

The jurisprudence of the African Commission on Human and Peoples' Rights with respect to peoples' rights

Solomon A Dersso*

Doctoral Research Fellow, South African Institute for Advanced Constitutional Law (SAIFAC), Johannesburg, South Africa

Summary

The African Charter has many unique features that have given it a place of its own in the family of human rights instruments. The most important of these is its departure from the individual rights orientation of almost all human rights instruments by entrenching collective rights of peoples. It is the only instrument to provide for an elaborate list of peoples' rights beyond and above the internationally recognised and controversial right of all peoples to self-determination. Nevertheless, since the African Charter provides no definition to the term 'peoples' and the formulation of the rights in the Charter invites various interpretations, which are not always consistent, the elaboration of peoples' rights by the Charter was received with little or no optimism. This article seeks to examine the extent to which such expectations were borne out in the interpretations and applications of peoples' rights in the jurisprudence of the African Commission. To that end, the article seeks to identify the conceptual and legal issues raised with respect to peoples' rights and examines how the African Commission addressed them. Although it is maintained here that the jurisprudence of the Commission has clarified many of the doubts and questions that have been raised with respect to peoples' rights in the Charter, opening a new direction for

* LLB (Addis Ababa), LLM (Human Rights and Democratisation in Africa) (Pretoria); solomon@saifac.org.za; Solomon.dersso@gmail.com. I owe particular gratitude to Tshepo Madlingozi of the Faculty of Law, University of Pretoria for his comments on an earlier draft of this article. I would also like to thank Emezat Hailu and my colleagues at SAIFAC who contributed to the writing of this article in different ways. Whatever mistakes remain are my own.

the development of jurisprudence on such rights, there are some outstanding issues that the jurisprudence of the Commission did not address. The examination of the Commission's jurisprudence further reveals that there is no commonly discernable thread in the conceptualisation and interpretation of peoples' rights.

1 Introduction

The African Charter on Human and Peoples' Rights (African Charter)¹ is the foundation of the African regional human rights system. Like similar founding human rights instruments, the African Charter provides for substantive rights, lays down enforcement procedures and establishes a supervisory body.² The African Charter, however, represents a significant departure from such other instruments in the range of rights that it enshrines. The two other regional human rights instruments, namely, the European Convention on Human Rights and Fundamental Freedoms³ and the American Convention on Human Rights,⁴ enumerate the classic civil and political rights of individuals only. By contrast, the African Charter incorporates not only the traditional civil and political rights and the substantive guarantees of economic, social and cultural rights, but also collective rights of 'peoples'. This gives the African Charter a special character, though for that very reason it was received with pessimism by many human rights scholars and practitioners.

It has now been 25 years since the adoption of the African Charter and 20 years since its entry into force.⁵ As the adoption and entry into force of the African Charter are commemorated, it is important to reflect on achievements and challenges in the enforcement of the African Charter in general and the newly recognised rights of peoples in particular. The aim of this article is to examine the interpretation and application of peoples' rights in the decisions of the African Commission on Human and Peoples' Rights (African Commission). In doing so, the article seeks to look into the extent to which the African Commission

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

² For a recent discussion on the nature and operation of the African Charter, see C Heyns 'The African regional human rights system: The African Charter' (2004) 108 *Pennsylvania State Law Review* 679.

³ European Convention on Human and Fundamental Rights, adopted on 4 November 1950 by the Council of Europe and entered into force on 3 September 1953. See ETS No 5, 213.

⁴ The American Convention on Human Rights was adopted on 22 November 1969 and entered into force on 8 July 1978. Reprinted in (1970) 9 *International Legal Materials* (1970) 99.

⁵ The African Charter was adopted by the Eighteenth Assembly of Heads of State and Government of the Organization of African Unity in Nairobi in July 1981 and entered into force on 21 October 1986.

outlived the expectations and fears of many commentators on this unique feature of the African Charter. To this end, the article will discuss the conceptual and legal dilemmas raised with respect to peoples' rights of the African Charter and the ways in which the decisions of the African Commission have addressed these dilemmas.

Apart from this introduction, the article is divided into four sections. The first section examines the conceptual problems caused by the openness of the term 'peoples' and the various interpretations it has given rise to, as well as the approach of the African Commission to the problem. It is my belief that the extent to which peoples' rights are employed to address the human rights concerns of vulnerable communities within a state is a litmus test to determine the potential of peoples' rights to advance the cause of human rights in Africa. Thus, the second section examines the determination of the application of peoples' rights to sub-state groups. Concerns about the validity of peoples' rights relate to their legal nature and enforceability. The issue of the legal nature and enforceability of peoples' rights is therefore dealt with in part three. Finally, the article concludes its discussion in section four.

2 The conceptual and legal dilemmas with respect to peoples' rights of the African Charter

All peoples have a right to self-determination. *There may, however, be controversy as to the definition of peoples and the content of the right.*⁶

The above paragraph, quoted by the African Commission, spells out the most vexing issue with respect to peoples' rights in the African Charter. This pertains to the meaning of the concept 'peoples' and the content of these rights. The Charter provides for peoples' rights without clearly delimiting both the subject or beneficiary of the rights and the nature of the content of the rights. The absence of a definition for the term 'peoples' in the Charter has opened it up to different interpretations. The result is that no agreement and certainty exist as to when and how peoples' rights apply to particular cases.

A textual analysis of the African Charter reveals that the term 'peoples' can be understood to refer to five different situations. The least controversial conception of the term signifies peoples subject to colonial or alien domination. Seen from this perspective, peoples' rights in the Charter are manifestations of the struggle for the eradication of colonialism in Africa, which has been the core objective of the

⁶ African Commission in *Katangese Peoples' Congress v Zaire* (2000) AHRLR 72 (ACHPR 1995) para 3 (my emphasis).

Organization of African Unity (OAU).⁷ It is therefore rightly observed that some of the provisions on peoples' rights represent 'a reaction to the continental experience of slavery and colonialism'.⁸ The jurisprudence of the African Commission affirms this historical origin of peoples' rights. For example, with respect to article 21 of the Charter, the African Commission said:⁹

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

The term 'peoples' is also used to refer to the population of a state as a whole. The reading of article 23(2)(b) reveals this:¹⁰

For the purpose of strengthening peace, solidarity and friendly relations, States parties to the present Charter shall ensure that . . . their territories shall not be used as basis for subversive or terrorist activities against the *people* of any other State party to the present Charter.

