2003) 3 *Macquarie Law Journal* 155, 158.

[4] Charter of the United Nations (adopted 26 June1945, entered into force 24 October 1945) 1 UNTS XVI.

[5] M Shaw, *International Law* 9 ed (2021) 1.

[6] Ibid.

[7] Dugard et al (note 1 above) 1.

[8] UN Charter (note 4 above) arts 1(2) & 55.

[9] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art 1.

[10] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR), art 1.

[11] African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter), art 20.

Each of these instruments are generally sympathetic to international law being used and designed for the needs of states but they address the fundamental international law principle and right to self-determination. For example, common article 1 of the international human rights covenants (ICCPR and ICESCR) provides that: '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.' This framing positions the right to self-determination as a political, cultural, economic and social concept which should be people-centred.[12] The proposition that it should be people-centred is made notwithstanding the observation made by Shaw about failed attempts at rearranging international law perceptions which still largely maintain the protection of territorial integrity and sovereignty over the will of the people.[13] This research report seeks to add to the discourse seeking this rearrangement because of the importance of the right even in the post-colonial context.

In view of what is meant to be its people-centred nature, this research report will analyse the extent to which the Khoi-San people in the Western Cape region of South Africa, may be entitled to self-determination. This analysis is necessitated by the long history of subjugation of the Khoi-San people in Southern Africa. This history is rehashed in a recent South African Human Rights Commission (SAHRC) report on the human rights situation of the Khoi-San people which highlights their subjugation as being a 'virtually invisible' people because of apartheid and colonisation.[14] Some historians trace back their origins as the first people to experience the brutality of colonisation by the Portuguese in the 1400s.[15] Others describe them as 'late stone age people(s) of the Cape whom the Dutch (first) encountered in the seventeenth and eighteenth centuries'.[16] Although these timeframes may be a contested topic for different areas of sociology and anthropology, largely because of the effects of colonisation, it is less contested that the Khoi-San people are Africans who lived in a particular milieu in South Africa

[12] See Shaw (note 5 above) 233; see also Strydom et al (note 1 above) 385, reference to art 19-24 of the African Charter; see also F Mnyongani- 'Between a rock and a hard place: the right to self-determination versus uti possidetis in Africa' (2008) 41 *Comparative and International Law Journal of Southern Africa* 463, 464.
[13] Shaw (note 5 above) 233.
[14] South African Human Rights Commission *National Hearing Relating to the Human Rights Situation of the Khoi-San in South Africa* (SAHRC report) (2018), 9.
[15] J Klaasen 'Khoi-San identity: A contribution towards reconciliation in post-apartheid South Africa' (2018) 44 *Studia Historiae Ecclesiasticae* 1, 7-8.
[16] S Marks 'Khoi-San resistance to the Dutch in the seventeenth and eighteenth centuries' (1970) 13 *The Journal of African History* 58.

and in the Western Cape region of South Africa in particular.[17] Further, it is also less contested that their history is embedded in the long history of South Africa's colonisation.[18]

Most recently, in July 2018, media reports revealed that King Khoebaha Calvin Cornelius III of the Khoi-San had informed the South African government that the Cape had seceded from South Africa.[19] The reports suggested that the newly formed 'Sovereign State of Good Hope' territories would include most of the Western Cape region along the northern border of the Cape and ending on the east-ward frontier of Fish River (including some parts of the Northern Cape and Eastern Cape provinces). On the other hand, another group who are facing an eviction order at the time of writing this research report, has been camping outside South Africa's official seat of government—the Union Buildings—since 2017.[20] The group demands recognition of, amongst other things, their language as an official language and their status as an indigenous people of South Africa by the government.[21] Although subsets of the Khoi-San people later distanced themselves from the secession and some are not part of the group at the Union Buildings, both these instances raise important questions about the entitlements of the Khoi-San people to self-determination especially in the post-colonial context.

Hence, this research report considers three questions: first, are the Khoi-San people in the Western Cape region of South Africa entitled to self-determination under international law and South African law? Secondly, if they are entitled to this right, which form(s) of self-determination can they exercise? Thirdly, under what circumstances can they exercise it? An understanding of the nature of the right to self-determination is necessary to answering these questions. Hence, in the part that follows (part 2), this research report assesses the substance of the right to self-determination. A human-rights centred approach to this right is adopted in assessing both its forms (internal and external self-determination), after which an assessment of the right within the South African Constitution is undertaken. In part 3, the research report

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[17] R Viljoen 'Khoi San Heritage and Identity' (1996) 35 *South African Historical Journal* 140, 142.
[18] S Burnett, N Ahmed, T Matthews, J Oliephant & A Walsh 'A politics of reminding: Khoisan resurgence and environmental justice in South Africa's Sarah Baartman district' (2023) 20 *Critical Discourse Studies* 524, 526.
[19] C Cilliers 'Khoi-San king declares that the Cape has seceded from SA' (2018) *The Citizen* https://www.citizen.co.za/news/south-africa/khoi-san-king-declares-that-the-cape-has-seceded-from-sa/ accessed 29 November 2024.
[20] M Maurice & T Chaane 'Public Works dept postpones eviction of Khoisan King from Union Buildings after tragedy' (2025) *The Citizen* https://www.citizen.co.za/rekord/news-headlines/2025/01/20/public-works-dept-postpones-eviction-of-khoisan-king-from-union-buildings-after-tragedy/#:~:text=The%20Department%20of%20Public%20Works%20and%20Infrastructure%20has,after%20tragedy%20struck%20the%20protester%20on%20January%2010 accessed 29 November 2024.
[21] Ibid.

assesses the extent of entitlement of the Khoi-San people to self-determination. The latter positions the Khoi-San people as having political, cultural, and socio-economic character as a people subjugated within the context of self-determination. Their positioning as a people is important because it is central to the theoretical underpinnings and the attempts at rearrangement in the post-colonial context. Part 4 of this research report gives a brief conclusion on the findings of the report and makes recommendations.

2. The nature of the right to self-determination

2.1 *A legal right of peoples*

The preamble of the UN Charter highlights the international community's determination 'to save succeeding generations from the scourge of war (twice)' away from the colonial period and mass human rights violations.[22] In view of this, the United Nations General Assembly (UNGA) accepts the exercise of self-determination as 'one of the basic principles of international law'.[23] A number of declarations from the UNGA—the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (Declaration on Friendly Relations),[24] the Declaration on the Granting of Independence to Colonial Countries and Peoples (Declaration on the Granting of Independence),[25] the Declaration on the Rights of Indigenous Peoples (Declaration on Indigenous Peoples),[26] and the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious, and Linguistic Minorities (Declaration on Minorities)[27]—are significant for self-determination and will be assessed at different parts of this research report.

