

The protection of minorities under the African Charter: Opportunities and challenges *

Solomon A. Dersso**

I Introduction

African states have among the most diverse peoples in the world. Linguistic, cultural and religious differences internally divide populations in almost all African states. This rich ethnic diversity has however brought to Africa more curse than blessing, trouble than tranquillity. The political landscape of the post-independent African state has been dominated by a number of conflicts of different intensity between different ethnic groups and between minorities and the state. It is enough to mention here only the recent ones. When South Africa held the historic election that marked the end of apartheid and the dawning of a democratic era, Africa witnessed one of the largest human tragedies of the 20th century as Rwanda was ravaged by the horrific genocide of 1994. The attempt of the authorities of Democratic Republic of the Congo (formerly Zaire) to denationalise Tutsi Congolese immersed the country into the abyss of devastation that claimed the lives of about 4 million Congolese people. In Sudan, before the dusts of the North-South civil war settle, hundreds of thousands of people were perished and millions others displaced in a conflict that defied clear legal characterisation. In West Africa as Liberia and Serra Leon are busy to nurse their wounds left by years of civil wars, Ivory Cost, once an island of stability in a troubled sea, sunk into conflict that swiftly escalated into a north-south civil war. Despite its seemingly return to democracy, Nigeria is not able to provide solution to the crisis in its oil rich but impoverished Niger Delta region.

Events like the ones mentioned above have been a recurrent phenomenon throughout the post independent period. These events also highlight the minority problems that African

* This paper was presented at the conference on 'Organisation of Justice and Protection of Fundamental Rights in South Africa and the EU' organised by UNISA and Centre for European Constitutional Law held in Johannesburg on 22-23 February 2007.

** LL.B (Addis Ababa University); LL.M (Centre for Human Rights, University of Pretoria); Diploma in Linguistic and Minority Rights (Institute for Human Rights, Åbo Akademy University Finland); Doctoral Research Fellow, South African Institute for Advanced Constitutional Law (SAIFAC) PhD candidate at School of Law, University of Witwatersrand; solomon@saifac.org.za; Solomon.dersso@gmail.com

states need to address and the intensity of these problems. One however notes that the attention given to the problem of minorities in Africa is not matched by the gravity of the perils that it entails. As Ramcahran put it: ‘The protection of minorities in Africa is a subject particularly untouched in the literature or in African policy documents *even though it involves one of the core causes of conflicts and of gross violations of human rights throughout the continent.*’¹ In this paper I would like to reflect upon on this very important and yet neglected subject matter. Nevertheless, since the theme of this particular session of the conference is about the protection of minorities under the African Charter, my discussion of the problem of minorities is confined to the legal framework set under the said instrument. Since this itself is not narrow enough, I thought that it will be good if I limit my presentation to the question of the opportunities available in and the dilemmas presented by the African Charter with respect to the protection of minorities in Africa.

The order of my presentation is as follows. Before an understanding of what one is dealing with when speaking of the protection of minorities is attained, one would not be able to undertake a useful exposition of what the African Charter provides in terms of the protection of minorities. Accordingly, the next part, Part II, discusses the nature of minority problems in Africa. In part III, I will examine the African Charter. Here, an attempt is made to highlight some of the aspects of the African Charter that provide peculiar legal materials that can be used for effective protection of minorities in Africa. The dilemmas that one faces when seeking to advance the rights of minorities under the African Charter are uncovered in part IV. The African Commission is the body that is charged with the responsibility to ensure the protection of the rights enshrined in the African Charter and promote their implementation and compliance by states parties to the Charter. One would like to know the ways in which the African Commission has or has not dealt with the protection of minorities in its practice. This is a matter dealt with in Part V. Part VI closes the discussion with a conclusion.

¹ Bertram G. Ramcharan ‘The protection of minorities in Africa’ in Gudmundur Alfredsson and Maria Stavropoulou (eds.) *Justice Pending: Indigenous Peoples and Other Good Causes. Essays in Honour of Erica-Irene A. Daes* (2002) 100.

II The nature of minority problems in Africa

The factors that lead to minority conflicts are as diverse as the number of minorities itself. Broadly speaking however in the context of Africa one can identify three categories of situations that define the nature of minority problems.

The first such situation is also the one envisaged by international norms on minority rights. This is the case where the constitutional and political framework of states recognises and protects the cultural identity of the majority dominant group at the centre to the exclusion and at the expense of the cultures of minority groups. This framework is also one that emphasises the commonness and identity of the citizens of the country but based on the cultural attributes of the majority group. This situation is clearly reminiscent of Benedict Anderson's idea of official nationalism.² This is a process by which a state institutionalises the culture of the dominant group as a national culture by way of 'stretching the short, tight, skin of the nation over the gigantic body of the empire.'³ It involved the diffusion of the majority (or dominant) group's language and culture all over the territory of the state through the state institutions. The media, the education system and all other public activities reproduce the dominant culture and are conducted in the language of the dominant group. No space is left for expression of other cultures and those who are not members of the dominant culture have no choice but to assimilate into the dominant culture.⁴ The cultures of minority groups have often been treated as nuisance, and thus governments in these countries have in different ways attempted to weaken and ultimately eliminate the institutions in which these non-dominant cultures are

² See Benedict Anderson *Imagined communities* 83-112.