'On different occasions, the African Commission also spoke of the protection of the 'people of Rwanda' against the consequences of the war, the 'people of Togo' and the 'people of Liberia' who were suffering as a result of conflicts, and the 'people of South Africa' in their fight against apartheid.¹¹ There is little debate as to whether 'peoples' can mean the entire population of a state. Indeed, in the practice of the United Nations (UN), the OAU and African states, the term 'people' as a reference to the whole people of a state is no longer debatable.¹²

⁷ See the Charter of Organization of African Unity that was adopted by a conference of Heads of State and Government at the Ethiopian capital, Addis Ababa on 25 May 1963. Reprinted in (1963) 2 *International Legal Materials* 766. Art 2(1)(d) of the OAU Charter states that one of the objectives of the OAU was 'to eradicate all forms of colonialism from Africa', 767.

⁸ Heyns (n 2 above) 679. Indeed, some maintain that the reaction to Africa's colonial history through the expression of the desire for self-determination and sovereignty over natural resources is the core of the Charter. See J Swanson 'The emergence of new rights in the African Charter' (1991) 12 *New York Law School Journal of International and Comparative Law* 307 328.

⁹ *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) para. 56.

¹⁰ See J Crawford 'The rights of peoples: "Peoples" or "governments"?' in J Crawford (ed) *The rights of peoples* (1988) 62.

¹¹ See R Murray & S Wheatley 'Groups and the African Charter on Human and Peoples' Rights' (2003) 25 *Human Rights Quarterly* 231.

¹² See S Kwame Nyameke Blay 'Changing African perspectives on the right to self-determination in the wake of the Banjul Charter on Human and Peoples' Rights' (1985) 29 *Journal of African Law* 147, particularly 147-154.

Another interpretation of the term as employed in the African Charter signifies the people of Africa in general. The Preamble to the African Charter referred to the awareness of African states of their duty to achieve the total liberation of Africa, *the peoples of which* are still struggling for their dignity and genuine independence.¹³ Similarly, the African Commission has on several occasions spoken of 'African peoples'.¹⁴ From a human rights perspective, this can be understood as imposing a collective responsibility on African governments to promote the wellbeing of African peoples using the institutions of the OAU (now African Union (AU)).

Article 21(4) of the African Charter envisages the state as yet another entity entitled to exercise the right of peoples to freely dispose of their natural wealth, although in paragraph one the right is declared as a right of 'all peoples'. According to this provision:

States parties to the present Charter shall individually and collectively *exercise the right to free disposal of their wealth and natural resources* with a view to strengthening African unity and solidarity.

There is no doubt that in adopting the African Charter, African states might have viewed this and other peoples' rights through a statist prism and hence as a boost to their sovereign rights.¹⁵ As we shall see below, this understanding of the term people has been the basis for the pessimism that many scholars expressed regarding the merit of the African Charter's extensive elaboration of peoples' rights.

Finally, we have an understanding of the term 'peoples' that is highly controversial in Africa.¹⁶ According to this understanding, 'peoples' is a reference to the distinct communities constituting the state. In this sense, the subjects of peoples' rights are the different ethnic groups or inhabitants of a particular territory within the state, who on account of historical, cultural and/or existing patterns of discrimination have come to form a sense of separate identity. This finds textual support in the African Charter, particularly in article 19: '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.'¹⁷ This

¹³ Para 8 Preamble to the African Charter.

¹⁴ See Resolution on the Celebration of African Day of Human Rights Second Annual Activity Report (1988-1989) ACHPR/RPT/2nd, Annex VII; Resolution on the African Commission on Human and Peoples' Rights, Sixth Annual Activity Report (1992-1993) ACHPR/RPT/6th.

¹⁵ See Blay (n 12 above) 158-159. After proposing that 'all peoples' can mean the collection of individuals who make up the constituent communities of Africa, Blay states that this is not to say that signatory states pledge themselves to accept such interpretation and makes reference to the objections that state representatives raised against such interpretations.

¹⁶ The objections raised by state representatives that Blay referred to (n 15 above) were directed particularly against such an interpretation.

¹⁷ The Guidelines for National Periodic Reports require states to supply information with respect to art 19 on 'precautions taken to proscribe any tendencies of some people dominating another as feared by the article'. See text in R Murray & M Evans (eds) *Documents of the African Commission on Human and Peoples' Rights* (2001) 65.

recognises the multi-ethnic composition of many African states and seeks to address situations in which one group of people may be subject to domination by another. Once again, although it did not make a direct pronouncement as to the applicability of peoples' rights to such sub-state groups *vis-à-vis* their states, the African Commission on a few occasions referred to distinct groups within states as 'people' entitled to peoples' rights. It is, however, never clear from the jurisprudence of the Commission how a particular territory of a state inhabited by groups with different ascriptive qualities, such as language, as in the case of the Katanga or the Casamance of Senegal, may be entitled to peoples' rights in the same way as the Ogoni of Nigeria, a minority group with an identifiable ethnic character.

The openness of the term 'peoples' to such various interpretations, not necessarily consistent, has given rise to some conceptual and legal dilemmas. These include, among others, the nature of the relationship between these interpretations and questions regarding which rights apply to the different situations that these interpretations envisage.

This has led some to express fear that the inclusion of peoples' rights might lead to abuses and confusions. For some, particularly, the conceptualisation of the term 'peoples' as a reference to states endangers the perpetuation of a statist approach to peoples' rights. Kiwanuka accordingly reiterated that 'equating peoples and states further strengthens the state and subjects the rights of the people to the whims of whoever controls the political process'.¹⁸ According to him, under such circumstances the apparently progressive introduction of the concept 'people' into the African Charter could actually turn out to be counterproductive.¹⁹ Others seriously question the contribution of the African Charter in advancing the concept of peoples' rights. As recently as 2001, Alston concluded that 'there is no reason to expect that the African Charter will prove in the years ahead to be a force for the progressive development of peoples rights'.²⁰

There are also others who expressed doubt that a robust and more innovative interpretation can be attributed to the term 'peoples'. The fear here is that the conceptual indeterminacy of the term 'peoples' as used in the African Charter might lead to a restrictive interpretation that excludes the application of peoples' rights to sub-state groups. This is particularly valid, given the practice of the OAU and African states in declining from recognising sub-state groups as peoples. It is for this reason that Howard laments that:²¹

There are no rights to minorities, in opposition to the larger nation-state, in

¹⁸ RN Kiwanuka 'The meaning of "people" in the African Charter on Human and Peoples' Rights' (1988) 82 *American Journal of International Law* 97.

¹⁹ As above.

²⁰ P Alston 'Peoples' Rights: Their rise and fall' in P Alston (ed) *Peoples' rights* (2001) 287.

²¹ RE Howard *Human rights in Commonwealth Africa* (1986) 92.

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.

