

Peoples' rights of the African Charter: Interrogating their applicability to minority situations

Solomon A Dersso*

I Introduction

One of the unique features of the African Charter on Human and Peoples' Rights¹ is its incorporation of peoples' rights. This has given rise to a fair amount of scholarly debate. The most vexing question at the heart of this debate is the meaning of the term 'peoples'. Since the African Charter has provided no definition to the term, many expressed their doubt that peoples' rights would apply to the different sections of the population of a state.² As a result, some scholars concluded that 'there is no reason to expect that the African Charter will prove in the years ahead to be a force for the progressive development of peoples' rights.'³ This article seeks to interrogate the applicability of peoples' rights of the African charter to minority situations. To that end it will examine the legal and conceptual hurdles that may explain much of the pessimism expressed on the subject. Based on the works of the African Commission, this article contends that sub-state groups including those in a minority situation can benefit from peoples' rights of the Charter. The article also highlights the potential of peoples' rights of the Charter to afford protection to such groups and therefore to the advancement of the cause of human rights in Africa.

* LL.B (Addis Ababa, 2001), LL.M (Pretoria, 2003), Doctoral Research Fellow at the South African Institute for Advanced Constitutional Law (SAIFAC), PhD Candidate at the Faculty of Law, University of the Witwatersrand.

¹ African Charter on Human and Peoples' Rights (Hereinafter the Charter or the African Charter) OAU Doc. CAB/LEG/67/3 Rev. 5 (1981) reprinted in 21 *ILM* (1982) 59.

² See, for example, Rhoda E. Howard *Human rights in Commonwealth Africa* (New Jersey: Rowman and Littlefield, 1986) 92; Julia Maxted and Abebe Zegeye 'North, West and the Horn of Africa' in Patrick Thornberry et al. (eds.) *World Directory of minorities* (London: Minority Rights Group International, 1997) 392.

³ Philip Alston 'Peoples' Rights: Their rise and fall' in Philip Alston (ed.) *Peoples' Rights* (Oxford: Oxford University Press, 2001) 287.

II Minorities and the African state

The multiple problems that have continued to beset the African state for most part of the last century since the time of independence⁴ are partly the consequences of the crises in the peoples-state relations. These crises are best characterised by the struggle between the centrifugal and centripetal forces. At the heart of this struggle lies the issue of how African states should deal with ethnic diversity.⁵

The approach of the post colonial state to its diverse configuration has been critical of and pessimistic about ethnic demands.⁶ Socio-cultural difference was seen as divisive and incompatible with the need to build a strong state.⁷ Thus the state pursued a policy of homogenization that sought to dismantle the ethno-cultural loyalty of members of society.⁸ The state failed to provide protection to the language of many ethno-cultural groups which contributed to their ruin and the cultural heritage embedded in them.⁹ It also eschewed federation, minority

⁴ Oko noted that 'For the better part of the last century, civil wars, ethnic unrest and political instability raged throughout most of Africa.' Okechukwu Oko 'Confronting transgressions of prior military regimes towards a more pragmatic approach' 11 *Cardozo JICL* (2003) 89.

⁵ The diverse ethnic configuration of the state in Africa is characterised by the presence of numerous and distinct groups that are divided along cultural, linguistic and religious lines, which resulted from the amalgamation of the various communities of Africa into one political unit under the colonial state. See A G Selassie 'Ethnic Identity and constitutional design for Africa' 29 *Stanford Journal of International Law* (Fall 1992-1993) 12.

⁶ Rachel Murray and Steven Wheatley 'Groups and the African Charter on Human and Peoples' Rights' 25 *Human Rights Quarterly* (2003) 217.

⁷ See S K B Asante 'Nation building and human rights in emergent African nations' 2 *Cornell International Law Journal* (1969) 83-84.

⁸ Not all states employed the same approach towards ethnicity; While some took an abolitionist approach, others opted for cultural assimilation and some others attempted to forge an artificial common state identity. See Solomon A Dersso 'Institutional Options of the Right to self-determination as a human rights solution to problems of ethnic pluralism in Africa' in Martin Scheinin and Marku Suksi (eds) *Human Rights in Development Yearbook 2002* (2005) 344-346.

⁹ Such is for example the case in Morocco and Algeria as far as the Berber language (Tamazight) is concerned. See *Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities* (Transaction Publishers, New Jersey, 2005) 41. (hereafter Report of the Commission's working Group) 41.

rights or any other mechanism that promotes cultural autonomy and strengthens ethnic loyalty.¹⁰

In this process, some ethno-cultural groups, often smaller minority groups, were victimized, while others were able to use the state apparatus to impose their culture and language on the rest of the population.¹¹ As national languages and dominant cultures are promoted, the cultures and languages of minority groups have been as a result diminished. The Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities discovered that:

The promotion of national languages and dominant cultures has been accompanied by a systematic suppression of indigenous languages and cultures, such that in urban settings it is becoming common for indigenous children whose parents work in towns not to speak their own languages.¹²

With the pressure to adopt the national language and culture, members of minorities have been made to be ashamed of speaking their languages in public, practicing their culture and enjoying their distinct identity. Such rights as freedom of speech and association as used by groups to advance their particular interests have also been routinely discarded.¹³

These trends forced many ethno-cultural groups to put resistance for defending their identity and culture and to make various economic and political demands. This resulted in internecine conflict and in some instances a full scale civil war. The civil wars in Ethiopia, Liberia, Nigeria, Sierra Leone, Sudan, Uganda, Chad, Angola, Zaire (DR Congo)¹⁴; the conflict in Algeria, South Africa, Cameroon,

¹⁰O C Okafor *Re-defining legitimate statehood: International law and state fragmentation in Africa* (2000) 103.

¹¹Okafor (as above) 102.

¹² Report of the African Commission Working Group of Experts on Indigenous Population/Communities (hereafter the Report of the African Commission's Working Group). (Banjul and Copenhagen: ACHPR and IWGIA, 2005) 42.

¹³ See Asante (n 7 above) 83.

