

Peoples' Rights under the African Charter on Human and Peoples' Rights: Much ado about nothing?

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Abstract

In stark contrast to other regional and international human rights instruments, the African Charter on Human and Peoples' Rights is unique in its approach to collective rights known as peoples' rights. It is the first human rights treaty that accords unqualified recognition to peoples' rights. Many commentators have expressed their concern about the congruity of peoples' rights with individual rights, their conceptual clarity and their effective implementation through the African Commission on Human and Peoples' Rights. This paper argues that the African Charter is premised on the understanding that the human rights concerns of Africa can best be addressed not only by ensuring the dominant model of individual human rights but also by incorporating the concept of peoples' rights. To that end, the paper will discuss the meaning of the term peoples. It will also examine the nature, significance and status of peoples' rights within the African Charter and critically analyze the approach of the African Commission on Human and Peoples' Rights to these rights. It is in this context that the paper will elucidate how the concept of peoples' rights could be used to address the concerns of minorities and other sub-state groups.

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I Introduction

In international Human rights discourse, human rights are traditionally classified into three generations of human rights.¹ The first generation of rights consist of civil and political rights; the second generation of rights are what are called economic, social and cultural rights under international human rights law; and the third generation of rights, which are also called solidarity or collective rights are the ones which the African Charter on Human and Peoples' Rights² calls peoples' rights.

Currently, it is only the first and second generation of rights that international human rights law fully recognizes as rights in law.³ From the category of third generation of rights, it is only the rights of all peoples to self-determination and its constituent part the right of peoples to freely dispose of their natural wealth that are given recognition by treaty under international human rights law.⁴ Even here, the right to self-determination constitutes a separate part of the two UN Covenants (Part I) dissociated from civil and political rights and economic, social and cultural rights.⁵

¹ It was Karl Vasak, one of the former Directors of the Division of Human Rights and Peace of UNESCO, who originally expounded the idea of the three generations of human rights. See Marks, *Emerging Human Rights: A New Generation for the 1980s?*, 33 *Rutgers L. Rev.* 441, 442-50 (1981). This classification of rights does not create hierarchy between the various categories of human rights. As the Vienna Declaration of 1993 has affirmed all human rights are '...universal, indivisible and interdependent'. Article 1, Vienna Declaration and Programmed of Action, A/CONF.157/23, July 12, 1993.

² African Charter on Human and Peoples' Rights, June 27, 1981, O.A.U. Doc. CAB/LEG/67/4/Rev.5, reprinted in 21 *I.L.M.* 58 (1982) [hereinafter the African Charter or the Charter].

³ The International Bill of Rights, which, as the foundation of international human rights law, is composed of the Universal Declaration of Human Rights (UDHR) and International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), consists largely of civil and political rights and economic, social and cultural rights.

⁴ Common Article 1 of the ICCPR and the ICESCR provide:

'1. All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based on the principle of mutual benefit, and international law. In no case a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of non-self-governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.'

⁵ The inclusion of the right to self-determination, which makes peoples a subject of right, into the covenant was controversial. In this regard Theo van Boven has noted that '[T]hat article (Art. 1 of the

The formulation of peoples' rights under the African Charter is by far the most generous and comprehensive.⁶ It has recognized a wide range of peoples' rights including those that had not previously found any recognition in treaty form.⁷ The African Charter proclaims not only the internationally recognized right of all peoples to self-determination⁸ but also the right of peoples to equality;⁹ the right to existence;¹⁰ the right to development;¹¹ the right to national and international peace;¹² and the right to environment.¹³

One cannot help wondering if this innovative approach of the African Charter is of practical value to the cause of human rights in Africa, considering the continent's past history and current challenges. Particularly, it is sought here to see how peoples' rights are crucial to cater for the human rights concerns of marginalized groups such as minorities.¹⁴ In this regard, some of the questions that this paper raises and seek to address are: What are some of the serious human rights concerns in Africa? What role would peoples' rights play in addressing these human rights concerns? In trying to address these questions it is also important to examine the essence of peoples' rights under the African Charter and in the jurisprudence of the African Commission on Human and Peoples' Rights.¹⁵ In this regard, the questions are: What are the

ICCPR) was not only contentious in view of the interests of certain colonial powers at the time...but it was also at variance with certain Western concepts to make peoples as such the subject of rights and to include that notion in a human rights instrument.' Theo van Boven, 'The relations between peoples' rights and human rights in the African Charter', 7 *Human Rts. L.J.* 185.

