2/4/2/1/10/18

ECCO

CONFERENCE AND LANGUAGE SERVICES

The TECHNIHIRE group of Companies
(Registration No. 86/03905/06

1102 Heerengracht Centre
Adderley Street
Cape Town
South Africa
Tel.: 27-21-254590
e-mail: bbohle@aztec.co.za

P.O. Box 6550
Roggebaai
8012

Fax: 27-21-4191613

THEME COMMITTEE	2
DATE OF MEETING	26/06/95
NUMBER OF TAPES	9
CONTENT OF ENVELOPE	
1) PRINT OUT	✓
2) NOTES	✓
3) TAPES	
4) COMPUTER DISK	✓

Tape 2
Theme Committee2 - 26 June 1995

NOTES

0018:
Who is speaker

0035:
that we do require ???

0440:
is it camera discussion??

0520
Professor Andries Raadt???

2053:
Robert McCorkindale McCoraudale?

2555:
Joeran ???

2684
is it the iboos of Nigeria?

2845:
Paragraph ???

2971:
Van Dijk or Van Dyk

3091:
as a ripe egg ??? ??? who

3160:
Is it Jordan Palscht?

3260:
the corrimitive right?

3946:
Kovan??Covan??

4056
A. Ricusereda ???? - some name

4617
Hugo Grousias???

4621:
Day doolie bellie of parties???

4672
other work "Operajeticus" ???

4680:
under the name of Tranwoordoe???

4697:
Latin

4905
Who identifies ???

4955:
who???

4977:
who identifies???

5058:
Otto Kimberlitz ???

6542:
Following Lookage/Lukitch???

6712:
his famous Fortun/Autumn Cane??

Tape 1, Side A

Theme Committee 2 - 26 June 1995

NOTES

0017:
??? provincial government

0957:
Dr Pahaad/Bahaad/Paar/Paar/Baard?

1520:
Is it Dr Ranchod? Longship? Ranchua?

1896:
may not want to be detained at the ??? committee

2341:
Who is the chairman calling upon?

2674:
Who is speaker??

3313:
Who is speaker?

3766:
And therefore lucky??? normal

4020:
Who is speaker?

4041:
the working capes???

4054:
and the power constitutions?

4088:
a multi supreme law?

4192:
Mr Ackerman???

5177:
Who is speaker?

5486:

Is it Mr Groenewald?

6037:
Who is speaker?

6048:
voters ?? ordinary citizen.

6280:
??? may have domicile in ???

6536:
Who is speaker?

6628:
Who is speaker (Same as 6536)

6941:
Who is speaker?

7064:
Who is last speaker? Is it Ranchod

Tape 3
Theme Committee2 - 26 June 1995

NOTES

0178:
As ??? has observed? Who?

0266:
Canada to Calvatskop??

1428:
disqualify the culture of wit man rules/roots???

1896:
??? is a mark of

1988:
Max van der Stoel/Spoel???

2685:
that Afrikaners today ??? in the country???

3164:
capability of ???

3545:
in common with what ??? has called

3773:
velvet divorce???

3874:
the ??? operates above all

3900:
ethical ???

4026:
Professor Djugat???

4040:
Dr Q. Maluwa (is the initial correct??)

4452:
would be ???

4543:

Dr Pahaad/Baard/Paar/Parr???

4552:
Who is speaker

4554:
Can I just ??? Professor Venter

5770:
Is it Professor Dugard???

6613:
??? no real agreement

6666:
Is it Aurelio Cretescu?

TAPE 4

Theme Committee2 - 26 JUNE 1995

NOTES

0720 & 0929 & 2390
utiposidatus??? - Latin

3008 - 3038
??? African perspective etcetera

3073:
factotum issues???

3138
has a ??? perspective

3173
??? have one

3207
??? international law

3233:
??? called the people's approach

3300:
much more ???

3339:
and the ??? approach

3459
fresher??? construction

3597:
so the ??? inspiration

3696:
cultural ??? with

3866:
Biafran ???

3878:
iboo-speaking(??)

3909:
the greater ???

4000:
know as the ???

4033:
socio???

4220:
the ??? was in Katanga.

4119:
???speaking people of

4161
in that ??? at the time

4343:
by way of argument???

4417:
the role of the???

4437:
but this was a federation that was supposed to ???

4453:
Selassie ??? decided

4468:
and the ??? state

4492:
by Eritrea ??? but various federation movements in Eritrea

4536:
Ethiopa, ??? like every

4553:
have an extended???

4585:
bear in mind that the ???

4601:
of Eritrea from Ethiopia ???

4607:
after the fall of ???

4639
the people of Eritra decided vis-a-vis???

4683:
about the references that ???

4716:
pretend that the ???

4757:
If you ???

4880:
??? which should be to protect

4937:
??? jumping to the conclusion

5056:
degree of ??? which

5085:
based on linguistic activity???

5115:
world an example of secession???

5156:
of places where ???

5173:
but I ???

5199:
???and you might say

5303:
or to lead us into ???

5350:
??? the ever pragmatic

5375
that we inherited???

5424:
??? the African perspective

5455:
to conform to what???

5465:
??? this construction

5504:
Yugoslavia are historical???

5515:
in Africa we have ???

5523:
??? of territorial

5533:
Mkhetse ???

5549:
some sense of a cross-colonial ??

5628
takes us away from these limited ???

5660:
ethnicity ??? and the national question.

5678:
??? wanted to ask questions

5818:
???also it also uses ???

5906:
in a sense that ???

5919:
from ??? for example

5946:
based on the ???

5955:
what I was ??? against was

6012 - 6079
??? to something like four centuries etcetera

6083:
In Kadesh in Canberra???

6097 - 6159
an independent ??? state etcetera

6164:
Who???

6373:
Ethiopia of ???

6437:
issue of ???

6742:
Kossova??? which was an autonomous

6846:
question, you ???

TAPE 5
Theme Committee2 - 26 JUNE 1995

NOTES

1591:
Who is speaker?

1741:
Dr Marnie???

2066:
Who is speaker? Carriem?

2292:
but ??? whether

2994:
Who is speaker???

3010 - 3211
Can make out very little - only a single word here and there

3450:
Who is speaker??

3490:
does not seem to have failed??? there

3831:
social ??? here

3905:
Professor Juda???

3935
the Zulu ???

4074:
to have a complete??

4080:
Who is speaker??

5305:
Who is speaker?

5355:
Professor James Kruger or Schroder???

5377
he refers ??? in passing

5444
???background

5724:
??? South Africa

5800:
??? of the common country

6259:
Who is speaker?

6266
??? over and over

6691:
culture???

6700:
???are also

6839
and ??? said

7058:
the ??? of written English in Germany

TAPE 6

Theme Committee2 - 26 JUNE 1995

NOTES

0075:
??? democratically

0160:
become ???

0310:
that the Indians

0442:
existence of such an ???

1087:
John Maseford(???)

1313:
fashion ???

2873
??? and so on and so forth

3128:
descended from ???

3209
into the ???

3243:
??? ??? explanations

3263:
??? has demonstrated

3290:
which must ???

3317:
??? is there

3384:
group that is ????

3439:
that's also ???

3472:
the ??? have not yet hit

3509:
??? one branch of ???

3526:
??? of ??? to this sort of ethnicity in ???

3561:
civil war???? ????

3601:
given a ???

3615:
??? because of problems

3637:
could not accept???

3659:
tells us ???

3682:
the ??? people

3728:
We are not told the policy and ???

4257:
with our first ??? report

4888:
wording of a ???

4920:
gather process???

6325:
where we could have a ???

6700:
as far as women??? is concerned

6873:
???Mahlana

6895:
???we traced the

6930:
??? the Afrikaner ???

6956:
Volkstaat???

7007:
are prevalent???

7024
not in ??? stay together

7043:
sitting ???

7069
Who is speaker? Is it Adv. de Jager??

TAPE 7

Theme Committee2 - 26 JUNE 1995

NOTES

0203:
??? who is speaker

0390:
Who is speaker???

0650:
should have a ??? but

0820:
could share ???

0884:
used to do ???

1494:
if you are ???

2106:
Who is speaker? Mr Viljoen?

3706:
Mr ???mela???

4051:
Is it Ebrahim or Jade Mahiem??? Mr ???mela???

4368:
Is it Mr Andrew? Who is speaker???

4486:
??? the Volkstaat

4587:
Mr who??? Damotse???

4814:
were actually trained to ???attack a leg???

4992:
Who is speaker??? mike was inaudible - chairman far away

5062:
put in a ???

5063:
???to his household

5090:
extreme to the ???

5142:
we have been ???

5161:
Is Dr Jooste the speaker???

6098:
Mr Ligege, then Mr ???

6121:
mine is a???

6156:
he had ???

6211:
of the ??? have collapsed

6218:
??? who stayed behind

6702:
made or ???

TAPE 8

Theme Committee2 - 26 JUNE 1995

NOTES

0208:
it's saying that on ???

0300:
affairs on a ??? government.

0314:
I think ??? to produce

0485:
It can't be ???

1466:
any ??? which

1552:
not to ??? but

2177:
and who regard themselves as the ???

2366:
position which states ??? in the Volkstaat

2403:
??? it's not my work

2669:
??? deposition

2794:
??? more carefully

2890:
office in ???

2901:
??? leave Klerksdorp

3012
??? Park

3049:
??? of democratic ???

3079:
??? segregation

3175:
Is Mr Viljoen the speaker or is it Dr Jooste???

4177:
at the ???

4210:
Who is speaker??? Is it Dr Jooste or Mr Viljoen??

4452:
Mr Rabie, then Mr Ramusi. The last one would be Mr ???

4781:
Who is speaker???

4949:
??? has been happening on Saturday

5022
Who is speaker?

5079
??? examination

5133:
??? functions

5162:
the ??? of your coming

5658:
Who is speaker? Is it Mr Viljoen?

6046:
Who is speaker interrupting Chairperson???

6052:
try and ??? ???

6166:
??? if that needs to

6184:
drafts ??? of

6300:
??? on page 6.

6373:
I don't think ???

6452:
Who is speaker??

6513:
??? whatever else

6674:
Who is speaker???

6869:
Who is speaker??

Tape 1

Theme Committee 2 - 26 June 1995

Chairperson ...draft report ??? provincial government. Have you received the memo. from the CA? Now just before we go on to the draft report on Provincial Government, the minutes have not been circulated, so we are not going to deal with that this morning. I would just like us to deal with the memo. from the CA first, if that carries your approval and Mr Ebrahim can explain to us. OK? Mr Ebrahim?

Mr Ebrahim Thank you. We received a memo. from your Theme Committee and the Management Committee with regard to the concerns on the question of time constraints, particularly with regard to the report on the Senate and possibly the following items on the agenda, and the issue as we understood it was that, because of the divergent views and perspectives coming through within the Theme Committee, it would perhaps – having regard to the time difficulties – be much more expedient for the Theme Committee to formulate and table its report for the Constitutional Committee and only after that would the question of draft formulations be something that should be considered. The Management Committee considered the proposal from the Theme Committee on Thursday and my task here this morning is merely to advise that the Management Committee has agreed to it. We in the Management Committee would be prepared to receive the reports without the draft text or formulation of the Theme Committee for its tabling with the Constitutional Committee. If I may just take a moment to basically state that between Theme Committee 2 and 3 I think you people

carry much of the burden and the difficult issues of this entire process and between Theme Committee 2 and 3 reside the most important issues and perhaps the most contentious and difficult issues. Having regard to that it may perhaps at this early stage of the process perhaps not be possible to completely finalise draft formulations which would be agreed to by all parties, because of the divergence of the views. It may very well be helpful to agree to merely the tabling of the report and when the process unfolds further then to try and unlock some of the more contentious and controversial issues. If that is in agreement, then it will have some impact and implication in terms of how the Management Committee processes and forwards matters to the Constitutional Committee. Essentially I look for guidance from your Theme Committee as to how you people intend to deal with the matter. Thank you.

Chairperson Dr Pahad?

Dr Pahad Mr Chair, first of all, from our side I would like to offer our congratulations to South Africa for winning the World Cup. It's just we want some clarity as to how the Management Committee intends to proceed. I really don't think it would be very useful if later on the Management Committee sends it back to the Theme Committee as they did with the one Public Administration, if you remember? Does it come back to the Theme Committee? We've had two meetings in the Constitutional Committee on this matter. So, I have no problem that we send it like this to the Constitutional Committee as long as there is a clear understanding that the Management Committee has a problem insofar as problems with controversial issues would have to be resolved by the

Constitutional Committee or by the subcommittees that have now been set up and not here by the Theme Committee. I'd like to make it clear: if it comes back here, we're just going to repeat the same things we've been saying here. So, as long as that is understood, I have no problem with that. I just want to add that in the end somebody will have to draft different sets of proposals. I can't see in the end that we are going to have one set of proposals. I think in the drafting they then also use our technical experts who have been involved in this aspect of the work so they've been aware of the discussions and the issues. Other than that, we have no problem with accepting the recommendations of the Management Committee.

Chairperson — Anybody else? Do you want to add to that, Mr Ebrahim?

Mr Ebrahim — Chairperson, the only point that I can make is that Pahaad is much more eloquently experienced in the position of the Constitutional Committee. I believe that it is the responsibility of the Constutitional Committee to attract the most controversial and sensitive issues and not to have this sort of shuttling between the Theme Committee and the Constitutional Committee. Secondly, it is not intended to exclude those experts and advisors who have gone through the motions and all the dynamics and all those issues, so it's not intended to exclude them either.

Chairperson — Professor Steytler and then Dr Ranchod.

Prof. Steytler — Mr Chairman, may I just enquire from Mr Ebrahim, should a decision be made at the Constitutional Committee level and breaking through a principle issue, whether this matter

would then come back to this Theme Committee to look at the details and how that principle decision or compromise is then spelt out in the details of how Senate would function?

Mr Ebrahim

Chairperson, I don't believe there is any intention to shuttle it in that way. The idea embedded in our initial resolutions has been that we should not in the ultimate end force the Constitutional Assembly into being a rubber stamp. So I believe that if issues are contentious they would be dealt with by the Constitutional Committee. Those issues which cannot be resolved by the Constitutional Committee should go to the Constitutional Assembly. That's why we have been fortunate in that we have been able to unlock most of the issues at the Constitutional Committee and we are trying to address them there, but certainly there is no intention of reverting and referring matters for the final unblocking to the Theme Committee. I think that is the task and responsibility of the Constitutional Committee which was originally designed to negotiate the final conclusion to the difficult areas and then particularly agreement now to the Constitutional subcommittee or, as it's been referred to, the suitable committee to attend to.

Prof. Steytler

May I just come back? I think perhaps I did not express myself clearly. The issues clearly entail very conceptual differences and if that is solved, there are a lot of minor little details – qualification of membership etc. etc. – which may not want to be detained by the ???, whether those little issues will be sent back to this Theme Committee to be worked out.

Dr Ranchod — Chairperson, I would like to know whether members of this Theme Committee who are not serving on the Constitutional Committee, whether they could attend the deliberations and make an input because I am not sure how many members of the Theme Committee actually serve on the Constitutional Committee and it would be valuable for those of us who have an interest to be present when this is deliberated.

Chairperson — Senator Groenewald and then Dr Pahad.

Sen. Groenewald — Chairman, I believe, first of all, that provision has been made for people who have in actual fact in a particular Theme Committee worked with the issue to sit in with the representative. The number of representatives as indicated in the Constitution, in the draft paper which we have, will have speaking rights, the others will be there in an advisory capacity only. So, only the members indicated here, those numbers – and they could also alter – would be present. So, your answer I think, Dr Ranchod, is "yes". But I also say that the idea is that the Theme Committee should put all the information on the table and when a matter is not contentious most probably in the Constitution Committee that would be referred to the drafters, they'll continue and draft the particular tests for the Constitutional Assembly. But when there is contention, it will go to the ad hoc committee as indicated here. When there are gaps in information, certainly it can be referred back to the Theme Committee and said: You haven't done this or that or that. Or one Theme Committee could even refer it to another Theme Committee. That has happened. The great advantage that this ad hoc committee will have is it will

cover all 16 committees, it will cover the total range. So you won't have a shuttling of issues from one Theme Committee to another.

Chairperson ???

??? Just to add to what... My own understanding is, inside the ANC, that where matters are discussed at the Constitutional Committee and we have people who are in the Theme Committee, certainly in the Core Group, and those members of the Constitutional Committee they then form part of the ANC's delegation so that when discussion takes place on specific issues arising from a specific Theme Committee, those of our people who are members of this Theme Committee would be present. Of course, we are in a slightly better position in that we have more people in the Constitutional Committee so we do have people who are represented from the different Theme Committees. But that's my understanding that, that's what should happen. In relation to what Professor Steytler is saying, I don't think that's really a problem, I don't think that's an issue insofar as the Senate is concerned, and fundamental problems arising from the conceptual understanding to start with, so that needs to be resolved and when we are going to then come to details, insofar as those kinds of details are concerned, if the Management Committee then feels that they should bring it back to us because we can then deal with it more adequately, I should think that should be fine. It should not pose a problem for our Theme Committee. But really, the differences aren't so much on the detail as so much as the conceptual understanding of what kind of Senate do we want. So I would expect that we will be able

to come back to that later depending on what Management Committee or the Constitutional Committee itself decides with regard to the issue.

Chairperson — Thank you. I think that deals with this matter. We can now carry on with our agenda. OK.