¹⁴ The demand of ethno-cultural groups for the right to self-determination has been the underlying factor in the conflict and civil wars in Ethiopia, Nigeria and the Sudan, Zaire and Senegal. In the case of Nigeria and the Sudan resource exploitation and the allocation of the wealth that accrue there from has also remained to be a bone of contention. Fear of domination, dispute over

Mauritania¹⁵; and the massacres between Hutus and Tutsis in Burundi and the 1994 horrific genocide in Rwanda¹⁶ are some of the many conflicts between a sub group and the state. These all have also aptly manifested the on going crisis in the peoples-state relationship in Africa.¹⁷

Addressing these issues requires a comprehensive human rights framework that provides and ensures non-discrimination and equal treatment for the various communities constituting the state. That is also a framework that must allow such communities to enjoy and promote their distinct culture, develop and use their language and to exercise control over their own affairs and resource basis. The interpretation of peoples' rights of the African Charter as providing such framework is of particular importance. This is particularly true in the light of the fact that only few African constitutions acknowledge ethnic diversity and provide a framework for the protection of multiculturalism. There are however legal and conceptual dilemmas that have made such an approach to the concept of peoples' rights difficult to employ. The next section examines those dilemmas.

III The legal and theoretical hurdles

In international law and legal discourse, distinction is made between minorities and peoples. 'Peoples' is given a particular legal meaning as subjects of the right

exploitation of natural resources and rivalry for political power has informed the conflict and civil wars in Liberia, Sierra Leone, Uganda, Chad and Angola.

¹⁵ At the heart of the conflict in Algeria, Cameroon and Mauritania, is the resistance to and opposition against cultural, political and economic marginalization and exclusion manifesting the quest of marginalized groups for inclusion. In South Africa, various groups have demanded for linguistic equality and recognition of their cultures and history.

¹⁶ Fear of domination and physical security of groups fuelled the crisis in Burundi and Rwanda. The Darfur crisis in the Sudan and the on going conflict in Democratic Republic of Congo (DRC) arguably fall in the same category.

¹⁷ It is important to note that the crisis in state-peoples relationship finds expression in the unequal position of various groups in access to societal resources that the state controls and distributes.

to self-determination. As such, much of the discussion on the concept of 'peoples' under international law is closely linked to self-determination.¹⁸

The Charter of the United Nations¹⁹ is the first modern international instrument to enshrine the principle of self-determination of peoples. The two instances that the Charter makes reference to this principle are both in the context of developing 'friendly relations among nations'.²⁰ Rosalyn Higgins thus maintains that the principle of self-determination of peoples as referred to in the UN Charter 'seems to be the rights of the peoples of one state to be protected from interference by other states or governments.'²¹ This implies that the term 'peoples' in the Charter of the UN signifies the entire population of the member states of the UN. The opening words of the UN Charter, 'We the peoples of the United Nations' offer further support to this conception of the term 'peoples'. It is evident from this that the term *nations* is a reference to states and hence the term *peoples* was a reference to those having their own states.²² Indeed, this interpretation is also in line with the foundational principles of the UN Charter particularly the principles of the territorial integrity of states²³ and non-intervention in domestic affairs.²⁴

Self-determination has been further enunciated in the Declaration for the Granting of Independence to Colonial Countries and Peoples in 1960.²⁵ This

¹⁸ It is for this reason that ILO Convention on Indigenous and Tribal Peoples specifies under Article 1(3) that the use of the term peoples in the Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law. ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries 72 *ILO Official Bull.* 59. Adopted by the General Conference of the International Labor Organization in 1989 and entered into force in 1991.

¹⁹ Charter of the United Nations of June 26, 1945 *UNTS* No. 993, 3 (Hereinafter the UN Charter).

²⁰ Article 1 (2) of the UN Charter stipulates as one of the purposes of the UN '...to develop friendly relations among nations based on the principle of equal rights and self-determination of peoples...'. Similarly Article 55 requires the UN to promote higher standards of living, solutions to health and cultural problems, and universal respect for human rights in order to create conditions necessary for the peaceful and friendly relations among nations based on equal rights and self-determination of peoples.' As above.

²¹ Rosalyn Higgins 'Self-determination and secession' in Julie Dahlitz (ed.) *Secession and international law* (The Hague: T.M.C. Asser Press, 2003) 23.

²² 'We cannot ignore,' maintains Higgins, 'the coupling of 'self-determination' with equal rights and it was equal rights of *states* that was being provided for (emphasis in the original).' As above.

²³ UN Charter Art. 2(4) (as note 19 above).

²⁴ UN Charter Art. 2(7) (as note 19 above).

²⁵ UN GA Res. 1514 (XV) of 14 Dec. 1960 15 *United Nations General Assembly Official Records*, Supp. (No. 16) 66, UN Doc. A/4684 (1961).

Declaration transformed self-determination from an international 'principle' under the Charter of the UN to a right of peoples. Despite its universal formulation, in terms of its application, the term 'peoples', as the title of the Declaration suggests, was essentially a reference to colonial peoples.²⁶

When the two UN Covenants were adopted in 1966, peoples' right to self-determination was given the prime place as common Article 1. Here, the right to self-determination is manifestly not confined to colonial or dominated peoples alone and hence seems to have acquired a general application. Distinction is however introduced under the ICCPR between 'peoples' and minorities. According to this, 'peoples' are entitled to the right to self-determination which is a collective right, whereas minorities are entitled to the minimal protection envisaged under Article 27. In the practice of states as well as the UN the general tendency has been to maintain this distinction between the two categories.