Notwithstanding the UNGA's position on self-determination, Shaw notes that the UN Charter's political aspirations may have at the time of its inception not necessarily resulted in the right acquiring any legal effects.[28] This may be because of the UN Charter's positioning of self-determination as only a principle of international law instead of a right. Whether this is a

[22] UN Charter (note 4 above).
[23] Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UNGA Res 2625 (XXV) (24 October 1970).
[24] Ibid.
[25] Declaration on the Granting of Independence to Colonial Countries and Peoples, UNGA Res 1514 (XV) (14 Dec 1960).
[26] Declaration on the Rights of Indigenous Peoples, UNGA Res 61/295 (13 Sep 2007).
[27] Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, UNGA 47/135 (18 Dec 1992).
[28] Shaw (note 5 above) 228-229.

compelling argument or not may no longer be relevant because the International Court of Justice (ICJ) in *Portugal v Australia* (*East Timor Case*) recognised self-determination as 'one of the essential principles of contemporary international law' (even in the post-colonial context).[29] This decision is amongst others that have confirmed respect for self-determination as an obligation *erga omnes* for states.[30] Additionally, the ICJ in *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius* also acknowledged that both state practice and *opinion juris* confirm self-determination's customary law status.[31]

Its subsequent recognition in regional instruments and national constitutions is also a significant indication of its prevalence and importance in contemporary law. Despite the UN Charter's reference to the right as just a principle, article 20(1) of the African Charter provides that:

> 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. [Emphasis added]

Similarly, in the UN human rights framework, common article 1 of the ICCPR and ICESCR refers to the *right* as applicable to *all peoples*. As such, both the UN human rights framework and the African Charter's approach to self-determination is that of a peoples' *right* for both the 'colonised' and 'oppressed' peoples.[32]

As far as the concept of 'peoples' is concerned, after some years of uncertainty, the African Commission on Human and Peoples' Rights (African Commission) was given two opportunities to provide some clarity. In the *Katangese Peoples' Congress v Zaire* (*Katangese*), the African Commission did not deal sufficiently with this issue as it limited itself to the fact that there had not been any African Charter violations.[33] However, in *Kevin Mgwanga Gunme et al v Cameroon (Gunme),* the African Commission clarified that a people are those with 'a

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[29] *East Timor (Portugal v Australia)* (1995) ICJ Reports 90, para 29.
[30] Ibid; See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) (2004) ICJ Reports 136 paras 155-156; see also *Legal Consequences arising from the Policies and Practices of Israel In the Occupied Palestinian Territory, Including East Jerusalem* (Advisory Opinion) (2024) https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-00-en.pdf accessed 29 November 2024, para 232.
[31] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) (2019) ICJ Reports 95 para 160.
[32] Common art 1 of the ICCPR and ICESCR (note 9 & 10 above); See also The African Charter (note 11 above); See also R McCorquodale 'Self-Determination: A Human Rights Approach' (1994) 43 *The International Law and Comparative Law Quarterly* 857, 860.
[33] *Katangese People's Congress v Zaire* (*Katangese*), Communication 75/92, para 6.

common history, linguistic tradition, territorial connection and political outlook. More importantly they identify themselves as a people with a separate and distinct *identity*.'[34] This approach by the African Commission is in line with the United Nations Educational, Scientific and Cultural Organisation's (UNESCO) recommendations which sought to provide their own clarity on the concept.[35] The group of experts recommended that 'a people' need to reflect 'a common historical tradition, a racial or ethnic identity, cultural homogeneity, linguistic unity, religious and ideological affinities, territorial connection and a common economic life'.[36]

This is also in line with UNGA Declaration on the Granting of Independence to Colonial Countries and Peoples which had the effect of outlawing colonisation by transferring governing powers to the people of those territories 'with their freely expressed will and desire, without any distinction as to race, colour or creed, in order to enable them to enjoy complete independence and freedom'.[37] Whether 'all peoples' or 'people as a whole' extends to 'minority' or 'indigenous' people as a subset is not immediately ascertainable. However, despite the *Katangese* limitations, it is significant that the African Commission found that the people of Katanga in Zaire were 'obliged to exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire'.[38] This, by implication, extends self-determination to a subset of people. This approach is comparable to that of the Canadian Supreme Court in *Reference re Secession of Quebec* which highlighted that:

> The rights of other provinces and the federal government cannot deny the right of the government of Quebec to pursue secession, should a clear majority of the people of Quebec choose that goal, so long as in doing so, Quebec respects the rights of others.[39]

Furthermore, in *Gunme*, the African Commission highlighted that the exercise of self-determination may be through 'independence, self-government, local government, federalism, confedaralism, unitarism or any form of relations that accords with the wishes of the people

[34] *Kevin Mgwanga Gunme et al v Cameroon (Gunme)*, Communication 266/03, para 179. Identity is an important aspect of the characterisation of a peoples.
[35] Ibid 170; see also the Report of the Rapporteur of the OAU ministerial meeting on the draft African Charter on Human and Peoples' Rights held in Banjul, the Gambia, from 9-15 June 1980. See also Final Report and Recommendation of the Meeting of Experts on extending of the debate on the concept of peoples' rights held in Paris, France, from 27-30 November 1989.
[36] Ibid.
[37] Note 25 above.
[38] Mnyongani (note 12 above) 470-473.
[39] *Reference re Secession of Quebec* 1998 CanLII 793 (Supreme Court of Canada), para 92.

but (remains) fully cognisant of other recognised principles such as sovereignty and territorial integrity'.[40]

At the level of the ICJ, the *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* advisory opinion found no general prohibition in international law for a *part of the population* (a people) to declare independence from an existing state.[41] As Dugard notes, although the ICJ did not necessarily make a pronouncement on the issue of a subset of a people, its decision by implication was that 'the *Albanian people of Kosovo* constitutes a people for the purposes of self-determination'.[42] Dugard concludes this aspect by pointing out correctly that the term 'people' therefore includes 'a group of persons living within an established state, occupying a distinct territory *within that state*, that shares a common identity, language, religion, culture, history and traditions'.[43] These examples indicate that self-determination may in fact extend to a subset of a people.