³ *Ibid*, 86.

⁴ This happens to be the case even when an effective and seemingly 'neutral' individual rights is accorded to all citizens. Such a system favours the dominant group and minorities are as a result marginalised as a result of 'the drawing of internal boundaries; the language of schools, courts and government services; the choice of public holidays; and the division of legislative power between central and local governments.' See Will Kymlicka *Multicultural citizenship: A liberal theory of minority rights* (1995) 51.

embedded. This has been the case, for example, in such countries as Ethiopia,⁵ Malawi,⁶ and Botswana.⁷ In Algeria, Mauritania and Sudan, the policy of Arabisation that successive governments sought to enforce engendered minority demands for recognition and equal protection.⁸

In this situation, the problem of minorities arises not because the values of minorities and other groups in these countries are irreconcilable. It is rather mainly because minority groups seek to maintain their cultures and distinct identity, to be accepted accordingly as equal members of society and to have their inclusion into the national population on an equal basis with other members of society. Issues of particular concern for minorities in this category include language policy, education, national holidays and symbols, policies on land and economic development.

The other situation giving rise to minority conflicts and demands for protection of minority rights in Africa is the skewed nature of the organisation of political power. There is high degree of inequality among different groups in terms of their enjoyment of political rights, political representation and participation and in terms of access to economic resources. One good illustration for this is Kenya. 'Kenya's post independence period', observed Warren Weinstein, 'has been marked by uneven development. ...Although the government announced programs and policies to balance the provision of goods and services among all ethnic groups, the fact was that Gikuyu control was being expanded, and the development of ethnic groups was lopsided. Problems with non-

⁵ See Christopher Clapham 'Ethnicity and the national question in Ethiopia' in P Woodward and M Forsyth (eds.) *Conflict and peace in the Horn of Africa: Federalism and its alternatives* (Aldershot: Dartmouth Publishing Co. Ltd, 1994) 27-40.

⁶ See generally Deborah Kaspin 'Tribes, regions and Nationalism in democratic Malawi' in Ian Shapiro and Will Kymlicka (eds.) *Ethnicity and group rights* (New York and London: New York University Press, 1997) 464-503.

⁷ See generally Jacqueline S Solway 'Reaching the limits of universal citizenship: "Minority" struggles in Botswana' in Bruce Berman et al. (eds.) *Ethnicity and democracy in Africa* (2004) 129-147.

⁸ According to Horowitz for these Afro-Arab states the persistent question has been: Is the state to be Arab or African? And the derivative of which Who would rule it, Arabs or Africans? Donald Horowitz *Ethnic groups in conflict* (1985) 189.

Gikuyu became more pronounced.’⁹ Similar patterns of asymmetry in power relations have been dominant in the politics of Malawi and Zambia. This has also been a crucial factor that fuelled the conflicts in Uganda, Rwanda, Burundi, Liberia, Sierra Leone, Chad and the Sudan.¹⁰

As a result in Africa the most common manifestation of the problem of minorities is the struggle among various groups for share of political representation and access to economic resources. As the African state did not have effective constitutional and political framework that guarantees equitable political representation and just distribution of economic resources among the different sections of society, politics played itself out as a form of a struggle among different groups for control of the state machinery. As Lewis put it: ‘It (the state) is overwhelmingly viewed as an arena in which men of opposing tribes compete for power and advantage in what seems some times almost a Hobbesian war of all against all.’¹¹

This is a common characteristic feature of the problem of minorities in most African countries. Part of the reason for this is that in these countries are countries of minorities as there is no single majority group. The main issue here is not therefore how to protect minorities from majoritarian domination or assimilation. It is rather how to provide inclusive institutional and political arrangement and achieve equitable and effective share from the political and economic process of the state for all groups. What Justice Sachs said in *The Gauteng Provincial Legislature in re: Dispute concerning the constitutionality of certain Provisions of the School Education Bill of 1995* has particular

⁹ Warren Weinstein ‘Africa’ in Robert G. Wrising (ed.) *Protection of ethnic minorities: comparative perspectives* (1981) 231.