Many scholars have also articulated the legal as well as the conceptual distinctions between 'peoples' and minorities'. John Dugard expressed this position when he said: 'the word "people" or "peoples" ...does not mean the different ethnic groups or peoples that comprise a heterogeneous population but all the peoples within a state.'²⁷ For him and some others minorities can be taken as peoples only in some exceptional circumstances.²⁸ There are others who

²⁶ In its Advisory Opinion on Namibia International Court of Justice articulated self-determination in the light of the developments in international law as linked with non-self-governing territories. See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* Advisory Opinion, *ICJ Reports* 1971, 6, 31 (Hereafter the Namibia case). Similarly in the Western Sahara case the ICJ affirmed the principle of self-determination as a right of peoples and its application for the purpose of bringing all colonial situations to a speedy end.' *Western Sahara Case*, Advisory Opinion *ICJ Reports* (1975) p12, 31.

²⁷ John Dugard 'A legal basis for secession – Relevant principles and rules' in Julie Dahlitz (ed.) (as note 21 above) 92.

²⁸ See Dugard (as note 21 above) 93; A. Cassese *Self-determination of peoples: A legal reappraisal* (Cambridge: Cambridge University Press, 1995) 110-120; Christain Tomschat 'Self-determination in a post-colonial world' in Christain Tomschat (ed.) *Modern law of self-determination* (Dordrecht, Martinus Nijhoff Publishers, 1993) 8-11.

make strict distinctions between minorities and peoples, and therefore argue that minorities are not entitled to self-determination.²⁹

It is clear from the above that in international legal practice, 'peoples' and minorities are treated as separate categories referring to different entities, although there could be overlaps between the two.

The articulation of the concept of 'peoples' in the African context is very much linked to the anti colonial struggle. The Charter of the Organization of African Unity³⁰ makes an indirect reference to the right of peoples' to self-determination in its preamble and principles. In paragraph one of the preamble to the OAU Charter, the Heads of African State and Governments expressed their conviction that 'it is the inalienable right of *all people* to control their own destiny.' Under Article 3 of the OAU Charter they further affirm their adherence to the principle of 'absolute dedication to the total emancipation of African territories which are still dependent.' 'Peoples' in the first instance was, therefore, a reference to African peoples who were under colonial domination or those systematically suppressed by the practice of *apartheid*. Accordingly, Ouguergouz observed that 'the problems surrounding the right of African peoples to self-determination are thus clearly defined and cannot be stated in terms other than those of "official" decolonization'.³¹ From this perspective, one can say that the conceptualisation

²⁹ Higgins emphasises that 'one cannot ...assert that minorities are *peoples* and that therefore minorities are entitled to the right of self-determination.' Rosalyn Higgins 'Postmodern tribalism and the right to secession' in Catherine Brölmann et al. (eds.) *Peoples and minorities in international law* (1993) 29, at 32. She is even starker in her 'self-determination and secession' In Julie Dahlitz (ed.) (as note 9 above) 35-37 where she categorically rejects that self-determination involves secession; See also G.Welhengama *Minorities' claims: From autonomy to secession* (Aldershot: Ashgate, 2000) 280-281 who maintains that self-determination has to be exercised in conformity with the territorial integrity of states.

³⁰ The Charter of Organization of African Unity was adopted by a conference of Heads of State and Government at the Ethiopian capital, Addis Ababa on 25 May 1963. Reprinted in 2 *ILM* (1963) 766.

³¹ Fatsah Onguergouz, *The African Charter on Human and Peoples' Rights: A comprehensive agenda for human rights and sustainable democracy in Africa* (The Hague: Kluwer Law International Law, 2003) 251.

of the term 'people' in the African context has been largely confined to the fight against colonialism and apartheid.³²

Beyond the colonial context, the right of African peoples to self-determination has had a very limited application. Seen in the light of the overriding principle of 'respect for the sovereignty and territorial integrity of each state',³³ self-determination was understood to mean the right of the peoples of a state to be protected from external interference. Thus viewed, 'peoples' additionally was meant the totality of the population of a state. The law of the OAU, its practice and the practice of African states precludes any interpretation of the term 'peoples' to mean less than the entire population of a state when applied to independent states of Africa.³⁴

IV Peoples' rights under the African Charter: Change of meanings?

When adopting the Charter, there is little doubt that member states of the OAU viewed most of the provisions, particularly those dealing with peoples' rights, through a statist prism.³⁵ In the light of the view of many African states that recognition of the constituent ethnic communities would strengthen prevailing

³² See S. Kwaka Nyameke Balay 'Changing African perspectives on the right to self-determination in the wake of the Banjul Charter on Human and Peoples' Rights' 29 *J. Afr. L.* (1985) 147.

³³ See OAU Charter Article 3 (3) (as note 30 above) 768. This is further strengthened by the principle of *uti possidetis* that was adopted by the resolution of the OAU in 1964 where the Assembly of Heads of State and Government declared 'that all member states pledge themselves to respect the frontiers existing on the achievement of national independence.' OAU Res AHG/16/1 (1964) reprinted in Ian Brownlie (ed.) *Basic documents on African Affairs* (Oxford: Clarendon Press, 1971) 360.

³⁴ In the practice of the OAU and African states self-determination was not applicable to a section of the population of a state. The suppression of secessionist movements including Biafra from Nigeria, Katanga from Congo, Western Sahara from Morocco all are evidence of this trend. Even now the attempt of Somaliland to become an independent state is not as yet recognized. Eritrea was an exception as its secession was won by force and legitimized by the mother country Ethiopia itself. Naldi held that 'the African interpretation of the term 'people' refer to the population of a state as a whole or, the state itself.' Gino J. Naldi *The Organization of African Unity: An analysis of its role* (London and New York: Mansell Publishing, 2nd ed. 1999) 132.