Similarly, Maxted and Zegeye maintain that the term 'people' as used in the African Charter refers to the people of a state as a whole, and not to minority communities constituting the state.²²

Most importantly, the different interpretations of the term have also led to a division of opinion among members of the African Commission. During the examination of the state report of Rwanda, Commissioner Nguema asked, in response to the view of some commissioners, that the African Charter is concerned with the rights of communities:²³

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

By contrast, Commissioner Umozurike observed:²⁴

It seems pretty obvious that one of the peculiarities of the African Charter is its emphasis not just on individuals but on peoples, and this starts right from the very title and runs throughout there is no way that people here simply means all the people of the country — it is people that have an identifiable interest, and this may be carpenters, may be tribes, may be fishermen or whatever.

Indeed, if the term 'people' in the Charter is seen in the light of the practice of the AU and its member states, its applicability to sub-state groups will come into question. Equally, however, the attribution of peoplehood to any group of persons such as carpenters or fishermen would not make the understanding of the concept any clearer. As such, it is necessary for the African Commission to make a clear pronouncement as to the meaning of 'peoples' and rule that the understanding of 'peoples' in the African Charter is a departure from the traditional state-centred approach of the OAU. In the next section, I will examine whether and how the jurisprudence of the African Commission addresses these complex legal and conceptual dilemmas.

2.1 The approach of the African Commission

The African Commission has shown an increasing willingness to deal with cases involving allegations of violations of peoples' rights of the African Charter, including the right to self-determination. In the first

²² J Maxted & A Zegeye 'North, West and the Horn of Africa' in P Thornberry *et al* (eds) *World directory of minorities* (1997) 392.

²³ African Commission, Examination of State Reports (Libya-Rwanda-Tunisia) General Discussions (9th session March 1991) <http://www1.umn.edu/humanrts/achpr/sess9-generaldiscussions.htm> (accessed 15 May 2006 (my emphasis)).

²⁴ As above.

case on peoples' rights, *Katangese Peoples' Congress v Zaire*,²⁵ the complainant, the President of the Katangese Peoples' Congress, requested the African Commission to recognise, among other things, the independence of Katanga by virtue of article 20(1) of the African Charter.²⁶ It is worth noting two points here. First, the Katangese are only a portion of the population of Zaire. As such, the case brought into sharp focus the politically sensitive question of whether peoples' rights apply to the different sections of society separately. Second, they identify themselves as people and hence entitled to peoples' rights under the African Charter, including the right to self-determination in article 20, which the African Commission did not contest. At this point, it is important to note that Katanga is a province of Zaire that consists of different ethnic groups, including the Luba and the Kongo. This raises the important question of when the inhabitants of a particular territory of a state may, irrespective of their heterogeneity in terms of ethnic differences, qualify to be a people for the purpose of peoples' rights of the African Charter.

In its decision, the African Commission identified two versions of self-determination. The first is self-determination for all Zairians as a people, which it said was not the issue involved in the case. The other is self-determination for a section of the population of a state, that is, the Katangese, which was central to the communication. As regards the latter, the Commission emphasised the interplay between self-determination and the principles of sovereignty and territorial integrity of states. According to the Commission, although the right to self-determination may be exercised in different ways, including independence, it must be 'fully cognisant of other recognised principles such as sovereignty and territorial integrity'.²⁷ In affirming that territorial integrity takes priority over the right to self-determination, the African Commission declared that it is 'obliged to uphold the sovereignty and territorial integrity of Zaire'.²⁸ Consequently, the Commission held that²⁹

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

²⁵ n 6 above.

²⁶ n 6 above, para. 1.

²⁷ n 6 above, para 4.

²⁸ n 6 above, para 5. This view reflects the observation of the ICJ that the interpretation of the right to self-determination in the context of Africa takes account of the inviolability of territories inherited at independence. See ICJ Reports *Burkina Faso v Mali frontier dispute* (1986) para 25.

²⁹ n 6 above, para 6.

It is, however, interesting to note that the African Commission referred to the Katangese as 'the people of Katanga'. Moreover, the Commission's analysis affirms self-determination as a right of peoples, although it admits that 'there may be controversy as to the definition of peoples and the content of the right'.³⁰ This largely addresses the fear that peoples' rights would collapse into the sovereign rights of states.³¹ The finding of the Commission also suggests that the relationship between the two conceptions of peoples' rights to self-determination is such that the self-determination of Katangese gives way to the self-determination of all Zairians as a people. Thus, as long as there is a constitutional and statutory framework that guarantees political participation of all Zairians equally, the self-determination of the Katangese finds expression through the exercise with other Zairians of the self-determination of all Zairian people.

The Commission's decision also suggests and affirms that the concept 'peoples' can be construed to mean a section of the population of a state.³² Nevertheless, in the particular case no attempt has been made by the African Commission to determine under what circumstances inhabitants of a territory of a state may, in spite of their ethnic differences, come to develop a common identity enabling them to constitute a people entitled to peoples' rights and whether the Katangese have established such a common identity and hence they are people entitled to peoples' rights, including the right to self-determination. It is without such jurisprudential conceptualisation that the Commission referred to the Katangese as the 'People of Katanga'.

The African Commission also considered the issue of peoples' right to self-determination in relation to the separatist movement of Casamance in Senegal.³³ After analysing the positions of both the government and the separatist movement, the Commission rejected the claim of the separatists for the independence of Casamance from Senegal as lacking 'pertinence'.³⁴ Although it criticised the Senegalese state because it

³⁰ n 6 above, para 2.

³¹ Howard expresses the view that 'what peoples' rights appear to refer to is the rights of sovereign states' (n 21 above) 6. Similarly Kiwanuka cautioned that 'peoples rights might initially be treated as state rights and then degenerate into sectarian, class, government and clique rights' (n 18 above) 97.

³² In the *Reference re Secession of Quebec*, the Supreme Court of Canada held a similar but straightforward view: 'It is clear that a "people" may include only a portion of the population of an existing state ... To restrict the definition of the term to the population of existing states would render the granting of a right to self-determination largely duplicative, given the parallel emphasis within the majority of the source documents on the need to protect the territorial integrity of existing states, and would frustrate its remedial purpose.' *Reference re Secession of Quebec* 2 SCR [1998] 217 paras 123-124 (my emphasis).

³³ African Commission Report on the Mission of Good Offices to Senegal of the African Commission on Human and Peoples' Rights Tenth Annual Activity Report (1996-1997) Annex VIII reprinted in Murray & Evans (n 17 above) 530 (*Casamance* case).

³⁴ n 33 above, 536.