¹⁰ On the conflicts and situation of these various states see Pamela Mbabazi ‘Ethnicities in crises of governance in Africa: The case of Uganda in the Great Lakes Region’ in S MacLean et al. (eds) *The crises of governance in Asia and Africa* (2001) 227-244; John Reader *Africa: A biography of the continent* (1998) 665-672; See René Lemarchand ‘Burundi in comparative perspective: Dimensions of ethnic strife’ in John McGarry and Brendan O’Leary (eds.) *The politics of ethnic conflict* 151-171; Sandra Rein ‘Sierra Leone: Between the prison houses of nationalism and transnationalism’ in Malinda S. Smith (ed.) *Globalizing Africa* (Asmara: Africa World Press, Inc., 2003) 131; Decalo, S ‘Chad: The roots of centre periphery strife’ 79 *African Affairs* (1980); Alexis Heraclides *Self-determination of minorities in international politics* (Portland, Oregon: Frank Cass, 1991) 111.

¹¹ I M Lewis ‘The tribal factor in contemporary Africa’ in Colin Legum and John Drysdale (eds.) *Africa: Contemporary record 1969-1970* (Exeter: Africa research Limited, 1971) A 14.

resonance with this formulation of the problem of minorities in Africa. He said: '[T]here is no clear majority population in South Africa, against which minorities need to be protected. Linguistically and culturally speaking, there are only minorities in our country. The problem is to balance out their various interests rather than to protect any one group against another.'¹²

Although the demand of various groups to have a share in the control and exercise of state power is an overriding feature of minority issues in Africa, not any less important manifestation of minority problems in Africa is the demand for autonomy, self-government and even secession. That significant numbers of conflicts that took place in Africa have been ethno-regional or ethno-national clearly demonstrates this. According to some studies, out of more than 40 internal armed conflicts that took place in Africa during 1946-2001, ethno-regional or ethno-national conflicts account for 35 percent.¹³

In most cases, a combination of a sense of separateness, resulting from separate colonial history, and post-independence patterns of discrimination have provided the foundation for their demand of self-determination.¹⁴ For some like English speaking Cameroon, Eritrea, and the Isaq of Somalia the fact that they were under a different colonial administration from other parts of the state to which they have been incorporated coupled with disadvantages suffered during the post-colonial period has been one of the factors inspiring their demand for self-determination.¹⁵ The struggle of southern Sudan for self-

¹² Constitutional Court of South Africa 39/95, 4 April 1996; 1996 (3) SA 165 (CC), 1996 (4) BCLR 537, para. 81.

¹³ See details from *Armed Conflict 1946-2001* at <http://www.pcr.uu.se/publications/ucdp_pub/conflict_list_1946-2005.pdf> ; for the same period refer also to The chronology of armed conflict: prehistory to present attached as appendix 4 in Carolyn Pumphrey et al. (eds.) *Armed conflict in Africa* (Lanham, Maryland, and Oxford: The Scarecrow Press, Inc., 2003) 211-282.

¹⁴ Indeed according to Scarrit, in Africa 'demands for autonomy are much more the product of colonial policies of divide-and-rule and post independence conflicts than of group characteristics.' In Ted Robert Gurr *Minorities at risk: A global view of ethnopolitical conflicts* (Washington: United States Institute of Peace, 1993) 261.

¹⁵ English speaking Cameroon was part of the former British administered UN Trust Territory whereas the former Republic of Cameroon was the former French administered UN Trust Territory. They were united to form the Federal Republic of Cameroon on the basis of a UN sponsored referendum. The federal union of the two was however subsequently abrogated in 1972 giving rise to a secessionist sentiment in English speaking Cameroon. (See generally P Konings 'The Anglophone problem in Cameroon' *The Journal of Modern African Studies* (2000)).

determination traces its root back to regional discrepancies in British colonial administration and beyond.¹⁶

Sense of cultural distinctness is however equally, if not more, crucial in some of the demands for self-determination. This is for example true in the case of South Sudan with its African and mostly Christian and animist peoples and Zulus in South Africa¹⁷ with their sense of historical independence and cultural distinctness and some of the ethnic movements that have been active in Ethiopia. Apart from historical factors, colonial or otherwise, and ethnic factors, prevailing and continuing regional economic disparities explain some of the ethno-regional/national claims. In other words, one of the factors leading to such claims is economic discrimination which involves the systematic exclusion of members of a group from access to desirable economic goods, conditions, or positions which are to a large extent monopolized by other groups in society.¹⁸ According to Horowitz, it is the 'relative group' position combined with the 'relative regional position' that determines the conditions for secessionist movements.¹⁹ This view suggests that secessionist movements are triggered or exacerbated by the regional dynamics of different groups in relation to the state, and that, among other things, poor groups in underdeveloped regions are the most prone to secessionist movements. The

Similarly, Eritrea, a former colony of Italy which was administered as a UN Trust Territory by British, formed a federation with Ethiopia under a UN sponsored referendum in 1952. The anomalous relationship that resulted from the federation subsequently brought about the abrogation of the federal union by Emperor Hailesilassie I in 1962 leading to the beginning of the Eritrean liberation struggle (See Heraclides, *supra* note 80, 177-195 ; The northern secessionist territory of Somalia, which declared itself in 1991 to be the Republic of Somaliland, was a British colony and hence had separate history from the south which was under Italian colonial rule. See J Klabbers and R. Lefeber 'Africa: Lost Between self-determination and *uti possidetis*' in C Brölmann, R Lefeber & M Zieck (eds.) *Peoples and minorities in International law* (Dordrecht: Martinus Nijhoff Publishers, 1993) 65-70.