³⁵ See Blay (n 32 above) 158-159 (after proposing that "all peoples" can mean the collection of individuals who make up the constituent communities of Africa, Blay states that this is not to say that signatory states pledge themselves to accept such interpretation and makes reference to the objections that state representatives raised against such tendencies.)

socio-cultural cleavages and weaken the process of national integration,³⁶ it is questionable if peoples' rights were conceived as entitlements of these communities.³⁷ The view that Commissioner Nguema of the African Commission expressed at the examination of the state report of Rwanda fully supports this position.

when the term 'peoples' was introduced ...we meant peoples ...for instance the Nigerian people. We did not distinguish the Yorubas or the Minas etc. *These are not the communities or peoples we are aiming at... in Africa, it is not meant to recognize the identity of the various ethnic groups comprising the state.*³⁸

In the few cases that the African Commission decided on peoples' rights and from its recent practices, one can conclude that a more robust and liberal interpretation is being given to peoples' rights of the Charter. In the first case on peoples' rights, the *Congrès du Peuple katangais v. Zaire*,³⁹ the complainant, the president of the Katangese Peoples' Congress, requested the African Commission to recognize, among other things, the independence of Katanga by virtue of Article 20(1) of the African Charter.⁴⁰ It is worth to note two matters. First, the Katangese are only a portion of the population of Zaire. Second, they identify themselves as people and hence entitled to peoples' rights under the African Charter including the right to self-determination under Article 20.

In its decision, the African Commission identified two versions of self-determination. The first is self-determination for all Zaireoise as a people, which it

³⁶ According to Okafor as a result of this attitude, 'most African states became somewhat obsessed with the repression of socio-cultural differences, a move that was often characterized as a turn away from "tribalism".' Okafor (n 10 above) 101.

³⁷ The statement that the Meeting of Experts made in Dakar specifically stated that one of the characteristics of the African Charter was that emphasis was to be laid on the rules relating to the objectives of the OAU as stated in Article 2 of the OAU Charter. OAU Doc CAB/LEG/67/3/Rev.1 as quoted in the Report of the African Commission's Working Group (n 12 above) 80. Blay also indicated the objections that states raised at the Plenary Session of the OAU Council of Ministers saying, among other things, the provisions were capable of misinterpretation. (n 32 above) 158-59.

³⁸ ACHPR, *Examination of State Reports* (Lybia-Rwanda-Tunisia) General Discussions (9th Session March 1991) <www1.umn.edu/humanrts/achpr/sess9-generaldiscussions.htm> accessed 15 May 2006 (Hereinafter State Reports) emphasis added.

³⁹ Communication 75/92 8th Annual Activity Report (1994-1995) (Hereinafter the Katanga Case).

⁴⁰ As above para. 1

said was not the issue involved in the case. The other is self-determination for a section of the population of a state, i.e., the Katangese, which was central to the communication. As regards the latter, the Commission has emphasized the interplay between self-determination and the principles of sovereignty and territorial integrity of states. According to the Commission, although the right to self-determination may be exercised in different ways including independence, it must be 'fully cognizant of other recognized principles such as sovereignty and territorial integrity.'⁴¹ In affirming that territorial integrity takes priority over the right to self-determination, the Commission declared that it is 'obliged to uphold the sovereignty and territorial integrity of Zaire'.⁴² Consequently, the Commission held that

In the absence of concrete evidence of violations of human rights to the point that the territorial integrity of Zaire should be called to question and in the absence of evidence that the people of Katanga are denied the right to participate in government as guaranteed by Article 13 of the African Charter, the Commission holds the view that *Katanga is obliged to exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire.*⁴³

It is however interesting to note that the Commission referred to Katangese as 'the people of Katanga'.

The African Commission had also considered the issue of peoples' right to self-determination in relation to the separatist movement of Casamance in Senegal.⁴⁴ After analysing the positions of both the Government and the separatist, the Commission rejected the claim of the separatists for the independence of Casamance from Senegal as lacking 'pertinence'.⁴⁵ Although it criticised the Senegalese state that it 'had a mechanical and static conception of national unity', the Commission however recommended that the issue must be addressed

⁴¹ As above para. 4.

⁴² As above para. 5. This view reflects the observation of the ICJ that the interpretation of the right to self-determination in the context of Africa takes account of the inviolability of territories inherited at independence. ICJ Reports *Burkina Faso v. Mali frontier dispute* (1986) para. 25, 567.

⁴³ As above para. 6.

⁴⁴ ACHPR Report on the Mission of Good Offices to Senegal of the African Commission on Human and Peoples' Rights 10th Annual Activity Report (1996-1997) Annex VIII reprinted in Murray et al. (eds.) (n 90 above) 530 (Hereinafter the Casamance case).

⁴⁵ As above 536.

within the framework of 'the cohesion and continuity of the people of the unified Senegalese state in a community of interest and destiny.'⁴⁶ Significantly however, in outlining the objectives for a constructive dialogue between the two parties, the commission indicated that part of the search for solution must aim 'to post in Casamance so far as possible, officials native to the region.'⁴⁷ One can understand this as suggesting some form of self-administration for the Casamance whom the Commission referred to as people.⁴⁸

One can say from the forgoing that under the African Charter even a section of the population of a state can be taken as being entitled to the right to self-determination. But this is recognized within the limits of the territorial integrity of the state.⁴⁹ As such, the nature of the right that the section of the population of a state may exercise can be all but secession.⁵⁰ Subject to the territorial integrity of the state, this may involve 'self-government, local government, federalism, confederalism, unitarism or any other form of relations'.⁵¹ Which of these various modes of exercising self-determination is available to a group is a domestic matter to be decided by the agreement of the group concerned and the state to which the group belongs. It follows from this that although the African

⁴⁶ As above.

⁴⁷ As above 537.

⁴⁸ 'The Commission maintains ...that the sincerity, loyalty, and the transparency which the authorities demonstrated throughout the mission will contribute to reestablish peace, justice and well-being of the populations of Senegal and of the *people of Casamance* in particular.' As above 537. Note that the Commission makes a distinction in the use of terms between Senegalese in general – whom it called 'the populations of Senegal' – and the community inhabiting Casamance – whom it called 'the people of Casamance'.

⁴⁹ Report of the African Commission's Working Group (n 12 above) 75.

⁵⁰ There seems to be an emerging consensus that the right to self-determination as elaborated under Art. 20 of the African Charter does not involve secession. Thus, in the Second Workshop on Multiculturalism in Africa, a member of the African Commission has underlined the need to promote the understanding that the protection of the rights of groups to their identity and culture were to be made on the basis that 'members of such groups were citizens of the state and not through self-determination as a right to secession.' See ECOSOC Report on the Second Workshop on Multiculturalism in Africa: *Peaceful and Constructive group accommodation in situations involving minorities and Indigenous peoples* UN Doc.

