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The Legal Fundamentals of the Process of Secession

Introduction

The foundation of the ULA is laid firmly upon the primary goal to free the majority Capelander* groups of people from their dire circumstances in South Africa. The current ANC government openly implements and allows radical racist laws, policies, regulations and criminal activities to seriously and directly impact on the lives of Capelanders, threatening their long term survival as combined minority people representing less than 20% of the total SA populace.

This happens against the background where just about every dismal failure by the ANC government over the past 27 years has been blamed on these Capelanders. To reclaim and protect the human rights of the Capelanders the ULA very diligently follows the international law on self-determination (secession) and independence.

Below are the international laws and regulations proving overwhelmingly that ULA's secession process falls within the criteria and framework for legal secession.

1. The 1994 Accord on Afrikaner Self-determination:

The 1994 Accord on Afrikaner Self-determination emphasizes the acceptance of secession by international role-players. On 21 December 1993, Nelson Mandela wrote a letter of approval of the forthcoming signing of the Accord. This Accord was one of the negotiated settlements during the handing over of political power in 1994. The Accord was signed on 23 April 1994 and approved prior to the general election in 1994 by the ANC - Thabo Mbeki, the National Party - Roelf Meyer, Freedom Front Party - Genl. Constand Viljoen, and together with world leaders such as:

a. Princeton N. Lyman, the then US Ambassador to SA and an international witness,

b. Sir Anthony Reeve, the then UK Ambassador to SA and an international witness.

c. Klaus Baron von der Ropp of Germany, as EU international witness.

d. Martin Cullin of Ireland, as EU international witness.

The signing ceremony was supervised by witnesses Prof. Abraham Viljoen and Jürgen Kögl.
The internationally accepted "Accord on Afrikaner Self-determination" was inserted into the South African Constitution under Chapter 14 Article 235.

The ULA exercises its legal claim as per the agreement of the Accord.

2. Article 235 of Chapter 14 of the South African Constitution:

Article 235, Chapter 14 of the SA Constitution reads as follows:

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

*The term "Capelander" refers to the groups of people as defined by the ULA, being represented in a majority in the Cape region, the area legally identified for secession. (Refer to the Sections "People" and "The Cape" on the website)

It is important to understand that Section 235 of the South African Constitution is to be interpreted in accordance with international law, which reads as follows:

This section makes it overwhelmingly clear that the right to self-determination does not only vest in the South African nation as a whole, but in "peoples who share a common cultural and linguistic heritage". It provides for self-determination by stating "within a territorial entity in the Republic" but then continues to state "or in any other way", which clearly means external sovereign self-determination. Furthermore, the Constitution stipulates:

"When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law, over any alternative interpretation that is inconsistent with international law"
International Law: Application of international law, Sect. 233, South African Constitution.
Based on this stipulation in the Constitution reasonable interpretation must be upheld in line with international law.

UNESCO has provided a widely accepted definition of "peoples" stating the following:

A "people" are a group of human beings who share:

1. A common historical tradition;
2. Racial or ethnic identity;
3. Cultural homogeneity (sameness);
4. Linguistic (language) unity;
5. Religious or ideological affinity;
6. Territorial connection;
7. Common economic life.

By no means does this definition point to nations as a whole. It cannot be, because a nation as South Africa is a prime example where heterogeneity is apparent just by looking at the fact that we have 11 official languages. This alone nullifies those secessionist groups' attempting to secede whilst including all ethnic groups, meaning a part of the South African "general nation" as "the people" in their process.

The "people" defined in the ULA's legal process are those groups forming the majority in the Capeland Region and who fulfil these criteria of separate culture, language and religious ideology from the rest of the population of South Africa.

Section 9(3) of the South African Constitution states that: *"the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including language*".
The state increasingly neglects the language rights of the Capelander groups of people of South Africa.

Unless if active steps are taken to develop and advance South Africa's indigenous languages (Afrikaans and KhoiSan language) - especially at official level - they will soon be in a more threatening position of extinction than before 1994. This would put South Africa in the same situation as other post-colonial African states where colonial languages (such as English, French and Portuguese) were associated with power, modernity, school, government and officialdom, whereas African languages were relegated to the domestic domain, informal use and primordial solidarities.