¹⁶ See Angela M. Lloyd 'The Southern Sudan: A compelling case for secession' 32 *Columbia Journal of Transnational Law* (1994) 439-451.

¹⁷ See Jerom Wilson 'Ethnic groups and the right to self-determination' 11 *Connecticut Journal of International Law* (1996) 442-456.

¹⁸ Gurr, *supra* note 14, 43. One of the manifestation of this particularly in Africa is the existence of substantial material deprivation (inequality) affecting the group or groups in question. This is a result of the uneven distribution of economic goods by colonial powers and the indifference of the post-colonial state to rectify this situation.

¹⁹ Horowitz, *supra* note 8, 235.

case of Southern Sudan²⁰ and the movement of various communities in the Niger Delta of Nigeria, particularly the Ogoni sufficiently illustrate this point.²¹

The above exposition on the diverse forms and origin of minority problems on Africa shows that, although effective system of protection of individual rights is necessary and can address some of the disadvantages minority groups suffer, it is not by itself alone a sufficient condition to ameliorate minority conflicts and effectively vindicate the claims made by and the needs of minorities in Africa. Gordon Means has argued that 'where group identity and communal and ethnic prejudices permeate a society, it is naïve if not hypocritical to talk about the equality of opportunity based upon individual achievement and universalistic notions.'²² I would equally argue that where inequality in political participation and access to economic resources is pervasive in a multiethnic society, as in many states in Africa, and hence where the nature of the relationship among minority groups is characterised by a struggle for control or share of state power, where there is a quest for cultural recognition and self-government, individual human rights, although necessary, do not by themselves alone provide sufficient workable solutions. They must necessarily be supplemented by rights and instruments that are capable of advancing group based claims.

Does this have costs for society? Yes, it surely has. But I do not think that these costs are so magnanimous that they outweigh the benefits. Moreover, it is possible to design such a system in such a way that the dangers it may pose can be handled in a democratic fashion through dialogue, discussion and concessions. It is therefore contended here that a good system of minority protection is one that guarantees individual human rights, institutionalises justiciable socio-economic rights and provides for rights and mechanisms that cater for group claims including the right to self-determination. It is against this

²⁰ See Alexis Heraclides *Self-determination of minorities in international politics* (Portland, Oregon: Frank Cass, 1991) 110-111.

²¹ Chinedu Reginald Ezetah 'International law of self-determination and the Ogoni question: Mirroring Africa's post-colonial dilemma' 19 *Loyola of Los Angeles International and Comparative Law* (1997) 814.

²² Gordon P. Means 'Human rights and the rights of ethnic groups – A commentary' 1 *International Studies Notes* (1974) 17.

background that in what follows I will examine the extent to which the African Charter provides what it takes for ensuring effective protection of minorities in Africa.

III The African Charter on Human and Peoples' Rights

The African Charter on Human and Peoples' Rights²³ is the foundation of the African regional human rights system. Like similar other founding human rights instruments, the Charter provides for substantive rights, lays down enforcement procedures and established a supervisory body.²⁴ This part seeks to uncover the various aspects of the Charter that make it particularly useful for the protection of minorities in Africa.

Substantive rights of the African Charter relevant to the protection of minorities

In international human rights discourse, it is common to classify human rights in to three categories. The first category consists of civil and political rights. These are the rights that, according to Christof Heyns, constitute the daily staple of regional and domestic human rights mechanisms.²⁵ They include those rights that impose negative duty on the state and those rights that are meant to ensure citizens participation in public affairs.²⁶ One can cite as example the right to life, the right to liberty and personal security, the right to privacy, the right to fair trial and the right to equality and non-discrimination. Freedom rights such as freedom of religion, freedom of association, freedom of expression, freedom of assembly and freedom from torture and inhumane treatment also

²³ 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.

²⁴ For a recent discussion on the nature and operation of the African Charter see Christof Heyns 'The African regional human rights system: The African Charter' 108 *Penn St. L. Rev.* (2004) 679.

²⁵ See Christof Heyns 'Civil and political rights in the African Charter' in Malcolm Evans and Rachel Murray (ed.) *The African Charter on Human and Peoples' Rights: The system in practice* (1986-2000) 137.

²⁶ The International Covenant on Civil and Political Rights enshrines these rights and lays down mechanisms for their international enforcement.

form part of this category. The other category of rights consists of economic, social and cultural rights. These are rights that are meant to provide the necessary means for human beings to lead a life of dignity. They include, but are not limited to, the right to health, the right to education, the right to housing, the right to food and the right to social security.²⁷ Unlike civil and political rights however, these rights are not justiciable, although they are also legal rights. The rights that fall under the third category of rights are what are generally called collective rights. Unlike the two other categories of rights, this category of rights has not received the same legal protection internationally. Probably the only legally enforceable right that may fall within this category is the minority rights provision of Article 27 of the ICCPR. This article however mainly guarantees rights to individual members of minorities, and as such cannot be considered as a right of minorities qua minorities.