??? — Chairperson, having discussed this subcommittee of the Constitutional Committee and having agreed to its establishment at the Management Committee and the Constitutional Committee, we have had Administration draft letters to all party whips inviting them to submit their nominations by today. I merely raise it here at this early opportunity because we are hoping, in view of the recess, to convene the first meeting of that subcommittee on Thursday immediately after the Management Committee and we are hoping to try and address various basic issues such as programme etc. We hope that parties would be forthcoming in the nominations in this regard. Secondly, with regard to the subcommittee, Theme Committees will be able to impact on that subcommittee because we need to decide on its programme, what issues are to discussed, when, and which issues are to be tabled. And I think inputs from Theme Committee will greatly assist in directing the Management Committee and the Constitutional Committee in ensuring that the subcommittee properly deals with its work. Thank you, Chair.

Chairperson — Draft report on Provincial Government. We will ask Professor Steytler to take us through the report.

Prof. Steytler — Thank you, Mr Chair. The report you have here is basically

just a quick update from what we discussed on the previous occasion. Just one or two introductory remarks. Legislation: the draft text has already been prepared, we haven't yet submitted it to the legal advisors, but that will be done today. I should then say that draft text should come back to this committee because as one drafts a text, a number of issues come up which really this committee should look at. It's only in looking at the very detail of the actual wording that one realises a number of other issues that this committee has not discussed. And this will obviously be done in the same way as we will do with the draft text pertaining to the National Assembly and the National Executive. Otherwise the report is very much the same as the previous one, with the number of comments that were raised at that meeting. We could just go through it. On page 1, for example, things which were not discussed was the terminology, whether there should be a uniform terminology pertaining to the laws made by a provincial legislature, whether that should be a particular terminology used. That wasn't discussed here. That is an issue that probably needs to be discussed. On page 2 on the content of the framework for provincially drafted constitutions, in the comment column should be added the details or the particular framework should be revisited, that the only agreement on one issue was adopted by a two-third majority vote. All the other matters, for example the Constitutional Principles, which one should go on in, the number of issues that need to be addressed in such a framework, were not dealt with in detail and so a matter, not really of contention, but a matter of comment.

??? Mr Chairman, the agreement there. Point no. 2: Provincial

Constitution may not be inconsistent with the Final Constitution, is the word "Final Constitution" or "the principles of the Constitution"? Because I've got a problem with that. It does mean that the Provincial Constitution should just be like the National Constitution.

Chairperson — Professor Steytler?

Prof. Steytler — Mr Chairman, again, that is the formulation that was used in the present Constitution, inconsistent with the final Constitution, and a good example of when one used the actual wording in a section these issues do arise and they can be fundamental and then one can argue "inconsistently" means within the broad principle, it's more than being different; it cannot be consistent, which really suggests there can be differences, but that is really an issue that should be discussed when one has the draft text in front of you and want to see how this principle is in fact expressed in the text.

Chairperson — Dr Ranchod.

Dr Ranchod — Kwazulu-Natal is moving full steam ahead in drawing up its Constitution and have set a deadline for the end of this year and assuming that the Constitutional Court then approves of that Constitution, which is not inconsistent with the Interim Constitution, then you've got problems. You're going to say: Well, wait you cannot implement that Constitution until the Final Constitution has been adopted, which could mean a delay of several months. And I don't think this was ever really canvassed here.

Prof. Steytler — Mr Chairman, I think that we should just explain what Professor just said about the Final Constitution that it could be interpreted in different ways otherwise I'm not going to bind me to this point number 2, that's for sure.

Chairman — Dr Pahad?

Dr Pahad — Professor Ranchod has raised a separate problem. Your Constitution is the supreme law of the land, of the entire country. No matter where. And therefore ??? normal, no piece of legislation, no other constitution can be inconsistent with that because that's your supreme law. The question of who interprets it in the end, that's why you've got a Constitutional Court. It is then the power of the Constitutional Court to then decide whether or not a particular element is inconsistent with the fundamental principles, aims and objectives of the new Constitution. So, I really don't think that that's a problem. I think it is quite right to say it. Even if you didn't say so, that is still a fact, so you can't run from that particular fact that it's the Constitution of the country that is the supreme law. Now I think what we need to do is we need to leave it as it is because it isn't wrong in the way that it is put, but there is a clear understanding that it can't be a poitical party's interpretation as to whether or not a particular province's Constitution is in conflict with the Constitution of the country. If they think it is in conflict, they would have to go to the Constitutional Court. So it's really only the Constitutional Court that will make the final decision if such an issue is to arise so I think that's quite clear; that, that would have to be the situation. There is no other way out of this.

Mr Ackerman

Sorry, Mr Chairman, my voice is a bit hoarse after this meeting. If the working ??? believe there should be a Government of National Unity and the ??? constitutions say there shouldn't be a sharing of power at the executive level, then certainly this is inconsistent with the Final Constitution. My problem is that because it is a ??? supreme law of the country, but within the Constitution, you write certain things in and the principles of the Constitution are very important. With the Constitutional Court the principles will count. And I just say if you say the "Final Constitution", I will have problems with it. If you say the "principles of the Constitution" then I wouldn't have any problem with it, but if you say "Final Constitution" and you give me the point that it can be interpreted in different ways, you admit that point. I just wanted this terminology more a "beskikte ding"[1] than it is here.

Dr Pahad

I don't understand what Mr Ackerman's problem is. Either your party wants it that way or it doesn't. You want a Constitutional state or you don't! You can't pick and choose and say you want a Constitutional state, but there might be one or two elements of the Constitutional state you don't like. Now, I am trying to get Mr Ackerman to understand either you say that the Constitution is the supreme law of the land and anything else that happens whether it's... Let me finish. So when you say it's not inconsistent, it means it can't be inconsistent. If it is in contradiction to the Constitution, then it is that Constitution that has to be supreme. The question of the interpretation is another matter, the question of a political arrangement – and I doubt

---

[1] something which has been decided upon and agreed

whether Hernus Kriel wants to share power with anybody anyway at this moment in time, I am not sure that he will remain in power – is a separate matter. We haven't reserved that issue. If the National Party thinks that they want to make that a contentious issue, obviously we couldn't object to that, but then it should be made quite clear when the technical experts write their report that the National Party says that the statement of Provincial Constitutions will not be consistent with the Final Constitution is made contentious by the National Party, and then we can proceed. I don't think it's going to help us a great deal to proceed with this discussion.

Mr Ackerman — Mr Chairman, Dr Pahad is turning my words around now. I just want to clearly spell out and recommend our position, what I've just said, that if Final Constitution can be interpreted in different ways as Professor Steytler just said and we also feel that there should be in the wording "the principles of the Constitution".

Chairperson — Dr Ranchod.

Dr Ranchod — The issues are removing the word "Constitution" that meets... Dr Pahad is not listening. We could neatly drop the word "Final" but whatever Constitution is adopted by a province should not be inconsistent with the Constitution, then we don't have a problem.

Chairperson — Professor Steytler?

Prof. Steytler — Mr Chair, I think there are two issues. The first one is any province at the moment has got the power to draft a

constitution not inconsistent with the present Constitution, Kwazulu-Natal can do it, Western Cape can do it, but that's one issue. The second issue is then if the Final Constitution gives the same power in terms of the new and Final Constitution to the provinces again. That is a separate power that they have as opposed to the one that they have presently. So, it doesn't really matter what the position is now, what we have to only concentrate on is: What is the power given to provinces in the Final Constitution? If there is in existence at that time Provincial Constitutions, one may actually recognise any constitution, but the question would be whether such a Constitution could be inconsistent with the new Constitution. This may be an issue that would have to be looked into more carefully. Say, for example, the Western Cape drafts a Constitution. It is consistent with the present Constitution, but it may be inconsistent with the final one. What is the position then?

Chairperson — Dr Ranchod?

Dr Ranchod — Mr Chairperson, we have a deadline. By May next year the Final Constitution should be completed, but we know from experience that delays are possible. I think we could deal with this situation by simply dropping the word "Final". Let's leave it to the Constitutional Court if the Final Constitution is markedly different from the interim one, let the Constitutional Court deal with it, but I think if we said there is agreement now about something which does not exist at the present time, we don't have a Final Constitution, we cannot with confidence say that by May next year we are going to have a Final Constitution, perhaps it would be adequate if we simply say that it should not be

inconsistent with thé Constitution.

Chairperson — Anybody have any difficulty with that? Agreed? Final. Let's go back to page 1. Are we all agreed on page 1? It appears so, then it's accepted. Then page 2, the scrapping of the word "Final". Agreed to. Page 3, Professor Steytler.

Prof. Steytler — Mr Chairman, there's nothing new there. Just the issues in terms of the powers of legislature which need to be revisited. In the comments column about the provincial legislature standard constitution, whether it should be in the Constitution itself, or simply in a schedule, that matter should be revisited. Unless we agree that it should go into the body of the Constitution or simply as a schedule, a draft Constitution would then simply read: "until a provincial legislature adopts a Constitution, the Constitution contained in schedule X will be applicable".

Chairperson — Dr Ranchod?

Dr Ranchod — The question of the files of the legislature, we know from the demographic situation in Kwazulu-Natal that we are in fact going to have more voters in that province in the year 2000 than you are going to have in Gauteng. Supposing they ask for 100 members for their legislative assembly, would that be acceptable? If they can prove statistically that they in fact will be the province with the largest number of voters by the year 2000?

??? — Are we taking the numbers of the size of the legislature according to the Interim Constitution or how will this be dealt with?

Prof. Steytler — Mr Chairman, I think a very important issue again is something which we didn't address, who determines numbers in their body, who determines the actual numbers that may be according to a province, and what happens if there are changes in the demographics of a province? Are there changes? So one may want to add something, for example, that the National Assembly will determine the size of province's legislatives or whatever. There will be fluidity in demographics, how do you reflect that? Changes that may take place.

Chairperson — Dr Pahad.

Dr Pahad — I would have thought it is not a matter which should detain us with regard to the drafting of the Constitution. No constitution is going to lay down the exact demarcation of boundaries in respect of the demographics because these change, and that would be a matter for legislation. Obviously when the demography changes to the extent that it no longer represents what the actual composition of the population is, then obviously it would have to be changed to take that into account because the system of representation is designed in such a way that it will represent the amount of people you have. So you couldn't really have Northern Cape have the same level of representation as Kwazulu-Natal or Gauteng for matter. So I don't think it's a matter that we should deal with, it's a matter that will be decided upon by legislation, it's not a matter that goes into the Constitution in two tics. I really believe that we'll solve the problem when we get to it in terms of change. That's what happens in every country. No country has static proclamations and how and in what way

elections will be conducted still needs to be worked out. There is an independent electoral commission that would be set up which would then have the powers to be able to (inaudible, somebody coughing).

Chairperson — Senator Groenewald.

Sen. Groenewald — Chairperson, if it's a matter of determining this by some law or other, then we must say it. In other words, in our Constitution we must then say how the size... that the cabinet will decide, or the electoral commission or whatever the case may be. That's the first point I would like to make. Secondly, I think the size of provincial legislatures we also mentioned very specifically would be determined by the functions which provinces have. And here we also find that certain provinces will have more functions than other provinces so I think we need to revisit the size of provincial legislatures and we might just well just add "in the light of demographic functions" or something similar.

Chairperson — Any objections to that addition to comment? No objection, then we include that, Professor Steytler. On page 2, agreed? Thank you. Page 4? Professor Steytler?

Prof. Steytler — Chairman, much the same, it's just those two really technical matters about the polling date whether it can be harmonised, I don't think it can be harmonised, but at any case those are to be re-visited. The other matter is membership of ordinary residents in provinces, which is a contentious issue.

Chairperson — Comments or questions? Dr Pahad.

Dr Pahad — I don't know whether it's possible to put it... You see, in terms of many of the qualifications we would have to be consistent and the same as for National Assembly, I mean that you are a South African citizen, that you are of a certain age, and all of those things, that you are not a prisoner. Now members automatically resident in the province, we might find that... I don't know, because the ANC hasn't itself got a worked out position on this thing, we're waiting to hear from other parties too, but you might find that it's possible to visualise that there could be a difference in terms of the qualifications for the National Assembly where you may not have a limiting provision which talks about "ordinarily resident", but you might say that, that should apply to a provincial legislature. What I am asking is that we should be a little bit more clear here; that it is possible that you could have some elements of a qualification which would apply to the provincial legislature which may not necessarily apply to the National Assembly. So I am just saying that it should be put in a way that this matter is still left open for us to discuss. If you look at the present Constitution, you will see that there is a difference in terms of "ordinarily resident" that it applies to people who appear on regional lists, but not people who appear on other lists. I am just saying that it is not just a question of agreement of whether this requirement is necessary, but that it is possible that you could have two different requirements: one for provincial legislatures, which would not necessarily apply to the National Assembly.

Chairperson — Senator Groenewald and then Senator Ackerman.

Sen. Groenewald — Chairman, could we just say, as we did in the case of the

Senate, instead of saying "members ordinarily resident in a province" also rather use the terminology "in the provinces in which they are registered" then it would also have a better result?

??? Yes, Mr Chairman, I thought that we had agreement on this issue, that we have said that the registered voters ??? ordinary citizen. I just asked Professor Steytler now and he also said that, that was true: in previous discussions we decided on the "registered voter" to get out of the problem.

Sen. Groenewald Could I just explain to Dr Pahad, the argument was that with that kind of stipulation it would mean that all Members of Parliament would have to vote in the Western Province because we are resident here for much longer times than let's say in the provinces where we come from. That was the main problem.

Dr Pahad No, no, sorry. Mr Chairman, I don't think we should waste time. All I was asking was that there should be clarity. You cannot say now that you are going to put in the Constitution to give the ANC somebody who is registered as a voter in Gauteng and the ANC wishes to put that person on a list for some other place. I mean, we don't know what the electoral system is going to look like and I am just saying that we should leave this matter open. It is not a closed matter because it depends on the electoral system. It may help if we have a possible distinction between what is possible for provincial legislature as opposed to the National Assembly. So we need to leave that open because we cannot decide now that even if we have an electoral system which has constituencies that the

ANC for example, may be compelled to say... It is the ANC's business if it wishes to place somebody in a constituency even if that person is not a registered voter in that particular constituency. And the third element, Sen. Groenewald, is precisely what is the regulation? How can you get voters to vote in a particular place? ??? may have domicile in ??? So what I am really saying is we shouldn't agree to this thing now we should just leave it open and we have to come back to this question later, once we've solved other problems.

Chairperson — In other words, we approve page 4 as it stands now? Professor Steytler?

Prof. Steytler — I think it should be re-visited. Under the Comment column: The issue should be re-visited and whether it should be a "registered voter" because it presupposes that that's the easy way, a "cop out", because you are registered in the place of residence, ordinarily resident, so it presupposes another body making a similar decision. But I think the issue could be re-visited as opposed to a contention.

Chairperson — We've only got 12 minutes left to deal with this and then we start with our workshop. I would suggest that after the workshop, we carry on with this, the last formulation. Is that OK with everybody? Thank you. We'll re-visit, ja. Page 5?

Prof. Steytler — There's nothing new there.

Chairperson — Do we agree with page 5? Thank you. Page 6?

Prof. Steytler — Mr Chairman, there are just issues which were raised also in terms of the National Assembly, as to where a law should be lodged. It was felt it should be lodged in the appellate division; the feeling is now that it should be lodged in the Constitutional Court because the Constitutional Court is the upper guardian for all constitutional matters so there is an element on that point.

Chairperson — Any comment, or do we agree?

??? — Mr Chairperson, just with regard to the language, the first one under agreement: "Amendment to the Constitution should be by the majority of half of the members present and voting". It says there the "majority of half of the members present" so that with 50 members present, 13 is the majority of half the members, 25.

Chairperson — Professor Steytler?

Prof. Steytler — That is really an issue of quorum for a decision to be taken. It should be a quorum of half of the actual members and therefore half of the members make a decision valid.

??? — One thing about the language. You have a quorum requirement that you need at least half the members present. You can't take a vote if you don't have a quorum so you don't need to refer to that. All you need to say is "half of the members present and voting".

Prof. Steytler — Again, Mr Chairman, there should be some type of quorum which is really an issue on the previous section.

??? The point is this that should this be in the Constitution itself. I mean, is this National Assembly? We ourselves are discussing this whole question of the quorum and everything else. These terms should be determined before and carried in terms of sittings and in terms of passing certain legislation. I think it still needs to be examined depending on the kind of work you are expecting your Members of Parliament to do. I personally don't think that, that is agreement, that, that should appear in the Constitution. Make it clear now. We need to look at when we have to re-visit it or maybe put it under "contentious". But the question is whether that should itself be seen in the Constitution, about the size of quorums or so forth. To me it seems, just speaking off the top of my head, more relevant that the National Assembly they will decide for themselves what regulations to have. It's possible that provincial legislatures, depending on their own size, might decide what the quorum may be. I do believe it is not a matter for the Constitution to decide the quorum.

Chairperson Dr Ranchod?

Dr Ranchod We have had different points of views. I think when you are dealing with legislation, it is the business of... The Constitution shouldn't perhaps regulate the matter when dealing with legislation or the amendment of the Constitution. I don't think one can leave that to rules because let us suppose you have a quarter of the members present in the house and a bill is passed which has major financial implications or which affects social issues, that a minority of members present could then get legislation through. I believe that when it comes to legislation, it is

something which is normally regulated constitutionally.

??? Mr Chairman, if I'm correct you said under 1.3(xviii) with regard to a quorum that this will be re-visited. So the question of a quorum is one issue. We can decide what a quorum is. I think that the proposal is that in terms of agreeing to a decision, you say what type of majority you need. So if you say a "majority of the members present and voting" you will already have determined how many people you need for a decision, for the Assembly to be sitting, for a quorum to be there. So your quorum has already been specified somewhere else. But what you are saying is in terms of making decisions for ordinary legislation, you will need a simple majority, 50% plus 1 of those voting.