E/CN.4/sub.2/AC.5.2001/3 (2 April 2001) para. 58. Report of the African Commission's Working Group (n 12 above) 74-75; N Barney Pityana 'The Challenge of culture for human rights in Africa: The African Charter in comparative context' in Malcolm Evans and Rachel Murray (eds.) *The African Charter on Human and Peoples' Rights- The system in practice, 1986-2000* (Cambridge: Cambridge University Press, 2002) 233- 234. For a contrary view see U Oji Umzurike *The African Charter on Human and Peoples' Rights* (The Hague: Kluwer Law International, 1997) 89-90.

⁵¹ The Katanga case (n 39 above) para. 4.

Commission ascertained that the exercise of self-determination may take different forms including self-government, it is not legally established under the Charter that sub-national groups can choose the form of the exercise of self-determination.⁵²

In cases involving allegations of violations of other peoples' rights of the Charter, the African Commission employed peoples' rights as providing protection to sub-state groups against their states. In a series of communications brought before the African Commission against Mauritania,⁵³ it was alleged that members of black Mauritians were being murdered,⁵⁴ expelled from their lands,⁵⁵ inhumanly treated and tortured in Custody,⁵⁶ and have their goods confiscated and villages destroyed.⁵⁷ In the decision that it handed down on this case in May 2000, the African Commission held that:

Central to the communications in question is the domination of black Mauritians by a ruling Arab clique, for which the communication presents abundant evidence. The subsequent discrimination against black Mauritians goes against a principal objective of the Charter, that of equality. Such oppression constitutes a violation of Article 19.⁵⁸

⁵² The Human Rights Committee of the UN upheld a similar view with respect to the right to political participation in the Mikmaq people case. The Committee held that 'article 25(a) of the Covenant [ICCPR] cannot be understood as meaning that any directly affected group, large or small, has the unconditional right to choose the modalities of participation in the conduct of public affairs (para. 5.5). According to the Committee 'it is for the legal and constitutional system of the state party to provide for the modalities of such participation (emphasis added)' (para. 5.4) . Communication No. 205/1986 *Grand Chief Donald Marshal et al. (Mikmaq people) v. Canada* UN Doc. CCPR/C/43/D/205/1986 at 40 (1991).

⁵³ See Communications 54/91, 61/91, 98/93, 164/97, 196/97, 210/98 *Malawi African Association, Amnesty International, Sarr Diop, Union Interafricaine des Droits de l'Homme et des Peuple and RADDHO, Collectif des Veues et Ayants-Droits, Association Mauritanienne des Droit he l'Homme v. Mauritania* Thirteenth Activity Report of the African Commission 1999-2000, ACHPR/RTP/13th, Annex V (Hereinafter the case against Mauritania)

⁵⁴ Communication 98/93 provides list of villages that were destroyed.

⁵⁵ Communication 96/93 provides a list of villages all or almost all of whose inhabitants were expelled to Senegal.

⁵⁶ Communication 61/91 contains list of 339 persons believed to have died in detention.

⁵⁷ The Case against Mauritania (n 53 above) para. 17.

⁵⁸ Communications 54/91, 61/91, 98/93, 164/97, 196/97, 210/98 *Malawi African Association, Amnesty International, Sarr Diop, Union Interafricaine des Droits de l'Homme et des Peuple and RADDHO, Collectif des Veues et Ayants-Droits, Association Mauritanienne des Droit he l'Homme v. Mauritania* Thirteenth Activity Report of the African Commission 1999-2000, Addendum, paras. 65-67 as quoted in Pityana (n 50 above) 232-233. See also the *Report of the African Commission Working Group* (n 12 above) 73.

Even more significant was the interpretation that the Commission has given to Article 23 of the African Charter. Although the reading of this article gives the understanding that the term 'peoples' as used in this context is a reference to the population of a state in their entirety, the African Commission innovatively interpreted it to also give protection to a part of the population of a state. In the words of the Commission, 'the unprovoked attack on the villages [of black Mauritians] constitutes a denial of the right to live in peace and security.'⁵⁹ And the burden of securing this right lies on the state in that not only the state must respect this right but it must also ensure its protection from violation even by others within the state.⁶⁰

The Ogoni case has provided the African Commission another Chance to further pronounce on peoples' rights of the Charter.⁶¹ The Ogoni case was lodged by two non-governmental organizations the Social and Economic Rights Action Centre and the Centre for Economic and Social Rights in March 1996 on behalf of the Ogoni people, who inhabit a certain territory in the oil rich Niger Delta area of Nigeria.⁶² The complaint disclosed allegations that the oil extraction operations of the Nigerian military government, through the Nigerian National Petroleum Company together with Shell Petroleum Development Company, caused environmental contamination and degradation and health problems among the Ogonis. It further alleged that the Nigerian Military and security forces were involved in acts of terror and insecurity against the members of the Ogoni people and in the destruction of the food sources, several villages and homes of the Ogonis. The complainants therefore submitted that the Nigerian government

⁵⁹ The case against Mauritania (n 53 above) para. 140.

⁶⁰ This interpretation has a particular contemporary relevance to Africa in the light of the violations that have been and continue to be perpetrated against one or another group in the context of civil wars, inter-ethnic conflicts and situations of political crisis. The unabated plight of various communities in the Darfur region of Sudan aptly demonstrates the need to ensure respect to the right to peace to groups within the state.

⁶¹ African Commission on Human and Peoples' Rights, Communication No. 155/96, *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria* ACHPR/COMM/A044/1, 27 May 2002 (hereinafter the Ogoni case)

⁶² For the historical and political background on the Ogoni issue see Joa Oloka-Onyango 'Reinforcing marginalized rights in an age of globalization: International mechanisms, non-state actors, and the struggle for peoples' rights in Africa' 18 *Am. U. Int'l. L. J.* 851, 862-865.

violated rights ranging from civil and political rights (Articles 2, 4 and 14) to socio-economic rights (Articles 16 and 18) to collective rights of peoples (Articles 21 and 24).