The African Charter is unique in its definition of rights guaranteed. The first is that the African Charter is the only international instrument that has entrenched all the three categories of rights. Second and probably more important, is the fact that all the three category of rights have the same legal validity and are, at least theoretically, equally enforceable. From this perspective, one can say that under the African Charter human rights are considered in their entirety and holistically. Joa Oloka-Onyango summarised this particular achievement of the Charter as follows

the African Charter on Human and Peoples' Rights ("Charter") became widely recognized for breaking new conceptual ground in human rights law by including civil, political, economic, social and cultural rights in a single instrument. Additionally, the Charter's exemplification of group rights, such as the right to development, the right to peace, and the right to a general satisfactory environment, was viewed as a truly revolutionary re-articulation of rights discourse, and as providing much fodder to a holistic reading of human rights theory and practice.²⁸

From the perspective of the protection of minorities, this means that the African Charter provides an all inclusive legal materials which, if innovatively used, can afford effective

²⁷ These rights are guaranteed under the International Covenant on Economic, Social and Cultural Rights of the UN.

²⁸ 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, 857.

protection for minorities in Africa. If one examines the substantive rights contained the African Charter from the perspective of minorities in the light of the three categories of rights, it becomes clear that the Charter has indeed the potential to provide such effective protection to minorities.

From the category of civil and political rights the ones that stand out for their particular importance include the right to non-discrimination, freedom of expression and association and the right to political participation. Under Article 2 the non-discrimination clause provides:

Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

This provision is comparable with Article 26 of the ICCPR. It can therefore be argued that this provision can be understood as imposing on public authorities not only the obligation not to discriminate against members of minority groups on account of their membership in a minority group but also in certain circumstances the obligation to take necessary measures that correct the conditions that impair or diminish the enjoyment of rights by members of minority groups on an equal basis with other members of society.²⁹ In the light of the fact that some persons have historically, past and present, been discriminated against, and, thus, disadvantaged particularly on grounds of their linguistic, ethnic or religious membership, it is imperative that the protection against non-discrimination is given such content.³⁰

Freedom of association and expression are also instrumental to advance the rights of minorities. The most relevant part of Article 10, which provides for freedom of association provides: 'Every individual shall have the right to free association provided that he abides by the law.' Article 9 also provides for freedom of expression as follows:

²⁹ See General Comment No. 18 of the Human Rights Committee of the UN para. 10.

³⁰ See K A Acheampong 'The African Charter and the equalization of human rights' 12 *Scandinavian Human Rights Journal* (1994) 168.

1. Every individual shall have the right to receive information.
2. Every individual shall have the right to express and disseminate his opinions within the law.

One common feature of these freedoms is that they are limited by drawback clauses. The danger of this is that it permits states to limit the enjoyment of rights for purposes of advancing the interest of minority groups as many African states have done when they prohibit the establishment of political parties on the basis of identity.

Another right which can be utilised to articulate a constitutional and legal framework to ensure equal political participation and equitable political representation for the constituent communities of African states is the right to political participation. Article 13 provides for this right as follows

1. Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.
2. Every citizen shall have the right of equal access to the public service of his country.
3. Every individual shall have the right of access to public property and services in strict equality of all persons before the law.

If these provisions are jurisprudentially elaborated against the background of and in conjunction with Articles 19 and 20, it is not implausible that it can be understood as having alternative approaches that guarantee representation and equal participation of different sections of society and hence as providing a framework to address minority conflicts that arise from demands for equal political participation and political representation.³¹ Examples of such alternative mechanisms include power sharing at the legislative and executive branches of government as is being tried in Burundi, federalism as in the case of Nigeria or as provided for in the agreement between North and South Sudan, devolution of power, definition of electoral constituency in a way that enables minorities to have representation at national, regional and local levels or as in the case of Ethiopia by reserving certain number of seats for minority groups.

³¹ See The Guidelines for National Periodic Reports as regards Article 20.

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 choices they have made independently.

Economic, social and cultural rights are set out in Articles 14-17. B de Villiers succinctly explained the importance of these rights for disadvantaged groups, as most minorities in Africa are, when he asserted

The main purpose of socio-economic rights is to place the state under a legal obligation to utilise its available resources maximally to correct social and economic inequalities and imbalances. It has been stressed in the literature and confirmed by practical experience that democratisation and the protection of rights can be attained only if the social and economic conditions of individuals improved.³²

The reporting Guidelines for National Periodic Reports of the African Commission also require states parties to the Charter to supply information on special provisions for special groups in the field of primary education including ‘Children belonging to linguistic, racial, religious or other minorities, and children belonging to indigenous sectors of the population, where applicable.’³³ States are also required information on opportunities to attend schools where teaching is in the native language.³⁴ This suggests that these rights, despite their formulation as individual rights, can be claimed by minorities who are subject to particular socio-economic disadvantages. It is however very doubtful if the African Commission will hold a particular state for breach of socio-economic rights if a state knowingly fails to take necessary measures to redress particular socio-economic disadvantages suffered by a minority.