⁶ See Fatsah Onguergouz, *The African Charter on Human and Peoples' Rights: A comprehensive agenda for human rights and sustainable democracy in Africa* (2003) 203.

⁷ Philip Alston, 'Peoples' Rights: Their rise and fall' in Philip Alston (eds) *Peoples' Rights* (2001), 266.

⁸ Article 20.

⁹ Article 19.

¹⁰ Article 20.

¹¹ Article 22.

¹² Article 23.

¹³ Article 24.

¹⁴ The term minorities in this context is used in its traditional sense to refer to ethnic, religious or linguistic minorities. It consequently excludes what may be called new minorities like women, gays or lesbians etc. Evidently, the minorities to which peoples' rights apply under the African Charter are only ethnic minorities.

¹⁵ The African Commission on Human and Peoples' Rights is the regional human rights institution that is established under Article 30 of the African Charter with the mandate primarily of promoting and protecting

historical and socio-political factors that necessitated the extensive elaboration of peoples' rights in the African Charter? What is the place of peoples' rights within the framework of the African Charter? Who are the subjects of peoples' rights?

To address these and other similar questions, the paper is organized into five parts. Next to this introductory part comes, the second part of the paper that explores the concept of peoples' rights under the African chapter. The third part discusses the legal nature and status of peoples' rights of the African Charter. Part four of the paper deals with some of the serious human rights concerns in Africa that make peoples' rights particularly important in Africa. Finally, part five closes the discussion with a conclusion.

II The meaning of the term 'Peoples' Under the African Charter

The term 'peoples' is not defined any where in the African Charter. Indeed the drafters of the African Charter deliberately avoided the provision of a definition to the term. Under such circumstances, it is only from the legislative intention of the framers of the African Charter and the jurisprudence of the African Commission that one seeks guidance for determining the reach of the term as employed in the African Charter. The drafters of the African Charter sought to give the Charter an African content.

Peoples' rights of the African Charter constitute a monumental manifestation of the African conception of society and a person. The standing of the individual in society cannot be dissociated from the community to which she belongs. Though a person as she is, the individual largely exists through and by her relationship with the group of her birth.¹⁶ Peoples' rights are thus the imprint of this particularly communal character

human and peoples' rights and interpreting all the provisions of the Charter upon the request of a state party, an organ of the OAU or any African Organization recognized by the OAU. Article 45 of the African Charter.

¹⁶ This is a manifestation of the African philosophy of 'I am because we are and since we are therefore I am'. J.S. Mbiti, *African religions and philosophy* (1970) 144 as quoted in E. A. Ankumah *The African*

of African societies. The report of the OAU Rapporteur of the drafting process revealed that this African cultural imprint has guided the drafters:

Noting that in Africa, Man is part and parcel of the group, some delegations concluded that individual rights could be explained and justified only by the rights of the community. Consequently, they wished that the draft charter made room for the peoples' rights...¹⁷

In contrast to the individualistic view of the western world, therefore, the individual is not just herself alone; the group also lives in and through her. Thus apart from the individual, the group as a critical actor in society also enjoys a certain degree of free political, economic and social domain to which recognition is given through peoples' rights.¹⁸

Looking at the practice of the African Commission, one finds that no attempt has been made by the African Commission to define 'peoples'. Rather one identifies that the Commission has employed the term to diverse situations. One can identify some four different situations with respect to which the term has been deployed. Thus 'people' is used to refer to the population of a state in its entirety,¹⁹ to the peoples of the

Commission on Human and Peoples Rights: Practice and Procedure (1996) 159. Female pronouns (she/her) are used in this text to highlight the importance of equality generally and gender equality in particular.