'had a mechanical and static conception of national unity', the Commission recommended that the issue must be addressed within the framework of 'the cohesion and continuity of the people of the unified Senegalese state in a community of interest and destiny'.³⁵ Once again, this affirms the nature of the relationship between the two interpretations of self-determination as one of priority. Significantly, however, in outlining the objectives for a constructive dialogue between the two parties, the Commission indicated that part of the search for a solution must aim 'to post to Casamance so far as possible, officials native to the region'.³⁶ One can understand this as suggesting some form of self-administration for the Casamance whom the Commission referred to as people.³⁷ Once again one observes that the Commission did not explain the defining features of peoplehood and whether the Casamance people possess these features.

One can say from the foregoing that under the African Charter, even a section of the population of a state or, to be precise, the inhabitants of a particular territory of a state, can be taken as being entitled to the right of self-determination. But this is recognised within the limits of the territorial integrity of the state.³⁸ As such, the nature of the rights that the section of the population of a state may exercise can be all but secession.³⁹ Subject to the territorial integrity of the state, this may involve 'self-government, local government, federalism, confederalism, unitarism or any other form of relations'.⁴⁰ Which of these various

³⁵ As above.

³⁶ n 33 above, 537.

³⁷ 'The Commission maintains . . . that the sincerity, loyalty, and the transparency which the authorities demonstrated throughout the mission will contribute to reestablish peace, justice and well-being of the populations of Senegal and of the people of Casamance in particular' (n 33 above, 537). Note that the Commission makes a distinction in the use of terms between Senegalese in general — whom it called 'the populations of Senegal' — and the community inhabiting Casamance — whom it called 'the people of Casamance'.

³⁸ *Report of the African Commission Working Group of Experts on Indigenous Population/Communities* (Banjul and Copenhagen: ACHPR and IWGIA, 2005) 75.

³⁹ There seems to be an emerging consensus that the right to self-determination, as elaborated under art 20 of the African Charter, does not involve secession. Thus, in the Second Workshop on Multiculturalism in Africa, a member of the African Commission has underlined the need to promote the understanding that the protection of the rights of groups of their identity and culture was to be made on the basis that 'members of such groups were citizens of the state and not through self-determination as a right to secession'. See ECOSOC *Report on the Second Workshop on Multiculturalism in Africa: Peaceful and Constructive Group Accommodation in Situations Involving Minorities and Indigenous Peoples* UN Doc E/CN.4/Sub.2/AC.5.2001/3 (2 April 2001) para 58. *Report of the African Commission's Working Group* (n 38 above) 74-75; NB Pityana 'The challenge of culture for human rights in Africa: The African Charter in comparative context' in Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights. The system in practice, 1986-2000* (2002) 233-234. For a contrary view, see UO Umozurike *The African Charter on Human and Peoples' Rights* (1997) 89-90.

⁴⁰ *Katanga* case (n 6 above) para 4.

modes of exercising self-determination is available to a group seems to be a domestic matter to be decided by the agreement of the group concerned and the state to which the group belongs. It follows from this that, although the African Commission accepted that the exercise of self-determination by groups within a state may take different forms, including self-government, it is not legally established under the African Charter that sub-national groups can choose the form of self-determination as long as their effective participation is ensured.⁴¹

In cases involving allegations of violations of other peoples' rights of the African Charter, the African Commission employed peoples' rights as providing protection to sub-state groups against their states. In a series of communications brought before the African Commission against Mauritania,⁴² it was alleged that black Mauritians were being murdered,⁴³ expelled from their lands,⁴⁴ inhumanly treated and tortured in custody,⁴⁵ and had their goods confiscated and villages destroyed.⁴⁶ In its decision on this case in May 2000, the African Commission held that:⁴⁷

Central to the communications in question is the domination of black Mauritians by a ruling Arab clique, for which the communication presents abundant evidence. The subsequent discrimination against black Mauritians goes against a principal objective of the Charter, that of equality. Such oppression constitutes a violation of article 19.

Even more significant was the interpretation the Commission has given to article 23 of the African Charter. Although the reading of this article leads to an understanding that the term 'peoples' as used in this context is a reference to the population of a state in their entirety, the African Commission innovatively interpreted it so as to give protection to a part of the population of a state. In the words of the Commission, 'the unprovoked attack on the villages [of black Mauritians]

⁴¹ The UN Human Rights Committee held a similar view with respect to the right to political participation in the *Mikmaq People* case. The Committee held that 'article 25(a) of the Covenant [CCPR] cannot be understood as meaning that any directly affected group, large or small, has the unconditional right to choose the participation in the conduct of public affairs' (para 5.5). According to the Committee 'it is for the legal and constitutional system of the state party to provide for the modalities of such participation' (my emphasis) (para 5.4). Communication 205/1986, *Grand Chief Donald Marshal & Others (Mikmaq people) v Canada* UN Doc CCPR/C/43/D/205/1986 40 (1991).

⁴² See *Malawi African Association & Others v Mauritania* (2000) AHRLR 149 (ACHPR 2000).

⁴³ Communication 98/93 provides list of villages that were destroyed.

⁴⁴ Communication 98/93 provides a list of villages all or almost all of which the inhabitants were expelled to Senegal.

⁴⁵ Communication 61/91 contains list of 339 persons believed to have died in detention.

⁴⁶ n 42 above, para 17.

⁴⁷ n 42 above, paras 65-67, as quoted in Pityana (n 39 above) 232-233. See also the *Report of the African Commission Working Group* (n 38 above) 73.

constitutes a denial of the right to live in peace and security'.⁴⁸ Also, the burden of securing this right falls on the state in that, not only must the state respect this right, but it must also ensure its protection from violation by others within the state.⁴⁹

In the light of the troubled experience of African peoples, as illustrated by the Rwandan Genocide of 1994 and currently the Darfur crisis, such an insightful interpretation gives peoples' rights in the African Charter continuing relevance to the African reality. Not only article 23, but also the right to existence under article 20, would provide protection to address situations in which a section of the population of a state is exposed to attacks either by state organs or with the complicity of the state.⁵⁰ Indeed, as regards the right to existence, it is rightly asserted that it 'can in any event be interpreted as a reaction to certain tragic events which Africa has witnessed and which must be prevented from occurring again by making them an issue of *international concern*'.⁵¹

The implication of this innovative approach is that the term 'peoples' finds a broader and more robust meaning that gives it the potential to address the conflicts involving states and sub-state groups afflicting many countries in Africa. The decision of the African Commission on the *SERAC* case⁵² in October 2001 is a very good illustration of this potential use of peoples' rights in the African Charter.

The *SERAC* case was lodged by two non-governmental organisations (NGOs), namely, the Social and Economic Rights Action Centre and the Centre for Economic and Social Rights. It was brought before the Commission in March 1996 on behalf of the Ogoni people, who inhabit a certain territory in the oil-rich Niger Delta area of Nigeria.⁵³ The complaint disclosed allegations that the oil extraction operations of the

⁴⁸ n 42 above, para 140.