It seems there is no reason, in the post-colonial context, why this should not be read to include indigenous and minority people. Castellino and Gilbert's view is that a 'positivist' reading of self-determination as not being extended to indigenous and minority people is unjustifiably restrictive and would not be reflective of self-determination's evolution with the international human rights framework[44]—a proposition supported by this research report. This is in line with the Declaration of the Rights of Minorities which clarifies the obligations states have in securing the interests of distinct persons in the population.[45] This declaration employs governments to protect the rights of national, or ethnic, religious and linguistic minorities.[46] Furthermore, some representatives of indigenous peoples have also proposed that the UNGA Declaration on the Rights of Indigenous Peoples should also be understood in light of self-determination as 'the heart and soul' of the declaration.[47]

Both these declarations are not infamous in the African context in decisions such as the *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on*

[40] Note 34 above para 188.
[41] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (*Kosovo Secession* case) (2010) ICJ Rep 403 paras 82-84.
[42] Dugard et al (note 1 above) 152.
[43] Ibid.
[44] Castellino and Gilbert (note 3 above) 169.
[45] Note 27 above.
[46] Ibid.
[47] E Titanji 'The right of indigenous peoples to self-determination versus secession: One coin, two faces?' (2009) 9 *African Human Rights Journal* 52, 53.

behalf of Endorois Welfare Council v Kenya (Endorois) [48] and *African Commission on Human and Peoples' Rights v Republic of Kenya (Ogiek)* [49] for example. Although about other rights, the African Commission and African Court both recognised the importance of the indigenous peoples' entitlement to determine what happens to not only their land but to be consulted on decisions that affect them as well.[50] As will be seen in part 2.3 below, once governments cannot protect these rights, external self-determination should by operation of law arise. At a national level, as elaborated on in part 2.4 below, the South African Constitution for example also recognises 'the right of South African people as a whole to self-determination'.[51] In line with this and in terms of international law, a High Court in South Africa in the *Saharawi Arab Democratic Republic v Owners and Charters of the Cherry Blossom* confirmed that self-determination is a legal right.[52] As such, self-determination should be understood as a legal right belonging to a people in terms of international, regional and South African law.

Having proposed this, what follows (in parts 2.2 and 2.3 below) is an assessment of the two forms of this right: internal and external self-determination. The assessment has in mind the three scenarios that the Canadian Supreme Court in the *Reference re Secession of Quebec* expressed on the exercise of self-determination: 'where "a people" is governed as part of a colonial empire; where "a people" is subject to alien subjugation, domination or exploitation; and possibly where "a people" is denied any meaningful exercise of its right to self-determination within the state of which it forms a part'.[53] This context is important because the Court makes this reference of the right of a people in light of the colonial but, for present purposes in particular, even in the post-colonial context.

This research report prefers the commonly used 'internal' and 'external' self-determination terminology although some scholars use the language of the 'classical view' (which might be confusing in light of the colonial and post-colonial context) and the 'secessionist' model.[54] In their conceptualisation, these models explain the classical view as one where communities make the 'rational' decision to form (within) a society, and secessionist

[48] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya (Endorois)* (Communication No. 276/2003, 2010).
[49] *African Commission on Human and Peoples' Rights v Kenya (Ogiek) Application No. 006/2012)* African Court on Human and Peoples Rights (2022).
[50] See *Ogiek* paras 106-112 & 131; see also *Endorois* paras 147-159.
[51] Constitution of the Republic of South Africa, 1996, s 235.
[52] *Saharawi Arab Democratic Republic v Owners and Charters of the Cherry Blossom* 2017 (5) SA 105 (ECP).
[53] Note 39 above para 154.
[54] Castellino and Gilbert (note 3 above) 157.

as one where a nation (a people) is oppressed and rises against its oppressors.[55] From this, internal self-determination is therefore where a society (a people) is able to exercise its right to determine its own future within institutions and procedures established by government.[56] External self-determination assumes a more radical and exceptional form where a new 'state' with its own international legal personality results.[57] These ideas are taken further below.

2.2 Internal self-determination

2.2.1 Meaning

Internal self-determination is centred on the respect and protection of the human and democratic rights of people within post-colonial states.[58] This is in contrast to the colonial period where the right to self-determination involved mainly secession and external self-determination from colonial territories.[59] Internal self-determination also finds support from the UNGA Declaration on the Granting of Independence which suggests that territorial independence and secession are not the only forms of exercising self-determination pursuant to article 73 of the UN Charter.[60] Principle VI, which accompanies this declaration, on the principles guiding the applicability of article 73(e) of the UN Charter clarifies that 'free association should be the result of a free and voluntary choice of the people(s) of the territory concerned through informed and democratic processes'.[61] This conception of 'free association' does not contemplate only the secessionist form of self-determination.[62] Instead, it contemplates the idea of a society being formed within institutions and procedures established by a government.[63] Therefore, in what follows, this research report considers the protection of human rights and political participation as aspects of internal self-determination.

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[55] Ibid.
[56] Ibid.
[57] Ibid. See also *Reference re Secession of Quebec* (note 39 above) para 126 (internal self-determination defined as 'a people's pursuit of its political, economic, social and cultural development within the framework of an existing state').
[58] Dugard et al (note 1 above) 151.
[59] Ibid.
[60] McCorquodale (note 32 above) 865-864.
[61] Ibid, reference to Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under art 73e of the Charter, UNGA Res 1541 (XV) (15 Dec 1960) Principle VI.
[62] McCorquodale (note 32 above) 864.
[63] Ibid.

2.2.2 Internal self-determination and human rights

To begin with, it might not even require mention that democratic states are commonly characterised by the protection of human rights.[64] This is perhaps why McCorquodale proposes that it is the human rights framework and not the 'territorial' or the 'people' frameworks, that provide better sensitivity to the need for the necessary balancing of interests where a people exercise self-determination.[65] This, according to McCorquodale, is because the human rights framework is concerned with balancing rights with the requirements of society and the law whilst the 'territorial' and 'people' frameworks suggest that there are no limitations to self-determination.[66] This suggestion arises because once the requirement of 'people' or the possibility of 'territorial division' is met, there does not seem, through these approaches, to be other considerations such as the interests of society or other rights.[67] However, the Court in *Reference re Secession of Quebec* acknowledged that the right to self-determination may be limited to prevent threats to territorial integrity of an existing state or the stability of relations among states.[68] Put differently, this is an acknowledgement that self-determination is not an absolute right.