Unlike other international instruments, what makes the African Charter especially valuable for the protection of minorities is its elaboration of collective rights of peoples. The formulation of these rights under the African Charter is by far the most generous and comprehensive.³⁵ It has recognized a wide range of rights as peoples’ rights including those that had not previously found any recognition in treaty form.³⁶ The African Charter

³² B de Villiers ‘The protection of social and economic rights – International perspectives’ *Occasional Paper 9*, Centre for Human Rights (1996) 2.

³³ See the Guidelines for National Periodic Reports in Second Activity Report of the African Commission as adopted in June 1989 annex XII, Guidelines II, 47.

³⁴ As above Guidelines II, 55.

³⁵ See Fatsah Onguergouz, *The African Charter on Human and Peoples’ Rights: A comprehensive agenda for human rights and sustainable democracy in Africa* (2003) 203.

³⁶ Philip Alston, ‘Peoples’ Rights: Their rise and fall’ in Philip Alston (eds) *Peoples’ Rights* (2001) 266.

proclaims not only the internationally recognized right of all peoples to self-determination³⁷ but also the right of peoples to equality;³⁸ the right to existence;³⁹ the right to development;⁴⁰ the right to national and international peace;⁴¹ and the right to environment.⁴²

It can be argued that by expanding the rights beyond the controversial right of self-determination, the African Charter liberates the concept of peoples' rights from its confinement. It creates the opportunity to surpass the theoretical hurdle that inhibited significant advancement in the understanding and conceptualisation of peoples' rights. It is now possible to understand the term 'peoples' in its legal sense as having an ethnic content and hence at least in the African context as referring also to the various minority groups that constitute the African state. Such understanding of the term has so far been an essentially academic exercise with little legal support.⁴³

Provisions on communications procedures

The African Charter under its Article 55 (1) provides:

Before each Session, the Secretary of the Commission shall make a list of the *communications other than those of States parties* to the present Charter and transmit them to the members of the Commission, who shall indicate which communications should be considered by the Commission.

In so providing, the African Charter authorizes the African Commission to consider communications other than those of states parties.⁴⁴ If one reads the italicized phrase in

³⁷ Article 20.

³⁸ Article 19.

³⁹ Article 20.

⁴⁰ Article 22.

⁴¹ Article 23.

⁴² Article 24.

⁴³ Welhengama persuasively argues that the UN's practice strongly indicates that peoples or all peoples were used to identify a totality of peoples organized as a political unit in a state. Ethnic, national or other minority groups are not intended by *peoples*, *every people* or *all peoples*. Gnanapala Welhengama *Minorities claims: From autonomy to secession* (Aldershot: Ashgate Publishing Ltd., 2000) 79.

⁴⁴ Article 49 of the African Charter authorises states parties to submit communications if any state has reasonable grounds that show that another state party has violated the rights provided for under the charter.

conjunction with the provisions on the requirements of admissibility for communications other than those of states parties under Article 56 particularly paragraph 1, it is clear that the reference to communications other than states parties is a reference to communications lodged by, among others, victims of violations of the rights guaranteed under the African Charter. Victims may include individuals as holders of individual rights or groups such as minorities (or their individual members) as holders of collective rights of the African Charter. Once again this makes the African Charter the only international instrument that conferred on collectivities such as minorities an international legal personality of some sort. Indeed, in the practice of the African Charter other entities such as Non Governmental Organizations with observer status before the African Commission can submit communications to the African Charter on behalf of any one or group whose rights under the African Charter are violated.

Aspects of the mandates of the African Commission relevant to the protection of minorities

The mandates of the African Commission are set out in the African Charter in a fairly detailed manner. The Commission is expressly mandated to examine the human rights situation of states parties to the African Charter through the national periodic reporting procedure of the African Charter.⁴⁵ This has enabled the Commission to define guidelines for national periodic reports. It is interesting to note for our purpose that it is one of the instruments developed by the African Commission on the basis of the African Charter to make specific reference to minorities.⁴⁶ More significantly the guideline for Article 20 formulated the right to self- determination as requiring states parties 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 choices they have made independently.

⁴⁵ See for details Malcolm Evans et. al. 'The reporting mechanism of the African Charter on Human and Peoples' Rights' in Malcolm Evans and Rachel Murray (ed.) *The African Charter on Human and Peoples' Rights: The system in practice (1986-2000)* 36-60.