⁴⁹ This interpretation has a particular contemporary relevance to Africa in the light of the violations that have been and continue to be perpetrated against one or another group in the context of civil wars, inter-ethnic conflicts and situations of political crisis. The unabated plight of various communities in the Darfur region of Sudan aptly demonstrates the need to ensure respect for the right to peace by groups within the state.

⁵⁰ What the *Report of the African Commission's Working Group* in this regard states is illuminating: 'The genocide in Rwanda in 1994 has brought into sharp focus concerns about the domination of one people by another (art 19) and the systematic manner in which one group may design the "elimination" of another's "right to existence"' (n 27 above, 74).

⁵¹ F Ouguergouz *The African Charter on Human and Peoples' Rights: A comprehensive agenda for human rights and sustainable democracy in Africa* (2003) 227 (emphasis in the original).

⁵² *SERAC* case (n 9 above).

⁵³ For a historical and political background on the Ogoni issue, see J Oloka-Onyango 'Reinforcing marginalised rights in an age of globalisation: International mechanisms, non-state actors, and the struggle for peoples' rights in Africa' (2003) 18 *American University International Law Review* 851 862-865.

Nigerian military government, in the hands of the Nigerian National Petroleum Company and Shell Petroleum Development Company, caused environmental contamination and degradation to Ogoni land and health problems among the Ogonis. It further alleged that the Nigerian military and security forces were involved in acts of terror and insecurity against the members of the Ogoni people and in the destruction of the food sources and several villages and homes of the Ogonis. The complainants therefore submitted that the Nigerian government violated rights ranging from civil and political rights (articles 2, 4 and 14) to socio-economic rights (articles 16 and 18), and to collective rights of peoples (articles 21 and 24).

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

With respect to article 21, although it did not clearly and thoroughly analyse the content of the rights as applied to Ogonis and obligations under this article,⁵⁴ the Commission upheld the complaint that the Nigerian government 'did not involve the Ogoni communities in the decisions that affected the development of Ogoniland'.⁵⁵ More significantly, the Commission further said that 'the destructive and selfish role played by oil development in Ogoniland, closely tied to repressive tactics of the Nigerian government, and *the lack of material benefits accruing to the local population*, may well be said to constitute a violation of article 21'.⁵⁶ From this, it concluded that, by anyone's standards, the government's practice falls short of the minimum conduct expected of governments and, therefore, is in violation of article 21 of the African Charter.⁵⁷ In its recommendations, as a remedy to the violation of article 21 by the Nigerian government, the African Commission appealed to the government to provide, *inter alia*, meaningful access to regulatory and decision making bodies to the communities likely to be affected by oil operations.⁵⁸ It can be inferred from this that article 21 of the African Charter obliges states to ensure the participation of

⁵⁴ Oloka-Onyango rightly argues that the reason for the Commission's failure to clearly spell out the contents of the rights and obligations under art 21 'is an enduring reluctance to address the logical implications of holding that peoples, and not the state, are allowed to "freely dispose their wealth and natural resources"' (n 53 above, 891).

⁵⁵ SERAC case (n 9 above) para 55.

⁵⁶ n 9 above, para 58 (my emphasis).

⁵⁷ As above.

⁵⁸ n 9 above, para 70.

the communities concerned in decisions that involve (and in benefits that accrue from) development operations in their territories.⁵⁹

This case illustrates that there is a tension between the two conceptions of the term 'peoples', that is, peoples as the whole people of a state and peoples as the distinct communities constituting the state. The decision of the African Commission attempts to address this tension, although it did not take it to its logical conclusion. According to the Commission, although the Nigerian government has the right to produce oil 'to fulfil the economic and social rights of Nigerians' as a whole (people of a state as a whole), regard must be had to the interests of the communities who inhabit the territory from which the oil is to be extracted (people as a section of the population of a state).

The finding of the African Commission also sheds light on the dangers associated with the equation of peoples with states. In cases where the term 'people' is used as a synonym for the state, the Commission's analysis indicates that the state can be viewed only as the agent of its people. Thus, while acknowledging the right of the Nigerian government to produce oil in Nigeria, the Commission nevertheless emphasised that such must be 'used to fulfil the economic and social rights of Nigerians'. This can also be seen as an affirmation of the second sentence of article 21(1), which stipulates that this 'right shall be exercised in the exclusive interest of the people'.

As regards article 24, the Commission expressed the view that the right to a healthy environment 'requires the state to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure the ecologically sustainable development and use of natural resources'.⁶⁰ Thus, while acknowledging the right of the Nigerian state to produce oil, the African Commission held that the care that should have been taken for the protection of Ogoniland from despoliation has not been taken.⁶¹ Accordingly, the Commission found Nigeria to be in violation of the right to a healthy environment under article 24 of the African Charter.

These findings of the Commission presuppose the view that the Ogonis are protected by peoples' rights in the African Charter. The clear distinction that the African Commission made between the group (the Ogoni people) and the state (Nigeria) affirms this point. Indeed, this

⁵⁹ This is comparable to the requirement of art 4(5) of the Declaration on the Rights of Minorities which is to the effect that states are required to ensure the full participation of minorities when venturing into development activities in the territories occupied by the concerned minorities. Some of the cases of the UN Human Rights Committee imply that art 27 imposes similar obligations in some circumstances. See eg Communication 511/1992, *Ilmari Lämsmä & Others v Finland* Report of the Human Rights Committee Vol II GAOR 50th session, Suppl No 40 para 9(6); Communication 547/1993, *Apirana Mahika & Others v New Zealand* Report of the Human Rights Committee Vol II UN Doc A/56/40 para 9(6).

⁶⁰ SERAC case (n 9 above) para 52.

⁶¹ n 9 above, para 54.

distinction is meant to treat the Ogonis as beneficiaries of peoples' rights and the state as the bearer of the corresponding obligations that the rights impose.⁶² Moreover, the reference by the Commission to the Ogonis as 'the Ogoni people' and 'the people of Ogoniland' suggests that the Ogonis as a group qualify for protection as a 'people' from peoples' rights of the African Charter.

Although the African Commission has been increasingly willing to apply peoples' rights in the African Charter to groups within the state, it did so without determining whether these groups were minorities, indigenous groups or simply peoples. In the *Katanga* case, the Commission made reference only to the issue of whether the Katangese consist of one or more ethnic groups, which, it said, was immaterial for its purpose.⁶³ In the Ogoni case, '[t]hroughout the decision, the Commission does not deal with the issue of what kind of "peoples" the Ogonis are — indigenous, a minority, or both?'⁶⁴ Nor did the Commission find it necessary to deal with this issue in any of the other cases. The African Commission seems to have found such a determination irrelevant to the interpretation and application of peoples' rights of the Charter.