Despite this, the human rights approach may still be appropriate for two reasons. First, although the Universal Declaration of Human Rights (UDHR) is silent on self-determination as a human right, its article 21(3) speaks to democratic principles about governments not imposing their will on the people they govern (an anti-subjugation proposition).[69] Furthermore, article 1 of the UDHR affirms the fundamentals of freedom, equality and dignity which are repeated in the South African Constitution as will be seen in part 2.4 below. This anti-subjugation proposition centred on these fundamentals is even more relevant for internal self-determination but may be equally important for external self-determination. Secondly, the human rights approach *explicitly* recognises the limitation of human rights through, for example, limitations to protect other rights and the general interests of society.[70] Furthermore, the UNGA Declaration on the Granting of Independence to Colonial Countries and Peoples and the Declaration on Friendly Relations also set out conditions which should be met for such

[64] Ibid 861.
[65] Ibid 870.
[66] Ibid 871.
[67] Ibid 875.
[68] Note 39 above para 127.
[69] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR); see also Cole (note 2 above) 394.
[70] McCorquodale (note 32 above) 873.

limitations.[71] These conditions are in line with the human rights framework. McCorquodale also observes that, despite common Article 1 of the ICCPR and ICESCR's silence on limitations on the right to self-determination, common Article 5(1) of the covenants implies such a limitation when it prohibits activities/acts aimed at the destruction of the recognised rights.[72] Common article 5(1) also prohibits 'limitation' of the recognised rights 'to a greater extent than is provided for in the present Covenant'. Similarly, this limitation is also present in the European and American conventions on human rights.[73] As such, the human rights framework still presents the preferred model for self-determination especially for post-colonial democratic states such as South Africa which guarantee the protection of human rights for all people with some express limitations.[74]

2.2.3 Internal self-determination and political participation

The limitations referred to above should not be arbitrary and the democracy model presents an avenue for avoiding this. Democracy shares similar concepts with internal self-determination. These shared concepts are about the right of a people to determine their political system of governance and to select their leadership.[75] Cole observes correctly that democratic governance which involves political participation is a natural consequence of internal self-determination.[76] Article 13(1) of the African Charter, for example, recognises the right to freely participate in government.[77] This reasserts the idea of self-determination within the human rights framework and that 'a bridge has been built from self-determination as a process of decolonising to self-determination as a human right, a right of peoples'.[78] Additionally, Cole has also observed how the African Commission has dealt with article 13 (political participation) and article 20 (self-determination) of the African Charter as conceptually linked.[79] Denial of the right to participate

[71] Note 25 above 67; see also Note 23 above 123-124. These conditions on both declarations include on national unity, equality and non-interference with the territorial integrity of states.
[72] McCorquodale (note 32 above) 876.
[73] Ibid; American Convention on Human Rights 'Pact of San Jose Costa Rica' (adopted 22 November 1969, entered into force 27 August 1979) art 29; Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 18.
[74] The Constitution s36 'the rights in the bill of rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open democratic society based on human dignity, equality and freedom'.
[75] Cole (note 2 above) 404.
[76] Ibid 390.
[77] The African Charter, art 13.
[78] Cole (note 2 above) 403, reference to A Idowu 'Revisiting the right to self-determination in modern international law: implications for African States' (2008) 6 *European Journal of Social Sciences* 43, 52-53.
[79] Ibid 399.

in the government impedes people's exercise of their right to internal self-determination. As such, one should bear this important conceptual link in mind when considering the entitlement to internal self-determination.

2.2.4 Concluding remark on internal self-determination

This part of the research report has considered the protection of human rights and political participation as aspects of internal self-determination. While these broad issues allow a people to exercise autonomy within an existing state, they may not always be sufficient to address historical injustices or systemic marginalisation. In cases where a people experience oppression, alien domination or a denial of meaningful access to governance, the question of external self-determination arises. Unlike internal self-determination, which functions within the framework of a state, external self-determination involves a people seeking independent statehood or full sovereignty which is considered further in part 2.3 below.

2.3 External self-determination

2.3.1 Meaning

As a starting point to this part, external self-determination may be defined with reference to the UNGA Declaration on Friendly Relations as stated in *Reference re Secession of Quebec.*[80] The Declaration provides that: '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 to self-determination by that people'.[81] This declaration proposes that where secession arises, all people within a territory are consulted before any change in sovereignty over that territory occurs.[82] These consultations are important in line with the earlier observation about government's non-imposition of its will as well as the fundamentals of freedom, equality and dignity. However, the declaration is also about the implications of external self-determination which affect the international law principles of statehood and territorial integrity as related to

[80] Note 23 above; see also Note 39 above para 126.
[81] Ibid.
[82] McCorquodale (note 32 above) 864; see also *Western Sahara* (Advisory Opinion) (1975) ICJ Rep 12, 81 (Declaration of Judge Nagendra Singh) - 'the consultation of a people awaiting decolonisation is an inescapable imperative'.

a state's sovereignty. This is why statehood and territorial integrity are explored as aspects of external self-determination in the parts that follow.

2.3.2 External self-determination and statehood

The Montevideo Convention on Rights and Duties of States 1933 (Montevideo Convention) lays down the most widely accepted requirements for statehood.[83] These: in terms of article 1 of this Convention are: (a) a permanent population, (b) a defined territory, (c) government, and (d) the capacity to enter into relations with other states.[84] Nonetheless, Strydom observes that states as we know them today are a culmination of three international law periods in 1776, and in the mid and end of the 19th century.[85] These developments were centrally about the consequences of European conquest which had the effect of secession on the one hand, and the spread of European imperialism, on the other.[86]

This history foregrounds the international law debate coined as the 'great debate' by scholars such as Strydom.[87] The debate is about the two theories of statehood: constitutive and declaratory, where the former proposes that a state is 'constituted' by recognition of other states and the latter that a state is created when the requirements for statehood are met.[88] The international law discourse on this is continuing on opposite ends of the spectrum but Strydom notes how the declaratory theory is on the upper hand in textbooks and a mixture of the two is preferred in practice.[89]

In the context of self-determination, though a new state is generally expected to meet the statehood criteria, deciding between the two theories of statehood is about recognition once a secession has already occurred and so exploring the theories in detail might be out of the scope of this research report. However, both theories are important to guiding the approach about the entitlement to secession. This research report's approach to the two theories will become apparent later (in part 3.2 below).

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[83] Shaw (note 5 above) 182; see also The Montevideo Convention on the Rights and Duties of States (Adopted 26 December 1933, entered into force 26 December 1934) art 1.
[84] Ibid.
[85] Strydom et al (note 1 above) 50-51.
[86] Ibid.
[87] Ibid 46 & 52-58.
[88] Ibid.
[89] Ibid.