Chairperson There's a request for photo's to be taken as we are seated for a Constitutional Assembly booklet that's going to be published. So carry on talking, they will take the photographs. Dr Ranchod?

Dr Ranchod We must separate the two issues. The quorum required for the house to proceed with business and the quorum required to deal with legislation, passing of legislation, including amendments to the Constitution. I think...

(end of Tape 1)

??? ... of opinion that we do require ??? on passing legislation.

Chairperson Senator Groenewald?

Sen. Groenewald I don't think we have the time to argue it now. Could we just as far as 5.15 is concerned put under comments "to be re-visited"? I think that's all we can do at this stage.

Chairperson I think we stop with the discussion here, then we come back to it this afternoon when we carry on. Perhaps Dr Ranchod can have a chat with Dr Pahad and come back with a consensus of opinion. There are a few amendements as far as time is concerned. We have 11 o'clock to 11,45 camera discussion. We were advised that, that should be changed from 11,00 to 11,15: questions for clarification; and then 11,15 to 11,30: tea; 11,30 to 12,00: Professor Andries Raath (???), 12 o'clock to 12,15: Dr T. Maluwa, and 12,15 to 13,55: panel discussion. We must carry on, the professors haven't arrived yet. Professor Boesak informed us that his flight was delayed, but he will still be coming, so I think we carry on with page 6. They're not here yet. Professor Raath has arrived and he has preferred to deliver his address immediately. Is that OK with you? OK. Theme Committee 2 extends a hearty word of welcome to you, and appreciation for your willingness to address us and give us an academic overview on the Volkstaat. Professor, you may start.

Prof. Raath Thank you, Mr Chairman. In this short presentation I only

have time to make a few statements and suggestions as to how the ideals of an Afrikaner Volkstaat could possibly be accommodated on the basis of self-determination. It is well-known that cultural anthropology... Within a habitat throughout the world ethnic groups continue to retain and assert their distinctive identities and traditions despite the common response of the artificially created state governments, under which such people live, to exert measures to maintain control over people who have never consented to that control. Most commentators of the Interim Constitution, Mr Chairman, accept the fact that a profound liberal theory of state underlies this document. My conviction is that such a liberal theory should also be applied in all its consequences to the Volkstaat as a unit in the Final Constitution. It is against this background that one has to evaluate the academic merit of an Afrikaner Volkstaat as part of a multi-dimensional approach to solving South Africa's complex political and constitutional problems. Furthermore one has to point out that ethnic self-determination has become a universal phenomenon which has seriously jeopardised constitutional arrangements unsympathetic towards the political aspirations of ethnic groups. The most dramatic illustrations of this in recent years have been the break-up of the Soviet Union into several smaller independent states and the struggle of the several Yugoslavian republics to regain their independence. Arlene and William McCall describe this phenomenon rather aptly in their article "Ethnic autonomy, a social historical synthesis". This is perhaps the supreme paradox of the 20th century: As the people of the globe move economically, politically and culturally towards the creation of a more unitary world different lines of commitment are

drawn based on difference in power, religion, language or race and these give rise to a class separatism. Opposite tendencies, they say, appear to be moving together. Perhaps this is what we should all be striving for, namely to synthesise the urge for a unitary state, with the concept of ethnic and cultural self-determination in a Volkstaat as a political unit. In this context, an academic discussion of the concept of a Volkstaat should, I think, focus on the international acceptability of the concept, the moral tenability of this idea, and finally suggestions how such a unit could be taken forward in the Constitution; therefore you will excuse me if I venture into areas of other speakers, Mr Chairman, but please accept the sincerity of my efforts to bridle this unruly horse. For reasons of brevity, I wish to tabulate the points which, I think, form the basis of any academic discussion on the concept of the Volkstaat as a unit of self-determination. This brings me to the point of saying a few things about academic paradise for the accommodation of an Afrikaans Volkstaat as a political unit in a Constitutional dispensation. Firstly, the recognition of the principle of self-determination to the point of accepting regional autonomy is an important facet of a fair and just protection of cultural communities and ethnic groups in South Africa. Robert Macorqudale makes the following important point. He says: "Protection of the right of self-determination in South Africa can be a means to ensure that communities are fairly and justly protected and that groups participate peacefully in the nation-building process in the right way. After all, the purpose of the right of self-determination is to enable people, and ultimately individuals, to be able to participate fully in the political process and to prosper and transmit their culture and not to be subject to

such negation, domination and exploitation or any other form of oppression so the protection of lawful exercise in the new South Africa of the right of self-determination can assist in their parliament, real and perceived, of all the peoples of South Africa and strengthen and confirm democracy in this country." The agreement of Afrikaner self-determination between the Freedom Front, the ANC and the South African government on 23 April 1994 reflects some of the points mentioned by Macorqudale insofar as it makes provision for negotiation as the instrument by means of which the ideal of Afrikaner self-determination should be investigated, including the concept of a Volkstaat, but the possibility of local and/or regional or other forms of self-determination should be investigated and a principle fitting for the Constitution should be considered. Secondly, since World War I the principle of self-determination has been included in many international documents. The resolutions from the UN are no exception in this regard. In resolution 5.4.5.6 of the General Assembly of the UN, accepted on 5 February 1952, for example, under the heading "Inclusions with the international covenant or covenants on human rights of an article relating to the right of peoples to self-determination" it is stipulated: Firstly, the General Assembly decides to include in an international covenant or covenants on human rights an article on the rights of all peoples and nations to self-determination in re-affirmation of the principle enunciated in the Charter of the United Nations. This article shall be granted in the following terms: All people shall have the right to self-determination and shall stipulate that all states, including those having responsibility for the administration of non-self-governing territories, should promote the realisation of that right in relation to the

people's of such territories. The inclusion of similar formulations in international instruments has led to the following conclusion by an internationally respected expert on international law, Joeran ???. He says: "The upshot of the matter is that the right of self-determination is accorded not only to peoples under colonial domination in Africa and Asia, but also to peoples living within independent Afro-Asian nations as well as to those existing in Europe, for instance, in Scotland and the UK and in America. Just as people under colonial domination are entitled to create a new state where none existed before, so can a people living within the framework of an extant state surcease from it and establish its own independent country. This is precisely what was achieved by the Bengalis of East Pakistan when they created the new state of Bangladesh. This too is what was unsuccessfully attempted by the Ibo's of East Nigeria when they tried to create a new state of Biafra." From an international perspective, one may say that the principle of self-determination of ethnic groups within determinable geographical boundaries is widely accepted. More and more people are reading Jean Jacques Rossouw's admonition to political purists not to pretend that state's have "a stability of which human conditions do not permit". This is especially true of a country like South Africa with boundaries originally drawn by colonial conquest not sensitive enough for historical ethnic claims as largely taken over in Schedule 1, part 1 of the Interim Constitution. Thirdly, the Vienna Declaration of 20 June 1993 continues the international commitment for the maintenance of peace by recognising the principle of self-determination. In part 2, paragraph ??? the right of people's to self-determination is expressed as follows: "All peoples have the right to self-

determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." Read with article 1.2 of the Charter of the United Nations, this declaration is the extension of the formulation of self-determination contained in other international documents. Fourthly, the interpretation of a declaration has to take into account the use of the term "people" in the international, legal sphere. From the proceedings of UNESCO it appears that the term "people" is associated with a particular cultural identity which Vernon van Dijk, a well-known author on self-determination and human rights described in terms of such characteristics as language, religion and race and more broadly, by shared attitudes, customs and traditions. To qualify as a people those sharing a culture should think of themselves as collectively possessing a separate identity and they are unlike to be predominantly of common descent, he says. Although views on self-determination in Afrikaner circles may vary, there is general agreement as to the entity or self, which should have a right to self-determination. Fifthly, in recent years the right to self-determination has become intimately entwined with the concept of human rights as a ??? sees the right to self-determination as "the right of a people or a nation to determine freely by themselves without any outside pressure their political and legal status as a separate entity, preferably in the form of an independent state, the form of government of their choice and the form of their economic, social and cultural system." Jordan Palscht(?) formulates the relationship between self-determination and human rights as follows. He says: "The right of self-determination is the right of all peoples to participate freely and fully in the sharing of all values:

power, well-being, enlightenment, respect, work, skills, rectitude and affection." The right to political self-determination involves this broader focus, but may be summarised as the collective right of people to pursue their own political demands, to share power equally, as the ??? right of individuals to participate freely and fully in the political process. Whether or not collective and individual self-determination are viewed as human rights as such, there is no question that self-determination and human dignity are interconnected with human rights as well as the only legitimate measure of authority namely the will of the people. The implication is that the rights of cultural entities, striving for political independence, are disregarded. The individual rights of members of such a group are seriously jeopardised. It could therefore be said, Mr Chairman, that ethnic self-determination is at least an important pre-condition for the effective realisation and guarantee of human rights. It is of particular importance to note that the Human Rights Committee deems self-determination important because its realisation is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights. In the light of the foregoing, it can safely be said that the right of self-determination is an essential condition for the empowerment of all people in the political process to the highest political and constitutional level. Sixthly, from the reaction to the political changes in this country over the last number of years, it appears that a substantial segment of Afrikaner people deem their cultural identity and political independence so important that political self-determination of ethnic groups is not a phenomenon which can be wiped under the carpet. The political actors in this country in

particular, and the international community in general, has a responsibility to work towards a feasible solution and accommodation of these aspirations. For purposes of my presentation I shall use the term "people" or "volk" in Afrikaans in the sense of a body of people marked off by common descent, language, cultural and historical tradition. The term Volkstaat, or National State, then means a political unit for a particular people or "volk" which is characterised by a common language, culture or history. All the proponents of the Volkstaat concept have to accept, however, that the right of self-determination is not an absolute right. Like other human rights, there are limitations to the application and recognition of this right. From Section 5.1 of the ICCPR the ICEFCR, it is clear, for example, that the application of the right of self-determination may not be to the destruction or impediment of other rights. Section 5.1 stipulates that nothing in the present covenant may be interpreted as implying for any state, group or person, any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognised herein. Furthermore the obligation upon states to honour this right must be in conformity with the Charter of the United Nations. In addition, the Declaration contains a limitation of the right of self-determination insofar as nothing contained in this right shall be construed as authorising or encouraging any action which would dismember or impair totally or in part the territorial integrity or political unity of sovereign and independent states. It is noteworthy that the Declaration referred to above stipulates that only states conducting themselves in compliance with the principle of equal rights and self-determination of peoples thus possessed of a government representing the

whole people belonging to the territory, without distinction as to race, creed or colour, may appeal to this general interest in order to limit the exercise of the right to self-determination in this manner. A government therefore which does not represent the whole population, will not have sufficient grounds to limit the right of self-determination on the basis that it impairs the state's territorial integrity. We should, however, I may add, guard against the positivistic and narrow interpretation of these stipulations. A well-known writer in the field of self-determination, ...

very aptly describes the influence at stake in reconciling national interest with the recognition of the principle of self-determination. He says the truth seems to be that if we take the right of sovereignty on the one hand and the right of secession, and may I add, Mr Chairman, in the sense of immediate and drastic partition of country on the other, as absolute rights, no solution is possible. Further if we build only on sovereignty, we rule out any thought of self-determination and erect a principle of tyranny without measure and without end and if we confine ourselves to self-determination, a form of secession, we introduce a principle of hopeless anarchy into the social world. The approach of ??? in his well-known book "Evolution of the right of self-determination" seems the generally acceptable one, namely that the right of self-determination, including secession, should be recognised and applied insofar as international peace, harmony and stability is promoted thereby. For purposes of this presentation, I take secession to mean the withdrawal from an existing state and its central government, of part of the state, the withdrawing part consisting of citizens and the territory they occupy. We may summarise the foregoing by saying that apart from the

fact that the ethnic group involved must demonstrate that it is in fact itself capable of independent existence, the claimant must show that equation to its demand would be likely to result in a greater degree of world harmony or loss, global and societal disruption, than would be the case if the existing political state of affairs was preserved and that the recognition of geographical autonomy would not lead to an unreasonable and unfair disruption of existing economic and other infrastructures etc. The territory involved should not monopolise the economic core of the parent state or deprive it of its natural resources. Rights and freedoms of non-compatriots may not be renounced. Non-compatriots may not be deprived of their freedoms, may not be uprooted, and may not be resettled against their will etc. Vernon van Dijk very aptly describes the paradox inherent in argument denying ethnic groups the right of self-determination within autonomous geographical areas. He says: "An obvious paradox exists in asserting on the one hand that peoples are entitled to equal rights to self-determination and to preserve their culture, and on the other hand that they may not have the right to sovereignty that other people enjoy." In effect the Ibo's and the Bengalis revolted against this principal and leaders of many minority peoples over the world – some leaders of the French Canadians, for example – contemplate a similar course of action. In a new phase of constitutional development in this country, Mr Chairman, we have the wonderful opportunity of addressing these paradoxes in our endeavour to harmonise and synthesise the principle of self-determination and that of territorial integrity. Cognisance should be taken of the fact that full ethnic autonomy within clear geographical boundaries is accepted in quite a few constitutions of countries where ethnic separation is a

reality which could destabilise the constitutional dispensation in such countries. In the Soviet Union, for example, the constitution in Section 72 made provision for the fact that "each Union Republic shall retain the right freely to secede from the USSR". In the constitution of Yugoslavia, a right to full autonomy and self-determination was provided for in the following terms: "The nations of Yugoslavia, proceeding on the right of every nation to self-determination including the right to secession." These formulations clearly illustrate the need for the recognition of full political autonomy of ethnic groups to the point of secession under particular circumstances and conditions because enough misery has been caused in the past by accepting that the world consisted of states eternally fixed in numbers and borders. It is rather as if academics writing on moral issues arising out of knowledge of the family, do not even mention, let alone discuss, the phenomenon of divorce. Such a right of full political autonomy and secession is also contained in the Dutch and English common law of our country. Hugo ... in his authoritative work "??? of parties" provided for such a right of secession on the basis that the right of a part of a population to protect itself is stronger than the right of the nation over the part. The part availing itself of secession, according to ... employs the right which it had before entering the association. The same line of thought is also to be found in his other major work ..., translated and published under the name of ??? in 1622. On the same grounds he recognised the sovereignty of indigenous peoples on the grounds ??? (Latin). According to Kovan, this principle has also been applied in English law since the time of the War of Independence. It should firstly

be added, however, that in most instances of secession in the international sphere over the last two centuries, a lot of pressure was exercised on secessionist movements to guarantee the human rights and freedoms of people of different ethnic origins. I can go so far, Mr Chairman, as to say that were a state to be created in South Africa in which there was any discrimination in the participation in the political process or in the human rights of its inhabitants, such a Volkstaat with a new apartheid policy, it would not be a lawful exercise of the right to self-determination. It would be contrary to the purpose of the right to self-determination, would be a breach of international law, and would be condemned by the international community in the same manner as the so-called homelands were. No state could lawfully recognise such a state. Secondly, secession only comes into play where a group of common ethnic origin is concentrated within determinable geographical boundaries and the recognition of political autonomy of such a group will not lead to the impairment or destruction of the economy or other infrastructure of another country. Quite often one hears about the so-called federal right to self-determination and the question is whether such a right really exists. Adrian ??? identifies five levels on which self-determination operates, namely human rights on the national level, human rights on the individual level, minority rights on the sub-national level, national independence on the national level, and regional integration on the regional level as well as a global central guidance system. According to ??? it appears that a federal solution could be offered on three levels, namely on the sub-national, national and regional levels. On much the same lines, ??? identifies four facets of a peaceful process of self-determination, namely

a people, the legal and factual possibility to express its will, and the realisation of its will and the willingness of the existing state authority to accept it. From this perspective the right of self-determination has the features of a process. The right of peoples to self-determination is a continuing process. Once a group of people has attempted to fulfil one of the modes of implementing the right to self-determination, it continues to have a prerogative to assert the right. Otto ... sees greater autonomy for ethnic groups within federal structures of state as a valuable starting point for the realisation of the principle of self-determination. Although there is no clear federal right of self-determination, it could form an important manifestation of self-determination in the political development of an ethnic group towards full political autonomy. ... formulates it very aptly: federalism is only one form of implementation of this right and in many cases it might prove to be only a transitional stage in a long process of self-determination leading to wider unity. Exactly for this reason it is one those aspects of self-determination which points to the future. In the light of the complexities of the South African political scene, proponents of the Volkstaat ideal will have to accept that full political autonomy cannot be realised overnight. On the other hand, an open-ended formulation of self-determination, starting on a federal basis, may provide the stability necessary for political change in the years to come. It should be noted, however, that providing for a federal model in a multi-ethnic society can address some of the problems that may lead to secession, but may not necessarily probe secessionist sentiments. On the other hand, a state authority must accept the fact that if it is committed to accommodating the legitimate expectations of

ethnic groups, it should not shoot itself in the foot by acting paternalistically, to the extent where the donor parties of the government could be questioned, and thereby undermining the right of ethnic groups to govern themselves. Applying untried constitutional models makes it imperative to have the trust of all the major components within a political dispensation. A phenomenon which has over the last decade or so opened new perspectives on the question of self-determination, is the possibility of the inclusion of escape clauses as means of security for political groups. Some European heads of state, most notably former British Prime Minister Margaret Thatcher, have expressed a reluctance to commit their countries to the political union of Europe. This may be because the nature of the union itself, and hence its consequences for the wellbeing of particular member states, is uncertain and most likely will only be clarified fully after the initial commitment to union has been made and efforts are already underway to implement the provisions of the agreement. Such understandable reservations might be overcome if the initial agreement itself included an explicit right to secede. By creating a satisfactory default position, a constitutional right to secede can remove the barrier to association that uncertainty raises. Applying this to the Final Constitution, Mr Chairman, a strong point could be made out for the inclusion of such a law of secession in the Constitution for a new form of political association. The fundamental question now is how such a right to secede and an escape mechanism could be incorporated in the Constitution without undermining the democracy. Addressing the conditions in which secession could be morally justified, one is led to accept that the way in which unjustified claims of secession could be intercepted

would be to devise constitutional mechanisms to give some weight both to the interest in secession and the interest in preserving majority rule. The most obvious way to achieve this would be to allow secession under certain circumstances and an escape clause, may I emphasise, but to minimise the danger of strategic bargaining by erecting inconvenient but surmountable constitutional barriers to secession, e.g. the Constitution must recognise the right to secede, but require a majority of those in the potentially seceding area to endorse the session by a referendum vote. The purpose of long amendment while erecting strong majority requirements is to strike an appropriate balance between two legitimate interests, that of providing flexibility for change versus that of securing stability. Secondly, it would be important to have the necessary security that the state and the private individuals will be compensated for their loss of property as a result of secession. A combination of these approaches could serve to balance legitimate interests in secession on the one hand and equally legitimate interests in political stability and territorial integrity on the other. With reference to the results of the break-up of the Soviet political system, Alan Buchanan says: "Other states facing secessionist movements in the future can profit from the Soviet Union's embarrassment by thinking proactively about constitutional provisions for secession, chief among these is South Africa." From the relevant sections and principles of the Interim Constitution, it is clear that the Constitution does not accept a Volkstaat as such, but provides for the possibility that the proponents of a Volkstaat can convince the Constitutional Assembly to accept such a concept. Constitutional Principle 34 therefore is formulated in such a manner that it does not exclude a