The ULA's secession of the Capeland people will not only prevent this but enhance the Afrikaans and the KhoiSan languages.

3. Declaration on the Rights of Indigenous Peoples:

The Declaration on the Rights of Indigenous Peoples (UNDRIP or DOTROIP) is a non-legally-binding resolution passed by the United Nations in 2007. It delineates and defines the individual and collective rights of "Indigenous peoples", including their ownership rights to cultural and ceremonial expression, identity, language, employment, health, education and other issues. It *"emphasizes the rights of Indigenous peoples to maintain and strengthen their own institutions, cultures and traditions, and to pursue their development in keeping with their own needs and aspirations". It "prohibits discrimination against indigenous peoples"*, and it *"promotes their full and effective participation in all matters that concern them and their right to remain distinct and to pursue their own visions of economic and social development"*.

The goal of the declaration is to encourage countries to work alongside indigenous peoples to solve global issues, like development, multicultural democracy and decentralization. According to Article 31, there is a major emphasis that the indigenous peoples will be able to protect their cultural heritage and other aspects of their culture and tradition in order to preserve their heritage from over-controlling nation-states.

As example, both the KhoiSan and the Afrikaner are indigenous people for which the ULA advocates for. Both of these groups of people were born in Southern Africa, both have distinct languages and both are culturally different from the African Bantu tribes.

4. African (Banjul) Charter on Human and People's Rights:

The African (Banjul) Charter on Human and Peoples' Rights was promulgated by the Organization of African Unity (OAU). The Banjul charter is one of the clearest, most useful commitments to self-determination. This convention was adopted in 1981 and entered into force in 1986.
The International process of secession is clear and the ULA strictly adheres to it. In fact, the OAU laws make provision for secession in:

Article 20:

"1. All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.

2. Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community."

Article 21:

"1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it."

The African Charter's proof that the charter does not refer to "people" as a "nation" but a unique people: it states that the right belongs to all people and then goes on to recognise "colonized" or "oppressed people" in particular as is the case with the majority people of the Capeland in South Africa.

The ANC government signed this Charter on 16 March 2004 and it was ratified on 17 December 2004 and thus must comply with the African Charter on Human and People's Rights stipulations.

5. International Covenant on Civil and Political Rights:

Article 1 of the International Covenant on Civil and Political Rights referring to self-determination:

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

Article 1 of the International Covenant on Civil and Political Rights was signed by the South African Government on 3 October 1994 and ratified on 10 December 1998. The South African government is therefore legally bound by the Covenant's provisions.

From the article of Marieke Roos[1] of 1 December 2014:

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

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

6. Lotus-principle under international law:

According to the Lotus-principle under international law, that which is not prohibited is allowed. On a regional level, a legal basis for the right to self-determination can firmly be found in the "African Charter on Human and Peoples' Rights" in article 20 as mentioned:

"1. All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.

2. Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community.

3. All peoples shall have the right to the assistance of the State Parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural."

1 Marieke Roos, currently employed by the EU in Belgium , previously lecturer in law studies (LLB and Diploma in Law), University of Johannesburg, LLD in International law, University of Johannesburg, LLM in International law (cum laude) 2013, University of Kent, Canterbury, UK, LLB in International law (cum laude) 2011, The Hague University, Den Haag, previously served at the Constitutional court of South Africa.

In the context of the Capelander people in South Africa, the right to self-determination is guaranteed in section 235 of the South African Constitution.

7. Uti possidetis, ita possideatis:

According to Marieka Roos in her academic research paper "South African minorities' right to self-determination in the 21st century - 1 December 2014" explaining that the Latin maxim "uti possidetis, ita possideatis", meaning as you possess, so may you possess or which roughly translates to 'you may keep what you had'. Roos says this maxim was particularly applied in the "colonial context". The rule of uti possidetis was applied in the colonial context to ensure that decolonisation took place in an orderly fashion.Until recently, it was held to be one of the primary legal principles that had to be applied in cases of external self-determination and secession. The uti possidetis rule has been applied in the past in order to limit border conflicts. However, arbitrary borders drawn by colonialists were a particularly big source of ethnic and border conflicts. Why uphold a principle that in its essence already gives rise to conflicts, if the very reason for purporting it is to limit those conflicts?