2.3.3 External self-determination and territorial integrity

As far as territorial integrity is concerned, the ICJ recently recalled the international customary law right to territorial integrity as 'a corollary of the right to self-determination'.[90] The ICJ was of the view that 'Israel, as the occupying power, has the obligation not to impede the Palestinian people from exercising its right to self-determination'.[91] In particular, that their 'right to an independent and sovereign state' on the whole of their territory was not to be impeded.[92] The ICJ had prior to this already found that Israel's annexation of large parts of the Palestinian territory violated Palestine's territorial integrity; 'an essential element of the Palestinian people's right to self-determination'.[93] This demonstrates that colonies are entitled to the protection of their territorial integrity but that the colonial powers also have an obligation not to impede on those territories.

The decisions of the ICJ in the *Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (The Namibia Opinion)*[94] as well as in *The Case Concerning the Frontier Dispute (Burkina Faso v Mali)*[95] also illustrate the important link between territorial integrity and self-determination. In the *Namibia Opinion*, the ICJ found that South Africa's continued presence in Namibia was illegal and that it no longer had any right to administer the territory of Namibia.[96] The ICJ was of the view that South Africa's persistent physical control, even without title, on the territories of Namibia would attract international law obligations.[97] The ICJ concluded that for both South Africa and Namibia, the expressed will of the people of the territory in question remain 'supreme' and that states would need to give effect to those wishes.[98] As such, without entertaining the atrocities of so-called 'separate development' in apartheid South Africa, it was significant that the ICJ observed that where a people occupying the territory of Namibia do not wish to associate with apartheid South Africa then the international community is obligated to respect those wishes.[99]

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[90] *Legal Consequences arising from the Policies and Practices of Israel in Occupied Palestine* (note 30 above) para 237.
[91] Ibid.
[92] Ibid.
[93] Ibid para 238; see also *Legal Consequences of Construction of a Wall* (note 30 above) para 122.
[94] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (*The Namibia Opinion*) (Advisory Opinion) (1971) ICJ Reports 16.
[95] *Case Concerning the Frontier Dispute (Burkina Faso v Republic of Mali)* (Judgment) (1986) ICJ Reports 554.
[96] Note 94 above paras 108-116.
[97] Ibid para 118.
[98] Ibid.
[99] Ibid.

Conversely, the ICJ in the *Case Concerning the Frontier Dispute (Burkina Faso v Mali)* explored the principle of *uti possidetis*,[100] which functions as a justification of the limitation to territorial integrity by asserting the rules of maintaining colonial boundaries[101]. The ICJ observed the possible contradiction that may arise from these principles specifically for self-determination.[102] However, the Court conclusively observed that 'the maintenance of the territorial *status quo* in Africa is often seen as the wisest course, to preserve what has been achieved by people(s) who have struggled for their independence'.[103] This matter reasserts *uti possidetis* as a principle of general international law importance to the extent that it affirms stability in the post-colony.[104]

These ICJ decisions do three things for the purposes of this research report. First, they reassert the people-centred approach to self-determination. Secondly, they speak to the ICJ's infamous observation by Judge Dillard's Separate Opinion in the *Western Sahara Advisory Opinion* that it is the territory that follows the people and not the people following the territory.[105] Thirdly, the decisions also maintain the very important principle of territorial integrity in light of self-determination and the limitations thereof.

2.3.4 Concluding remark on external self-determination

For external self-determination in general, the international law system emphasises state's territorial integrity and sovereignty. However, the argument is that there may be a need for movement towards a rearranged sense of 'self' in the post-colonial context where the people's will takes precedence in the considerations about entitlement to self-determination. This will be taken further later. At this stage, part 2.3 of this research report illustrates that statehood, territorial integrity (as part of states' sovereignty) and peoplehood are aspects of external self-determination. This discussion demonstrates that these principles may potentially co-exist to give effect to the will of the people in the post-colonial context.

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[100] Note 95 above.
[101] R McCorquodale 'South Africa and the Right of Self-Determination' (1994) 10 *SAJHR* 4, 9.
[102] Note 95 above 25, the ICJ observes that 'it may be wondered how the time-hallowed principle has been able to withstand new approaches to international law as expressed in Africa, where the successive attainment of independence and the emergence of new States have been accompanied by certain questioning of traditional international law. At first sight this principle conflicts outright … with the right of peoples to self-determination'.
[103] Ibid.
[104] Ibid.
[105] *Western Sahara* (1975) ICJ Reports 12, 122 (Separate Opinion of Judge Dillard); see also Strydom et al (note 1 above) 55.

This discussion has thus far drawn from international law. Hence, in part 2.4 below, this research report will turn to assessing self-determination within the South African Constitution.

2.4 Self-determination in the South African Constitution

The South African democratic project is founded on its Constitution which recognises self-determination both in terms of national and international law.[106] Sections 232, 233 and 235 of the Constitution are the guiding provisions on this. These provisions, read together, suggest that the relationship between South African law and international law is one of (a) international law as part of South African law and (b) South African law having to be consistent with international law. The former situation, specifically customary international law, is given constitutional legitimacy by section 232 which domesticates customary international law.[107] This section also subjects customary international law only to the Constitution and an Act of Parliament. Dugard observes that the 'constitutionalisation' of international customary law in this context gives it additional weight.[108] Therefore, at the onset, self-determination begins its positioning within South African law through section 232.

However, section 235 expands on this idea by explicitly recognising the right to self-determination. Section 235 states that:

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

This framing of self-determination as 'manifested in the Constitution' in section 235 suggests that it must be understood within the context of the values of the Constitution. These values envisioned in section 1 include 'human dignity, the achievement of equality and the advancement of human rights and freedoms … non-racialism and non-sexism and … the rule of law'. These values are testament to South Africa's history and the objectives to heal wounds of the country's past racial, ethnic and identity segregation. The preamble of the Constitution speaks to these values but also appreciates the diversity of various identities within South Africa's territories. Beyond this appreciation, section 31 of the Constitution provides that

[106] Note 51 above.
[107] J Dugard 'International Law and the South African Constitution' (1997) 8 *European Journal of International Law* 77, 79.
[108] Dugard et al (note 1 above) 67.

persons belonging to a cultural, religious or linguistic community may not be denied the right to exercise those entitlements. Any limitation should be considered in terms of section 36 narrowly with considerations given to the circumstances of the relevant society. This limitation aligns with the general legal rules that can be discerned from the international human rights framework[109] This may include where enforcing a right would be contrary to public policy for example.