Volkstaat that does not specifically provide for one. One must add, however, Mr Chairman, that a Volkstaat could be accommodated in terms of principle 34, read on its own insofar as it refers to a territorial entity within the Republic or any other recognised way. This leaves the possibility for the construction and recognition of a Volkstaat while open. There are, however, numerous difficulties in reconciling the principle with Constitutional Principle 1 providing for one sovereign state, a common South African citizenship and democratic system of government committed to achieving equality between men and women and people of all races and Section 1.1 providing for one sovereign state. These provisions in the Interim Constitution are typical examples of the paradox mentioned previously, a paradox which needs to be clarified in the Constitution. A responsible way to do this would seem to have three major components. Firstly, principle 34 appears to be a sensible provision insofar as it contains the major sectors of the principle of self-determination for ethnic groups to the point of regional autonomy. This principle should be supported by provisions in the body of the Constitution which reflect a federal system of government as point of departure for accommodating the political aspirations of ethnic groups. Secondly, Principle 34 should be formulated in such a way that the relationship thereof with other constitutional principles is clear to the extent where there can be no uncertainty of the fact that the notion of self-determination also includes geographical autonomy. Furthermore, such a formulation should be complemented by provisions in the chapter on human rights containing the normative framework within which full political autonomy within a geographical entity would be acceptable. That is prohibiting

impairment of human rights, prohibiting violation of territorial integrity of the country by monopolising the infrastructure, and preventing an unreasonable fragmentation of the territory. Thirdly, an escape clause for the proponents of ethnic self-determination should be contained in the chapter dealing with human rights, providing for instances of emergency secession as well as the conditions applicable, for example strong majorities, and compensation to the state and private individuals who will lose property as a result of secession. I conclude, Mr Chairman, by saying one of the biggest challenges facing the drafters of the Constitution will be to solve the apparent paradox between human rights and democracy on the one hand and that of self-determination of the Volkstaat on the other. It is worthwhile facing this challenge and contributing towards humanity and human aspirations in our lovely country. Solving this paradox from a literal perspective means crossing the bridge together into a new South Africa to guarantee human rights, guarding democracy and ensuring that proponents of the Volkstaat could realise their dream in the future, possibly as a tenth province, if they so wish, even if this ultimately boils down to a form of evolutionary and negotiated secession because if we take the liberal theory of the state seriously, then it means that parents cannot morally bind their offspring. Membership in a state, once voluntarily accepted, should not be irrevocable and persons cannot predict with certainty what is in their long-term interest. Liberalism means that democracy should not be constitutionally indissoluble because in so freezing the status quo, one generation which exercised its right to freedom of choice, attempts to deprive latter generations of the same freedom. Liberalism means that the state should

not be an absolutistic idol which traps the aspirations of generations to come. Liberalism, Mr Chairman, means that people should be given the opportunity of settling in cultural communities and that such territorially concentrated groups within a state should be permitted to secede if they want to and if it is morally and practically possible. Norms of legitimacy for such claims would then reasonably involve that secession would not be allowed under the following circumstances:

1. The group which wishes to secede is not sufficiently large to resume the basic responsibilities of an independent state.
2. It is not prepared to permit subgroups within itself to secede although such a cession is morally and practically possible.
3. It wishes to exploit or oppress a subgroup within itself with cannot secede in turn because of territorial dispersal or other reasons.
4. It occupies an area not on the borders of existing state so that secession would create an enclave.
5. It occupies an area which is culturally, economically or militarily essential to the existing state.
6. It occupies an area which has a disproportionately high share of economic resources of the existing state.

Liberalism means restructuring and redrawing man-made boundaries in a quest for accommodating all the legitimate aspirations in the new South Africa. I thank you.

Chairperson — Thank you, Professor Raath. Professor Venter is the next speaker; he will address us on an international political perspective. After he has delivered his paper, we will

adjourn for tea and then we will come back for questions. Professor Venter?

Prof. Venter

Thank you, Mr Chairman. Ladies and gentlemen, it is a pleasure to be with you here in the Cape once more. Courtesy of the South African Airways, I wasn't as on time as I usually am. Also you will be listening to the voice of Jacob in the clothes of Esau: the paper was prepared by my colleague, Deon Geldenhuys, who was in Taiwan until recently and couldn't come down to deliver the paper himself, but Deon and I share many of the views in the paper, so whatever I say here this morning, I will take my own responsibility, I won't shovel it onto his shoulders. At any rate, it is his work. In presenting the case, the advocates of Afrikaner self-determination are bound to agree that their's is an aspiration with the times. The quest for ethnic self-determination, they will submit, is a powerful political force that has entered the world of the 1990s. Following ??? I think one can distinguish two types of self-determination though. The one is complete and full self-determination or secession which involves separation from an existing state and the creation of a new sovereign state. This could be achieved through peaceful negotiated partition or through secession; in other words, through conflict. By "secession" is meant an abrupt unilateral move to independence on the part of a region that was metropolitan territory of the sovereign independent state. That's one possibility. The second one is limited self-determination which affords the minority special protection through cultural or political autonomy within an existing state. Autonomy extends well beyond the constitutional recognition of minority rights. It signifies some

decisionmaking authority by groups over matters affecting their own interests. Now this paper will look at both these aspects. Let us look briefly at the spread of the idea of self-determination. It's born out of the American and French Revolutions of the 18th century, but the principle of self-determination should become an enduring western export to the world. In the 20th century, one of the foremost exponents of self-determination was President Woodrow Wilson who promoted it as an imperative principle of action which statesmen will henceforth ignore at their peril and he gave the expression to his national determination in his famous Fortnum??? in 1918 for the creation of a new, harmonious international order in the wake of the First World War. Now, Wilson's interpretation of self-determination was not strictly adhered to in practice. Several of the states born or re-born out of the ashes of the old multi-national empires have heterogenous populations themselves. Consider the cases of Hungary, Czechoslovakia, Rumania and Yugoslavia. These states thus inherited from their regimens a flaw that was later to prove fatal. Still the principle of self-determination laid the foundation for the first wave of state creation this century, this is the wave of state creation after the First World War. Although self-determination was a key premise of the League of Nations, as the organisation's very name suggests, the idea found no formal expression in the League Covenant. The world body nonetheless introduced an important innovation to protect minorities not able to achieve self-determination in their own independent states, a series of minority treaties which the victorious allies imposed on the new states born out of the Austria-Hungarian empire. These treaties failed, however, to protect

the safety, culture, dignity, welfare and autonomy of minorities in these states. Following the Second World War, minority rights as recognised by the League of Nations gave way to the protection of individual human rights. The principle of self-determination of peoples was, by contrast, enshrined in Articles 1 and 55 of the United Nations Charter. However, no effort was made to define self-determination or to identify the peoples. In practice self-determination was, until the end of the 1960s, associated virtually exclusively with the liberation of colonial domination like in Africa and in Asia specifically. Self-determination thus gave birth to a second wave of state creation, that is the one after the Second World War. The vast majority of this new generation of states was again multi-ethnic in composition. They were state nations rather. They emerged in an era in which the notion that state and nation should be congruent, the Wilsonian idea had become passé and the national integration and nationbuilding programmes were the order of the day in post-colonial states. Territorial fragmentation was prohibited during the decades of the Cold War; neither the West nor the Communist bloc would accept secessionist self-determination for fear of weakening their own ranks and causing international instability. In addition, the international normative framework of the time, that is the Cold War period, more or less 1945 to 1990, the fundamental legal and political principles that governed the interstate system were singularly unfavourable to secession. The secession of Bangladesh from Pakistan in 1971 and Singapore from Malaysia in the late 60s were exceptions that proved the rule. In other attempted cases, notably Katanga in 1960 and Biafra later by 1967, internationally recognised states were

allowed and given assistance by the world community to suppress secessionists. With the passing of the Cold War and the collapse of Communism in the Soviet Union in Eastern Europe, the prohibition of secession has disappeared. For the first time since Bangladesh, the international community recognised the sovereignty of states established against the wishes of an existing central government. That happened with the secession of Croatia and ...

(end of tape 2)

...delayed response to insufficient ethnic accommodation several decades earlier. All of a sudden the previously fashionable notions of integration of nationbuilding within multi-ethnic states appear to have been discredited by events on the ground. So what we can now call... there's a new wave of secession in the post-Communist, post-Cold War world. The current process of state disintegration is not confined to Eastern Europe and Central Asia. In Africa, Eritrea in 1993 broke away from Ethiopia to become an independent state. As ??? has observed, the independence of Eritrea broke a major taboo of post-colonial Africa, namely the prohibition of secession with the accompanying alteration of inherited colonial boundaries. Logical movements under the banner of self-determination are today active in over 88 states from Belgium to Burundi and Canada to ??? Although the quest for self-determination is principally the result of the internal political dynamics of state, the permissive international climate of the 1990s has no doubt encouraged the process far and wide. It is therefore entirely possible that the present round of state disintegration and recreation has not yet been completed. Among the candidates often mentioned who furthered this integration are Sri Lanka, India, Burma, Indonesia, Iraq, Turkey, Nigeria, Sudan and even the People's Republic of China. Meanwhile, at a different level, several major international initiatives have recently been taken to safeguard the rights of ethnic minorities within heterogenous societies. In Europe, at least, a national minority is conventionally regarded as a population group that is distinct in terms of culture, ethnicity, religion or

language and even numerical minority within the state. It is with such minorities in mind that the Conference on Security and Co-operation in Europe, now renamed OSCE – the Organisation for Security and Co-operation in Europe – in June, 1990, adopted the Copenhagen document, at the time the most far-reaching multilateral declaration on the issue of minority rights. Three years later the CSCE created the post of High Commissioner for National Minorities in an effort to prevent inter-ethnic conflict in Europe. Minority rights have received further recognition and the pact of stability in Europe, signed by over 50 states in Paris on 20 March 1995, more or less just the other day. The participants committed themselves to create a climate conducive to democracy and human rights while at the same time respecting the identities of people. The objectives of stability with resolve will be achieved by good neighbourly relations also on minority issues. The UN General Assembly in December 1992 adopted the declaration of the rights of persons belonging to national or ethnic, religious and linguistic minorities. It recognises the right of such minorities to enjoy their own culture to profess and practise their own religion, to use their own language in private and in public freely, without interference from any form of discrimination. Now, let us look at and assess some of the guidelines for the self-determination of groups and people. The various international instruments for protecting minority rights provide no clear guidelines on which groups qualify for lesser self-determination in the form of autonomy and which are eligible for the highest level of self-determination in the shape of a new independent state borne out of an existing one. International law and policy on self-determination are of limited use because they are still

relatively undeveloped, particularly when compared with international doctrines of human rights and democracy. The need for some international guidelines in dealing with self-determination plans is evident when one recalls that movements campaigning for self-determination are operating in scores of states. Various academics, politicians and others have come up with some suggestions. These proposals can serve as an indication of the direction in which international opinion on the issue may be developing. They can also form a norm against which the quest for Afrikaner self-determination could be judged. I have identified about seven or eight of these criteria. The first would be that the mother state would be an undemocratic state and the claim to secession and self-determination will enjoy greater international legitimacy if the group making it lives in an undemocratic state or is being systematically disadvantaged and repressed by the government. The second one would be that the government is unwilling to negotiate. Where self-determination by fragmentation, i.e. secession, is demanded, it must be evident that the central government is not prepared to negotiate or otherwise allow the minority group involved a meaningful albeit limited measure of self-determination. Thirdly, a territory is needed. The territorial factor is critical in the case of secession. A group wishing to break away from an existing state typically seeks a territorial base or homeland in which to govern themselves. The size or economic potential of the territory is of far less relevance than historic planning to a specific area, something like Bangladesh or Eritrea or Lithuania. The majority in the region should be willing to secede. Another requirement for secession is a distinct self-defined community that forms a majority in a particular region of a

state and whose members are overwhelmingly in favour of complete separatism. Legitimacy can be determined through opinion surveys, strikes, demonstrations, massive input of members, referenda and so on. Fifthly, there should be some idea of cultural self-preservation. Cultural self-preservation provides another justification. First though, conclusive evidence is required that a particular way of life which marks off a group's uniqueness as a nation is truly threatened, that less drastic means of preserving a culture are unavailable or insufficient and that the culture meets minimum standards of decency. This would, for instance disqualify the culture of ??? There should be some history of autonomy. The group's claim to self-determination needs a strong historical foundation especially in the case of secession and the minority should preferably have enjoyed independent autonomy in the past. Seventhly, there should be some dedication towards human rights by believers of the group that are demanding self-determination. Eighthly, there should be some evidence that there is violence or potential violence if the proposers of the self-determination clauses achieve their goals and conversely, if their demands are not met. Ninthly, secession should also point towards the resolution of ethnic conflict. There should be a realistic prospect of conflict resolution and peace within and between the old or the runt state and the new one that may result from secession, something like Slovinia seceding from Yugoslavia. There should be some minimum economic viability. All things being equal, it is likely that the measure of international support for a secessionist claim will be inverse in proportion to the degree of economic damage the petition may cause the old state. The smaller the cost, the great the support. Given the international preference for a

qualified self-determination, it is not surprising that notably stringent criteria has been proposed for international recognition of the new entity born out of secession. The key guidelines that have emerged here are that an affluent state should endorse the UN Charter and international law, restrict state boundaries, renounce violence and commit itself to the peaceful settlement of disputes, accept the constitutional democracy and market economy, and protect both individual and minority rights. Now let us look at and evaluate the two plans for Afrikaner self-determination. The first one would be limited claims and the second one would be for complete secession. Firstly, arguments for limited Afrikaner self-determination. Afrikaners arguing for a constitutionally guaranteed right to limited self-determination within South Africa can certainly draw strength from evolving international laws representative of the community on the grounds of history, culture and language. The so-called primordial factors instil what Raoul Prendos has called "collective consciousness or group identity". ??? is a mark of a minority group desiring constitution protection is at present highly structured in the modern world, and also so in South Africa, we should point out. Afrikaners can also base their claims on the desire for cultural self-preservation in a country that was formally multi-cultural and multilingual, but in fact is engaged in the process of anglicisation. Another powerful argument that Afrikaners could present is that minority protection and also ethnic autonomy are entirely consistent with democratic government. According to Max van der ???, OSCE's High Commissioner for Minorities, the treatment of ethnic and other minorities is the touchstone of the democratisation process of previously authoritarian states. Where a state is