Higgins puts it as follows:

"The principle of uti possidetis provides that states accept their inherited colonial boundaries. It places no obligation upon minority groups [or indigenous peoples or other distinct peoples] to stay a part of a unit that maltreats them or in which they feel unrepresented. If they do in fact establish an independent state, or join with an existing state, then that new reality is one which, when its permanence can be shown, will in due course be recognized by the international community."
The United Nations General Assembly confirmed that secession was always thought to involve the clash of two international law principles; the right to self-determination and the territorial integrity of the state in paragraph 6 of Resolution 1514 (XV) where it reiterated that *"Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purpose and principles of the United Nations".*

However, even though governments readily claim the principle of territorial integrity in an attempt to curb secessionist movements, Professor James Crawford[2] concluded that individuals or groups of individuals are not bound by the principle of territorial integrity:

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

Roos says this was confirmed by the International Court of Justice (ICJ) in 2010 when it ruled that the principle of territorial integrity is limited to the relations between states (Kosovo Advisory Opinion).

Professor Dr. Peter Hilpold[3] also argues that territorial integrity is directed at the protection from infringements by other states and *"surely no directed against changes coming from the inside".*

A further argument against the territorial integrity defence was articulated in a separate opinion by Judge Cançado Trindade in which he concluded that states cannot invoke the principle of territorial integrity where the state has grossly violated human rights of the people asserting a

2 Crawford James: 'The Right of Self-determination in International Law', i.D Alston (ed), People's Rights (OUP, 2001), 50; Contra Orakhelashvili, 'Statehood, Recognition and the United Nations System: A Unilateral Declaration of Independence in Kosovo', 12 Max Planck Yearbook of United Nations Law (2008) 12.
3 Peter Hilpold, Self-determination and Autonomy: Between Secession and Internal Self-determination: University of Innsbruck, Faculty of Law, Innsbruck, Austria, International journal on minority and group rights 24 (2017) 302-335

right to external self-determination. This is also asserted by McCorquodale when he argues that states can only claim territorial integrity if it internally provides for self-determination.

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

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

8. Universal Declaration of Human Rights (UDHR):

The Universal Declaration of Human Rights (UDHR) was conceived as a United Nations General Assembly resolution on 10 December 1948. Article 21(3) of the Declaration states that *"the will of the people shall be the basis of the authority of government..."* and provides support for a proposition that peoples MUST FIRST SEEK to *"exhaust its remedies"* within the status quo before taking a radical step such as secession.

On 10 December 1996, the Constitution of South Africa was signed into law by former South African President Nelson Mandela. Ms Thoko Modise, GM for Communications for Brand South Africa said: *"Premised on the Universal Declaration of Human Rights, South Africa has included amalgamated human rights in our own Bill of Rights, Chapter 2 of the Constitution of the Republic of South Africa, 1996"*.

The ULA has exhausted all internal remedies available with the ANC government since 2014. Sufficient evidence shows that ULA has fully complied with Article 21(3) which the ANC must honour according to them signing the Declaration.

9. United Nations Twin Covenants: International Covenant on Civil and Political Rights:
Since the 1960s, international documents have become more directly affirmative of self-determination. For example, Article 1 of both the International Covenant on Economic, Social, and Cultural Rights and that on Civil and Political Rights, refers to self-determination AS A RIGHT, not just a mere principle.

Article 1 of the treaties, both of which were signed in 1966 and entered into force in 1976, provides in relevant part that:

"1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources... In no case may a people be deprived of its own means of subsistence."

These provisions are important not just because they accord self-determination the status of a right, but because they link the political destiny of a people to its economic foundation.

The South African government signed it on 3 October 1994, ratified is on 10 December 1998 and enforced it on 10 March 1999 and is now legally bound by it. The ULA also conforms with the criteria of Article 1 of the United Nations Twin Covenants of 1966.

10. The Unrepresented Nations and Peoples Organization (UNPO):

The Unrepresented Nations and Peoples Organization (UNPO) is an international membership organization established to facilitate the voices of unrepresented and marginalized nations and peoples worldwide. It was formed on 11 February 1991 in The Hague, Netherlands. Its members consist of indigenous people, minorities and unrecognized or occupied territories.