Although section 36 limitation (which applies to 'rights in the Bill of Rights') may be applicable in the exercise of section 31 rights, it is not applicable to self-determination because it is not within the bill of rights. However, the caveat in section 235 that self-determination is enforceable only either (a) 'within a territorial entity within the Republic' or (b) 'any other way, determined by national legislation' creates internal limitations. The section also includes the requirement of a 'community sharing a common cultural and language heritage'. This section does not create a difficulty for internal self-determination because if one is within the territories of South Africa and is not denied rights in accordance with the principles of democracy, dignity, equality and non-discrimination, then South Africa may be complying with its internal self-determination obligations. Whether it presents a problem for external self-determination and secession is not immediately clear as indicated by Dugard in his recent work, posing the question: 'Does it mean that all options—including secession—remain open, provided they are determined by "national legislation"?'.[110] This is despite his earlier work which described this situation in the following terms:

> while the purpose of this provision is to hold out hope to disaffected communities of a greater degree of territorial or community autonomy, 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.[111]

This seems to be the appropriate position. De Villiers notes that although a claim to section 235 has not yet been explored, it is 'potentially a powerful and far-reaching provision'.[112] This is because, as the argument proceeds, section 235 extends, a *right* to self-determination and not merely a principle, promise or an objective of the Constitution.[113] However, De Villiers is quick

[109] McCorquodale (note 32 above) 873.
[110] Dugard et al (note 1) 163.
[111] Dugard (note 107 above) 88.
[112] B De Villiers 'Section 234 of the Constitution: Too soon or too late for cultural self-determination in South Africa' (2017) 30 *SAJHR* 458, 458.
[113] Ibid 458-459.

to highlight that self-determination within this context should not be viewed as the Constitution granting rights to external self-determination or secession.[114] The rationale for this is that the Constitution in its entirety 'emphasises the unity and territorial integrity of South Africa'.[115] This research report is unable to support this view for two reasons. First, section 235 has not been appropriately dealt with in the South African courts to provide a conclusive view on the extent of its limitation beside those pointed out in the text. Second, the South African jurisprudence on the application and interpretation of the Constitution does not support this proposal.[116] Instead, the manifestations of both section 235 and the entirety of the Constitution propose a compelling argument for a people-centred approach which may possibly include external self-determination and secession through national legislation which parliament would have to be involved in.

Lastly, the Constitution also commits allegiance to international treaties in terms of section 231. As such, South Africa is required to also uphold self-determination as guaranteed in the ICCPR, ICESCR, UN Charter and African Charter, for example, that it is a party to. Accordingly, self-determination of a people within the territory of South Africa is protected within South African law. This protection is not inconsistent with international and regional law which was considered in parts 2.1-2.3 above. This consistency potentially also supports the earlier observations at adapting a less restrictive approach to reading 'a people' in the Constitution. Following this conceptual clarity, the report in the next part discusses the entitlement of the Khoi-San people in the Western Cape region to self-determination.

3. The entitlement of the Khoi-San people in the Western Cape region to self-determination

3.1 *The Khoi-San people*

The Khoi-San Nation Self-Defence Unit of South Africa characterises the five main groups of the community as the San, Griqua, Nama, Koranna and the Cape Khoi.[117] In other historical

[114] Ibid.
[115] Ibid.
[116] This proposition is not supported by any approaches; purposive, literal or generous reading of the Constitution, as adopted by the Constitutional Court. See A Klaasen "Constitutional interpretation in the so-called 'hard cases': Revisiting S v Makwanyane" (2017) 1 *De Jure Law Journal* 1; See also S Woolman 'Application' in S Woolman et al (eds) *Constitutional Law of South Africa* 2 ed (2008).
[117] Khoisan Nation Self Defence Unit of South Africa https://pmg.org.za/committee-meeting/30285/ accessed 29 November 2024.

accounts, they are referred to as the Bushman and Hottentots.[118] This is largely racial and ethnic but historians such as Marks illustrate that the Khoi-San people are more than just a racial or ethnic grouping.[119] The suggestion is that they are a community that was unified in resisting Dutch colonisation during the seventeenth and eighteenth centuries in South Africa.[120] In this context, their subjugation begun when Jan van Riebeeck, the first commander of the Dutch East India Company's settlement in Cape Town, referred to the 'Hottentots' as a 'dull, stupid, lazy, stinking nation'(the 1652 project).[121] This 1652 project begun the colonial approach to dehumanisation, displacement and genocide.[122]

It is at this point where decades long of land dispossession, cultural and linguistic subjugation then followed. For example, isolated groups in the Northern Cape (as well as the Western Cape region) speak *Khoekhoegowab* (or Nama) and those from Botswana and Namibia speak! Xun and Khwe.[123] These isolated groups of various languages are as a result of years long of subjugation and resultant migration in various parts of Southern Africa. A part of this subjugation includes how those who owned cattle were dispossessed of it and their grazing land forcefully appropriated.[124] The Khoekhoe group who were known for sheep and cattle herding (the herders) migrated from places such as Namibia and Botswana to the south.[125] These migrations away from the coast affected the independence of the culture and language of the Khoi-San people but it also affected their occupation to specific areas of territory.

Nonetheless, the Western Cape region is where for the purposes of this report, the 1652 project begun and persisted for decades. The various migrations as a result of subjugation means that it may be possible that those who remain in the Western Cape region are a minority of South Africa's population. This minority is highlighted by the Khomani San in the Kalahari region, who illustrate how the San were generally 'pushed into remoter and drier regions' away from the coast.[126] This pushing away from areas such as the Western Cape region was also directed at dispossession (of culture, history, language and land) in the main. Interestingly, the

[118] Marks (note 16 above) 55.
[119] Ibid.
[120] Ibid.
[121] Ibid.
[122] Burnett et al (note 18 above).
[123] Y Abrahams 'Resistance, pacification and consciousness: A discussion of the historiography of Khoisan resistance from 1972 to 1993 and Khoisan resistance from 1652 to 1853' (1994) Unpublished Master's Thesis file:///C:/Users/a0070270/Downloads/thesis_hum_1994_abrahams_y.pdf accessed 5 February 2025 ; see also Ibid 526.
[124] Ibid.
[125] Ibid.
[126] Khomani San https://www.khomanisan.com/about-us/ accessed 29 November 2024.

