

## ABHANDLUNGEN / ARTICLES

### Self-determination in the Case Law of the African Commission: Lessons for Europe

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**Abstract:** Looking at self-determination in contemporary Europe, one finds self-determination lumped together with the question of a possible right to remedial secession, either passionately defended or fervently rejected. Lumping self-determination and secession together tends to reduce self-determination to a territorial meaning. Such a territorial meaning indicates a larger geographical bias in international law. This paper inquires, first, what legally might remain of self-determination in a post-colonial context by focusing on the case law of the African Commission on Human and Peoples Rights (ACHPR). Second, it asks what might be the lessons for Europe by gazing at the development of the legal concept of self-determination in Africa. Legal developments in the global south, Africa in particular, have largely gone unnoticed in legal scholarship. Such negligence is unwarranted as the most acute and fast paced global trends manifest more visibly in Africa than in other places. Africa foreshadows global processes in many ways. After giving a brief overview over self-determination in the colonial context (part 2), the paper addresses the question who remains the bearer of the right to self-determination (part 3) and what remains the content of self-determination (part 4). The final chapter (part 5) concludes by relating the jurisprudence of the African Commission to current European events.

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#### A. Introduction

After the former U.S. president Woodrow Wilson famously announced the principle of self-determination in the aftermath of World War I, it spread in the minds and hearts of disenfranchised minorities across Europe. In the 1950s and 1960s freedom fighters struggling against colonial domination ‘rediscovered’ the principle of self-determination, and these days, self-determination appears again from Russian-speaking Crimean to yellow-red-striped flag waiving Catalonians. For people under colonial domination, self-determination

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provided the principal legal argument for creating new states independent from colonial powers. Today, self-determination serves as the foremost argument for disassembling states. From Georgia to the United Kingdom, and from Spain to Ukraine, the territorial integrity of states seems at peril. Despite the prominence of self-determination, it is unclear what remains of the *right* of self-determination today. After the right to self-determination was enshrined in the UN-Charter, international lawyers vigorously attacked it as a “legal tenet of uncertain contours”.<sup>1</sup> Charles de Visscher even questioned the existence of such a right, accusing it of a “total lack of precision”.<sup>2</sup> In the colonial context self-determination, however, gradually developed into a principle firmly established in international law. The ICJ found self-determination to be a right *erga omnes*, an obligation towards the entire international community.<sup>3</sup> The legal content of a right to self-determination in a post-colonial context, however, is anything but clear. Equally, the contours of the right bearers largely lack legal precision and remain vague. The ICJ, for instance, abstained from defining the population of Kosovo as a people. And what is a people anyway? Despite its prevalence in political and legal discourse, does self-determination today not face similar faults of legal precision than at the outset of the 20th century that put its existence as a legal principle at question, demoting it entirely to the realm of politics?

In contemporary Europe, in particular, self-determination and questions of a remedial right to secession are lumped together, the latter either passionately defended or rejected. One argument of this article is that lumping self-determination and secession together tends to reduce the dimension of the former to the latter, that is, to a primarily territorial meaning of self-determination. The reduction of self-determination to a territorial question in legal discourses reflects a broader geographical bias in international law.<sup>4</sup> By a geographical bias I mean the selection of the factor of territory – territorial language, concepts, and imagery –

- 1 *Joshua Castellino*, International Law and Self-determination: Peoples, Indigenous Peoples and Minorities, in: Christian Walter / Antje von Ungern-Sternberg / Kavus Abushov (eds.), *Self Determination and Secession in International Law*, Oxford 2014, p. 27.
- 2 Charles de Visscher, quoted in: *Grigory Ivanovich Tunkin*, *Theory of International Law*, Cambridge 1974, p. 64.
- 3 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 136, para 156.
- 4 On some of the scholarship on geographical (or territorial) bias in international law, see, *Irus Braverman / Nicholas Blomley / David Delaney / Alexandre Kedar* (eds.), *The Expanding Spaces of Law: A Timely Legal Geography*, Stanford 2015; *Peter D. Szigeti*, *Territorial Bias in International Law: Attribution in State and Corporate Responsibility*, *Journal of Transnational Law and Policy* 19 (2010), p. 313; *Richard T. Ford*, *Law’s Territory (A History of Jurisdiction)*, *Michigan Law Review* 97 (1999), p. 843; *Nicholas Blomley*, *Law, Space, and the Geographies of Power*, Bloomington 1994. In immigration law, the notion of territory often evokes an analogy, either implicitly or explicitly, to private property arguments (e.g. trespassing) and/or a reduction to its circumscribing and defining element, a border (for a concise critique of territory as private property in law and political theory, see, *Margaret Moore*, *A Political Theory of Territory*, Oxford 2015, p. 28ff). Borders, in turn, are fetishized, capable of gaining sentiments (“vulnerable borders”, see, Report from the European Commission on the Operationalisation of the European Border and Coast Guard, COM (2017)

on which interest is focused and corresponding assumptions on its role in contemporary and historical processes.<sup>5</sup> Accordingly, it is used in one way (to propel arguments on territorial secession), but not in another (to advance claims of disenfranchised groups within a state).<sup>6</sup> Moreover, geographical bias also entrenches the stance of international legal theory and jurisprudence towards theory from the global south.<sup>7</sup> The enduring perception of Africa as a place of deficiency, as a negative interpretation of all what is not there, of what it has not achieved and is not working, as Achille Mbeme argues, is still prevalent: “Africa thus stands out as the supreme receptacle of the West’s obsession with, and circular discourse about, the facts of ‘absence,’ ‘lack,’ and ‘non-being,’ of identity and difference, of negativity – in short, of nothingness.”<sup>8</sup> Still, Africa is considered as a reservoir to extract data from in order to test theories developed in the global north, but not as a place capable of producing theories.