⁴⁶ Guidelines II, 47

The Commission is also charged with the responsibility to promote the rights enshrined under the African Charter. One of the instruments that the African Commission has developed as part of its promotional mandate is the issuance of resolutions. According to Dankwa 'resort to resolutions has been an important mode for promoting human rights.' He further adds, 'where the human rights situation gives cause for concern, the Commission has not hesitated in passing resolutions condemning actions of governments and stating what ought to be done to improve the situation.'⁴⁷ For our purpose, it is important to note that many of the cases in which the Commission has issued resolutions are those which involve minority conflicts.⁴⁸

The Commission can also appoint special rapporteurs.⁴⁹ This has been one of the mechanisms employed by the UN as far as minority rights are concerned and has contributed tremendously to the development of standards and for maintaining the issue of minorities in the global agenda under the auspicious of the UN. If this instrument was employed for dealing with minority problems in the continent, one would expect this to draw, if not the willingness of the states concerned to take actions for the protection of minorities, the attention of the political organs of the AU allowing the possibility for including minority issues in the agenda of the continental organization.

As part of its protective mandate, the Commission can also conduct an on-site visit in cases where there have been allegations of serious or massive violations through the communications procedures.⁵⁰ The commission has done this in various circumstances involving violation of the rights of minorities.

Other aspects of the African Charter that provides opportunity for effective protection of minorities

⁴⁷ Victor Dankwa 'The promotional role of the African Charter' in Malcolm Evans and Rachel Murray (ed.) *The African Charter on Human and Peoples' Rights: The system in practice (1986-2000)* 338.

⁴⁸ See Dankwa's note 13 as above.

⁴⁹ See Malcolm Evans and Rachel Murray 'The special rapporteurs in the African system' in Evans and Murray, as above, 280-304.

⁵⁰ See R Murray 'On-site visits by the African Commission on Human and Peoples' Rights: A case study and comparison with the Inter-American Commission on Human Rights' 11 *African Journal of International and Comparative Law* (1999) 460

Another feature of the African Charter that can be used to advance the claims of minorities is Article 60 of the Charter. According to this article

The Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights as well as from the provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the parties to the present Charter are members.

Additionally Article 61 allows the Commission to determine principles of law from subsidiary sources by providing

The Commission shall also take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognized by member states of the Organization of African Unity, African practices consistent with international norms on human and people's rights, customs generally accepted as law, general principles of law recognized by African states as well as legal precedents and doctrine.

As Rachel Murray observed, the Charter is 'unusual in its inclusion of non-binding concepts and the jurisprudence of other bodies'.⁵¹ The importance of these provisions is that they open the door for adopting for the protection of minorities in Africa legal materials developed under other international instruments relevant to minorities such as CERD.

IV Factors that limit the protection of minorities under the African Charter

It seems from the foregoing discussion that the African Charter seems to offer a significantly robust legal framework potentially capable of vindicating the claims of minorities in Africa. A closer look at the operations of the African human rights system reveals that the environment is not as comfortable as it seems for the protection of

⁵¹ R Murray *The African Commission on Human and Peoples Rights and international law* (2000) 25.

minorities. One can identify in this regard two sets of challenges for the protection of minorities under the African Charter: Challenges internal to the African system of human rights under the African Charter and external challenges.

Internal Factors

Problems with respect to the substantive provisions of the African Charter

One of the criticisms raised against the substantive provisions of the African Charter is the nature of the formulation of the rights. As an example critics point out that these provisions are equivocally phrased. The limitations put on some of the rights by way of 'clawback' clauses have also been cited as some of the defects of the substantive provisions of the Charter. These have however been rectified through the innovative jurisprudence of the African Commission which refuted the argument that the 'clawback' clauses leave the nature of protection of the rights to the discretion of national authorities.⁵²

Definitional problems

One of the difficulties in any discussion on minority rights is that there is no legally established definition of the term minority. Owing to the particular features of the problems of minorities in Africa, the problem of definition is even more complicated. In the majority of African countries, there is no single group that constitutes a clear majority. If minority status is to be determined purely on numerical basis, then where there is no clear majority how can one determine the minority status of groups? If minority status is not a numerical issue, what other factor can be used for determining who a minority is? The history of African politics as we all know is such that it is not necessarily numerically smaller groups that suffer disadvantages. During the apartheid period, the majority black South Africans suffered systematic discriminations and disadvantages in the hands of the white minority government. In Burundi, the minority

⁵² See Communications 105/93, 128/94, 130/94 and 152/96 Media Rights Agenda and Constitutional Rights Project v. Nigeria in 12th Annual Activity Report (1998-1999) Annex V. para. 57.

Tutsi have been in a politically and economically dominant position while members of the majority Hutu group suffered political and economic marginalisation.