The prayer note, known as the "localisation of foreign policy", has in recent years increasingly manifested itself in the federal states of the United States, Canada, Belgium, Switzerland, Australia and even the case of the former Yugoslavia's constituent units. It means that the subnational entities, the provinces, for instance, can establish their own foreign relations. On the same point reference can also be made to another significant recent development in international politics, and that is regionalisation. I would simply refer you to the Europe of regions, the Eurasia initiative, ???, ???, ??? Lux Association, the Pyrenean community and so on, that are cross border regionalisations of economic regions. Finally, one could question the assumption that limited self-determination can be legally guaranteed. In states where democracy and the rule of war are not well established this can be a very risky premise indeed as the recent history of the Soviet bloc reveals. In the case of South Africa, a question mark still hangs over the survivability of its democracy. The fear has been expressed that collapse of democracy in this country may expose the Afrikaner minority to a fate similar to that of the Bulgar Germans in the former Soviet Union. As you know, they were transported about 3 000 kilometres away from their original homeland by Stalin. One way of reducing such risk to Afrikaner survival is the granting of a substantial degree of territorial autonomy, but the surest way of protecting them against problems of adverse consequences of authoritarianism in South Africa, is a completely independent homeland, practically. Practicability therefore, of course, is in the type of different ??? to which we should now turn and I will now talk about full Afrikaner self-determination or secession. From an international

perspective, complete Afrikaner self-determination in an own independent state is at present highly problematic. Firstly, South Africa is a democracy. The first difficulty that Afrikaners today, ??? in the country, one whose process of democratisation still commands worldwide international admiration. The world community hopes, and indeed seems to expect, that democracy will succeed in an undivided South Africa. Even more important, is the person of President Mandela, very well illustrated this last Saturday, with the Springbok jersey and cap. Should democracy collapse in South Africa – something that is not at all impossible, particularly after President Mandela leaves the political scene – Afrikaners could be presented with a powerful international case for secession. Their argument would, of course, be even stronger if authoritarianism were to be combined with the persecution of Afrikaners as a community, of their being deliberately disadvantaged by the government. There is no clear Afrikaner homeland. The second, equally familiar, problem is there is no clearly demarcated territory to which Afrikaner secessionists can lay historical claim. Various proponents in the Afrikaner Volkstaat are at variance over appropriate territory. Opinions range from the restoration of the Boer Republic of the Transvaal and the Orange Free State, and there are about 18 others as well, as well as the homeland in the Northern Cape Province. Such conflicting plans undermine the national and international credibility of the Volkstaat ideal. The third question that needs to be asked is, is there a majority of Afrikaners favouring a Volkstaat? The fourth question is, cultural self-preservation. While a growing sense of cultural alienation and threat to the language may indeed gain international understanding, it does not follow

that the outside world sees an own state as the only way of protecting Afrikaner culture. Afrikaners would first have to convince foreigners that cultural protection proved either inadequate or was not permitted by the rulers of the country. Neither of these conditions is presently being met. In future, however, cultural self-preservation may become a major motivation for secession if either a majoritarian black government or authoritarian one were to deliberately deny Afrikaners cultural self-expression. Fifthly, the effect of affirmative action. The effect of affirmation action on Afrikaners is still too limited to make an international case for secession. Afrikaners are undoubtedly the principle victims of concerted action programmes in the public service, which they had long dominated. That they are being replaced by black people is the price for re-shaping the whole Afrikaner state, to reflect the numerical preponderance of black South Africans. Black preferment will, however, have to go well beyond the inevitable present stage of driving apartheid wrongly before it can be considered another justification for Afrikaner secession. Sixthly, one has to look at economic viability. It should at once be said that the international community does not take economic capability or viability into account when deciding on dependent territories' plans to statehood. But does economic viability, a context frequently used but seldom found, what does it actually mean? Well, following Schröder we can say the functioning of the economy at the time of the independence of such a secessionist state, together with economic costs of separation, should make the state economically viable. It should have some ability to produce goods and services that can be sold in competitive global markets, there should be a level of literacy and skills in the

population, the extent of infrastructure development, level of development of industrial and service sectors, geographical proximity to potential market, the degree of self-sufficiency with regard to food and energy supplies, and the ability or willingness to pursue policies conducive to sustained economic development. For an Afrikaner state, one of its main economic assets may be its highly skilled manpower, capable of managing a market-service oriented economy that could hold its own in the global market. These issues... (inaudible - coughing and sneezing)...geophysical disadvantages. A seventh and related plane is that the breaking away of an Afrikaner state could seriously and irreparably damage the economy of the rest of South Africa. If so, it is bound to undermine the international saleability of the Volkstaat idea. Champions of secession could therefore strengthen their case internationally if they pursue fractificial partition instead of the greedy partition that was apartheid, which incidentally unilaterally and arbitrarily reserved over 80% of South African territory for the white minority. This means limiting their claims to a relatively small part of South Africa, sacrificing vast tracts of land currently owned by Afrikaner farmers, or traditionally regarded as Afrikaans land, including the country's economic heartland in the Gauteng province. Creation of an Afrikaner state that could occupy say 6% of the entire country, which is more or less the size of the population, and largely confined to rural and sparsely populated areas would be presented as having a minimally destabilising economic effect on the rest of the country. An eighth factor that Volkstaat advocates have to consider is international suspicions about their democratic bona fides. This is, of course a consequence of the undemocratic

features of Afrikaner rule in the old South Africa. The concern is that Afrikaner sentiments could have much in common with what ??? has called "a new and unproductive strain of self-determination as manifested in much of the former Soviet Union. Obviously no-one knows for sure whether an Afrikaner state would be democratic or not. In the meantime, leaders of the Volkstaat movement can at best heed an earlier mentioned norm "when judging planes of self-determination foreigners should be guided by the conduct of its leaders, particularly on the issue of human rights". Ninthly, and finally, it has been said that the creation of a separate Afrikaner state could precipitate a new racial conflict. For blacks in the rest of South Africa, the argument goes, the existence of an Afrikaner Volkstaat would serve as a constant reminder of an unfinished struggle for liberation. The international community, it was noted earlier, places a high premium on the resolution qualities of any partition scheme. In trying to make a case that the proposed state would resolve rather than stimulate conflict, Afrikaner secessionists might argue that an ethnic homeland would remove a potential fifth column from South African society. To make such a claim credible, dissident Afrikaners might feel inclined to flex their economic and military muscle. Other arguments that Afrikaners could possibly advance are that their state would have no claims on more South African territory, to respect international boundaries and support mechanisms for resolving with South Africa properly. Notwithstanding the stumbling blocks mentioned, the international community is bound to accept the peacefully negotiated partitioning of South Africa, along the lines of the velvet divorce(???) between the Czechs and the Slovaks that would provide for an independent Afrikaner

homeland. However, the prospects for such an outcome presently seem to be remote due to a lack of domestic support on both sides and the problem of identifying an Afrikaner territory. Thus, in conclusion, if they were guided by current international sentiments, by the dictum that politics is the art of the possible, proponents of Afrikaner self-determination would today confine their aspirations to the achievement of cultural or territorial autonomy within South Africa. Afrikaners are still leading far too comfortable lives to be able to convince the international community of a need for secession or self-determination. ??? operates above all according to the law of change: today's good life may turn into a nightmare existence tomorrow. If so, Afrikaners may rally around the Volkstaat banner and previously ethical ??? may come to see full Afrikaner self-determination as eminently reasonable and even intelligent. Those Afrikaners and foreigners may then regard such a state as the open remedy for legitimate and uncontainable Afrikaner grievances in a black-ruled English-oriented South Africa. This possibility leaves South Africans and outsiders alike with the thorny question of immediate relevance: is preventive action required now to avoid unfulfilled Afrikaner aspirations, perhaps later tearing South Africa apart in abiding conflict? Thank you, Mr Chair.

Chairperson — Thank you, Professor Venter. We will adjourn for tea. Be back at half past eleven, then we come back for questioning to get some clarification on the two papers delivered and then thereafter Professor ??? who has arrived will address us, followed by Dr T. Maluwa. We adjourn for tea.

(adjourned for tea)

Chairperson — The two papers that were delivered. Mr Mahlangu.

Mr Mahlangu — Chairperson, I'm not too sure where can I direct this question to, but I think the Professor there could be in a position to assist me. I think Professor Raath... both of them, addressed the question of regional autonomy. They also addressed the question of freedom etc. My question is the problem that one has in mind if you talk about regional autonomy, that means you have to demarcate a certain region where you can say: this is where the area will be, this is where the people will settle. Is the Professor saying once you have demarcated that particular area you will be considering resettling people like in the olden days, moving people out of the area, throwing people into the area etc.? And how does that interfere with the freedom of the people?

Prof. Raath — Mr Chairman, may I emphasise that one of the important things I have concluded with is the fact that according to international law, there could be no infringement of human rights in the application of the principle of self-determination, even up to the point of regional autonomy and of secession. Now this means, of course, that there could be no possibility of the resettlement of people or the infringement of their human rights so the determining of borders is something which forms part of a process, let's say a negotiated process, in which adherence to all the instruments of human rights is incurred because if there should be any infringement then, of course, the recognition of such an autonomous unit would be ???. The international community would not accept the creation of such a unit were the rights of people to be infringed.

Prof. Venter — Sorry, could I just add to what Professor Raath has said. Indeed you are right, there is no specific Afrikaans homeland at the moment that is recognised as such internationally or even locally, it would mean that such a territory would have to be identified, Afrikaners would have to move there and the present people that are there would either have to be resettled or they would have to be absorbed into the Afrikaner state.

Chairperson — Dr Pahad and then Senator Groenewald.

Dr Pahad — Can I just make ??? Professor Venter has said there. You say some of the people would be absorbed into that part of the territory. Would you accept people of different ethnicity also to be members of the Volkstaat if they are being absorbed there or not?

Prof. Venter — Can I just say I am not a proponent of the Volkstaat idea. I am just quoting out the problems. Of course, existing Afrikaners would say in the new Afrikaner Volkstaat... Let's say there is a Volkstaat determined somewhere in the north-western Cape, Professor Boshoff's idea. There are existing Afrikaners there, they would obviously be absorbed, but should there be people of colour, Africans, so-called Coloured people, Griquas, Damaras and so on, that aren't accepted by the new Afrikaans rulers, their right to that would be protected from one another, so either they would have to be brought out and resettled or they would have to be absorbed, that is a dilemma for the Volkstaat idea.

Prof. Raath — This, of course is one of the features, pre-conditions for the recognition of any unit on the Volkstaat basis and that is

that the human rights of people, irrespective of their ethnic origin and history, language and religion, would have to be protected and there will have to be guarantees to that effect.

Dr Pahad

Listening to Professor Raath's contribution, of course Professor Raath quoted extensively from a lot of sources and since I am a constitutional lawyer they didn't mean anything to me, but I suppose one Professor's meat may be another one's poison – with respect to many of these issues. I don't think that there is anybody who denies that the what I call the national question, excepting that I would regard the national question in relation to the class question in South Africa to be a critical factor in the process of democracy... What concerns me in the end... I didn't know Professor Raath since the last time I met him, has now become so liberal that he seems to justify all of his arguments and what he thought was a liberal approach to this issue, but obviously liberalism is not the only ideological possibility to looking at problems and therefore it would seem to me difficult to pursue a specific line merely because it may be regarded as being liberal. That's the first one. The second thing that did concern me was with all of the examples that were given, either the United Nations Convention or indeed even now what's happening in relation to the European Union, is that if you take the last one in relation to the European Union it is so far fetched from what the South African problem is that it does seem to me quite irrelevant. The question about whether or not Britain will join the European Union in its fullness is rather different from what we are talking about in South Africa and I do just get a bit concerned that we are throwing so

many examples, that we actually lose sight of the fundamental issues facing us here in South Africa. The third element is that it is becoming quite common now here in this country to bandy the names of countries without then perhaps examining those countries in some depth. So if you take Yugoslavia, for example, quite clearly in terms of the Yugoslavian position, the different states which made up Yugoslavia before the break-up, certainly in my view, had a great deal more independence in economic and other matters than almost any other country in the world. But what you are not looking at is: what indeed was the influence of outside forces? What indeed was the influence of Germany's hurried recognition of some of the breakaway states in Yugoslavia? To what extent did that play a part in consolidating the break-up of Yugoslavia because you can't just talk as if these things were happening in some kind of vacuum and that there were not outside forces who, for their own reasons - whatever their reasons may be - played a part and indeed if you tried to see now in terms of, as I understand it, some kind of solution being found to Yugoslavia, it's also being complicated by what different interests, whether it's United States or Germany or France or Britain or indeed Russia perceive to have in that particular part of the world. So, if you are looking at a thing, you need to not just say that in Yugoslavia certain things happen. You certainly need to take into account the whole history of that country, its geographic location and the impact of outside forces upon them precisely because of its geographic location.

Prof. Raath

Mr Chairman, with your permission, I start with the first remark and that is the remark about liberalism. Have I

pointed out, Mr Chairman, most commentators of the Interim Constitution do refer to the liberal ideology as the basis of this Constitution and the point which I made was that if this is so, then such a liberal theory of state should be applied to the whole of the Constitution and to all its implications, and not merely accept the ideal of human rights, and on the other hand accepts the ideal of a fascist state, namely that the state is a model – let me say an idol – which cannot be changed and that all future aspirations are actually cut in such a state. I emphasise, once more, that you cannot accept on the one hand the idea of human rights and on the other hand the idea of fascism with an absolutistic state. Secondly, it may be so that many of these examples are far removed from one another in terms of practical consequences etc., but there are to a very large extent similarities in the principles involved. And the principle involved as far as the Union of Europe is concerned, is that of participation and if we look at the principle of participation, then I must say that it is evident over the last couple of years that escape clauses have come up as a possibility of safeguarding the participation of state and of peoples in the political process and that is as far as I took the example. Thirdly, the Yugoslavian position, let me say it in the first place, that the difference is this that there you have an ethnically, geographically located people, which, or course, we don't have in South Africa to the same extent; except for the fact that one must not look at existing borders being the product of human ingenuity particularly as far as South Africa is concerned. We have borders here as the result of colonisation and one should say that the whole question of majorities within geographical boundaries has to be viewed and has to be

evaluated against that background. This means that borders, being man made, can also be changed. And that is also one of the implications of the liberal theory of state and with that may I say, Mr Chairman, I have not said here in my presentation that I have accepted all the implications, all the philosophical ramifications of liberalism as we know it in strategic manifestations, but that if one accepts the liberal basis of the Constitution, then one should accept all the results also flowing from that, from a liberal position.

Chairperson — There are four more: Senator Groenewald, Ebrahim, Dr Ranchod and, if my memory serves me correctly, Carriem. But I'll end this question time here and I will give you more time during the panel discussions to carry on with the questions because we are running behind time with the other two speakers. OK? Can Professor Dugard and Dr Maluwa please come to the fore? En my twee gashere kan sommer hier sit, aan my regterkant.[1] A warm word of welcome to the two gentleman. Professor Dugard will address us on an international law perspective and Dr Maluwa said he will be very brief: he will give us a further comment on the issue of self-determination. Professor Dugard?

Prof. Dugard — Thank you, Mr Chairman. I hope I will not be too long either because many of the international law arguments has already been canvassed by the previous speakers. In fact, it is rather strange to be asked to speak about the international law perspective of self-determination because this is the principle perspective from which one has to view

---

[1] And my two hosts can just sit here, to the right of me.

the whole question of self-determination. After all, we are looking at self-determination within the context of a constitutional instrument, more particularly within the context of the true constitutional principles in Schedule 4, principles 12 and 34. This means that we have to look at the right to self-determination in the legal context and I think that most lawyers would agree that self-determination has been made fully developed in the context of public international law. The right to self-determination is one that is recognised by international law, but is nevertheless one that is still controversial. I am going to address what I regard as some of the most controversial issues internationally, but also the issues that concern us in South Africa most directly. So the questions I will be looking at are first of all, does the right of self-determination exist outside the context of decolonisation? Secondly, if it does, what the "self" is in the right to self-determination. Thirdly, what the content of the right is and in particular here I wish to examine whether the "self" in the right to self-determination has the right to secede and create a new state. Let us look briefly at whether the right exists outside the colonial context because there is still a debate about this in international law circuits. The Charter of the United Nations does recognise the right of self-determination in articles 1 and 55; the provisions are extremely vague and it is probably asking too much of them to create a legal right; certainly that was the early view taken after 1945. But then as the process of decolonisation gained momentum, the General Assembly adopted a number of resolutions in which they recognised this right, the most important one being the 1960 Resolution on the granting of independence to colonial countries and people which provided that all peoples have

the right to self-determination. By virtue of that right they predetermine their political status and freely pursue their economic, social and cultural development. And then 10 years later, in Resolution 2.6.2.5, the General Assembly endorsed this view. So the right to self-determination has been a major force behind the whole decolonisation process and is duly raised in that context. It came before the International Court of Justice in two cases: the 1971 Namibia opinion and in 1975 in the case involving Western Sahara. And in the Western Sahara case one of the judges said that this principle had become a customary rule of international law, that is a common law rule of international law, applicable to the decolonisation process. So for many the right to self-determination was seen to be inextricably linked with the whole process of decolonisation. But that view is gradually disappearing. The 1966 covenants on civil and political rights and economic and social rights both recognise the right to self-determination outside the colonial context. The African Charter on human and people's rights also recognises the right to self-determination and in 1991 you find the European Community was declaring guidelines to assist in its approach towards the dissolution of the Soviet Union and Yugoslavia, in which the European Community made it clear that they would be guided by the principle of self-determination. So I think today one can accept that this is a right which is recognised by international law and it is not confined to the colonial context or to the process of decolonisation. The second question that I wish to address concerns the people that are entitled to exercise this right. ??? no real agreement. Some ideas that have been advanced are, first of all, an ethnic group linked by common history or a culturally homogenous

group or a separate linguistic group. In 1981 a UN report prepared by the rapporteur ~~Aurelio Cretescu~~ ??? suggested that there were three components of this self. First of all he said that there should be a social entity presenting a clear identity with its own characteristics; secondly, that it should be linked with a particular territory and thirdly, that it should not be confused with ethnic, religious or linguistic minorities, which are protected by Article 27 of the International Covenant on Civil and Political Rights. This really creates a serious problem. Article 27, which I suspect was quoted to you this morning while I was attending Theme Committee 4's final meeting, provides that in states with ethnic, religious or linguistic minorities, persons belonging to such minorities shall not be denied the right to enjoy their own culture, to profess and practise their own religion or to use their own language. Essentially therefore what international law does is to distinguish between a people and a minority and, put crudely, I propose one can say that a people is a group within a colonial territory which is entitled to exercise the right to self-determination. But once that right to self-determination has been exercised, and the territory is now independent, if there is a people that did not constitute the majority within that territory, it becomes a minority entitled to a lesser degree of protection. So one has to bear in mind that international law does make this rather artificial distinction between a people which is entitled to exercise the right to external self-determination and a minority which is only entitled to certain protection in the territory. This is all linked to my next question, that is the content of the right. And there I would like to look at two questions; first of all, what is known as external and internal self-determination and then the question of

secession. In the context of decolonisation, external self-determination has been emphasised. That is the right of a people within a non-self-governing territory, within a colony, to exercise the right to self-determination by becoming an independent state or by forming an association with some one other state or by integrating with another state and in practice, in the focus of decolonisation in most instances external self-determination has led to the creation of new states. In one colonial context one can say that external self-determination means the right of a people to secession from independent states or the right to form an association with another state or the right to integration with an existing state. So that's external self-determination, the right of the people...