This approach is plausible and appropriate in the African context for at least three reasons. First, it avoids the controversies surrounding the categorisation of sub-state groups as minorities or indigenous.⁶⁵ In effect, it saves the Commission from the hostility that this may attract. Given the diverse demographic composition of the state in Africa, the Commission's approach is at present good enough to make available the protections given by peoples' rights of the Charter to sub-state groups, notwithstanding their status as minorities, indigenous groups, tribes or nations. Finally, it avoids the legal distinctions that are drawn between 'peoples', 'minorities' and 'indigenous peoples' and the resultant confusion and complications that may ensue from that.⁶⁶ as long

⁶² Oloka-Onyango contends that it is possible to read the provisions on peoples' rights, including art 21, as 'a direct boost to the rights and interests of peoples within the state, and of the responsibility of the state to those peoples' (n 53 above, 890). The undertaking of state parties under art 1 of the African Charter is to give effect to all the rights proclaimed in the Charter. Viewed in this light, the state is under obligation to ensure peoples' rights and thus is not itself a beneficiary of peoples' rights. See *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000) paras 45-46.

⁶³ *Katanga* case (n 6 above) para 3.

⁶⁴ Oloka-Onyango (n 53 above) 891.

⁶⁵ The protest by representatives of the governments of Ethiopia and Rwanda during the 39th ordinary session of the African Commission illustrates this problem. According to the representatives, the identification of groups in the report as indigenous peoples was arbitrary and lacked proper evidence and support from the states and groups concerned.

⁶⁶ In rejecting these distinctions, Brownlie reiterated that 'the issue of self-determination, the treatment of minorities, and the status of indigenous populations, are the same, and the segregation of topics is an impediment to fruitful work. The rights and claims of groups with their own cultural histories and identities are in principle the same — they must be. It is the problems of implementation of principles and standards which vary, simply because the facts will vary.' I Brownlie 'Rights of peoples in international law' in Crawford (n 10 above) 1 16.

as sub-national groups can find protection from utilising the concept 'peoples' rights' in the African Charter, it is unnecessary for the African Commission to determine the status of the group as a minority or indigenous people and require evidence to that effect. There is very little good to be achieved from that. If anything, it would only frighten away groups aspiring to seek protection under the peoples' rights provisions of the Charter.

This, however, does not mean that the jurisprudence of the African Commission has resolved all the conceptual problems surrounding the concept of 'peoples'. Significantly, in the few cases on peoples' rights, the African Commission decided on the merits of the case without articulating the nature of the category or group of persons who qualify to be 'peoples' for the purpose of peoples' rights of the Charter. Indeed, as much as it gives answers to some of the questions, the jurisprudence of the Commission raises other important questions. The most important of such questions is whether there can be more than one understanding of the term 'people' when it is used as a reference to a section of the population of a state. For example, is it required for a group to have a common identity defined by a common language, culture, territory or any other similar ethnic markers, in which case 'people' means the various ethnic groups within a state such as Ogoni? Is there any way in which the inhabitants of a section of the territory of a state can be taken as having a sense of being a people, while they have ethnic differences? If yes, under which circumstances? Irrespective of whether they have established a sense of being a people different from the rest of the population of a state, is it possible for inhabitants of a section of the territory of a state to claim people's rights under the Charter, for example the right to a clean environment?

Thus, so far there is no standard to determine the attributes of peoplehood for the purposes of peoples' rights in the African Charter. In other words, it is not as yet clear how and when a group qualifies to be a 'people', and hence a subject of peoples' rights. The attribution by some members of the Commission of peoplehood to any group of persons, such as 'fishermen' or 'carpenters', makes the need for establishing a sufficiently clear criterion even stronger. The next section addresses itself to this issue.

3 Towards a criterion for determining peoplehood: The test in the *Legal Resources Foundation* case

In *Legal Resources Foundation v Zambia*,⁶⁷ the complainant contended that the requirement in the Constitution of Zambia (Amendment) Act of 1996 that anyone who wants to contest the office of the President

⁶⁷ (2001) AHRLR 84 (ACHPR 2001).

has to prove that both parents are/were Zambians by birth or decent is, *inter alia*, a violation of article 19 of the African Charter. The state rejected this contention saying that 'article 19 of the Charter relates to the principle of "self-determination" by the mere mention of the term "peoples"'.⁶⁸

In its decision, rendered in May 2001, the African Commission held that 'recourse to article 19 of the Charter was mistaken', and, thus, 'the section dealing with "peoples" cannot apply in this instance'.⁶⁹ The reason for this finding was not, however, the same as the objection that the state raised. It was rather because the case did not fulfil the elements necessary to require the application of peoples' rights in the African Charter. According to the Commission, in order for peoples' rights in the African Charter to apply, it would require evidence that '[t]he effect of the measure was to affect adversely *an identifiable group of Zambian citizens* by reason of their *common ancestry, ethnic origin, language or cultural habits*'.⁷⁰ This offers the elements required to invoke the application of the term 'peoples' to a section of the population of a state. This approach does not attribute peoplehood to any group of persons. It can be inferred from this test that a group qualifies to be a people only if it consists of persons who are bound together by reason of common ancestry, ethnic origin, language or cultural habits.

This is essentially comparable to the ethnic meaning that is attributed to the term 'peoples' at the international level. Thus, for example, the UN Educational, Scientific and Cultural Organisation (UNESCO) employed a similar approach in identifying the defining elements of the term. According to this approach, to qualify as 'peoples' it at the minimum requires:⁷¹

- 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 as a whole must have the will to be identified as a people or the consciousness of being a people.

The first category, which should not necessarily be met cumulatively, constitutes the objective characteristics that define the term 'peoples'.

⁶⁸ n 67 above, para 49.

⁶⁹ n 67 above, para 73.

⁷⁰ n 67 above (my emphasis).

⁷¹ See UNESCO *New reflections on the concept of peoples' rights* Final Report and Recommendations of an International Meeting of Experts (27-30 November 1989) reprinted in (1990) 11 *Human Rights Law Journal* 446-447.

The second category involves the subjective element. The consciousness and assertion by a group of its distinctness are the subjective elements necessary for treating a group as people.⁷² Some add attachment to a particular territory as another element of the definition of the term people.⁷³

In the *Legal Resources Foundation* case, reference was made only to the objective dimension of the ethnic definition of the term 'peoples', that is, an 'identifiable group of Zambian citizens' having a 'common ancestry, ethnic origin, language or cultural habits'. The omission of the subjective element does not, however, make the Commission's approach less consistent with the approach at the international level. The reason for this is that the existence of the subjective dimension is often inferred from the objective existence of a group.⁷⁴ It can, therefore, be gathered from this that the sub-national groups to which peoples' rights under the African Charter apply have to be an identifiable group of citizens of a state who share and are bound together by some or all of the objective ethnic markers including 'common ancestry, ethnic origin, language or cultural habits'.