In the context of our discussion on peoples' rights, this case is particularly important, because it deals with allegations of violations of peoples' rights by a distinct community with a minority status, the Ogoni people. In its decision, the Commission held that the State of Nigeria violated the rights, *inter alia*, to free disposal of ones wealth and natural resources under Article 21 and to a healthy environment under Article 24.

With respect to Article 21, although it did not clearly and thoroughly analyse the content of the rights and obligations under this article,⁶³ the Commission upheld the complaint that the Nigerian Government 'did not involve the Ogoni Communities in the decisions that affected the development of Ogoniland.'⁶⁴ More significantly, the Commission espoused the view that 'the destructive and selfish role played by oil development in Ogoniland, closely tied with repressive tactics of the Nigerian Government, and *the lack of material benefits accruing to the local population*, may well be said to constitute a violation of Article 21.'⁶⁵ It, therefore, concluded that by any measure of standards, the government's practice falls short of the minimum conduct expected of governments, and therefore, is in violation of Article 21 of the African Charter.⁶⁶ In its recommendations a relief to remedy the violation of Article 21 by the Nigerian government, the African Commission appealed to the government to provide, *inter alia*, meaningful access to regulatory and decision making bodies to the communities likely to be affected by oil operations.⁶⁷ It can be inferred from this

⁶³ Joa Oloka-Onyango rightly argues that the plausible reason for the Commission's failure to clearly spell out the contents of the rights and obligations under article 21 'is an enduring reluctance to address the logical implications of holding that peoples, and not the state, are allowed to "freely dispose their wealth and natural resources.'" (as above) 891.

⁶⁴ Ogoni case (n 61 above) para. 55.

⁶⁵ As above para. 58 (emphasis added).

⁶⁶ Ogoni case (n 61 above) para. 58.

⁶⁷ As above para. 70.

that Article 21 of the African Charter obliges states to ensure the participation of communities concerned in decisions that involve (and in benefits that accrue from) development operations in their territories.⁶⁸

As regards Article 24, the Commission expressed the view that the right to a healthy environment 'requires the State to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources.'⁶⁹ Thus, while acknowledging the right of the Nigerian state to produce oil, the African Commission held that the care that should have been taken for the protection of the Ogoniland from despoliation has not been taken.⁷⁰ Accordingly, the Commission found Nigeria to be in violation of the right to a healthy environment under Article 24 of the African Commission.

These findings of the Commission presuppose the view that the Ogonis are protected by peoples' rights of the African Charter. The clear distinction that the African Commission made between the group (the Ogoni people) and the state, Nigeria, affirms this point. Indeed, this distinction is meant to treat the Ogonis as beneficiaries of peoples' rights and the state as the bearer of the corresponding obligations that the rights impose.⁷¹ Moreover, the reference of the Commission to the Ogonis as 'the Ogoni people' and 'the people of Ogoniland' suggests that

⁶⁸ This is comparable with the requirement of Article 4(5) of the Declaration on the Rights of Minorities which is to the effect that states are required to ensure the full participation of minorities when venturing into development activities in the territories occupied by the concerned minorities. Some of the cases of the UN Human Rights Committee imply that Article 27 imposes similar obligations in some circumstances. See for example Communication No. 511/1992 *Ilmari Lämsman et al. v. Finland* Report of the Human Rights Committee Vol. II, GAOR Fiftieth Session, Suppl. No. 40 para 9(6); Communication No. 547/1993 *Apirana Mahika et al. v. New Zealand* Report of the Human Rights Committee Vol. II, UN Doc. A/56/40 para. 9(6).

⁶⁹ Ogoni case (n 61 above) para. 52.

⁷⁰ As above para. 54.

⁷¹ Oloka-Onyango contends that it is possible to read the provisions on peoples' rights including article 21 as 'a direct boost to the rights and interests of peoples within the state, and of the responsibility of the state to those peoples.' (n 62 above) 890. The undertaking of states parties under Article 1 of the Charter is to give effect to all the rights proclaimed in the Charter. Viewed in this light the state is under obligation to ensure peoples' rights and thus is not itself beneficiary of peoples' rights. See ACHPR Communications 147/95 and 149/96 *Sir Dawda k Jawara v. the Gambia* Thirteenth Annual Activity Report (1999-2000) para. 45-46.

the Ogonis as a group qualifies to have protection as a 'people' from peoples' right of the African Charter.

In the case *Legal Resources Foundation v. Zambia*,⁷² the complainant contended that the requirement, in the Constitution of Zambia (Amendment) Act of 1996, that any one who wants to contest the office of the president has to prove that both parents are/were Zambians by birth or decent is a violation of Article 19 of the African Charter. The state rejected this contention saying that 'Article 19 of the Charter relates to the principle of "self-determination" by the mere mention of the term "peoples".'⁷³ Incidentally, this can be seen as a manifestation of the position of states to limit the interpretation of peoples' rights of the African Charter in the narrow sense as applicable only to colonial peoples or upon independence to the entire population of a state.

In its decision rendered in May 2001, the African Commission held that 'recourse to Article 19 of the Charter was mistaken,' and, thus, 'the section dealing with "peoples" cannot apply in this instance.'⁷⁴ The reason for this finding was not however the objection that the state raised. It was rather because the case did not fulfil the elements necessary to require the application of peoples' rights of the African Charter. According to the Commission, in order for peoples' rights of the African Charter to apply, it would require evidence that:

The effect of the measure was to affect adversely *an identifiable group of Zambian citizens* by reason of their *common ancestry, ethnic origin, language or cultural habits*.⁷⁵

This offers the elements required to invoke the application of the term 'peoples' to a section of the population of a state.