This paper has two aims. First, it inquires what legally remains of self-determination in a post-colonial context by focusing on the case law of the African Commission on Human and Peoples Rights (ACHPR).<sup>9</sup> A second argument of the paper is that, although the African Commission defines some vague ‘objective’ standards on what constitutes the bearers of the right to self-determination, it distinguishes cases primarily through the specific rights that are at question. By focusing on rights, the African Commission deemphasizes the relation between territory and rights. Territory thus features not as abstract *space* (as na-

42 final (25 January 2017)) and of being attacked. The separate opinion of Judge Dedov, describing Subsaharan immigrants crossing the border fence into the Spanish enclave of Melilla, brings it to the point: “Je peux imaginer à quel point les gardes- frontières espagnols ont été choqués par cette invasion, lorsque les candidats, accompagnés de nombreux autres migrants, *ont attaqué la frontière.*” [italics added by author] (separate opinion Judge Dedov, *N.D. et N.T. c. Espagne*, Appl. no. 8675/15 et 8697/15, (ECtHR, 3 October 2017), p. 44).

- 5 The notion of bias employed in this paper relies on the definition set forth in development economics by Gunnar Myrdal, see, *Gunnar Myrdal, An Approach to the Asian Drama Methodological and Theoretical*, New York 1970, p. 211.
- 6 Models of self-determination generally distinguish between autonomy and self-determination (or internal and external self-determination), i.e. rights of a group to regulate its own affairs for important political or economic reasons and independence or “complete self-determination” (see, still, *Louis B. Sohn, Models of Autonomy Within the United Nations Framework*, in Yoram Dinstein (ed.), *Models of Autonomy*, New Brunswick/London 1981). This delimitation merely restates the problem and is not capable of answering the personal scope of and the legal effects following from the right to self-determination in a post-colonial context.
- 7 For instance, hardly any books on African legal theory exist. Why is that so? One remarkable exception is *Oche Onazi* (ed.), *African Legal Theory and Contemporary Problems*, Heidelberg/New York/London 2014.
- 8 *Achille Mbembe, On the Post-Colony*, Berkeley 2001, p. 4.
- 9 Post-colonial context denotes, on the one hand, the period after the process of decolonization and does not mean post-colonial international law, as various fields and practices of international law reiterate its colonial origins and practices (see *Anthony Anghie, Imperialism, Sovereignty and the Making of International Law*, Cambridge 2005).

tive lands, for instance), but as concrete (cultural or religious) attachment to a specific *place*.<sup>10</sup>

Second, this paper asks what might be the lessons for Europe by looking at the development of the right to self-determination in the case law of the African Commission. It thereby takes up the argument of acclaimed anthropologists Jean and John Comaroff that theory from the global south, in this context legal doctrine and theory, is important in understanding global processes.<sup>11</sup> Legal developments in the global south, Africa in particular, have largely gone unnoticed in legal scholarship. Such negligence is unwarranted as the most acute and fast paced global trends manifest more visibly in Africa than in other places: spaces of un-governability (megacities),<sup>12</sup> the fundamental transformation of money,<sup>13</sup> sovereign bond debts,<sup>14</sup> transnational governance regimes, extraction without state mediation, wide scale (forced) human migration, shadow economies, or radicalization of poverty. Africa in a way, as Jean and John Comaroff argue, foreshadows global processes in many ways.<sup>15</sup> If one of the foremost tasks of today's international legal scholarship is to understand law in the context of processes of societal globalization, then why should legal developments be any different from these other processes? These processes are not peculiar to Africa, but they also exhibit global political, social, economic and cultural processes, world processes in a sense. Struggles and conflicts, say, about the veil in France, crucifixes in Italian classrooms, or borders in Austria represent simultaneously regional and local conflicts in Nice,<sup>16</sup> Veneto,<sup>17</sup> or Austria *and* global conflicts. The space of these conflicts has become global, or in other words, these conflicts constitute "world experiences".<sup>18</sup>

The remainder of this article is structured as follows. After giving a brief overview over self-determination in the colonial context (part 2), the paper addresses the question who remains the bearer of the right to self-determination (part 3) and what remains the content of self-determination (part 4). The final chapter (part 5) concludes by relating the case law of the African Commission to current European events.

10 Yi-Fu Tuan, *Space and Place The Perspective of Experience*, Minneapolis/London 1977, p. 6.

11 Jean Comaroff & John Comaroff, *Theory from the South, or how Euro-America is evolving toward Africa*, Boulder 2012.

12 e.g. Achille Mbembe / Sarah Nuttall / Arjun Appadurai / Carol A. Breckinridge (eds.), *Johannesburg: The Elusive Metropolis*, Durham 2008.

13 In Kenya, for instance, more than two thirds of adults use a mobile phone based payment system, *M-Pesa*. See: David Birch, *Before Babylon, Beyond Bitcoin: From Money That We Understand to Money that Understands Us*, London 2017.