It seems that the issue of whether such group is a minority, an indigenous group or a nation does not have relevance for the African Commission in its determination of the application of peoples' rights in the Charter to groups within the state. If the criterion that the Commission outlined in the *Legal Resources Foundation* case is something to go by, to determine whether a sub-national group can find protection from peoples' rights under the African Charter, what matters is not the minority or indigenous status of the group. It is rather whether the group consists of an identifiable group of citizens of a state who share some form of common identity on account of some or all of the objective ethnic markers.

If the test outlined by the African Commission in the *Legal Resources Foundation* case is to be taken as establishing a jurisprudential conception of the attributes of a 'people', it would go a long way to advancing the understanding of the term. It is unfortunately difficult to consider the test as providing such a conceptualisation. A testimony of this is the fact that the Commission itself did not employ this test in subsequent cases involving peoples' rights. Thus, in its decision on the *SERAC* case in October 2001, the Commission did not raise and address the issue of whether and in what way the Ogonis constitute a 'people' for the

⁷² The centrality of self-identification is recognised in some international instruments. This is the case, eg, for indigenous peoples under art 1(2) of the International Labour Organisation's Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries.

⁷³ See Kiwanuka (n 18 above) 86-88.

⁷⁴ See MN Shaw 'The definition of minorities in international law' in Y Dinstein & M Tabory (eds) *The protection of minorities and human rights* (1992) 28.

purposes of articles 21 and 24.⁷⁵ This leaves the issue of the criterion for peoplehood still in limbo. In the absence of a clear pronouncement, this would make the applicability of peoples' rights to particular groups within a state arbitrary and hence something that is left to the discretion of the African Commission.⁷⁶ This does not, however, mean that the Commission cannot in future cases utilise the standard set in the *Legal Resources Foundation* case for determining the peoplehood of a group alleging entitlement to peoples' rights under the African Charter. At this point, it is important to emphasise that ethnic identity, in the way it is conceptualised by the *Legal Resources Foundation* case, has to be the only point of departure in examining whether a group constitutes a people. In the light of the decision of the Commission in the *Katanga* case, inhabitants of a section of the territory of a state who belong to different ethnic groups may in some circumstances qualify as a people. Unfortunately, there is so far little guidance from the Commission's jurisprudence regarding the circumstances under which such a group would come to establish a sense of being a people. One may indicate here such considerations as historical factors, cultural differences between the centre and the territory, existing patterns of economic underdevelopment separating the territory, issues of political discrimination affecting the territory, and so on.⁷⁷

4 The legal nature and enforceability of peoples' rights

As a preliminary point, it is important to underline that peoples' rights are distinct from individual rights.⁷⁸ At the same time, the two are also interrelated and interdependent. There is no indication in the African

⁷⁵ The Commission's Guidelines for national periodic reports do not help much either. It is only with respect to arts 19 and 20 of the Charter that the Guidelines envisage that the various distinct communities within the state are beneficiaries of peoples' rights. See Murray & Evans (n 17 above) 65-66.

⁷⁶ Since members of the African Commission change from time to time, if at some point the majority of the members of the Commission tend to be lawyers who follow the view that peoples' rights do not apply to sub-state groups, the emerging jurisprudence of the Commission would be reversed. There is no guarantee that this would not happen.

⁷⁷ One can cite as evidence of such an approach in defining the attributes of a people as holders of the right to self-determination the successful secession of Eritrea from Ethiopia. One can also look at the nature of the claim for self-determination of South Sudan, which is mainly based on these considerations. See H Hannum's case study on South Sudan in his *Autonomy, sovereignty and self-determination* (1990) 308-332; A Heraclides *The self-determination of minorities in international politics* (1991) 107-112.

⁷⁸ As Mojekwu puts it: 'The nature and attributes of individual and collective rights are fundamentally different.' C Mojekwu 'Self-determination: The African perspective' in Y Alexander & R Friedlander *Self-determination: National, regional and global dimensions* (1980) 223.

Charter that one category is more important than the other. It is only logical to assert that they all are of equal value and significance.⁷⁹ 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.⁸⁰ For some they are just political abstractions historically employed to undermine human rights.⁸¹ In the end, they could not be enforced in a way that human rights are enforced through a court action.⁸²

These conclusions might have been prompted by the fact that there has been no mechanism to enforce the right to self-determination under article 1 of the International Covenant on Civil and Political Rights (CCPR). In one case the Human Rights Committee, the body monitoring the implementation of CCPR, received a communication by a representative of an indigenous people alleging the violation of the right to self-determination by a state party to CCPR, Canada.⁸³ 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 to self-determination enshrined in article 1 of the Covenant, which deals with rights conferred upon peoples, as such'.⁸⁴ The effect of this is that self-determination, being a collective right, could not be enforced through the existing individual communications procedure.⁸⁵ Fortunately, in the context of the African human rights system, the issue of enforceability of peoples' rights is subject to a broader and novel test.

Peoples' rights in the African Charter are more than mere political or moral principles intended to guide the 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.⁸⁶ But they are more than that. Peoples' rights are also legal rights. As such, they can

⁷⁹ See n 89 below and accompanying text.

⁸⁰ See eg E Bondzie-Simpson 'A critique of the African Charter on Human and Peoples' Rights' (1988) 31 *Howard Law Journal* 643 657; Alston (n 20 above) 289.

⁸¹ P Sieghart *The international law of human rights* (1988) 368.

⁸² See L Thio 'Battling balkanisation: Regional approaches toward minority protection beyond Europe' (2002) 43 *Harvard International Law Journal*. 458 n.320 (referring to some of the peoples' rights recognised under the African Charter as being so broad that they 'defy enforcement').

⁸³ See Communication 167/1984, *Bernard Ominayak, Chief of the Lubicon Lake Band v Canada* (Views adopted 26 March 1990, Report of the Human Rights Committee, Vol II, GAOR, 45th session, Suppl NO 40 (A/45/40), 1-30 (*Ominayak* case).

⁸⁴ n 33 above, para 13(3).

⁸⁵ See Optional Protocol to the International Covenant on Civil and Political Rights, concluded 16 December 1966, entry into force 23 March 1976.