Under the African Charter the definitional problem is further complicated by the absence of a definition to the term 'peoples'. What makes this more complicated is that in international law the terms minority and peoples have been conceptualised as referring to different categories of groups. 'Peoples' is given a particular legal meaning as subjects of the right to self-determination. As such, much of the discussion on the concept of 'peoples' under international law is closely linked to self-determination.⁵³ Under ICCPR '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. The mainstream opinion of scholars similarly upholds this distinction. 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.'⁵⁴ For him and some others minorities can be taken as peoples only in some exceptional circumstances.⁵⁵ There are others who make strict distinctions between minorities and peoples, and therefore argue that minorities are not entitled to self-determination.⁵⁶

⁵³ 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.

⁵⁴ John Dugard 'A legal basis for secession – Relevant principles and rules' in Julie Dahlitz (ed.) *Secession and international law* (The Hague: T.M.C. Asser Press, 2003) 92.

⁵⁵ See Dugard as 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.

⁵⁶ 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 54 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.

Since no mention of minority rights was made under the African Charter, the view of many scholars has been that minorities are not protected under the African Charter.

Rhoda E Howard thus asserted that

There are no rights to minorities, in opposition to the larger nation-state, in the African Charter on Human and Peoples' Rights; rather, the rights of peoples mentioned in Articles 19-24 are clearly meant to be the rights of national, not sub-national, groups.⁵⁷

Similarly Julia Maxted and Abebe Zegeye maintained that the term 'people' as used in the African Charter refers to the people of the state as a whole, and not to minority communities constituting the state.⁵⁸

The attitude of states and the legal tradition of the OAU are other factors that militate against interpreting the term 'peoples' as referring, among other things, to minorities. The challenge here is that peoples' rights would be empty rights with very limited practical application if minorities are not considered as the subject of these rights. This is because in most African countries almost all groups can be considered as having a minority status. Although the African Commission has been willing to apply peoples rights to groups with minority status, in all those cases that it did so it has never determined whether and how the group concerned is a minority. Nither has the Commission told us why and how both the Ogoni, a minority ethnic group, and Katangese, peoples of different ethnic group but who share a common territory and have lived in the same province, can be referred to people.

A further difficulty with respect to peoples' rights is that the Charter does not sufficiently define the content of the rights and the specific nature of the obligations that they impose on states. The limited jurisprudence of the African Commission has also failed to provide particular content to these rights. The decisions of the commission lack any jurisprudential conceptualisation on the various ways, institutional frameworks and policies by which these rights can be given effect.

⁵⁷ Rhoda E. Howard *Human rights in Commonwealth Africa* (New Jersey: Rowman and Littlefield, 1986) 92.

⁵⁸ 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.

External Factors

One such factor is the attitude of states to minority rights. African states have generally been against any recognition of minority rights. Even today, this seems to be the dominant position. The central theme running through almost all African constitutions has thus been to deny the diverse components of society any form of institutional expression. The pursuit of national unity by denying political space to ethnic diversity has been the characteristic feature of African statecraft and constitution-making that has commanded wide acceptance. African constitutions have therefore been particular about asserting the unity and non-indivisibility of the state. Paradoxically enough, such constitutional assertion of the unity of the nation is to be found in 'even that of the constitution of Burundi, a country where hundreds of thousands were killed or exiled as a result of ethnic strife, claims that the Burundi people 'is confident in its unity and secular cohesion.'⁵⁹ Some countries such as Mali have gone as far as criminalising any form of ethnic movement which was punishable by imprisonment.⁶⁰ A recent survey on contemporary African constitutions has also revealed that minority rights are the least recognised in African constitutions.

Certain legal principles held to be of supreme importance within the framework of the now defunct OAU have also undermined the protection of minorities. In this regard mention can be made of the emphasis of the OAU Charter on the principles of the sovereignty of states and non-intervention and OAU's affirmation of the principle of *uti possidetis*. It is on account of these principles that one of the Commissioners of the African Commission asked during the examination of the state report of Rwanda

Does that mean we have to take into account the rights of the Hutu community, the Tutsi Community or the Twa community? I think that according to the interpretation and even the

⁵⁹ Filip Reyntjens 'The constitutional status of ethnicity in Africa south of the Sahara' 8 *South African Public Law* (1993) 37-38.

⁶⁰ Soyinka-Airewele, *supra* note 14, 177.

principles which are enforced in the OAU at the level of the states it is admitted that we do not have to take account of the rights of various ethnic groups to consider them as peoples' rights.⁶¹

V Conclusion

Three conclusions can be drawn from the foregoing. First, the protection of minorities is a very critical aspect not only for the effective protection of human rights but also for national and regional peace and stability in Africa. Second, the African Charter has different aspects that give it immense potentials to provide effective protection for minorities in Africa. Finally, however, these potentials can be realised only if the African Commission, the African Union and states parties to the African Charter are willing to address the challenges posed by some factors that can inhibit the utilization of the African Charter for effective protection of minorities.

⁶¹ ACHPR, *Examination of State Reports* (Libya-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.