14 The Economist, Kenya launches the world's first mobile-only sovereign bond, 29 June 2017, <https://www.economist.com/news/finance-and-economics/21724419-and-may-soon-become-nation-bondholders-kenya-launches-worlds-first> (last accessed on 10 July 2017).

15 Comaroff & Comaroff, note 11.

## B. Self Determination: the Emergence of the Concept

From its ascendancy onto the international political plane, self-determination has been simultaneously pursued with great enthusiasm and profound suspicion. Woodrow Wilson's stipulation of self-determination met Trotsky's accusation of Western governments excluding their own spheres of influence:

*"[A]re they [the Allied governments] willing on their part to give the right of self-determination to the peoples of Ireland, Egypt, India [...] etc. For it is clear that to demand self-determination for the peoples that are compromised within the borders of enemy states and to refuse self-determination to the peoples of their own state or of their own colonies would mea[n] the defense of the most naked, the most cynical imperialism."*<sup>19</sup>

Initially, self-determination was absent in the Covenant of the League of Nations and included in the UN-Charter as a political principle under the aims and purposes of the UN Nations (art 1(2)) and international economic and social cooperation respectively (art 55). The Belgian representative at the Conference at Dumberton Oaks starkly criticized the inclusion of a right to self-determination:

*"It would be dangerous to put forth the peoples' right of self-determination as a basis for the friendly relations between the nations. This would open the door to inadmissible interventions if, as seems probable, one wishes to take inspiration from the peoples' right of self-determination in the action of the Organization and not in the relations between the peoples."*<sup>20</sup>

This view represented by no means an outlier, but a broader mood of governments about self-determination. Reduced to a mere political principle, self-determination merely meant states ought to grant self-government as much as possible to communities they rule over.<sup>21</sup>

- 16 *Benn Quinn*, The Guardian, French police make woman remove clothing on Nice beach following burkini ban, 25 August 2016, <https://www.theguardian.com/world/2016/aug/24/french-police-make-woman-remove-burkini-on-nice-beach> (last accessed on 10 July 2017).
- 17 *Lautsi and others v Italy*, App no 30814/06 (ECtHR, 18 March 2011). The large number of state interventions points to the symbolic global dimension of the case (the Lautsi case generated the largest number of state interventions so far): *Antoine Buyse*, Grand Chamber Judgment in Lautsi (ECHR Blogspot), <http://echrblog.blogspot.co.at/2011/03/grand-chamber-judgment-in-lautsi-no.html> (last accessed on 10 July 2017).
- 18 *Boaventura de Sousa Santos*, A New Vision of Europe: Learning from the South, in: Gurminder K Bhambra / John Narayan (eds.), *European cosmopolitanism: colonial histories and postcolonial societies*, London 2016, p. 174.
- 19 Telegram of the Ambassador in Russia (Francis) to the Secretary of State of 31 December 1917, [http://avalon.law.yale.edu/20th\\_century/bl03.asp](http://avalon.law.yale.edu/20th_century/bl03.asp) (last accessed on 10 July 2017).
- 20 Henry Rolin, quoted in *Antonio Cassese*, *Self-Determination of Peoples: A Legal Reappraisal*, Cambridge 1995, p. 39. [italics in original].
- 21 Cassese, note 20, p. 42.

The decolonization process, the emergence of new states on the international plane, shifting power structures in the UN and the greater role of UN bodies in the process of norm creation in international law resulted in the quick transformation of self-determination from a mere political principle to a firm rule of international law.<sup>22</sup> It was included as the first right into both Human Rights Covenants,<sup>23</sup> and the ICJ declared it as an obligation *erga omnes* owed to the international community as a whole.<sup>24</sup>

Three defining characteristics could be ascribed to the right of self-determination in the process of decolonization. First, on a structural level, self-determination provides the theoretical, legitimizing basis for statehood: every people has the right to establish a political entity, a state, within which they conduct their political affairs, and every other state has the duty to respect this and not to interfere in that people's business.<sup>25</sup> Self-determination appears here as popular legitimacy, linking the nation to the state. God and the monarch as the legitimate embodiment of sovereignty were replaced by the idea of sovereignty being vested in the people, "a community whose members are united horizontally by cultural and political ties"<sup>26</sup> By providing the legitimizing basis for statehood, self-determination as a principle of international law is the theoretical fundament that provides the ultimate legitimacy for the state-centered structure of international law.<sup>27</sup>

Second, on a rights level, self-determination in the decolonization process articulated the nexus between universal human rights and decolonization by pointing to the exclusionary dimension and practices of universal human rights. By carrying the prohibition of racial discrimination from the national level to the international plane, subjecting a whole people to foreign rule on the basis of racial inferiority arguments was not considered to be a matter between the subjugated people and the colonial state anymore, but a matter of the funda-

- 22 Declaration on the Granting of Independence to Colonial Countries and Peoples, UNGA Res 1514 (XV), 14 December 1960; UN GA Res 2625 (XXV), 24 October 1970, Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.
- 23 "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." Art 1, International Covenant on Civil and Political Rights, UNTS vol. 999, p. 171; International Covenant on Social and Economic Rights, United Nations, Treaty Series, vol. 993, p. 3.
- 24 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 9 July 2004, I.C.J. Report 2004, p. 136, para 155.
- 25 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UN GA Res 2625 (XXV), 24 October 1970.
- 26 *Olli Lagerspetz*, National Self-Determination and Ethnic Minorities, Michigan Journal of International Law 25 (2004), p. 1300. Although Lagerspetz refers to nations, we will see below that the various definitions of nations in European political thought exhibit identical features as the concept of 'people' in the case law of the African Commission.
- 27 *Martti Koskenniemi*, National Self-Determination, International Comparative Law Quarterly 43 (1994), p. 245.

mental values of the international community.<sup>28</sup> Its ascendancy to a right firmly established under international law meant that the right bearers were clearly defined (a people under colonial rule) and that specific legal consequences followed from that right.