¹⁷ Rapporteur's Report, OAU Doc. CM/1149 (XXXVII), Annex 1, at 4, para. 14 (1981). On the cultural foundations of the African Charter see generally Makau wa Mutuwa 'The Banjul Charter and the African cultural fingerprint: An evaluation of the language of duties 35 *Virginia Journal of International Law* (1995) 339-380.

¹⁸ This understanding finds expression in the preamble of the African Charter in which states parties pledged their commitment to the charter 'taking into consideration the virtues of their historical tradition and the Values of African civilization which should inspire and characterize the their reflection on the concept of human and peoples' rights.' See para. 5 of the preamble to the African Charter.

¹⁹ The commission thus referred, for example, to the 'people of South Africa' and the 'people of Rwanda'. See Government Legal Experts Meeting on the establishment of an African Court on Human and Peoples' Rights 6-12 Sept. 1995 Cape Town South Africa Report OAU/LEG/EXP/AFC/HPR *Third Activity Report of the African Commission on Human and Peoples' Rights 1989-1990*, ACHPR/RPT/3rd Para. 14. and *Press Release on the Situation in Rwanda* Seventh Annual Activity Report of the African Commission on Human and Peoples' Rights 1993-1994 ACHPR/RPT/7th, Annex XII.

continent as a whole,²⁰ to an identifiable portion of the population of a state,²¹ and trade union.²² Although one appreciates the dynamism attributed to the term in this way, its application to trade unions is rather the obfuscation of a concept as valuable as peoples.

In the discussion on the right to self-determination under international law, it is common to define the term 'peoples' by a combination of some objective elements and subjective elements. The United Nations Educational, Scientific and Cultural Organization (UNESCO) employed this approach in identifying the defining elements of the term. Thus to qualify as 'peoples' it requires:

1. An enjoyment by a group of individuals of some or all the following common features:
 - a) a common historical tradition;
 - b) racial or ethnic identity;
 - c) cultural homogeneity
 - d) linguistic unity;
 - e) religious or ideological affinity;
 - f) territorial connection
 - g) common economic life
2. the group on a whole must have the will to be identified as a people or the consciousness of being a people.²³

The first category, which should not necessarily be met cumulatively, constitutes the objective characteristics that define the term 'peoples'. The second category involves the subjective element. The consciousness and assertion by a group of its distinctness as the mark of the subjective element is crucial for treating a group as people.

²⁰ See, for example, Resolution on the African Commission on Human and Peoples' Rights *Sixth Annual Activity Report of the African Commission on Human and Peoples Rights 1992-1993* ACHPR/RPT/6th.

²¹ Thus the Commission called the Katangese 'the people of Katanga' and the Ogonis as the 'people of Ogoni'. See The Katanga case as note 25 below and the Ogoni case as note 26 above.

²² See Rachel Murray *The African Commission on Human and Peoples Rights and International Law* (2001) 106.

²³ UNESCO Meeting of Experts on International Law, Paris, February, 1990, reprinted in E.A Ankuma *The African Commission on Human and Peoples' Rights: Practice and procedure* (1996) 160-161.

This approach of defining the term 'peoples' is apparently limited for the purpose of the African Charter. The term is used in the African charter not in a way that it can mean only one thing. Nevertheless, this approach could be relevant in the context of the Charter to identify that portion of a population of a state to which peoples' rights could apply.

In those instances when the Commission was seized to make pronouncement on the existence of violation of peoples' rights, the Commission employed the term as referring to a portion of the population of a state. The application of the term in these instances by the African Commission does not preclude an understanding that a minority is entitled to peoples' rights under the African Charter.²⁴ This is particularly true where there is a self-identifying minority. There are two such cases: The Katanga case²⁵ and the Ogoni cases.²⁶

In the Katanga case 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. 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. In its decision on the case the African Commission has not hesitated to refer to the Katangese as people without holding it important to determine whether Katangese consist of one or more ethnic group.

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

²⁴ Pityana expressed the view that some of the variant of self-determination referred to in the Katangese case 'may be extended to indigenous communities and ... interpreted to suit their situation.' W. Barney Pityana *Situation of indigenous people in Africa*, DOC/OS(XXVI)/130, Para 11.