(end of tape 3)

Prof. Dugard

So that's external self-determination. The right of the people to in effect change the nature of the state. Opposed to that is internal self-determination, which concerns the right of a people, in effect the right of a minority within a state, to choose its own political status: to opt for federation or some form of consociationism or canton system or unitary state, whatever. The right to internal self-determination does not necessarily mean the right to self-government, but it does mean the right of the people, the minority, to choose their government freely, exercising all the rights that make a free choice possible. In other words, the people should have the necessary freedom of speech and association and assembly so that they can participate freely within that political system and they should have the right to live in that state free from oppression. In other words, the government must respect the right of the minority. Which brings me to the final question, that of secession. Although the resolutions of the United Nations do recognise the right to self-determination they also recognise the right of territorial integrity of states. So there is a tension between the right to self-determination and territorial integrity. One finds that in the 1960 declaration and the granting of independence to colonial countries and people and again in the 1970 resolution. One also finds that principle endorsed by Resolution..., I think it was the first resolution of the OAU in 1964, when the heads of state agreed that they would respect the borders existing on the achievement of national independence. So one could say that in Africa the notion of the nation state has been replaced by the concept

of the territorial state. The OAU and African states have invoked the principle of ???. This is an interesting principle which has its origin in the decolonisation of Latin America in the early 19th century. At that time, you will recall, the whole of Latin America, with the exception of Brazil, consisted of Spanish colonies that were roughly divided into administrative provinces and once the war of liberation had been won in South America the different provinces starting fighting amongst themselves in trying to expand their territory. In order to maintain stability in Latin America, the leaders of the different erstwhile Spanish colonies agreed that they would accept the Spanish colonial borders, in accordance with the principle of ???: as you possess now, so you shall possess in future. And that's a principle which has been adopted by the United Nations and, most particularly, by the Organisation of African Unity. It has also been endorsed by the International Court of Justice. But most important, if one looks at African history since 1960, one will see this commitment to the principle that self-determination is to be exercised within the framework of colonial boundaries, however artificial those colonial boundaries may be. So we see the refusal to permit Katanga to secede from the Congo. We see the refusal of the OAU to give support to Biafra when it attempted to secede from Nigeria. We see the present refusal of South Sudan to secede. And, of course, within the South African context we must bear in mind that there were many reasons advanced by the international community for their refusal to accept the TVBC State as states. One of the reasons advanced was that this would lead to a violation of the principle of territorial integrity, that the self-determination unit for South Africa is that contained within the 1910

borders of South Africa with self-determination to be exercised within the self-determination unit. So the TVBC states, which resulted in the fragmentation of this unit, were visited with the sanctions of non-recognition. One probably goes too far to say that international law prohibits secession. On the other hand, one cannot say that there is a right on the part of a state to secede in international law. Certainly there is a presumption against secession. The previous Secretary General of the United Nations, UThant, once said that United Nations had never recognised, and would never recognise the principle of secession. That was clearly an exaggeration, but many states, particularly African states, have adopted a strict anti-secession approach. Of course there are exceptions, the most recent one being the secession of Eritrea from Ethiopia. The presumption against secession raises the question: under what circumstances will secession be permitted? One suggestion that has been made by many international lawyers is that if one looks at the 1970 Resolution on principles of international law, there is some guidance because it states that the "dismemberment of the territory is not allowed in the case of a state possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour". So, in other words, it may be argued that if a state does not have a government representing the whole territory without distinction as to race, creed or colour, that peoples within that territory, minorities, may exercise the right to self-determination. And this does indicate the close link between self-determination and human rights. If a people are oppressed, if their human rights are violated, if they are not able to participate in the government of the day, then that

people is not obliged to (microphone moved) ...restrict the right of territorial integrity and may, in the final resort, exercise the right to self-determination. Very briefly, those are what I regard as the guiding principles of international law in respect of self-determination. Let me conclude by applying them to the South African context. First of all, one can say that the right to self-determination as it operates outside the colonial context is one that we in South Africa must take cognisance of. It is part of international law applicable to South Africa. Secondly, as far as the peoples are concerned, I would maintain that the state of South Africa does comprise many peoples; all are minorities in the sense that there is no dominant majority group in South Africa, unless one takes the view that the black community in South Africa is the majority group, but this is difficult to sustain in the light of the fact that probably the most, certainly the largest, group within the African community tends to emphasise its own separate identity – the Zulu nation. So, I think it is better to see South Africa as a society in which there is no clear majority group, we are a nation of minorities. Minorities do have a right to internal self-determination. This means three things. First of all they have the right to participate in free elections for government representatives of the country as a whole. The second right that they enjoy is the right to their own culture, their own religion and to use their own language. This is in accordance with Article 27 of the international covenant of civil and political rights. And thirdly, they have the right to enjoy basic human rights. Fourthly, the people's of South Africa at present have no right to external self-determination. They have no right to secede, for a number of reasons. First of all, the right to self-determination in

South Africa must prima facie be exercised within the colonial borders of 1910 – this in accordance with the principle of ??? and in accordance with the presumption against secession. There is no denial of the rights of any minority in South Africa, all minorities are permitted to participate in the political process. The Interim Constitution protects the political, cultural and human rights of minorities. So in these circumstances, it seems clear that there is no right on the part of any people within South Africa to secede. They are minorities that must seek to exercise their rights to self-determination internally, within South Africa. Of course you will say but what is the sanction as far as international law is concerned if a people in South Africa decides to go it alone and to secede? Well, the answer is that the international community will subject that secession to non-recognition. Interesting to bear in mind, that when United Nations first imposed the sanctions on Transkei in the mid 1970s, the response of the South African elite, at that stage the governing elite, was that this meant nothing. The government was rather upset by the fact that the TVBC states were not recognised, but this didn't, so it was argued, deprive them of their status. But, of course, as time went by it became more and more apparent that the TVBC states without any recognition from the international community, were not states. And I think that is really the memory that should guide South Africa in this respect, that any group that feels it would like to go it alone, it would like to secede completely, must accept that the likelihood of it being recognised as an separate state by the international community is very far-fetched and that it is more likely that it will simply subject itself to the kind of isolation that the TVBC encountered. Mr Chairman, I think

that's all that I can say on the subject. Obviously I am prepared to submit to interrogation at a later stage.

Chairperson — Thank you, Professor. We now call upon Dr Maluwa for his input.

Dr Maluwa — Thank you, Mr Chairman. I must apologise. I have a rather groggy voice, not – I must emphasise – as a result of shouting and so on over the rugby, but the result of a cold. When I was asked to participate in this workshop I was asked to say something about the African perspective relating to these arguments about self-determination and international law and I resisted that temptation to be brought in as a spokesperson on the African perspective. One because I don't think I am very ??? African perspective. ??? we are talking here about a general argument, general issues ??? of a certain universal ??? But again, I thought that even if I were to talk about what is called the African perspective, there wouldn't be much by way of ??? issues that my colleague, Professor du Plessis, would have covered. I did say to that Dr Herbst, once he engaged Professor Dugard, there's no point bringing me in, because I learned my international law at his feet and I don't want to sit here and disagree with him. I cannot understand about the timetable, or rather the programme, has ??? perspective so we have a regional perspective, an international perspective and an academic perspective. So I'll get back to the regional idea and talk about the African perspective. ??? have one ought to be talking about is human rights perspective. Now, what has come out of the discussions this morning, I think, is perhaps the obvious point that arguments about ??? international law are essentially based

on three fundamental approaches: the ??? called the people's approach or the idea that we are not focused on the definition of a self, when discussing self-determination; the territorial problems, the idea that we should focus on the territory entity which got a claim to self-determination is to be endured, but also much more ??? James has talked about what I call the human rights approach. But perhaps we ought to locate these arguments in a wider family about human rights and dispense with the people's approach and the ??? and I should briefly explain why and in doing that I shall go back to what I usually call the African perspective. The problem, of course, with the people's approach or the business of trying to identify the people who are entitled to self-determination, whether the Afrikaner community in the context of South Africa or the Zulu nation as people like to say in other parts of South Africa, is that we end up using paradigms that in some cases are really invented paradigms. Because what we haven't talked about here, in this argument, is the whole problem about the fresher??? construction of ethnicity, the fresher construction of race. It is the ideological invention of this category that then we use in order to advance our argument for self-determination. None of the international instruments that the three previous speakers have referred to, define for us, other than just saying that a group may be a group that has a common historical tradition, racial or ethnic identity, culture etc. there is no clear definition about just who such groups are. If we take the Afrikaner community, for example, we might say that there is the obvious characteristic of a shared language so ??? inspiration. We might also argue perhaps that there is the issue of cultural homogeneity. Some people may even dispute that. And, of course, the idea that they

belong to a certain race that we call the white race, but even these are not exactly biological concepts, these are for sure biological, perhaps also historical, constructions of race and ethnicity. There are a whole series of people, the so-called brown Afrikaner who also can lay claim to a certain cultural ??? with Afrikaners perhaps, but certainly the linguistics are characteristic and so on. And that immediately brings up the problem that some speakers actually did begin to point out. You get a particular territorial entity demarcated in neutral Africa for the Volkstaat. Just who exactly will be entitled to claim residence, citizenship or any other rights in that sort of entity? I just want to say that perhaps in checking about these arguments, about the definition of a "self" in international law, international lawyers and constitutional lawyers, we haven't really focused on the argument that in fact ethnicity, tribe and race present a paradigm and we must try to come to terms with just what exactly this sort of thing is. Reference was made to Biafra in Nigeria. Now, as you all know, the Biafran ??? was fought on the basis that a particular group of people. The Ibo-speaking people of western Nigeria wanted to exercise a claim to self-determination on the general argument that the greater ???, the greater Nigerian state did not satisfactorily guarantee their equal rights, the federation of Nigeria, and so on and so forth. But what is not often brought up is that until the Nigerian civil war broke out in 1967, the question of ethnicity in the Nigerian context in terms of people demanding autonomy had not really arisen. In fact, it was partly because of that brutal and tragic war from 1957-1970, that what we now know as the ??? of the Ibo nation or the Ibo group, the Ibo-speaking group came out. Now there are also socio-historical reasons, there

are also socio-??? reasons that played a part in the Nigerian civil war. It is not even a good example of an ethnic group elsewhere in black Africa demanding a separate nation on the basis of this sort of consideration. Mention has been made of Katanga in what is now Zaire. Again it has never been clear to me who exactly the ??? was in Katanga, other than to say that people, the ??? speaking people of southern Zaire and the southern parts of Zambia, there was no obvious distinction in terms of race perhaps, but also in terms of just linguistic considerations or cultural considerations between the people in that ??? at the time and the rest of Zaire. Other than that, these are people who were located in certain territorial units, demarcated during the colonial administration etc. Mention has been made of Sudan. Now Sudan, of course, part of the problem there is the tension between the so-called Arab north and the so-called Christian non-Arabic south of Sudan. Immediately there what we see is not simply a question of cultural perhaps also racial identity, but the question of religion. And yet even in the Sudan the question of secession has not really been on the forefront. The various organisations that have fought for the past twenty years for self-determination have in fact by and large tried to fight on the basis that there needs to be a change in their run in the political dispensation across the entire Sudan, not simply a question of breaking away and forming a province of ethnicity. The examples from the African continent do not really give us much by way of argument ??? The so-called successful example of secession that has been mentioned this morning is Eritrea, but again in Eritrea we need to look at the historical context. Eritrea used to be a separate territorial entity, a separate colony of people. The rest of that

territory, Ethiopia, was never colonised by anyone. In 1952 Italy relinquished control after the role of the ???. The arrangement was then entered into whereby Eritrea and Ethiopia entered into a federation, but this a federation that was supposed to ??? regional autonomy of that area of Eritrea. The late emperor Haile Selassie ??? decided to incorporate Eritrea into Ethiopia and the ??? state. So for 30 years, from 1964 until 1994 part of the reason for the struggle by Eritrea ??? but various federation movements in Eritrea, not so much a question of demanding secession, but simply to reclaim what had been an independent, or rather separate political entity that was called Eritrea. Because if it hadn't been for this unilateral annexation by Ethiopia, ??? like every other African colony all the time who were being led to independence have an extended ???. So I think we ought to be careful here, Professors Raath and Dugard here, did make reference to Eritrea, but we ought to bear in mind... And also we ought to bear in mind that the ??? whatever the other arguments are, the so-called cessation of Eritrea from Ethiopia ??? after the fall of ??? when the new regime came to power they went about organising a confrontation and through that confrontation, democratic confrontation such as it was, the people of Eritrea decided vis-à-vis ??? by the rest of Ethiopia to go for independent status. So, I think, there is that particular context. And in that regard I must also mention rhetoric that was raised by Mr Pahaad about the references that ??? what is happening in Yugoslavia, what is happening in the Soviet Union and so on and so forth. I don't think that any of us here can pretend that the ??? or the ??? have any resemblance to the issue that the proponents of a Volkstaat are trying to project. Those references must be looked at in

that special context. If you ??? the examples of the former Soviet Union and Yugoslavia, don't tell us much. Because even in the case that has been made, there is still the question of minorities, so we go back to that problem about the social construction of minority groups and so on, and it hasn't been clarified to me, at any rate, what Bosnia Herzigovina or Serbia and so on are going to do with the minority groups within their own territory, which suggests to me that we ought to look at the question of how international law deals with that question a little differently. People talk about territorial separation, secession, in order to satisfy demands for minority group autonomy as if that is the only solution. ??? which should be to protect the minority groups within territorial unions. In other words, there are two approaches. We can talk about the application of that aspect of international human rights laws which focuses on guarantees for minority protection within given states, ??? jumping to the conclusion that to have those minority groups must go for territorial secession in order to be seen to be fully protected under the umbrella of international law, and so on. My own opposition to the argument about secession is that if we adopt what I call a human rights approach to the question of self-determination, that isn't just a people's approach for territorial groups. If we adopt an approach which looks at the rights of a particular nation simply as one or a whole chain of rights that must tie in together, it is human rights too. We should be able to arrive at a mechanism which satisfies a certain element, a certain degree of autonomy, a certain degree of ??? which need not necessarily involve territorial secession, especially where that demand for territorial secession is generally just based on linguistic ???

and not much else. I am going to ask those proponents where in the world an example of secession???, the argument for ??? purely in the context of linguistic homogeneity and perhaps also cultural homogeneity, have been successfully achieved in terms of secession in a territorial sort of context. I could give examples perhaps of places where ??? autonomy leads to self-determination, you might want to call it, but I ??? measures that allow people to enjoy their own range of human rights, religious, cultural, linguistic and other rights within existing entities. ??? and you might say there is nothing particularly exciting, except that we live in a world in which we are governed by international law, but international law does not operate in the outside, international law is also a pragmatic attempt to order the whole community, to order the international community, to order our national communities in which we operate. There are, at the last count, something in the region of 5 000 so-called minority groups in the world, against something like 200 independent sovereign states. If the lot of arguments about self-determination appear to be in the context of minority self-determination or to lead us into ??? one shudders as to what would happen in terms of the stability, in terms of the continuity of the international legal scheme in which we operate. Reference was made by Professor Dugard and various speakers to ??? the ever pragmatic approach that the Organisation of African Unity has taken for the past fifty years to maintain the territorial boundaries that we inherited ??? a conceptual approach of ??? It is simply a pragmatic approach in the sense that if every other country decided to accede to these sorts of demands, we would have problems on our hands. That is to be seen in the historical content in which we operate on

this continent ??? the African perspective. The evolution of self-determination in Europe was a revolution which succeeded on the basis partly over stress being created to conform to what were ??? Even that is a historical lie because if you take ??? Germany, ??? this ??? for the German identity ??? and the territorial demarcation of what we called Germany over the years has not always conformed to that. Some of the problems that we have in the former Yugoslavia are historical ??? But, in any event, in Africa we have ??? because of the history of colonialism ??? of territorial entities like the Mkhetse ??? so-called ethnic and other identities and our attempts have been to try and fashion some sense of a ??? colonial world in order to retain the borders that we have. Not because we particularly agree with them but because pragmatism requires that we do so. And I think that it is in this context that debate about autonomy for the Zulu kingdom, for example, something that we haven't mentioned yet, but it is also on the agenda, argument about Afrikaner Volkstaat etc. etc. ... it is in that context that we must understand everything. Perhaps, just to conclude, Mr Chairman, if we do adopt an approach to self-determination that takes us away from these limited ??? and focus on the human rights problems, we might then begin to make sense of some of these invented social complexions about ethnicity, ??? and the national question. Thank you very much.

Chairperson — Thank you, Doctor. As I indicated earlier, ??? wanted to ask questions and I am going to give them the opportunity now to do so. I will allow the two professors to take seats here so that they're near a microphone. Senator Groenewald, you first.