Third, self-determination appears as an end norm, as the goal to be achieved. The end to be achieved was the establishment of ‘own’ sovereign states independent from the colonial state. Sovereignty thereby meant territorial sovereignty. Judge Dillard powerfully pronounced in the Western Sahara Advisory Opinion that “[i]t is for the people to determine the destiny of the territory and not the territory the destiny of the people.”<sup>29</sup> Whereas Judge Dillard’s aphorism points to the ‘good’ side of self-determination, the ‘ugly’ side of self-determination means “sovereign independence to the exclusion of all other people”,<sup>30</sup> which often translates into nationalism. Self-determination as an end norm acquired a territorial meaning that still represents its most enduring aspect. In order to realize the goal of territorial sovereignty, a set of other norms are attached (mean norms). To comprehensively describe these mean norms one would need to look at the different subsystems of international law, as they are dispersed over the entire spectrum of international law. International humanitarian law, for instance, sets forth that a population revolting and fighting against a colonial state enjoys the privileges of combatants, such as prisoner of war status, under the more favorable regime of international armed conflicts.<sup>31</sup> Furthermore, international law sets forth obligations on third states. When the small white minority declared independence of Southern Rhodesia, states were obliged to abstain from recognizing the regime and from rendering any assistance to the government.<sup>32</sup> The Human Rights Committee restated and underlined this approach in its General Comment No. 12: the corresponding obligations for third states are interrelated in particular with obligations under the human rights regime and other norms under general international law.<sup>33</sup>

28 Rüdiger Wolfrum, in Bruno Simma / Daniel-Erasmus Khan / Gregor Nolte / Andreas Paulus (eds.), *The Charter of the United Nations, A Commentary*, Oxford 2012, p. 115.

29 Separate Opinion of Judge Dillard, Western Sahara, Advisory Opinion, I.C.J. Reports 1975, p. 114.

30 Richard N. Kiwanuka, *The Meaning of People in The African Charter on Human and Peoples’ Rights*, AJIL 82 (1988), pp. 90-91.

31 ICRC, *Commentary to the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, para. 1661, <http://www.icrc.org/ihl/COM/470-750053?OpenDocument> (last accessed on 10 July 2017); Jean-Marie Henckaerts & Louise Doswald-Beck, *Customary International Humanitarian Law*, Vol. I, Cambridge 2005, p. 38.

32 UNSC Resolution 216 (1965) of 12 November 1965, S/RES/216 (1965); UN Security Council, Resolution 217 (1965) of 20 November 1965, S/RES/217 (1965).

33 UN Human Rights Committee (HRC), CCPR General Comment No. 12: Article 1 (Right to Self-determination), *The Right to Self-determination of Peoples*, 13 March 1984, para 2.

## C. The Post-Colonial Rights Bearers

### I. The inclusion of the term *people* in the African Charter

Once having achieved independence, African states had no urgency to include the right to self-determination in the regional legal system. At the founding of the Organization of the African Union (OAU) in 1963 self-determination did not appear as a right of groups or individuals, but as state-centered self-determination. Although human rights rhetoric played a crucial role in the struggle for independence, it remained absent on a regional level for a quarter of a century. The concern at the time was the protection of the state, not the protection of groups or individuals.<sup>34</sup> It was only in negotiations to the African Charter on Human and Peoples Rights (ACHPR) in the 1970s that self-determination emerged as a concept, not merely in opposition to the colonizing powers, but also as a right to be enshrined in the African human rights context.

The African Charter, like the International Covenants, enshrines the right of “all peoples” to self-determination. Yet, who ‘all peoples’ are, is anything but clear. The drafters of the African Charter deliberately avoided any definition of the term *people* *in abstracto*. The African Charter stands not alone in this regard, as the interpretation of the term ‘people’ is also absent in other international legal instruments. Fatsah Ouguergouz, Vice-President of the African Court of Human and Peoples’ Rights, pointedly remarks that the meaning of the term ‘people’ as used in the African Charter seems like a “chameleon-like concept”.<sup>35</sup>

The inclusion of the concept of ‘people’ in the African Charter was linked to an African conception of rights, i.e. collective rights. The inclusion of collective rights into the African Charter – together with the notion of duties that the individual owns towards her community – meant to reflect Africa’s cultural and historical particularity. At the opening speech of the meeting of the experts preparing the draft of the African Charter, Léopold Senghor – Senegal’s former poet president who, as a member of the French parliament, also had role in the drafting of the European Convention on Human Rights (ECHR) – who initially suggested the introduction of the term *people* and *people’s rights* into the African Charter, remarked that by including the concept of *people* into the African Charter “[w]e simply meant...to show our attachment to economic, social and cultural rights, to collective rights, in general, rights which have a particular importance in our situation in a developing country...”.<sup>36</sup> Senghor’s claim was one of conceptual particularity of collective rights in an African human rights system vis-à-vis the European human rights system that primarily

34 Rachel Murray, *Human Rights in Africa: From the OAU to the African Union*, Cambridge 2004, p. 7.

35 Fatsah Ouguergouz, *The African Charter on Human and Peoples Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa*, Leiden 2003, p. 204.