²⁵ ACHPR Communication 75/92 *Congrès du Peuple Katangais v. Zaire* Eighth Annual Activity Report 1994-1995 (the Katanga case)

²⁶ ACHPR Communications 147/95 and 149/96 *Sir Dawda k Jawara v. the Gambia* Thirteenth Annual Activity Report 1999-2000.

Government as guaranteed by Article 13(1) 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.²⁷

The African Commission then concluded that the case held no evidence of violations of any rights under the African Charter. Therefore, the request for independence had no merit under the African Charter. It is important to note the distinction that the Commission envisaged in its decision between Katanga and the state of Zaire.

Interestingly enough, the Ogoni case also involved allegation of violation of peoples' rights under the African Charter, namely the rights to environment under Article 24 and the right to freely dispose of ones wealth and natural resources under Article 21. This case is particularly important, because it deals with a distinct community with a minority status, the Ogoni people. In its decision although the African Commission employed the term people interchangeably with the Ogoni community and the Ogonis, seemingly to emphasize the distinctness of a group, with its own standing in the Nigerian Society. The Commission held that the State of Nigeria violated the rights of the Ogoni people, inter alia, to environment and to free disposal of ones wealth and natural resources the subjects of which are 'peoples'. This presupposes the view of the Commission that the Ogonis are holders of peoples' rights under 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 the distinction is meant to treat the group as subjects of peoples' rights and the state as the bearer of the corresponding obligations that the rights impose.²⁸

It is important to observe that in the areas of peoples' rights there has been very few cases that were brought before the African Commission. Of these very few cases these two are prominent. Even in these cases, however, the Commission avoided the

²⁷ The Katanga case as note 25 above para. 6.

²⁸ 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 the state is not itself beneficiary of peoples' rights. See para. 45-46.

elaboration of the term 'peoples' in the context of the African Charter. The Commission also failed to examine the nature of the Katanga people or the Ogoni people as minority, indigenous people or other.

III The nature and status of peoples' rights under the African charter

a) peoples' rights as collective rights

Peoples' rights are by their very nature collective. They are rights that are afforded to groups that possess distinct common identity. This characteristic feature of the rights arise from the term 'peoples' used in the concept peoples' rights.²⁹ As the prefix 'human' in the concept human rights designate the individual as the holder of human rights, the term 'peoples' in peoples' rights arrogate peoples' rights to peoples qua people. The beneficiaries of peoples' rights are therefore groups having distinct identity. The groups in this context are not the kinds that have come into being by way of association or those marginalized social groups, such as women, physically and mentally disabled persons, homosexuals etc.³⁰ They are simply there as such not by human will.

Peoples' rights are also collective not only in the beneficiaries that they designate but also in the manner of their enjoyment. Thus they are conceived as 'that set of rights that can conceivably be enjoyed only in a collective manner.'³¹ It is, therefore, the groups envisaged by the term 'peoples' that are entitled to exercise these rights.³²

²⁹ It is common to define peoples in terms of subjective and objective definitional elements. See above note 22 and the accompanying text.

³⁰ On the non-application of collective rights to such groups see Midorag A. Jovanović 'Recognizing Minority Identities through collective rights' 27 *Human Rights Quarterly* (2005) 636-637.

³¹ See *Report of the African Commission's Working Group of Experts on the Rights of Indigenous Populations/Communities* (2005) 73. See also James Crawford, 'Rights of Peoples: Peoples or governments', in James Crawford (eds.) *The Rights of Peoples* (1988), 57.