UNPO works to develop the understanding of and respect for the right to self-determination. It provides advice and support related to questions of international recognition and political autonomy. It trains groups on how to advocate for their causes effectively and directly. It advocates for an international response to human rights violations perpetrated against UNPO member groups.

The ULA's case of self-determination, for the unique KhoiSan and Afrikaans speaking indigenous people, birthed and established on Africa soil, conforms to the guidelines of the UNPO.

11. The Moosa-declaration:

On the 5th of June 1998 Mohammed Valli Moosa, the then minister of Constitutional Development of the ANC ruling party, said during a parliamentary debate that:

"The pursuit on the part of the Freedom Front and other Afrikaners to strive towards the development of a particular region in the country (the North Western Cape corridor) as a home for Afrikaner culture and language within the framework of the constitution and Bill of Rights is in government's view indeed a legitimate pursuit." "the ideal of some Afrikaners to develop the North Western Cape as a home for the Afrikaner culture and language within the framework of the Constitution and the charter of human rights is viewed by the government as a legitimate ideal."

The ULA seek all groups of Capelanders to be included in the development of a new country free from domination and oppression.

12. Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities:

Resolution 47/135 was adopted by the United Nations General Assembly on 18 December 1992. The requirements set out by international law are explained by Prof C. Lloyd Brown-John of the University of Windsor (Canada), as follows:

"A minority who are geographically separate and who are distinct ethnically and culturally and who have been placed in a position of subordination may have a right to secede. That right, however, could only be exercised if there is a clear denial of political, cultural and religious beliefs."

Its key provisions include that *"Persons belonging to national or ethnic, religious and linguistic minorities have the right to enjoy their own culture, to profess and practice their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination"* (Article 2.1).

The “Framework Convention for the Protection of National Minorities” refers to the Declaration in para. 24 of its Explanatory Report. The Commonwealth of Independent States (CIS) “Convention Guaranteeing the Rights of Persons Belonging to National Minorities” (in other translations - Convention on the Rights of Persons Belonging to National Minorities, or Convention on the Protection of the Rights of Persons Belonging to National Minorities) also refers to the Declaration in its preamble.

In a formal letter to President Cyril Ramaphosa dated 11 February 2019, the ULA provided overwhelming proof that the Capelander people in South Africa are oppressed.

13. Peaceful means:

Article 2(4) of the United Nations Charter prohibits states from resorting to the threat or use of force against another state. It does not provide for a prohibition against the threat or use of force by a people claiming self-determination per se but there is a presumption that the use of force is illegal, unless it is in self-defence. The prohibition against the use of force is also a jus cogens norm. A violation of a jus cogens norm is not only a violation of international law but can also result in a duty of non-recognition as discussed earlier.

According to Professor Dr. Malcolm Shaw[4] the use of force to suppress self-determination is unacceptable under international law. States can therefore not use disproportionate force against self-determination movements. Should the state however resort to the use of force in an attempt to curb the self-determination movement, said movement can seek assistance from the international community and act in self-defence.

Conclusion:

International law presents recourse for the establishment of an independent area over and above that which the South African Constitution offers. It is available to all groups of people who wish to achieve self-determination in the form of independence. The international community have done their part by providing the legal base to support secession, now it is up to the will of the majority people of the Capeland to bring it to reality.

Facts established:

1. International law recognises a right to self-determination and does not prohibit secession.
2. The South African Constitution recognises the right to self-determination and does not prohibit secession.
3. There are certain guidelines that need to be followed before secession would succeed; the United Liberty Alliance already conforms to all the criteria as required by both the South African Constitution and international law.
4. The perceived obstacles hindering secession are archaic and no longer constitute obstacles to secession.

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[4] Shaw, Malcolm N. International law and the use of force by states: International Law, pg 1118. Professor of International Law at the University of Leicester. One of the world’s leading international lawyers, he has been awarded the decoration of ‘Officier de l’Ordre de la Valeur’ by the Republic of Cameroon. He is a member of the Advisory Council of the British Institute of International and Comparative Law and a founding member of the Curatorium, Xiamen Academy of International Law. He is also a practising barrister at Essex Court Chambers