The implication of this innovative approach is that the term 'peoples' is given a broader meaning that gives it the potential to address the human rights concerns

⁷² Communication 211/98 (Hereinafter the Legal Resources Foundation case) 14th Annual Activity Report (2000-2001).

⁷³ As above para. 49.

⁷⁴ As above para. 73.

⁷⁵ As above (emphasis added).

of minorities discussed above. It is not however clear if the Commission has made this pronouncement with the intention of establishing a criterion for determining the applicability of peoples' rights to distinct groups within the state.

V Some major human rights concerns of minorities and the relevance of Peoples' rights of the African Charter

A very vital significance of the concept of peoples' rights under the African Charter is its potential to address the particular human rights concerns of various communities in the continent. What gives the African Charter such potential is its elaboration of the reach of peoples' rights beyond the controversial self-determination of the UN Covenants to issues particularly relevant to the concerns of minorities and other sub-state groups.

Human rights are meant to provide a legal and political framework for opposing abusive use of power by the state.⁷⁶ Peoples' rights have the same role in the context of the African situation.⁷⁷ They operate in a way that affords protection against acts, state or otherwise, contrary to the wellbeing and interest of any community. They also operate to ensure the promotion and fulfilment of the development and wellbeing of peoples. Peoples' Rights also offer the necessary normative ground to defy oppression. Theo van Boven aptly captured this point in the following words:

[I]nstruments on human rights and peoples rights may function in an extra-legal dimension as a guarantee and as mechanisms to defend freedom. Particularly in the third

⁷⁶ According to Heyns' 'struggle approach' to human rights 'human rights are not about asking favours and they are not merely moral or rhetorical concepts; they are guides to action and triggers of resistance against what is perceived as the illegitimate use of power, in particular state power.' Christof Heyns 'A 'struggle approach' to human rights' in A. Soeteman (ed.) *Pluralism and law* (2001) 171.

⁷⁷ This fits with Kiwanuka's view that " 'people' could be used in contradistinction to their state. This view, by separating the people from their state, does for collectivities what civil liberties do for individuals. It seeks to preserve a certain amount of political and economic space for peoples qua peoples." Richard N. Kiwanuka ' The meaning of 'people' in the African Charter on Human and Peoples' Rights' 82 *AJIL* (1988) 81.

world, they also serve as tools of liberation for the deprived, the oppressed, the have-nots and victims of discrimination.⁷⁸

In Africa peoples' rights are also employed as a shield against domination and oppression of one group by another. It is on this account that the African Commission interpreted Article 19 of the African Charter⁷⁹ to mean that the discrimination against a certain distinct group constituted a domination of one group over another.⁸⁰

It has been noted earlier that one of the challenges in the state-peoples relationship is the marginalization, exclusion and domination of some communities, often a times in minority situations. This has created a political system in which some are denied any meaningful participation and representation in the structures and processes of the state. Through peoples' rights peoples can ascertain their entitlement to democratic governance, representation and participation both in the political and economic spheres.⁸¹ The Guidelines to Periodic Reports to the African Commission indicates that Article 20 of the African Charter requires that 'all communities are allowed full participation in political activities and are allowed equal opportunities in the economic activities of the country both of which should be according to the choice they have made independently.'⁸² Viewed in this light, peoples' rights are

⁷⁸ Theo van Boven, 'The relations between peoples' rights and human rights in the African Charter', 7 *Human Rts. L.J.* (1986) 192.

⁷⁹ Art. 19 provides: 'All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.'

⁸⁰ Communications 54/91, 61/91, 98/93, 164/97, 196/97, 210/98 *Malawi African Association, Amnesty International, Sarr Diop, Union Inter africaine des Droits de l'Homme et des Peuple and RADDHO, Collectif des Veues et Ayants-Droits, Association Mauritanienne des Droit he l'Homme v. Mauritania* Thirteenth Activity Report of the African Commission 1999-2000, ACHPR/RTP/13th, Annex V para. 141-142.

⁸¹ The proclamation of the right to self-determination under Article 20(1) recognizes economic and social self-determination at par with political self-determination. The relevant part of this article reads: 'They (all peoples) shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their social and economic development according to the policy they have chosen.'

⁸² the General Guidelines Regarding the Form and Content of Reports to be Submitted by State members regarding the meaning, Scope and weight of the rights of peoples recognized by Article

instrumental to ensure the protection of the various communities from exclusion and marginalization.

Discrimination is one of the serious concerns of groups in a minority situation. It underlies many of the conflicts involving the state and groups. This is not a result just of failure to guarantee for non-discrimination and equality. It is a result of the peculiar situation of these groups, i.e, their minority status. The Report of the Commission's Working Group have found as regards the Batwa of central Africa that

Forming a numerical and political minority, and being a dispersed population with the lowest level of social status, the Batwa have been unable to overcome their difficulties in order to defend their rights and resist arbitrary violence. They are treated as inferior, and are hence the victims of scorn and exploitation.⁸³

There is also discrimination in the areas of social services, access to education and justice. The situation of other similar groups in other parts of Africa is not any better.

Many problems in the state-peoples relations have also resulted from attempts to impose a homogeneous dominant national culture and language on the diverse ethno-cultural groups. This has been sought to be achieved at the expense of the cultures and identities of minority groups.⁸⁴

With the recognition of peoples' rights, various groups will have protection against violations of their cultural rights including their languages. In its decision on the case against Mauritania, the African Commission held that depriving a man of the means (the language) to take an active part in the community and in

17(2), 19 to 20 of the African Charter *Second Activity Report*, Annex XII (Adopted June 1989) Para. III(4). (hereafter Guidelines)

⁸³ Report of the Commission's Working Group (n 12 above) 35.