³² Commenting on the right to self-determination in Article 1 of the ICCPR, Alexander Kiss observed that 'it is questionable whether communications by individuals who would claim to be victims of a violation of the right to self-determination ... can be received, since undoubtedly this right is a collective one.' Alexander Kiss 'The peoples' right to self-determination' 7(2-4) *Human Rights Law Journal* (1986) 175. See further the case of *Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada*

This makes peoples rights under the African Charter different from the rights in Article 27 of the ICCPR.³³

b) the legal nature and enforceability of peoples' rights

Many people have expressed their doubts that peoples' rights in the African charter are legal rights. They argued that peoples' rights are not rights in the legal sense at all, but are merely aspirational ideals or have rhetorical purpose.³⁴ For some they are just political abstractions that were historically employed to undermine human rights.³⁵ In the end, they could not be enforced in a way that human rights are enforced through a court action.³⁶

These fears might have been prompted by the fact that there has not been a mechanism for enforcing the right to self-determination under Article 1 of the ICCPR. The Human Rights Committee, the body monitoring the implementation of ICCPR, received a communication by a representative of an indigenous people alleging the violation of the right to self-determination by a state party to the ICCPR, Canada.³⁷ The Committee rejected the communication on the ground 'that the author, as an individual, could not claim under the Optional Protocol to be a victim of a violation of the right of self-determination enshrined in article I of the Covenant, which deals with rights conferred upon peoples, as such.'³⁸ The effect of this is that self-determination

(Communication No. 167/1984), Views adopted 26 March 1990, Report of the Human Rights Committee, Vol. II, GAOR, Forty-fifth Session, Suppl. NO.40 (A/45/40), 1-30. (Ominayak case)

³³ The rights under Art. 27 are what some authors call collective rights, but the bearers of these rights are not collective groups but individuals. What makes them collective is that they are communal in the manner of their enjoyment as the phrase 'in community with others' in that article suggests. It is thus rightly observed that 'Art.27 CCPR ...does not recognize a collective right of the group itself, it only speaks of its individual members.' Karl Josef Partsch 'Recent developments in the field of peoples' rights' 7(2-4) *Human Rights Law Journal* (1986) 129.

³⁴ See, e.g., Bondzie-Simpson 'A Critique of the African Charter on Human And Peoples' Rights' 31 *HOWARD L.J.* (1988) 643, 657; Philip Alston 'Peoples' Rights: Their rise and fall' in *Peoples' Rights* (2001) 289.

³⁵ Paul Sieghart *The international law of human rights* (1988) 368.

³⁶ See Li-Ann Thio 'Battling balkanization: Regional approaches toward minority protection beyond Europe' 43 *Harv. Int'l L.J.* (2002) 458 n.320 (referring to some of the peoples' rights recognized under the Charter as being so broad that they "defy enforcement").

³⁷ See the Ominayak case as note 32 above.

³⁸ The Ominayak case as **note 32 above para 13(3)**.

could not be enforced through the existing individual communications system.³⁹ Fortunately in the context of the African human rights system, peoples' rights have not faced similar fate.

Peoples' rights in the African Charter are more than mere political or moral principles intended to guide political actions of member states. Of course they dictate policy directions as to the right course of political action that states must follow in this area.⁴⁰ But they are more than that. Peoples' rights are also legal rights. As such they can be claimed by an identifiable collectivity or group and enforced against a state.

In the African human rights system, not only violation of individual human rights in the Charter that can be brought before the African Commission, but peoples rights as well. This is partly because there is no requirement that the communications be brought before the commission only by individuals directly affected.⁴¹ Interestingly enough, unlike the international and other regional human rights systems⁴², the affected people or representative of such people or even groups that act on behalf of such people can lodge the complaint before the African Commission. As such peoples' rights are enforceable. What the African Commission said in the Ogoni case is quite commendable:

Clearly, *collective rights* (peoples' rights), environmental rights and economic and social rights are essential elements of human rights in Africa. The African Commission will apply any of the diverse rights contained in the African Charter.

³⁹ See Optional Protocol to the International Covenant on Civil and Political Rights, concluded 16 Dec. 1966, entry into force 23 March 1976.

⁴⁰ Peoples' rights have a bearing on the policy of state parties to the Charter in such areas as language, participation, etc. 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.

⁴¹ See Article 55 of the African Charter. Note that the provision does not speak of individual communications, rather it speaks of 'communications other than those of states parties'. There is no reason why this should be construed as a provision that gives standing before the commission only to individuals. It must as well be read as giving standing before the Commission to peoples as well since the Charter guarantees human rights and peoples' rights on an equal basis.