⁸⁶ Peoples' rights have a bearing on the policy of state parties to the Charter in such areas as language, political participation and such. See Guidelines in Murray & Evans (n 17 above).

be claimed by an identifiable collectivity or group and enforced against a state.⁸⁷

Under the African human rights system, it is not just the violation of individual human rights in the African Charter that can be brought before the African Commission, but violations of peoples' rights as well. This is partly because there is no requirement that communications be brought before the Commission only by individuals directly affected.⁸⁸ Interestingly enough, unlike the international and other regional human rights systems,⁸⁹ the affected people or representatives of such people or even groups that act on behalf of such people can lodge the complaint before the African Commission. This approach thus seems to suggest that, as long as the facts complained of reveal a state party's failure to comply with any of the peoples' rights in the Charter, the Commission can hold the state responsible for a violation of the right. As such, peoples' rights are enforceable.

4.1 The approach of the African Commission

The position of the African Commission on this matter is emphatically spelt out in the *SERAC* case:⁹⁰

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

The African Commission thus clearly establishes that communications

⁸⁷ Murray & Wheatley argued that 'there was no indication in the Charter that the rights enumerated in articles 19 through 24 were not legally binding' (n 11 above, 226). Even better is the observation of Ouguergouz that 'the states parties to the African Charter are legally responsible for implementing the collective rights set forth in it, on the same basis as individual rights; article 1, on undertaking of states, moreover, draws no distinction between the rights protected' (n 51 above, 575).

⁸⁸ See art 55 of the African Charter. Note that the provision does not speak of individual communications; rather it speaks of 'communications other than those of state 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.

⁸⁹ In the Inter-American system, although peoples' rights are not yet recognised, the Inter-American Human Rights Commission has given standing to representatives of indigenous peoples by permitting them to address it. See eg Inter-American 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 September 1997.

⁹⁰ *SERAC* case (n 9 above) para 68 (my emphasis).

alleging violations of peoples' rights are enforceable at par with those of individual rights.⁹¹

In the *Katanga* and the *SERAC* cases, the African Commission had the opportunity to decide on allegations that peoples' rights were violated. The approach of the Commission to these cases 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.⁹² The complainant and his organisation 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.⁹³ The Commission declared the case inadmissible, but because 'the case holds no evidence of violations of any rights under the African Charter'.⁹⁴

The *SERAC* 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 whose behalf the communication was lodged 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.⁹⁵ And the Commission has been willing to consider the case and went further to speak about the usefulness of the *actio popularis* for enforcing the rights in the African Charter.⁹⁶

5 Conclusion

The above discussion demonstrates that significant strides have been made in the understanding of the subjects and content of peoples' rights through the decisions of the African Commission. One can also conclude from the decisions discussed above that the main areas of focus of peoples' rights are 'people' as the population of a state as a whole and 'people' in the sense of a section of the population of a state. The role of the state with respect to peoples' rights under the African

⁹¹ This does not assume that all the rights of peoples under the African Charter are equally enforceable. On account of the level of their precision and their socio-political ramifications, the nature of their enforceability could vary. Indeed, the nature of enforceability of peoples' rights in general is not necessarily the same as the nature of enforceability of individual rights. Thus, eg, the nature of enforceability of the right to vote and the right to self-determination is significantly different.

⁹² See the *Katanga* case (n 6 above) para 1.

⁹³ n 6 above, para 3.

⁹⁴ n 6 above, para 6.

⁹⁵ *SERAC* case (n 9 above) para 43.

⁹⁶ n 9 above, para 43.

Charter is to respect, protect and fulfil them,⁹⁷ and in some instances exercise peoples' rights on behalf of and to the benefit of its people as a whole.⁹⁸ This enhances the human rights content of the concept of 'peoples' in the African Charter and replaces the traditional state-centric understanding of the concept.⁹⁹ Moreover, the decisions of the Commission leave no room for doubt about the legal nature and enforceability of peoples' rights. Generally, the interpretation and application of peoples' rights by the African Commission has addressed much of the fears and misgivings of many commentators. To the extent that peoples' rights are interpreted and applied as providing protection to vulnerable communities against domination and abuse of their rights by the state and others within the state, the entrenchment of those rights in the African Charter advances the cause of human rights in Africa and the concept of peoples' rights in general. In terms of its approach to cases on peoples' rights, the African Commission did not develop a principled approach to the interpretation of peoples' rights under the Charter. Instead, the Commission employed a case-by-case approach. As a result, one cannot find a commonly discernable pattern in the Commission's jurisprudence on the conceptualisation and interpretation of peoples' rights. There are also some outstanding issues that have yet to be addressed.

Although it can be gathered from its decisions that sub-state groups are beneficiaries of peoples' rights in the Charter, the Commission has as yet to make a clear pronouncement to that effect. Moreover, for reasons of legal certainty it is also crucial that the African Commission elaborates sufficiently clear criteria for determining the nature of the groups who qualify to be peoples in such circumstances. The Commission has also to offer a full analysis of the content of peoples' rights under the Charter in its decisions. In this regard, one can note that, whereas the Commission delimited the extent of the entitlement of sub-national groups to the right of peoples to self-determination (notwithstanding its acceptability), and the various modalities of exercising the right,¹⁰⁰ it has not gone far enough in analysing the nature and extent of their entitlement in other areas. If peoples' rights under the Charter are to be utilised to address some of the human rights challenges affecting the continent, it is imperative that the African Commission puts extra effort into the interpretation and application of these rights and

⁹⁷ n 9 above, paras 44-47 in conjunction with paras 52-57.

⁹⁸ n 62 above and accompanying text.

⁹⁹ Oloka-Onyango elaborates the promise of the *SERAC* decision in this regard: 'The Ogoni decision helps us to move away from the pessimism that has engulfed much of the scholarship in this area and the conclusion that the future of peoples' rights is "... not very bright". It provides some hope that issues such as self-determination, minority rights and even the "explosive" issue of secession can be approached in a more creative and non-state-centric fashion' (n 53 above 895).

¹⁰⁰ nn 25-41 above and accompanying text.

in the promotion of their understanding. In this regard, the establishment of the African Commission's Working Group of Experts on Indigenous Populations/Communities¹⁰¹ and the adoption by the Commission of the report of the Working Group¹⁰² are significant developments to be commended.

¹⁰¹ The Working Group was established by the Resolution of the African Commission on the Rights of Indigenous Populations/Communities passed at the Commission's 28th ordinary session held in Cotonou, Benin in October 2000. One of the tasks that the Working Group was entrusted under this Resolution was to study the implications of the African Charter and the well-being of indigenous communities, especially with respect to the right to equality (arts 2 & 3), the right to dignity (art 5), protection against domination (art 19), on self-determination (art 20) and the promotion of cultural development and identity (art 22).

¹⁰² In 2003, the African Commission adopted the report in recognising, among others, the standards of international law for the promotion and protection of minorities and indigenous peoples. The report as adopted by the Commission expresses the view that peoples' rights 'should be available to sections of populations within nation states, including indigenous people and communities' (n 27 above, 116 79).