Western Cape region's capital, Cape Town, is also considered in contemporary scholarship as the 'epicentre of the Khoi-San Revival and Consciousness' as a direct consequence of the 1997 Khoi-San Conference ('the conference').[127] The conference sought to agitate for the revival of the Khoi-San heritage, culture and identity in democratic South Africa owing to its erasure.[128]

This conference was part of the efforts against Khoi-San erasure.[129] Verbuyst's conceptualisation of what he calls 'extinction discourse' best captures this erasure.[130] This extinction discourse illustrates the 'common place belief that the Khoi-San have ceased being a distinct collective as a result of their decimation and dispossession by colonial aggressors, and their assimilation as coloured through a protracted process of bureaucratic erasure'.[131] This referencing is done in light of post-colonial South Africa's categorisation of the Khoi-San people as being coloured – a categorisation rejected as being a 'history of misrecognition'.[132] A step further is that some literature limits their place in history to only their socio-economic labels such as 'herders', 'hunterers' and 'gatherers' for example which is rejected by some scholars.[133] Scholars such as Viljoen for example argue that these 'less controversial' categorisations of the Khoi-San people also have remnants of erasure.[134]

As such, the Khoi-San people reflect how a people's legacy and history can become wiped out because of colonisation. This wiping out of history is also reflected in the SAHRC report mentioned earlier. The report was necessitated by consistent reports of human rights violations on the Khoi-San people even after SAHRC's 2004 report on the Khomani San community.[135] Some of these human rights violations indicated that there is still a group that occupies the territories of the Western Cape region of South Africa to some extent. Consequently, the SAHRC recommendations ranged from issues of identity and recognition, culture and language, access to land and basic services, as well as on governance, consultation and participation, to mention but a few.[136] These recommendations were made as part of SAHRC's concerns of the 'continued failure to officially recognise the Khoi-San peoples in the

[127] B Coetzee 'Khoisan consciousness: An ethnography of Emic Histories and Indigenous Revivalism in Post-Apartheid Cape Town' (2024) 38 *Critical Arts Journal* 164, 165.
[128] See Burnett et al (note 18 above) 528.
[129] Ibid.
[130] See Ibid 528, reference to R Verbuyst 'Khoisan consciousness: Articulating indigeneity in post-apartheid Cape Town' Unpublished Phd Thesis.
[131] Ibid.
[132] Ibid.
[133] Marks (note 138 above) 14.
[134] Klaasen (note 15 above) 142.
[135] Note 14 above.
[136] Ibid 80-89.

current democratic dispensation'.[137] This SAHRC report's letter and intent is probably related to Davison's argument for the preservation of the Khoi-San people's legacy and that they should not be regarded as victims of history but as part of that history, a history that resulted in their subjugation.[138] As such, their quest of what some call 'the politics of reminding' or 'revival' is to be understood in the context of erasure and subjugation.[139] This quest is about anti-subjugation in the post-colonial context.

Whether one takes the posture seeking to centralise the Khoi-San people's identity to ethnicity and race or socio-economic history, it is almost conclusive that they remain a reflection of the effects of South Africa's colonial and apartheid past.[140] Moreover, it is almost conclusive that despite efforts at erasure, the Khoi-San people have the characteristics set out in *Gunme* as a people. Those in the Western region of South Africa in particular share in a territorial connection and political outlook because of their history of subjugation and dispossession in that territory. This sets them apart from a people who for example may have not endured colonial subjugation and dispossession. As such, in view of the post-colonial conceptualisation of a people as including indigenous and minority people with common characteristics, the Khoi-San people in the Western Cape are entitled to self-determination as a people and as a community sharing common cultural and language heritage as required by section 235. Whether there is an oppression or human rights violations answers the question about which form of self-determination they are entitled to. Part 3.2 below addresses the question of the form(s) of self-determination they exercise and under what circumstances, taking into consideration the discussion in part 2 above.

3.2 External or internal self-determination

As noted earlier, external self-determination is an exceptional form of the right which arises where a people have been denied internal self-determination. Where there is a representation of a people belonging to the territory without distinction as to race, creed or colour, internal self-determination is given effect to as noted earlier.[141] As such, to the extent that the South African democratic project protects civil and political rights such as political participation for all its people and holds regular elections which involves multiple parties and individuals, for

[137] Ibid 91.
[138] Viljoen (note 17 above) 143 reference to P Davison 'Museums and Khoisan heritage: Future challenges'.
[139] Ibid.
[140] Ibid.
[141] McCorquodale (note 32 above) 864.

example, it may be protecting all its people's rights to internal self-determination. In this context, a 2023 Constitutional Court judgment in *Mogale and Others v Speaker of the National Assembly and Others* may be used as a recent account of what the South African position is especially regarding the Khoi-San people.[142] In this matter, the Constitutional Court declared the Traditional and Khoi-San Leadership Act invalid because there had not been sufficient public participation.[143] This law arose as a result of a high level panel finding that its predecessor had 'allegedly failed to address historical challenges faced by customary law and traditional communities' (such as the Khoi-San people).[144] In setting aside the new Act, the Court observed the following as part of its introductory remarks:

> The importance of public participation in South Africa cannot be understated. Affected persons must be afforded the opportunity to meaningfully participate in the legislative process. Public participation acts as a safeguard to prevent the interests of the marginalised being ignored or misrepresented. The significance of public participation for the advancement of South Africa's democratic project is underscored by the colonial and apartheid governments' complete disregard of the views of the people in legislating their lives.[145]

In light of this, the South African democratic project purports to recognise how affected people must be part of decisions about them. This approach relates to the conceptual link between political participation and internal self-determination. For example, in *Reference re Secession of Quebec* and in the context of external self-determination, the Court found that the people of Quebec did not meet the threshold of a 'colonial people' or 'an oppressed people', or even that they were denied 'meaningful access to government to pursue their political, economic, cultural and social development' as they already had representation in government, could freely make political choices and are also represented in other spheres of the state such as the legislature and judiciary.[146] As such, to the extent that the Khoi-San people in the Western Cape region have their human rights protected, they participate in government, in decision-making and in regular elections, and are not prevented from pursuing their economic, social and cultural development, an argument may be made that they exercise internal self-determination and are therefore not entitled to external self-determination.

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[142] *Mogale and Others v Speaker of the National Assembly and Others* 2023 (6) SA 58 (CC) (30 May 2023).
[143] Ibid.
[144] Ibid para 44.
[145] Ibid para 3.
[146] Note 39 above para 154.

However, where these concerns are not addressed within the ambits of what is permissible then the approach should be that they may be entitled to external self-determination. This approach is not left without criticism. Mutua observes that 'using political democracy as one medium through which the human rights culture is conveyed, is able to capture the imperial project at work'.[147] Mutua makes this observation by showing that the human rights framework may itself be an adopted regime in the third world which is not open to 'tweaking'.[148] That those who deviate from the framework may be seen (by the international community) as 'savage and invoking images of barbarism'.[149] As such, in view of this and as suggested earlier, section 235 of the Constitution should not be read to be an immediate limitation to secession lest it is accused of capturing the imperial project.