⁴² In the Inter American System, although peoples' rights are not yet recognized, the Inter-America Human Rights Commission has given standing to representatives of indigenous peoples by permitting them to address it See for example Inter-America Commission on Human Rights, *Report on the situation of human rights in Brazil*, 1997, OEA/Ser.L/V/II.97, Doc.29 rev.1, 29 Sept. 1997

It welcomes this opportunity to make clear that there is no right in the African Charter that cannot be made effective.⁴³

This has enabled the African Commission to entertain communications alleging violations of peoples' rights at par with those of individual rights.

In the Katanga and in the Ogoni cases, the African Commission had the opportunity to decide on allegations that peoples' rights are violated. Methodological and procedural questions such as whether the groups in whose behalf the complaints have been lodged can qualify as 'peoples' and whether they are duly represented did not inhibit the Commission from deciding on them. The approach of the Commission seems to suggest that it is the merit of the question that should be decisive rather than method and procedure.

In the Katanga case it was the president of the Katangese Peoples Liberation Movement that lodged the Communication.⁴⁴ The complainant and his organization are members of the Katangese people. No issue was raised as to the capacity of the complainant to lodge the communication representing the Katanga. Nor did the Commission held it relevant to decide whether the Katangese consist of one or more ethnic groups.⁴⁵ The commission declared the case inadmissible, but for reason that 'the case holds no evidence of violations of any rights under the African Charter'.⁴⁶

The Ogoni case is even more interesting in this regard. Here, unlike the Katanga case, the complainants are not in any way associated with the people on their behalf it has lodged the communication before the African Commission. It was The Social and Economic Rights Action Centre and the Centre for economic and Social Rights that jointly brought the case before the Commission.⁴⁷ And the Commission has been willing to consider the issue. Indeed, in this case the African Commission has found

⁴³ Ogoni case as note 26 above para.68.(Emphasis added).

⁴⁴ See the Katanga case as note 25 above para.1.

⁴⁵ As above para. 3.

⁴⁶ As above para. 6.

⁴⁷ See the Ogoni case as note 26 above.

violation of peoples rights, specifically the right to freely dispose of ones wealth and natural resources under Article 21 and the right to environment under Article 24, by the respondent state, Nigeria.

IV The significance and potential of peoples' rights in Africa

A very vital significance of the concept of peoples' rights under the African Charter is its potential to address the particular human rights concerns on 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.⁴⁸ Peoples' rights have the same role in the context of the African situation.⁴⁹ They operate in a way that affords protection against acts contrary to the wellbeing and interest of any people. Peoples' Rights also offer the necessary normative framework 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 world, they also serve as tools of liberation for the deprived, the oppressed, the have-nots and victims of discrimination.⁵⁰

⁴⁸ 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.

⁴⁹ 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 aconomic 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.

⁵⁰ van Boven as note 5 above 192.

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 Charter⁵¹ to mean that the discrimination and attack against a certain distinct group by another constituted a domination of one group over another.⁵²

One of the challenges in the state-peoples relationship is the marginalization, exclusion and domination of some communities, often a times minorities. 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.⁵³ 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 of the country both of which should be according to the choice they have made independently.'⁵⁴ Viewed in this light, peoples' rights are instrumental to make the state amenable to the will of its peoples.

Discrimination is one of the serious concerns of minority groups that underlie many of the conflicts involving the state and groups. This is not a result just of guarantee for non-discrimination and equality. For some groups such as the Massai of Kenya or the San of Botswana, it also results from the distinct feature of their group characteristics,

⁵¹ 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.'

⁵² 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 para. 141-142.

⁵³ 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.'

⁵⁴ 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 17(2), 19 to 20 of the African Charter *Second Activity Report, Annex XII (Adopted June 1989) Para. III(4).* (hereafter Guidelines)

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.⁵⁵

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 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 non-dominant groups.⁵⁶

With the recognition of peoples' rights, various groups will have protection against violations of their cultural rights. 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 its activities 'amounts to depriving him of his identity.'⁵⁷ This is found to be contrary to the right to culture under Article 17 of the African Charter.⁵⁸ Peoples will also have entitlements for the promotion and development of their cultures, for which states also must take positive measures.⁵⁹

⁵⁵ Report of the Commission's Working Group of Experts on the Rights of Indigenous Populations/Communities (2005) 35.