36 Address delivered by Léopold Sedar Senghor, President of the Republic of Senegal, at the opening of the Meeting of African Experts preparing the draft African Charter in Dakar, Senegal from 28 November to 8 December 1979, reprinted in *Christof Heyns / Karen Stefiszyn* (eds.) *Human Rights, Peace and Justice in Africa: A Reader*, Pretoria 2006, p. 51.



consisted of negative rights, i.e. to be free from government interference. Senghor's conception of difference of African rights from European rights was based on their embeddedness in a different normative universe, a universe that provides meaning and commands. In his opening speech, Léopold Senghor went on to point out that,

*"In Europe, human rights are considered as a body of principles and rules placed in the hand of the individual, as a weapon, thus enabling him to defend himself against the group or entity representing it. In Africa, the individual and his rights are wrapped in the protection of the family and other communities....Rights in Africa assume the form of rite, which must be obeyed because it commands. It cannot be separated from the obligations due to the family and other communities...If we want to build the Homo Africanus of tomorrow, we should, once again assimilate without being assimilated. We should borrow from modernism only that which does not misrepresent our civilization and deep nature. As regards human rights, Liberarian freedom, irresponsibility and immorality should be carefully avoided."*<sup>37</sup>

The erection of the "*Homo Africanus* of tomorrow" rested on the reenactment of a cultural and historical memory of the past. Writing on the African Charter briefly after it was adopted, scholars considered the inclusion of group rights into the African Charter as "revealing consistency with historical traditions and values of African civilization upon which the Charter relied".<sup>38</sup> Probably most illustratively, Keba M'Baye, the "father of the African Charter", stated that "the purpose of law is to maintain society in the state in which it had been transmitted by the elders".<sup>39</sup> Léopold Senghor's view did not fall on deaf ears. During the preparatory work of the African Charter, different delegations took up Senghor's view on an African civilization rooted in tradition and insisted on the inclusion of group rights into the draft Charter.<sup>40</sup> To be sure, I am not criticizing Léopold Senghor or Keba M'Baye's accounts of a tradition that contains common elements, supposedly sufficient to call it an *African* tradition spanning across the various societies of the continent, or their interpretation of the person in Africa, as unconvincing.<sup>41</sup> Rather my intention is to point to the contested historical and cultural memory enshrined in the African Charter. The views of the founding fathers of the African Charter were fiercely rejected by other African scholars, who denounced those as a "myth of an idealized, conflict-free traditional society", as ideal-

37 Heyns & Stefiszyn, note 36, p. 52.

38 *Richard Gittleman*, *The African Charter On Human And Peoples Rights: A Legal Analysis*, Virginia Journal of International Law 22 (1982), p. 676.

39 *Kebo M'Baye*, *Human Rights in Africa*: in Karel Vasak (ed.), *The International Dimension of Human Rights* New York 1982, p. 597.

40 Kiwanuka, note 30, p. 82.

41 On a brief account on the different philosophies of personhood in African societies see the excellent brief analysis of South African anthropologists Jean and John Comaroff (*Comaroff & Comaroff*, note 11, pp. 51-64).

ized projections of “Merrie Africa”.<sup>42</sup> In that regard, the African Charter is not different from any other international human rights instrument, that serves, as Marco Duranti beautifully described, as “a kind of totem around which people have come together to reenact their historical memory.”<sup>43</sup> Thus, what constitutes a people in the context of the African Charter reflects contested philosophical ideas and concepts that were enshrined into the African Charter and that took place in a specific political context.

## II. Hybrids: Peoples, Indigenous Peoples, and Minorities

Reiterating the political delicacy of the term people in the post-colonial context, the African Commission noted that it regularly “arouse[s] emotional debates”.<sup>44</sup> The differentiation between the concepts of people, minorities and indigenous people in the case law of the African Commission and the African Court on Human and Peoples’ Rights is anything from clear. The broad interpretation of the term ‘people’ by the African Commission comes at the price of conceptual clarity. Besides the issue of clarity, another issue concerns the problems of hybrids: a concept that has an unambiguous definition in international law might have a different meaning in another context. Yet, the original definition does not disappear. Rather a new meaning is added to the original definition, turning the initially unambiguous concept into a hybrid concept that can mean at the same time the oppressed and the oppressor, for instance.

It has been argued that “indigenous people appear to have the best case for engaging anti-colonial rhetoric and gaining the right to self-determination”.<sup>45</sup> The criteria for indigenous people in international law are considered to be the prior and continued occupancy of a territory, self-identification as an indigenous people, the perception of being culturally different, a non-dominant position, the communal perception of being a people, the actual existence of some form of self-governance and the regulation of, at least some aspects, of their life through customary laws.<sup>46</sup> The Inter-American Court of Human Rights found that indigenous people often face political, economic, and social marginalization,<sup>47</sup> and the African Court on Human and Peoples’ Rights (African Court) enumerated in its definition of indigenous people the requirement of the “experience of subjugation, marginalisation,

42 *El-Obaid Ahmed El-Obaid & Kwadwo Appiagyei-Atua*, Human Rights in Africa – A New Perspective on Linking the Past to the Present, *McGill Law Journal* 41 (1996), p. 828.