This research report suggests that a continued subjugation of an indigenous people where they legitimately show that they have been denied internal self-determination is not part of the manifestations of the Constitution. Within this context, the SAHRC report's conclusions acknowledge the abundance of laws aimed at protecting indigenous people's rights in South Africa.[150] However, the report highlights that this was not sufficient to 'protect and promote the rights of indigenous peoples'.[151] This SAHRC report continues with the following about the shortcomings:

> In understanding interdependence of rights, the achievement of a number of other rights including the right to self-determination and development is thus predicated on the fulfilment of the right to access to land and natural resources, and the fulfilment of this right is therefore of central importance to the realisation of both individual as well as collective rights of indigenous peoples.[152]

This postulation accounts for the evolution of self-determination within the international human rights framework and its protection of rights in relation to other rights.[153] That is, that self-determination may not be protected in isolation but as part of a collection of important human rights.[154] Secondly, this view also raises that self-determination may not necessarily be about just 'an abundance of laws' but is also about the actual realisation of the letter and intent

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[147] M Mutua 'Savages, Victims and Saviors: The Metaphor of Human Rights' (2009) 42 *Harvard International Law Journal* 201, 244.
[148] Ibid.
[149] Ibid.
[150] SAHRC report 91.
[151] Ibid.
[152] Ibid.
[153] McCorquodale (note 32 above).
[154] Ibid 877.

of those laws by the people themselves. As such, there may well be an argument for external self-determination and secession where these rights are not protected although this will be under a more strenuous test. This strenuous test would have to be undertaken to establish a reconciliation between the rules and principles of secession and territorial integrity, as Dugard notes.[155]

In as far as territorial integrity is concerned, Mutua's critique is that in the context of border conservativism, 'prevailing state ideology in Africa treated as treason any discussion about border changes, separatist movements, or ethnic self-determination within an independent state'.[156] This criticism is about the extent to which some international law principles such as *uti possidetis* may still have elements that seek to maintain the colony even in the 'post-colony'. However, Eritrea successfully seceded from Ethiopia in 1993 when African states begun to accept the possibility of secession through a referendum.[157]As such, it may be possible especially in the South African context to seek to negotiate with parliament and the South African government about the extent of impact a secession, if so agreed by a majority, will have on South Africa's territorial integrity. This approach relates to Shaw's earlier observation that a people may seize upon the phrase 'or in any other way' to justify their claim to external self-determination. Second, matters such as *Reference re Secession of Quebec* for example may possibly make out an argument that a minority who are a majority in the territory they occupy may elect to secede.[158] However, where these negotiations do not yield results, the finding in *Kosovo* that there is no general prohibition to unilaterally declaring independence may be explored.[159] In this instance not only will territorial integrity limitations still have to be considered but statehood limitations as well.

For statehood, it is clear that self-determination is not only about the people's own subjective situations but also about whether their standing (as a state in the context of secession) in international law terms is respected and restored by the international community.[160] Without negotiations or a referendum, especially considering the national legislative approval requirement in the Constitution, this is a potential difficulty that the Khoi-San people in the Western Cape region may experience. This difficulty is about recognition of a new state in the

[155] Dugard et al (note 1 above) 149.
[156] M Mutua 'Why redraw the map of Africa: a moral and legal inquiry' (1995) 16 *Michigan Journal of International law* 1113, 1119.
[157] Mnyongani (note 12 above) 470-473
[158] Note 39 above paras 121-125.
[159] Note 41 above.
[160] McCorquodale (note 32 above) 885.

international community notwithstanding the existence of the principles laid down in the Montevideo Convention. Given the brief historical background highlighted in part 2.3.2, this research report supports a blended approach of the constitutive and declaratory theories more so for self-determination in the post-colonial context. This blended approach is similar to Lauterpacht's failed attempt at proposing that once the requirements for statehood (in terms of the Montevideo Convention) are met, then states are under a duty to grant recognition.[161]

This approach is supported here for two reasons. First, the constitutive theory is necessary for completeness and the resultant capacity of governments to enter into relations with others. If the international community does not recognise the new state, it may be difficult to enter into relations and this affects legitimacy in the international community. Secondly, the declaratory theory is equally important in line with the required rearranging of 'self' in the post-colonial context. The declaratory theory reinforces the idea about creating a people-centred approach to self-determination where the will of the people takes precedence as an anti-subjugation ideal. Blending these two theories of statehood reasserts the recognition of both the will of the people and the international community's obligations as encapsulated by the UNGA Declaration on the Granting of Independence.[162]

As such, and through this analogy, the Khoi-San people in the Western Cape region of South Africa are also entitled to external self-determination. This entitlement is based on what this research report has considered especially where there is a denial of internal self-determination through human rights violations, non-representation and non-participation in government, as well as where national legislation is enacted to this effect.

4. Conclusion

The aim of this research report was to determine whether the Khoi-San people in the Western Cape region of South Africa are entitled to self-determination under international law and South African law, and if so, which form(s) of self-determination can they exercise and under what circumstances. These questions were answered in a systematic way which begun with setting out the substance of the right and its positioning as part of the struggle for decolonisation but also as a vehicle against the subjugation of a people. This research report proposed that, in the

[161] Strydom et al (note 1 above) 48.
[162] Note 25 above; the declaration makes reference to both the people's right to self-determination as well as the commitment by international community to take steps on the granting of independence.

post-colonial context, self-determination should be understood as more people-centred than it might have been in the colonial period. The report adds onto the failed attempts at rearranging international law perceptions of the 'self', as Shaw prefers, and 'a people', as has been used in this report. The report proposes that the international human rights law discourse in the post-colonial context presents an opportunity at the rearrangement more so for indigenous people who may have become minorities but are still a majority in the territory they occupy.

In assessing the Khoi-San people's entitlement to self-determination, the report demonstrated that they remain a reflection of the effects of South Africa's colonial and apartheid past whether one centralises their identity to ethnicity and race or socio-economic history. This part demonstrated that their history, linguistic tradition, culture and political outlook remains part of their subjugation. The report concludes that firstly, the Khoi-San people of the Western Cape region of South Africa are entitled to self-determination as a people with a common history of subjugation, linguistic tradition, historical territorial connection and a similar political outlook. Secondly, they are entitled to internal self-determination based on (a) the evolving human rights discourse especially in Africa and (b) the post-colonial link between democracy (political participation specifically) and self-determination. Finally, considering that the Khoi-San people qualify as a 'people' for purposes of self-determination, the research report also finds that they may be entitled to external self-determination where: (a) they can demonstrate that they have been denied the right to internal self-determination; and (b) a reconciliation, perhaps through negotiations, can be found between the principles of secession and South Africa's territorial integrity.

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