⁵⁶ Murray and Wheatley as note 25 above 223.

⁵⁷ The case against Mauritania as note 52 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 (the case against Mauritania).

⁵⁸ Article 17 (1) provides: 'Every individual may freely take part in the cultural life of his community.'

⁵⁹ 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 as note 40 above. Also note that Art. 20(1) of the African Charter guarantees the right of peoples to their cultural development.

The policy of cultural assimilation has also created a situation which has exposed certain groups to attacks and killings.⁶⁰ The guarantee for the right of all peoples to existence⁶¹ and the right to peace⁶² imposes 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.⁶³

The state has been diminished in its capacity to afford the necessary protection from external exploitation of natural resources and the destruction of the environment on which the largest portion of Africans depend for their subsistence.⁶⁴ This has threatened the environment and livelihood of many communities in different parts of Africa.⁶⁵ In this context, peoples' rights must also serve as a mechanism to defy the exploitation of natural resources by multi national companies 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.⁶⁶ 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

⁶⁰ The blacks in Mauritania and the communities in the Darfur region of the Sudan have been subject to attacks and killings.

⁶¹ Article 20.

⁶² Article 23.

⁶³ See The case against Mauritania as note 40 above 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.

⁶⁴ 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 J. 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. Rev.* (2003) 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.

⁶⁵ See *Report of the African Commission's Working Group* as note 31 above 26-29.

⁶⁶ 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.'

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.⁶⁷

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.⁶⁸

V Conclusion

The African Charter is not merely an instrument designed to give expression to the internationally recognized rights at the African level. Most importantly, it is a manifestation of the uniqueness of some of the human rights concerns of Africa from the rest of the world. Thus, it is an instrument that seeks to respond to these particularly African circumstances.

Undoubtedly, peoples' rights of the African Charter are destined to address the unique situations of Africa. The elaboration of these rights in the African Charter in a way that is unprecedented in the international and other human rights system is manifestation of the continent's reaction to its colonial past and its resolve to uphold its cultural values as expressing the identity of its peoples. Significantly, this novel approach is a legal and institutional representation of the urgent need to end the misery of peoples by redeeming their dignity. In this sense, it is meant to provide a comprehensive framework to respond to the current multifaceted crisis in the relationship of the state with its peoples.

⁶⁷ The Ogoni case as note 25 above para. 56.

⁶⁸ See Guidelines as note 40 above para. II (6).

Admittedly, the absence of authoritative definition of 'peoples' has obscured the application of peoples' rights to numerous minorities and other sub-state groups. The vulnerable situation of these groups to marginalization, domination, involuntary assimilation and in the extreme cases to genocide does not warrant the exclusion of the application of peoples' rights to such groups. Indeed, the practice of the African Commission shows that such groups have demanded for the application of the protection afforded through peoples' rights.

The encouraging stance that the African Commission has taken in entertaining cases involving allegations of violations of peoples rights has striped the doubt that peoples' rights qua peoples are enforceable. This willingness of the Commission to examine cases in the areas of peoples' rights must be accompanied by a willingness to elaborate on the concept of 'peoples' so as to clarify the application of peoples' rights to minorities and other groups. It is only in this way that the Commission may live up to its own words.⁶⁹

The recognition and expanded elaboration of peoples' rights under the African Charter and the commendable but slow start of the of the African Commission in examining alleged violations of peoples' rights have proved wrong the conclusion that peoples rights have no bright future wrong.⁷⁰ Yet, the prevalence of repression, domination and state sponsored attacks against many communities in many parts of Africa and the ambivalence of states to recognize cultural diversity is indicative of the many mountains yet to be conquered and the many rivers to be crossed in the effort to the full realization of peoples' rights in Africa.

⁶⁹ In the view of the African Commission '[t]he Uniqueness of the African situation and the special qualities of the African Charter on Human and Peoples' Rights impose upon the African Commission an important task' the ogoni case as note 25 above para.68.

⁷⁰ Alston as note 7 above 292.