43 *Marco Duranti*, *The Conservative Human Rights Revolution*, Oxford 2017, p. 13.

44 Centre for Minority Rights Development (Kenya) and Minority Rights Group, *Comm. 276/2003* (ACHPR, 25 November 2009), para 151.

45 Castellino, note 1, p. 33.

46 *Steven Wheatley*, Conceptualizing the Authority of the Sovereign State over Indigenous Peoples, *Leiden Journal of International Law* 27 (2014), p. 376.

47 *Saramaka v. Suriname*, Inter-American Court of Human Rights, Judgment of 28 November 2007, para. 12; *Yatama v. Nicaragua*, Inter-American Court of Human Rights, Judgment of 23 June 2005, para 100.

dispossession, exclusion or discrimination, *whether or not these conditions persist*”.<sup>48</sup> Martinez Cobo, former UN Special Rapporteur on minorities, set forth the probably most influential definition referred to by the African Court<sup>49</sup> of indigenous people as “those which, having a historical continuity with pre-invasion and precolonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories [...]”.<sup>50</sup> Although the African Commission refers to the case law of the Inter-American Court on Human Rights in its interpretation of indigenous people,<sup>51</sup> the concept of indigenous people remains highly contested, and at times acquires contradictory meanings and content.<sup>52</sup> The notion of first occupancy of land or being first, for instance, remains highly problematic in the African context. In Nigeria the concept of indigeneity institutionalizes discrimination of non-indigenous persons or settlers on the arguments that were not first to a place.<sup>53</sup> Universities base their admission policies on indigeneity criteria, local governments hardly award jobs to persons they consider settlers, and scholarships are awarded on the same basis.<sup>54</sup> Aware of the problematic relationship between ethnic identities and land the African Commission de-emphasized the criteria of prior and continued occupancy of territory. The Commission pointed out that “validation of rights is not automatically afforded to such pre-invasion and pre-colonial claims.”<sup>55</sup> Instead the Commission considered it as sufficient “that indigenous peoples have an unambiguous relationship to a distinct territory and that all attempts to define the concept recognize the linkages between people, their land, and culture.”<sup>56</sup> Furthermore, the Commission relied on self-identification

- 48 African Commission on Human and Peoples’ Rights v Republic of Kenya, Appl. no 006/2012 (African Court on Human and Peoples’ Rights, 26 May 2017), para 107. [italics added].
- 49 African Commission on Human and Peoples’ Rights v Republic of Kenya, Appl. no 006/2012 (African Court on Human and Peoples’ Rights, 26 May 2017), para 106.
- 50 *Jose Martinez Cobo*, Study on the Problem of Discrimination against Indigenous Populations, Chapter V: Definition of Indigenous Populations, UN Doc E/CN.4/Sub.2/1982/2/Add.6 (20 June 1982).
- 51 Centre for Minority Rights Development (Kenya) and Minority Rights Group, Comm. 276/2003 (ACHPR, 25 November 2009), para. 281.
- 52 *Felix Mukwiza Ndahinda*, *Indigenesness in Africa: A Contested Legal Framework for Empowerment of ‘Marginalized’ Communities*, Heidelberg 2011.
- 53 *Daniel Bach*, *Federalism, Indigeneity and Ethnicity in Nigeria*, in: Larry Jay Diamond / Anthony Hamilton Millard Kirk-Greene / Oyeleye Oyediran (eds.), *Transition without end: Nigerian Politics and Civil Society Under Babangida*, Boulder 1997, pp. 333-350.
- 54 Human Rights Watch, “They Do Not Own This Place“: Government Discrimination Against Non-Indigenes in Nigeria’ (April 2006).
- 55 Centre for Minority Rights Development (Kenya) and Minority Rights Group, Comm. 276/2003 (ACHPR, 25 November 2009), para 154.
- 56 Centre for Minority Rights Development (Kenya) and Minority Rights Group, Comm. 276/2003 (ACHPR, 25 November 2009), para 154. In *ACHPR v Kenya* the African Court, however, seems to re-emphasize the factor of priority in time of occupation of a specific territory. The African Court considers the “presence of priority in time with respect to the occupation and use of a specif-

as key criteria for the definition of an indigenous people, in particular the desire to preserve one's identity with cultural patterns, social institutions and religious systems.<sup>57</sup>

What constitutes a people in the context of self-determination has often been set apart from religious, ethnic or linguistic minorities, based on the distinctive criteria of territory. The term 'people', a UN study argues, "implies a relationship with a territory even if the people in question has been wrongfully expelled from it and artificially replaced by another population".<sup>58</sup> Such a distinction based on territory is problematic in the African context for various reasons. First, its equating with the criteria of prior occupancy has been pointed out above. Second, the legal consequence of the relationship with a certain territory cannot be translated into a right to remedial secession as the existence of such a right is widely contested (as argued below in section D.I). Third, relationship with a territory in the sphere of rights is particularistic. It is not the abstract right to territory in the sense of territorial sovereignty or property that forms the basis of a right, but the particular cultural or religious attachment to a specific place. Thus, not territory as an abstract category is relevant, but territory as a specific place whose importance can only be understood in relation to particular cultural and religious practices.<sup>59</sup>