Sen. Groenewald Chairperson, I would like to ask a question of our last two speakers, Dr Maluwa and Professor Dugard. I think we have looked at the two extremes. There is complete secession on the one side and then on the other side we have complete a melting pot principle, based purely on human rights. Now, Professor, to give an example of territorial division purely based on language is Belgium, for example, divided into three very distinct geographic areas and the only criteria is language. We can go a bit further and look at a country like Switzerland which ??? it also uses ??? Now, the question I would like to ask you: isn't there something in between these two. In other words, between secession on the one side where you break up a certain geographical area using the same United Nations criteria as Professor Dugard mentioned, and secondly, when you look at one geographical entity but within that geographical entity, to make the same kind of provision for different peoples as in the context of Belgium or Switzerland.

Chairperson Professor?

Dr Maluwa I would say in a sense that ??? I mean, if we have any lesson to draw from ??? for example, it is that it should be possible to provide within a constitutional framework for the enjoyment of certain levels of autonomy based on the ??? ...what I was ??? against was the quick argument, the quick connections that people make between demands for minority autonomy and territorial suppression because nobody has ever suggested, least of all the various parties in ???, that ??? to secure for themselves secession from the current state. Switzerland again provides that, but then again Switzerland is ??? to something like four centuries for

dissolution of a free state from ??? and there are, of course, obvious historical ??? So all of these perhaps they can provide that type of mainstream, halfway house approach. ??? in the context of ??? in which developed minorities are guaranteed within the constitutional scheme of things that sort of right. In ??? where an attempt has been made to create an independent ??? state purely on the basis of shared language ??? French-speaking Canadians in ??? have and there is another ??? but the issue is not really one of secession of the ??? of Canada, but past constitutional guarantees can be further extracted within the Canadian territorial policy for ???

Chairperson — Professor Dugard???

Prof. Dugard??? — Just here to comment... Of course I think that what we are looking for here in the context of the Volkstaat is something between secession and what you call the melting pot experience, by which they really mean the extreme unitary state and I think that one had to look for something in between. I don't think that Belgium is a very happy example because, as you will know, in Belgium there are often divisions between suburbs. If one goes backwards, for instance, you never quite know whether you are in a Flemish or in a French suburb at any particular point at the time and I would like to think that, that would not be the case in South Africa and, of course, the difficulty at present is that there is no clear area for a Volkstaat. That's an obvious matter for negotiation, but I would hope that you would seek to avoid the Belgium proliferation of separate areas.

Chairperson Mr Ebrahim?

Mr Ebrahim Thank you, Mr Chairman. Mr Chairman, I would like to raise one particular issue and that is the question of the examples that have been given here in trying to justify the establishment of a Volkstaat. There have been liberal examples I would say to a large degree. We have had the question of Ethiopia and Eritrea as one of them and I want to agree with Mr Maluwa that the whole historical context of the Ethiopian/Eritrea issue should be looked at because there is also the other issue in Ethiopia of ??? but that was not tackled in the same way as the Eritrean issue was tackled because of the historical context and I want to go further to say it was not the Eritrean and the Ethiopian and the Haile Sellasie's that brought about Ethiopia, because in fact it was the Americans and the Ethiopians who decided that Eritrea should be incorporated on an autonomous basis and after that it was correct that Ethiopia was... Emperor Haile Selassie decided then to unilaterally bring in the process. So the issue of ??? wasn't sold in the same way. There it was a question of secession. But in the question of Eritrea the right was self-determination so that's the difference that we must understand very clearly in that regard. There is also the issue of Bangladesh that was raised here. If you talk about Bangladesh, you talk about the division from Pakistan, but Bangladesh itself was divided from Bengal. East Pakistan and that division still remains so what are we talking about because the people in Bangladesh and the people in West Bengal in India speak the same language, have the same culture, everything is the same, but because of the historical decolonisation process we have brought about a religious context in which

Bangladesh or East Pakistan was created and that's a different situation altogether, but as I am saying now the people, language, and culture and everything are still divided in that context. Then there has been the issue of Malaysia and Singapore that has been raised here. Now, if you look at Malaysia, you will find they have a Malaysian language, but ethnically they are composed of Malay, Chinese and people of Indian origin. If you take Singapore, it is the same thing. It is made up of Chinese, people of Indian origin as well as people of Malay origin. The whole question there was not one of religion, it was not one of ethnicity, it was not one of language either. That had to do also with the decolonisation process that had taken place there and the fight between Indonesia at the time and the creation of this what they call Malaysian Federation that was being created at the time. So I think one has to look at that in that context. The last one I want to find out that has been mentioned here quite often, is the question of Yugoslavia. We must understand that there was no such thing as a Yugoslav state before the end of the Second World War so it came about in the post-Second World War period where you had different states that were joined together to form the federation. One of those entities in Yugoslavia at that time was Kosova??? which was an autonomous state in that context. It was not part of the federal state and had autonomous status there. Nothing has been said about Kosova??? now because we got the ??? I mean if anybody had the right of self-determination, it would be those people in Kosova, but now what we are seeing there is an attempt to either expand the Serbian part of Yugoslavia that was there or an attempt to re-establish; to a large degree it has been re-established. So what I am trying to say here, Mr

Chairman, is that I don't think we should just throw in all these examples just loosely, without the proper historical context in which these were brought about. I thank you, Mr Chair.

Chairperson — You didn't actually address a question, you ... Dr Ranchod?

Dr Ranchod — Thank you, Mr Chair. If I understood Professor Raath correctly, the new South Africa should be a federal state in order to accommodate the idea of a Volkstaat. My reading of the present Constitution is that we are not really a classic federal state and I am not sure whether the Final Constitution will be markedly different to the Interim Constitution, whether we will in fact move towards giving greater powers to the provinces. My second question relates to his statement that there should be respect for fundamental human rights and that no persons will be forcibly removed from the Volkstaat. The question then arises whether the right to freedom of movement will be respected because if the notion is to provide a heimat for a particular racial, cultural group, how is one going to deal with the free movement of South Africans into whatever area is defined as the Volkstaat? I think, underlying the entire discussion, is the problem that we have a minority community that fears the future, fears being marginalised and I would like to hear more about mechanisms to deal with this. It seems as if the fundamental rights that are recognised under our Constitution appear inadequate to meet the fears of this community. The question is: what other

Chairman, is that I don't think we should just throw in all these examples just loosely, without the proper historical context in which these were brought about. I thank you, Mr Chair.

Chairperson — You didn't actually address a question, you ... Dr Ranchod?

Dr Ranchod — Thank you, Mr Chair. If I understood Professor Raath correctly, the new South Africa should be a federal state in order to accommodate the idea of a Volkstaat. My reading of the present Constitution is that we are not really a classic federal state and I am not sure whether the Final Constitution will be markedly different to the Interim Constitution, whether we will in fact move towards giving greater powers to the provinces. My second question relates to his statement that there should be respect for fundamental human rights and that no persons will be forcibly removed from the Volkstaat. The question then arises whether the right to freedom of movement will be respected because if the notion is to provide a heimat for a particular racial, cultural group, how is one going to deal with the free movement of South Africans into whatever area is defined as the Volkstaat? I think, underlying the entire discussion, is the problem that we have a minority community that fears the future, fears being marginalised and I would like to hear more about mechanisms to deal with this. It seems as if the fundamental rights that are recognised under our Constitution appear inadequate to meet the fears of this community. The question is: what other mechanisms could be put in place to ensure minority communities are not marginalised. Thank you.

Chairperson Professor Raath.

Prof. Raath Mr Chairman, may I start my answer with the

the burden and the difficult issues of this entire process and between Theme Committee 2 and 3 reside the most important issues and perhaps the most contentious and difficult issues. Having regard to that it may perhaps at this early stage of the process perhaps not be possible to completely finalise draft formulations which would be agreed to by all parties, because of the divergence of the views. It may very well be helpful to agree to merely the tabling of the report and when the process unfolds further then to try and unlock some of the more contentious and controversial issues. If that is in agreement, then it will have some impact and implication in terms of how the Management Committee processes and forwards matters to the Constitutional Committee. Essentially I look for guidance from your Theme Committee as to how you people intend to deal with the matter. Thank you.

Chairperson Dr Pahaad(???)

Dr Pahaad Mr Chair, first of all, from our side I would like to offer our congratulations to South Africa for winning the World Cup. It's just we want some clarity as to how the Management Committee intends to proceed. I really don't think it would be very useful if later on the Management Committee sends it back to the Theme Committee as they did with the one Public Administration, if you remember? Does it come back to the Theme Committee? We've had two meetings in the Constitutional Committee on this matter. So, I have no problem that we send it like this to the Constitutional Committee as long as there is a clear understanding that the Management Committee has a problem insofar as problems with controversial issues would have to be resolved by the

Dr Ranchod — Chairperson, I would like to know whether members of this Theme Committee who are not serving on the Constitutional Committee, whether they could attend the deliberations and make an input because I am not sure how many members of the Theme Committee actually serve on the Constitutional Committee and it would be valuable for those of us who have an interest to be present when this is deliberated.

Chairperson — Senator Groenewald and then Dr Pahaad.

Sen. Groenewald — Chairman, I believe, first of all, that provision has been made for people who have in actual fact in a particular Theme Committee worked with the issue to sit in with the representative. The number of representatives as indicated in the Constitution, in the draft paper which we have, will have speaking rights, the others will be there in an advisory capacity only. So, only the members indicated here, those numbers – and they could also alter – would be present. So, your answer I think, Dr Ranchod, is "yes". But I also say that the idea is that the Theme Committee should put all the information on the table and when a matter is not contentious most probably in the Constitution Committee that would be referred to the drafters, they'll continue and draft the particular tests for the Constitutional Assembly. But when there is contention, it will go to the ad hoc committee as indicated here. When there are gaps in information, certainly it can be referred back to the Theme Committee and said: You haven't done this or that or that. Or one Theme Committee could even refer it to another Theme Committee. That has happened. The great advantage that this ad hoc committee will have is it will

Prof. Steytler — Mr Chairman, I think that we should just explain what Professor just said about the Final Constitution that it could be interpreted in different ways otherwise I'm not going to bind me to this point number 2, that's for sure.

Chairman — Dr Pahaad?

Dr Pahaad — Professor Ranchod has raised a separate problem. Your Constitution is the supreme law of the land, of the entire country. No matter where. And therefore ??? normal, no piece of legislation, no other constitution can be inconsistent with that because that's your supreme law. The question of who interprets it in the end, that's why you've got a Constitutional Court. It is then the power of the Constitutional Court to then decide whether or not a particular element is inconsistent with the fundamental principles, aims and objectives of the new Constitution. So, I really don't think that that's a problem. I think it is quite right to say it. Even if you didn't say so, that is still a fact, so you can't run from that particular fact that it's the Constitution of the country that is the supreme law. Now I think what we need to do is we need to leave it as it is because it isn't wrong in the way that it is put, but there is a clear understanding that it can't be a poitical party's interpretation as to whether or not a particular province's Constitution is in conflict with the Constitution of the country. If they think it is in conflict, they would have to go to the Constitutional Court. So it's really only the Constitutional Court that will make the final decision if such an issue is to arise so I think that's quite clear; that, that would have to be the situation. There is no other way out of this.

Mr Ackerman

Sorry, Mr Chairman, my voice is a bit hoarse after this meeting. If the working ??? believe there should be a Government of National Unity and the ??? constitutions say there shouldn't be a sharing of power at the executive level, then certainly this is inconsistent with the Final Constitution. My problem is that because it is a ??? supreme law of the country, but within the Constitution, you write certain things in and the principles of the Constitution are very important. With the Constitutional Court the principles will count. And I just say if you say the "Final Constitution", I will have problems with it. If you say the "principles of the Constitution" then I wouldn't have any problem with it, but if you say "Final Constitution" and you give me the point that it can be interpreted in different ways, you admit that point. I just wanted this terminology more a "beskikte ding"[1] than it is here.

Dr Pahad

I don't understand what Mr Ackerman's problem is. Either your party wants it that way or it doesn't. You want a Constitutional state or you don't! You can't pick and choose and say you want a Constitutional state, but there might be one or two elements of the Constitutional state you don't like. Now, I am trying to get Mr Ackerman to understand either you say that the Constitution is the supreme law of the land and anything else that happens whether it's... Let me finish. So when you say it's not inconsistent, it means it can't be inconsistent. If it is in contradiction to the Constitution, then it is that Constitution that has to be supreme. The question of the interpretation is another matter, the question of a political arrangement – and I doubt

---

[1] something which has been decided upon and agreed

whether Hernus Kriel wants to share power with anybody anyway at this moment in time, I am not sure that he will remain in power – is a separate matter. We haven't reserved that issue. If the National Party thinks that they want to make that a contentious issue, obviously we couldn't object to that, but then it should be made quite clear when the technical experts write their report that the National Party says that the statement of Provincial Constitutions will not be consistent with the Final Constitution is made contentious by the National Party, and then we can proceed. I don't think it's going to help us a great deal to proceed with this discussion.

Mr Ackerman — Mr Chairman, Dr Pahaad is turning my words around now. I just want to clearly spell out and recommend our position, what I've just said, that if Final Constitution can be interpreted in different ways as Professor Steytler just said and we also feel that there should be in the wording "the principles of the Constitution".

Chairperson — Dr Ranchod.

Dr Ranchod — The issues are removing the word "Constitution" that meets... Dr Pahaad is not listening. We could neatly drop the word "Final" but whatever Constitution is adopted by a province should not be inconsistent with the Constitution, then we don't have a problem.

Chairperson — Professor Steytler?

Prof. Steytler — Mr Chair, I think there are two issues. The first one is any province at the moment has got the power to draft a

Prof. Steytler — Mr Chairman, I think a very important issue again is something which we didn't address, who determines numbers in their body, who determines the actual numbers that may be according to a province, and what happens if there are changes in the demographics of a province? Are there changes? So one may want to add something, for example, that the National Assembly will determine the size of province's legislatives or whatever. There will be fluidity in demographics, how do you reflect that? Changes that may take place.

Chairperson — Dr Pahad.

Dr Pahad — I would have thought it is not a matter which should detain us with regard to the drafting of the Constitution. No constitution is going to lay down the exact demarcation of boundaries in respect of the demographics because these change, and that would be a matter for legislation. Obviously when the demography changes to the extent that it no longer represents what the actual composition of the population is, then obviously it would have to be changed to take that into account because the system of representation is designed in such a way that it will represent the amount of people you have. So you couldn't really have Northern Cape have the same level of representation as Kwazulu-Natal or Gauteng for matter. So I don't think it's a matter that we should deal with, it's a matter that will be decided upon by legislation, it's not a matter that goes into the Constitution in two tics. I really believe that we'll solve the problem when we get to it in terms of change. That's what happens in every country. No country has static proclamations and how and in what way

elections will be conducted still needs to be worked out. There is an independent electoral commission that would be set up which would then have the powers to be able to (inaudible, somebody coughing).

Chairperson — Senator Groenewald.

Sen. Groenewald — Chairperson, if it's a matter of determining this by some law or other, then we must say it. In other words, in our Constitution we must then say how the size... that the cabinet will decide, or the electoral commission or whatever the case may be. That's the first point I would like to make. Secondly, I think the size of provincial legislatures we also mentioned very specifically would be determined by the functions which provinces have. And here we also find that certain provinces will have more functions than other provinces so I think we need to revisit the size of provincial legislatures and we might just well just add "in the light of demographic functions" or something similar.

Chairperson — Any objections to that addition to comment? No objection, then we include that, Professor Steytler. On page 2, agreed? Thank you. Page 4? Professor Steytler?

Prof. Steytler — Chairman, much the same, it's just those two really technical matters about the polling date whether it can be harmonised, I don't think it can be harmonised, but at any case those are to be re-visited. The other matter is membership of ordinary residents in provinces, which is a contentious issue.

Chairperson — Comments or questions? Dr Pahlad.

Dr Pahad — I don't know whether it's possible to put it... You see, in terms of many of the qualifications we would have to be consistent and the same as for National Assembly, I mean that you are a South African citizen, that you are of a certain age, and all of those things, that you are not a prisoner. Now members automatically resident in the province, we might find that... I don't know, because the ANC hasn't itself got a worked out position on this thing, we're waiting to hear from other parties too, but you might find that it's possible to visualise that there could be a difference in terms of the qualifications for the National Assembly where you may not have a limiting provision which talks about "ordinarily resident", but you might say that, that should apply to a provincial legislature. What I am asking is that we should be a little bit more clear here; that it is possible that you could have some elements of a qualification which would apply to the provincial legislature which may not necessarily apply to the National Assembly. So I am just saying that it should be put in a way that this matter is still left open for us to discuss. If you look at the present Constitution, you will see that there is a difference in terms of "ordinarily resident" that it applies to people who appear on regional lists, but not people who appear on other lists. I am just saying that it is not just a question of agreement of whether this requirement is necessary, but that it is possible that you could have two different requirements: one for provincial legislatures, which would not necessarily apply to the National Assembly.

Chairperson — Senator Groenewald and then Senator Ackerman.

Sen. Groenewald — Chairman, could we just say, as we did in the case of the

Senate, instead of saying "members ordinarily resident in a province" also rather use the terminology "in the provinces in which they are registered" then it would also have a better result?

??? Yes, Mr Chairman, I thought that we had agreement on this issue, that we have said that the registered voters ??? ordinary citizen. I just asked Professor Steytler now and he also said that, that was true: in previous discussions we decided on the "registered voter" to get out of the problem.

Sen. Groenewald Could I just explain to Dr Pahaad, the argument was that with that kind of stipulation it would mean that all Members of Parliament would have to vote in the Western Province because we are resident here for much longer times than let's say in the provinces where we come from. That was the main problem.