⁸⁴ Murray and Wheatley (n 6 above) 223.

its activities 'amounts to depriving him of his identity.'⁸⁵ This is found to be contrary to the right to culture under Article 17 of the African Charter.⁸⁶ Peoples will also have entitlements for the promotion and development of their cultures, for which states also must take positive measures.⁸⁷

The policy of cultural assimilation pursued by some states has also created a situation which has exposed certain groups to attacks and killings.⁸⁸ The guarantee for the right of all peoples to existence⁸⁹ and the right to peace⁹⁰ impose an obligation on the state not only to refrain from jeopardizing the collective existence of any group but also to protect them from attacks by others. The African Commission has already held that Article 23 could be used to protect one section of a society from attacks by others.⁹¹

The state has been diminished in its capacity to afford the necessary protection against external exploitation of natural resources and the destruction of the environment on which the largest portion of Africans depend for their subsistence.⁹² This has threatened the environment and livelihood of many

⁸⁵The case against Mauritania (n 53 above) para. 137; See also *Comité Loosli Bachelard, Lawyers Committee for Human Rights, Association of Members of the Episcopal Conference for East Africa v Sudan* in the Thirteenth Activity Report of the African Commission 1999-2000, ACHPR/RTP/13th, Annex V.

⁸⁶ Article 17 (1) provides: 'Every individual may freely take part in the cultural life of his community.'

⁸⁷ States are required to take measures and programmes aimed at 'promoting awareness and enjoyment of the cultural heritage of national ethnic groups and minorities and of indigenous sectors of the populations.' See *Guidelines for National Periodic Reports, in Second Annual Activity Report of the African Commission on Human and Peoples' Rights 1988-89*, ACHPR/RPT/2nd, Annex XII. Also note that Art. 20(1) of the African Charter guarantees the right of peoples to their cultural development.

⁸⁸ The blacks in Mauritania and the communities in the Darfur region of the Sudan have been subject to attacks and killings. On the Darfur situation see Frans Viljoen 'Recent developments in the African regional human rights system' 4(2) *African Human Rights law Journal* (2004) 348-350.

⁸⁹ Article 20.

⁹⁰ Article 23.

⁹¹ See The case against Mauritania (n 53above) para 139-140. It is interesting to note the view of the Commission that the right to peace under Article 23 imposes an obligation on the state not only to refrain from attacking any section of its population but also to protect them from attack by another section of the population.

⁹² This is particularly a result of the increasing surrender by the state of its policy making powers and control over economic actors owing to the pressure from globalization . See Oloka-Onyango

communities in different parts of Africa.⁹³ In this context, peoples' rights must also serve as a mechanism to defy the exploitation of natural resources by corporate entities without regard to the safety and developmental needs of the peoples concerned. Considering the legacy of colonialism and the current vulnerability of Africa, the African Charter framed peoples rights in a way that they can be put to such service.⁹⁴ The African Commission's interpretation of Article 21 of the African Charter emphatically supports this view. According to the Commission

The origin of this provision may be traced to colonialism, during which the human and material resources of Africa were largely exploited for the benefit of outside powers, creating tragedy for African themselves, depriving them of their birthright and alienating them from the land. The aftermath of colonial exploitation has left Africa's precious resources and people still vulnerable to foreign misappropriation. The drafters of the Charter obviously wanted to remind African governments of the continent's painful legacy and restore co-operative economic development to its traditional place at the heart of African society.⁹⁵

These rights are therefore meant to ensure that the utilization of natural resources be carried out not only without endangering the wellbeing of the peoples concerned but also in a way that brings about material benefits to them.⁹⁶

VI Conclusion

Although the African Commission has been more and more willing to apply peoples' rights of the Charter to groups within the state – including those in a minority situation-, it did so without determining whether those groups were

(n 62 above) 886-887; Kidane Mengisteab 'New approaches to state building in Africa: The case of Ethiopia's ethnic-based federalism' 40(3) *African Studies Review* (1997) 16.

⁹³ See Report of the African Commission's Working Group (n 12 above) 26-29.

⁹⁴ Art. 21(1) of the African Charter states that: 'All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.' Art. 24 complements this guarantee with a provision that: 'All peoples shall have the right to a general satisfactory environment favourable to their development.'

⁹⁵ The Ogoni case (n 61 above) para. 56.

⁹⁶ See Guidelines (n 82 above) para.II (6).

minorities, indigenous groups or simply peoples. In the Katanga case, the Commission made reference only to the issue of whether the Katangese consist of one or more ethnic groups, which, it said, was immaterial for its purpose.⁹⁷ In the Ogoni case, '[t]hroughout the decision, the Commission does not deal with the issue of what kind of 'peoples' the Ogonis are--indigenous, a minority, or both?'⁹⁸ Nor did the Commission find it to be necessary to deal with this issue in any of the other cases.

Given the legal and conceptual distinctions that are often made between 'peoples' and 'minorities', it is, however, necessary that the African Commission clearly pronounces that peoples' rights apply to the different sections of the population of a state. In this regard, the establishment of the African Commission's Working Group of Experts on Indigenous Populations/Communities⁹⁹ and the adoption by the Commission of the report of the Working Group¹⁰⁰ is a significant development to be commended. Even this, however, has not resolved the question of how to determine whether a particular group is a 'people', irrespective of its status as a minority or indigenous group. The Commission, therefore, needs to establish a clear criterion for making such a determination.

⁹⁷ Katanga case (n 53 above) para. 3.

⁹⁸ Oloka-Onyango (n 62 above) 891.

⁹⁹ The Working Group was established by the Resolution of the African Commission on the Rights of Indigenous Populations/Communities passed at the Commission's 28th Ordinary Session held in Cotonou, Benin in October 2000. One of the tasks that the Working Group was entrusted under this Resolution was to study the implications of the African Charter on Human Rights and the well-being of indigenous communities especially with respect to: The right to equality (Articles 2 and 3), the right to dignity (Article 5), protection against domination (Article 19), on self-determination (Article 20) and the promotion of cultural development and identity (Article 22).'

¹⁰⁰ In 2003, the Commission adopted the report in recognizing, among others, the standards of international law for the promotion and protection of minorities and indigenous peoples. The report as adopted by the Commission expresses the view that peoples' rights 'should be available to sections of populations within nation states, including indigenous people and communities. (n 12 above) at 116 and 79.