The UN study continues that a "people should not be confused with ethnic, religious or linguistic minorities, whose existence and rights are recognized in article 27 [ICCPR]."<sup>60</sup> Although the study distinguishes between the rights of people under Art 1 ICCPR and Art 27 ICCPR, this textual differentiation remains questionable in the text of the African Charter. The interpretation by the African Commission of what constitutes a people is at times quite similar to the interpretation of minorities by the High Commissioner on Human Rights in the General Comment No. 27 on the ICCPR.<sup>61</sup> Moreover, the Commission clearly stated that in "some cases groups of 'a people' might be a majority or a minority in a partic-

ic territory" as a relevant factor for the "identification and understanding of the concept of indigenous people" (para 107). This emphasis on the priority in time, however, has to be embedded in the specific rights claimed (the particular attachment of the Ogiek people to the Mau forest and the importance of unhindered access to and the use of the natural resources of the forest to ensure their survival). It is only through this particular claims that the concept of people that the concept of people is developed *in concreto*, see, African Commission on Human and Peoples' Rights v Republic of Kenya, Appl. no 006/2012 (African Court on Human and Peoples' Rights, 26 May 2017).

- 57 Centre for Minority Rights Development (Kenya) and Minority Rights Group, Comm. 276/2003 (ACHPR, 25 November 2009), para 157.
- 58 Aurelia Cristescu, *The Right to Self-Determination: Historical and Current Development on the Basis of United Nations Instruments*, UN Doc. E/CN.4/Sub. 2/404/Rev. 1, p. 41.
- 59 See also, *Margaret Moore*, *A Political Theory of Territory*, Oxford 2015, p. 28 (arguing that the concept of territory matters as persons are emotionally attached to concrete places).
- 60 Aurelia Cristescu, *The Right to Self-Determination: Historical and Current Development on the Basis of United Nations Instruments*, New York 1981, 41 (UN Doc. E/CN.4/Sub. 2/404/Rev. 1).
- 61 Office of the High Commissioner for Human Rights, General Comment No. 23: The rights of minorities CCPR/C/21/Rev. 1/Add.5, General Comment No. 23. (General Comments), para. 5.1. The African Commission found that the people of Southern Cameroon qualify as a people under the

ular State.”<sup>62</sup> In *Open Society v. Cote d’Ivoire* the Commission defined the complainants along ethnic criteria, while it subsumed them under the term ‘people’ of Art 20 of the African Charter (right to development).<sup>63</sup>

When majorities and minorities both qualify for subsumption under the term people in *some* cases, the question remains how one distinguishes cases where a majority or a minority constitutes a people from cases where they do not. Although the African Commission fleshes out some vague ‘objective’ standards of what constitutes a people, it distinguishes these cases primarily through the specific rights that are at question. The absence of any definition of the term people in the abstract in the African Charter, the avoidance of the drafters of the Charter to include any reference, and reluctance of the African Commission to go beyond vague standards, suggest that the term ‘people’ in the context of the African Charter does not exist *in abstracto*, but only through the specific rights that are at question.

### III. Rights Nexus

In international law, the right to self-determination was meant to apply to processes of decolonization by conferring to colonized people a temporally limited right. With the transition from colonization to the post-colony, the bearers of the right to self-determination were equally thought to be irrelevant on the plane of international law. The text of the African Charter however temporally extends the right to self-determination and thus imbues its rights bearers – ‘peoples’ – with legal significance beyond the colonial context. Article 20 of the African Charter reads:

1. All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.
2. Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community.

Interpreting the right to self-determination to a right of mere physical existence would be absurd, since other norms already cover the right to physical integrity of the individual and groups in more detail. Rather, in interpreting the right to existence one needs to take into account both the preamble of the African Charter, which refers both to the “historical traditions” and “values of African civilization” and to the nexus between development and

Charter, because they share “a common history [and] linguistic tradition” (Kevin Mwangi Gunme and others v. Cameroon, Comm. 266/03 (ACHPR, 27 May 2009), para 179).

62 Sudan Human Rights Organisation and Centre on Housing Rights and Evictions (COHRE) v. Sudan, Comm. 279/03-296/05 (ACHPR, 27 May 2009), para 220.

63 *Open Society Justice Initiative v. Côte d’Ivoire*, Comm. 318/06 (ACHPR, 27 May 2016), para 104, 124 (where the Commission referred to blood relations).

rights, the latter included in the third sentence of Art 20(1) of the African Charter itself.<sup>64</sup> Under a temporal perspective, the African Charter enshrines two notions of people. On the one hand, the African Charter recognizes colonized or oppressed people (paragraph 2) and on the other, people outside a state of colonization or oppression (paragraph 1).

Art 20(2) of the African Charter refers to the shared historical experiences of African states. Colonized people might refer to “peoples of non-self-governing territories and subject to alien subjugation, domination and exploitation”.<sup>65</sup> The African Commission recalls that paragraph 2 “was aimed at addressing the situation of Africans who remained under colonial domination at the time the Charter was drafted.”<sup>66</sup> The term ‘colonized people’ acquires its meaning through the legal classification of territories (non-self governing), hence reflecting the territorial dimension of self-determination.<sup>67</sup> Besides this largely historical meaning, colonialism might continue in the hyphenated terms of the post-colony or neo-colonialism, i.e. the domination or marginalization of a group by a state or another group within that state. Arguments of neo-colonialism have been made before the ACHPR. The complainants in the Cabinda case, for instance, argued that the exploitation of the natural resources in the Cabinda region by the Angolan government and the alleged economic and social marginalization of the Cabinda people amounted to “neo-colonialism”, an argument that was not rejected on formal grounds, neither by the African Commission nor by Angola.<sup>68</sup>

A third temporal dimension is the collective experience of a shared colonial past.<sup>69</sup> In the Ogoni case, the African Commission pointed out that “[t]he drafters of the [African] 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.”<sup>70</sup> On the one hand, this short passage can be read as a call to restore ties

64 *Dina Shelton*, Self-Determination In Regional Human Rights Law: From Kosovo To Cameroon, *AJIL* 105 (2011), p. 64.