Dr Pahaad No, no, sorry. Mr Chairman, I don't think we should waste time. All I was asking was that there should be clarity. You cannot say now that you are going to put in the Constitution to give the ANC somebody who is registered as a voter in Gauteng and the ANC wishes to put that person on a list for some other place. I mean, we don't know what the electoral system is going to look like and I am just saying that we should leave this matter open. It is not a closed matter because it depends on the electoral system. It may help if we have a possible distinction between what is possible for provincial legislature as opposed to the National Assembly. So we need to leave that open because we cannot decide now that even if we have an electoral system which has constituencies that the

people's of such territories. The inclusion of similar formulations in international instruments has led to the following conclusion by an internationally respected expert on international law, Joeran ???. He says: "The upshot of the matter is that the right of self-determination is accorded not only to peoples under colonial domination in Africa and Asia, but also to peoples living within independent Afro-Asian nations as well as to those existing in Europe, for instance, in Scotland and the UK and in America. Just as people under colonial domination are entitled to create a new state where none existed before, so can a people living within the framework of an extant state surcease from it and establish its own independent country. This is precisely what was achieved by the Bengalis of East Pakistan when they created the new state of Bangladesh. This too is what was unsuccessfully attempted by the Ibo's?? of East Nigeria when they tried to create a new state of Biafra." From an international perspective, one may say that the principle of self-determination of ethnic groups within determinable geographical boundaries is widely accepted. More and more people are reading Jean Jacques Rossouw's admonition to political purists not to pretend that state's have "a stability of which human conditions do not permit". This is especially true of a country like South Africa with boundaries originally drawn by colonial conquest not sensitive enough for historical ethnic claims as largely taken over in Schedule 1, part 1 of the Interim Constitution. Thirdly, the Vienna Declaration of 20 June 1993 continues the international commitment for the maintenance of peace by recognising the principle of self-determination. In part 2, paragraph ??? the right of people's to self-determination is expressed as follows: "All peoples have the right to self-

whole people belonging to the territory, without distinction as to race, creed or colour, may appeal to this general interest in order to limit the exercise of the right to self-determination in this manner. A government therefore which does not represent the whole population, will not have sufficient grounds to limit the right of self-determination on the basis that it impairs the state's territorial integrity. We should, however, I may add, guard against the positivistic and narrow interpretation of these stipulations. A well-known writer in the field of self-determination, ~~Kovan???~~ ... very aptly describes the influence at stake in reconciling national interest with the recognition of the principle of self-determination. He says the truth seems to be that if we take the right of sovereignty on the one hand and the right of secession, and may I add, Mr Chairman, in the sense of immediate and drastic partition of country on the other, as absolute rights, no solution is possible. Further if we build only on sovereignty, we rule out any thought of self-determination and erect a principle of tyranny without measure and without end and if we confine ourselves to self-determination, a form of secession, we introduce a principle of hopeless anarchy into the social world. The approach of ??? in his well-known book "Evolution of the right of self-determination" seems the generally acceptable one, namely that the right of self-determination, including secession, should be recognised and applied insofar as international peace, harmony and stability is promoted thereby. For purposes of this presentation, I take secession to mean the withdrawal from an existing state and its central government, of part of the state, the withdrawing part consisting of citizens and the territory they occupy. We may summarise the foregoing by saying that apart from the

reality which could destabilise the constitutional dispensation in such countries. In the Soviet Union, for example, the constitution in Section 72 made provision for the fact that "each Union Republic shall retain the right freely to secede from the USSR". In the constitution of Yugoslavia, a right to full autonomy and self-determination was provided for in the following terms: "The nations of Yugoslavia, proceeding on the right of every nation to self-determination including the right to secession." These formulations clearly illustrate the need for the recognition of full political autonomy of ethnic groups to the point of secession under particular circumstances and conditions because enough misery has been caused in the past by accepting that the world consisted of states eternally fixed in numbers and borders. It is rather as if academics writing on moral issues arising out of knowledge of the family, do not even mention, let alone discuss, the phenomenon of divorce. Such a right of full political autonomy and secession is also contained in the Dutch and English common law of our country. Hugo ~~Grousias??~~? in his authoritative work "???of parties" provided for such a right of secession on the basis that the right of a part of a population to protect itself is stronger than the right of the nation over the part. The part availing itself of secession, according to ~~Grousias???~~? employs the right which it had before entering the association. The same line of thought is also to be found in his other major work "~~Operajeticus"???~~, translated and published under the name of ??? in 1622. On the same grounds he recognised the sovereignty of indigenous peoples on the grounds ??? (Latin). According to Kovan, this principle has also been applied in English law since the time of the War of Independence. It should firstly

the same freedom. Liberalism means that the state should not be an absolutistic idol which traps the aspirations of generations to come. Liberalism, Mr Chairman, means that people should be given the opportunity of settling in cultural communities and that such territorially concentrated groups within a state should be permitted to secede if they want to and if it is morally and practically possible. Norms of legitimacy for such claims would then reasonably involve that secession would not be allowed under the following circumstances:

1. The group which wishes to secede is not sufficiently large to resume the basic responsibilities of an independent state.
2. It is not prepared to permit subgroups within itself to secede although such a cession is morally and practically possible.
3. It wishes to exploit or oppress a subgroup within itself with cannot secede in turn because of territorial dispersal or other reasons.
4. It occupies an area not on the borders of existing state so that secession would create an enclave.
5. It occupies an area which is culturally, economically or militarily essential to the existing state.
6. It occupies an area which has a disproportionately high share of economic resources of the existing state.

Liberalism means restructuring and redrawing man-made boundaries in a quest for accommodating all the legitimate aspirations in the new South Africa. I thank you.

Chairperson — Thank you, Professor ~~Raadt~~ Raath. Professor Venter is the next speaker; he will address us on an international political perspective. After he has delivered his paper, we will

is not prepared to treat its minorities with respect and give them the same for matters affecting them, there is reason to doubt its commitment to the strengthening of democracy. Some tactical problems though. There are nonetheless a number of tactical implications of possible Afrikaner autonomy that need careful consideration in the constitutional debate. The first is migration into an Afrikaner Volkstaat. If the free settlement of people were to be allowed in the Afrikaner Volkstaat, the Afrikaans language is bound to come under much pressure there as in the rest of South Africa and Afrikaners' ingrained fear of being swamped by strangers will not have been allayed. Perhaps the advocates of Afrikaner autonomy could investigate the situation of French Canadians and indigenous communities in the United States, Canada and Australia, all of them hold some rights to regulate external integration into their areas. The second would be the right to secession were Afrikaners to be given reasonable autonomy. The second question is whether it would be coupled with the right to secession in future. In this regard reference can be made to Buchanan's proposed hurdles to make secession difficult but not impossible and Professor ~~Raadt~~ Raath has referred to that. Ethiopia is a state, for instance, that allows the secession of its component regions. Last December the state legislator approved such a right to regions in which the majority of the population voted for separation. Previously, of course, the constitution of the Soviet Union contained a worthless right to secession of its republic. Then there are international relations. Also in the case of territorial autonomy set in the third place thereof whether the South African Constitution will acknowledge the right of regions to engage in a meaningful level of international relations.

The prayer note, known as the "localisation of foreign policy", has in recent years increasingly manifested itself in the federal states of the United States, Canada, Belgium, Switzerland, Australia and even the case of the former Yugoslavia's constituent units. It means that the subnational entities, the provinces, for instance, can establish their own foreign relations. On the same point reference can also be made to another significant recent development in international politics, and that is regionalisation. I would simply refer you to the Europe of regions, the Eurasia initiative, ???, ???, ??? Lux Association, the Pyrenean community and so on, that are cross border regionalisations of economic regions. Finally, one could question the assumption that limited self-determination can be legally guaranteed. In states where democracy and the rule of war are not well established this can be a very risky premise indeed as the recent history of the Soviet bloc reveals. In the case of South Africa, a question mark still hangs over the survivability of its democracy. The fear has been expressed that collapse of democracy in this country may expose the Afrikaner minority to a fate similar to that of the Bulgar Germans in the former Soviet Union. As you know, they were transported about 3 000 kilometres away from their original homeland by Stalin. One way of reducing such risk to Afrikaner survival is the granting of a substantial degree of territorial autonomy, but the surest way of protecting them against problems of adverse consequences of authoritarianism in South Africa, is a completely independent homeland, practically. Practicability therefore, of course, is in the type of different ??? to which we should now turn and I will now talk about full Afrikaner self-determination or secession. From an international

homeland. However, the prospects for such an outcome presently seem to be remote due to a lack of domestic support on both sides and the problem of identifying an Afrikaner territory. Thus, in conclusion, if they were guided by current international sentiments, by the dictum that politics is the art of the possible, proponents of Afrikaner self-determination would today confine their aspirations to the achievement of cultural or territorial autonomy within South Africa. Afrikaners are still leading far too comfortable lives to be able to convince the international community of a need for secession or self-determination. ??? operates above all according to the law of change: today's good life may turn into a nightmare existence tomorrow. If so, Afrikaners may rally around the Volkstaat banner and previously ethical ??? may come to see full Afrikaner self-determination as eminently reasonable and even intelligent. Those Afrikaners and foreigners may then regard such a state as the open remedy for legitimate and uncontainable Afrikaner grievances in a black-ruled English-oriented South Africa. This possibility leaves South Africans and outsiders alike with the thorny question of immediate relevance: is preventive action required now to avoid unfulfilled Afrikaner aspirations, perhaps later tearing South Africa apart in abiding conflict? Thank you, Mr Chair.

Chairperson — Thank you, Professor Venter. We will adjourn for tea. Be back at half past eleven, then we come back for questioning to get some clarification on the two papers delivered and then thereafter Professor ??? who has arrived will address us, followed by Dr [illegible]. Maluwa. We adjourn for tea.

(adjourned for tea)

Chairperson — The two papers that were delivered. Mr Mhlangu.

Mr Mhlangu — Chairperson, I'm not too sure where can I direct this question to, but I think the Professor there could be in a position to assist me. I think Professor ~~Raadt~~ Raath... both of them, addressed the question of regional autonomy. They also addressed the question of freedom etc. My question is the problem that one has in mind if you talk about regional autonomy, that means you have to demarcate a certain region where you can say: this is where the area will be, this is where the people will settle. Is the Professor saying once you have demarcated that particular area you will be considering resettling people like in the olden days, moving people out of the area, throwing people into the area etc.? And how does that interfere with the freedom of the people?

Prof. ~~Raadt~~ Raath — Mr Chairman, may I emphasise that one of the important things I have concluded with is the fact that according to international law, there could be no infringement of human rights in the application of the principle of self-determination, even up to the point of regional autonomy and of secession. Now this means, of course, that there could be no possibility of the resettlement of people or the infringement of their human rights so the determining of borders is something which forms part of a process, let's say a negotiated process, in which adherence to all the instruments of human rights is incurred because if there should be any infringement then, of course, the recognition of such an autonomous unit would be ???. The international community would not accept the creation of such a unit were the rights of people to be infringed.

Prof. Venter — Sorry, could I just add to what Professor ~~Raadt~~ Raath has said. Indeed you are right, there is no specific Afrikaans homeland at the moment that is recognised as such internationally or even locally, it would mean that such a territory would have to be identified, Afrikaners would have to move there and the present people that are there would either have to be resettled or they would have to be absorbed into the Afrikaner state.

Chairperson — Dr Pahad(???) and then Senator Groenewald.

~~???~~ Pahad — Can I just make ??? Professor Venter has said there. You say some of the people would be absorbed into that part of the territory. Would you accept people of different ethnicity also to be members of the Volkstaat if they are being absorbed there or not?

Prof. Venter — Can I just say I am not a proponent of the Volkstaat idea. I am just quoting out the problems. Of course, existing Afrikaners would say in the new Afrikaner Volkstaat... Let's say there is a Volkstaat determined somewhere in the north-western Cape, Professor Boshoff's idea. There are existing Afrikaners there, they would obviously be absorbed, but should there be people of colour, Africans, so-called Coloured people, Griquas, Damaras and so on, that aren't accepted by the new Afrikaans rulers, their right to that would be protected from one another, so either they would have to be brought out and resettled or they would have to be absorbed, that is a dilemma for the Volkstaat idea.

Prof. ~~Raadt~~ Raath — This, of course is one of the features, pre-conditions for the recognition of any unit on the Volkstaat basis and that is

that the human rights of people, irrespective of their ethnic origin and history, language and religion, would have to be protected and there will have to be guarantees to that effect.

Dr Pahad Listening to Professor ~~Raadt's~~ Raath's contribution, of course Professor ~~Raadt~~ quoted extensively from a lot of sources and since I am a constitutional lawyer they didn't mean anything to me, but I suppose one Professor's meat may be another one's poison – with respect to many of these issues. I don't think that there is anybody who denies that the what I call the national question, excepting that I would regard the national question in relation to the class question in South Africa to be a critical factor in the process of democracy... What concerns me in the end... I didn't know Professor Raadt since the last time I met him, has now become so liberal that he seems to justify all of his arguments and what he thought was a liberal approach to this issue, but obviously liberalism is not the only ideological possibility to looking at problems and therefore it would seem to me difficult to pursue a specific line merely because it may be regarded as being liberal. That's the first one. The second thing that did concern me was with all of the examples that were given, either the United Nations Convention or indeed even now what's happening in relation to the European Union, is that if you take the last one in relation to the European Union it is so far fetched from what the South African problem is that it does seem to me quite irrelevant. The question about whether or not Britain will join the European Union in its fullness is rather different from what we are talking about in South Africa and I do just get a bit concerned that we are throwing so

many examples, that we actually lose sight of the fundamental issues facing us here in South Africa. The third element is that it is becoming quite common now here in this country to bandy the names of countries without then perhaps examining those countries in some depth. So if you take Yugoslavia, for example, quite clearly in terms of the Yugoslavian position, the different states which made up Yugoslavia before the break-up, certainly in my view, had a great deal more independence in economic and other matters than almost any other country in the world. But what you are not looking at is: what indeed was the influence of outside forces? What indeed was the influence of Germany's hurried recognition of some of the breakaway states in Yugoslavia? To what extent did that play a part in consolidating the break-up of Yugoslavia because you can't just talk as if these things were happening in some kind of vacuum and that there were not outside forces who, for their own reasons – whatever their reasons may be – played a part and indeed if you tried to see now in terms of, as I understand it, some kind of solution being found to Yugoslavia, it's also being complicated by what different interests, whether it's United States or Germany or France or Britain or indeed Russia perceive to have in that particular part of the world. So, if you are looking at a thing, you need to not just say that in Yugoslavia certain things happen. You certainly need to take into account the whole history of that country, its geographic location and the impact of outside forces upon them precisely because of its geographic location.

Prof. ~~Raadt~~ Radth Mr Chairman, with your permission, I start with the first remark and that is the remark about liberalism. Have I

evaluated against that background. This means that borders, being man made, can also be changed. And that is also one of the implications of the liberal theory of state and with that may I say, Mr Chairman, I have not said here in my presentation that I have accepted all the implications, all the philosophical ramifications of liberalism as we know it in strategic manifestations, but that if one accepts the liberal basis of the Constitution, then one should accept all the results also flowing from that, from a liberal position.

Chairperson — There are four more: Senator Groenewald, Ebrahim, Dr Ranchod and, if my memory serves me correctly, Carriem. But I'll end this question time here and I will give you more time during the panel discussions to carry on with the questions because we are running behind time with the other two speakers. OK? Can Professor Dugard(???) and Dr Maluwa please come to the fore? En my twee gashere kan sommer hier sit, aan my regterkant.[1] A warm word of welcome to the two gentleman. Professor Dugard will address us on an international law perspective and Dr Maluwa said he will be very brief: he will give us a further comment on the issue of self-determination. Professor Dugard?

Prof. Dugard — Thank you, Mr Chairman. I hope I will not be too long either because many of the international law arguments has already been canvassed by the previous speakers. In fact, it is rather strange to be asked to speak about the international law perspective of self-determination because this is the principle perspective from which one has to view

---

[1] And my two hosts can just sit here, to the right of me.

that's all that I can say on the subject. Obviously I am prepared to submit to interrogation at a later stage.

Chairperson — Thank you, Professor. We now call upon Dr Maluwa for his input.

Dr Maluwa — Thank you, Mr Chairman. I must apologise. I have a rather groggy voice, not – I must emphasise – as a result of shouting and so on over the rugby, but the result of a cold. When I was asked to participate in this workshop I was asked to say something about the African perspective relating to these arguments about self-determination and international law and I resisted that temptation to be brought in as a spokesperson on the African perspective. One because I don't think I am very ??? African perspective. ??? we are talking here about a general argument, general issues ??? of a certain universal ??? But again, I thought that even if I were to talk about what is called the African perspective, there wouldn't be much by way of ??? issues that my colleague, Professor du Plessis, would have covered. I did say to that Dr Herbst, once he engaged Professor Dugard, there's no point bringing me in, because I learned my international law at his feet and I don't want to sit here and disagree with him. I cannot understand about the timetable, or rather the programme, has ??? perspective so we have a regional perspective, an international perspective and an academic perspective. So I'll get back to the regional idea and talk about the African perspective. ??? have one ought to be talking about is human rights perspective. Now, what has come out of the discussions this morning, I think, is perhaps the obvious point that arguments about ??? international law are essentially based

mechanisms could be put in place to ensure minority communities are not marginalised. Thank you.

Chairperson — Professor ~~Raadt.~~ Raath

Prof. Raadt — Mr Chairman, may I start my answer with the