65 Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010, para 79. In the Construction of a Wall Advisory opinion, the ICJ asserted the existence of a Palestinian people on the basis of Israel’s explicit recognition of the latter and on numerous UNGA Resolutions (Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, para 118).

66 Communication 328/06, *Front for the Liberation of the State of Cabinda v Republic of Angola* (2013) ACHPR (54<sup>th</sup> Ordinary Session), para 124.

67 Similarly people under military occupation who can exercise the right to self-determination appear through the spatial aspect of military occupation (Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p.136).

68 Communication 328/06, *Front for the Liberation of the State of Cabinda v Republic of Angola* (2013) ACHPR, (54<sup>th</sup> Ordinary Session), para 59-62, 90.

69 In similar terms see *Frans Viljoen*, *International Human Rights Law in Africa*, Oxford 2012, p. 221.

70 Communication 155/96, *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria*, (2001) ACHPR (30<sup>th</sup> Ordinary Session), para 56.

that have been torn apart by colonization in order to return to a glorified past. The opponents of “Merrie-Africa” projections would be quick in attacking this reading. On the other hand, the passage recalls the collective experiences of suffering rooted in the past. The *topos* of suffering also constructs Pan-African unity in the collective experience.

The second variant of paragraph 2, oppressed people, arguably is not limited to a colonial setting. It reflects the neo-colonial reading of the term people in a broader legal context that concerns the relation between the people of a country and its government. The relation between the people and the state opens the internal dimension, generally regulated by constitutional law, to a normative review on the international plane, i.e. international law. Reading this second variant under a human rights perspective, the term ‘oppressed people’ may easily acquire a broader meaning. This meaning is potentially so broad that it might include a vast variety of human rights violations.

The broad temporal dimension of the term ‘people’ relates to the way the African Commission employs the term under Art 20(1) of the African Charter. The African Commission employs the term in a twofold way. First, noting the political delicacy of the term, the African Commission attempted in several cases to define ‘objective’ criteria. In its *Endorois Communication* the African Commission stated that the question of what constitutes a people regularly “arouse[s] emotional debates”. Nevertheless, it did not abstain from finding that consensus exists on at least some minimum ‘objective’ criteria:

*“The African Commission is thus aware that there is an emerging consensus on some objective features that a collective of individuals should manifest to be considered as ‘peoples’; viz: a common historical tradition, racial or ethnic identity, cultural homogeneity, linguistic unity, religious and ideological affinities, territorial connection, and a common economic life or other bonds, identities and affinities they collectively enjoy – especially rights enumerated under Articles 19 to 24 of the African Charter – or suffer collectively from the deprivation of such rights.”*<sup>71</sup>

Note that the African Commission relied on a double approach. On the one hand, it set forth a set of broadly defined ‘objective’ criteria. A brief look at some attempts to define theoretically a nation in European political theory demonstrates the symmetries between the ‘objective’ criteria set forth by the African Commission and European political theory. The enumerations of the African Commission include ‘objective’ elements of Stalin’s definition of a nation, such as economic bonds and a common language and culture;<sup>72</sup> Max Weber’s description of common descendants and identifiable ethnic homogeneity and solidarity;<sup>73</sup>

71 Centre for Minority Rights Development (Kenya) and Minority Rights Group, Comm. 276/2003 (ACHPR, 25 November 2009), *Legal Resources Foundation v. Zambia*, (African Commission on Human and Peoples’ Rights), para. 73.

72 *Joseph Stalin*, ‘The nation’, in John Hutchinson, Anthony Smith (eds.), *Nationalism*, Oxford 1994, pp. 19-20.

73 *Max Weber*, ‘The nation’, in John Hutchinson, Anthony Smith (eds.), *Nationalism*, Oxford 1994, p. 22.

and Ernest Renan's subjective criteria of a "rich legacy of remembrances..., the desire to live together, the will to continue to value the heritage which all hold in common".<sup>74</sup>

On the other, it established a broad subjective approach ("other bonds, identities and affinities they collectively enjoy") that permits the subsumption of any collection of individuals under the term 'people'. A third criteria, the collective suffering of rights (note that the *topos* of suffering in connection to people appears again), might be labelled both objective and subjective. The African Commission considers the objective criteria only secondary to subjective criteria. In the *Gunme* case, the complainants claimed that they represented a separate and distinct people based on a different colonial history (language, educational system, local administration).<sup>75</sup> Although the Commission agreed with the governments' arguments that a "people" may manifest ethno-anthropological attributes", it held that such attributes cannot be used as the "only determinant factor to accord or deny the enjoyment or protection of peoples' rights".<sup>76</sup> The African Commission explicitly mentioned the controversial and politicized connotation of the term and limited itself to a definition according to which "certain objective features attributable to a collective of individuals" may be sufficient as criteria to consider a specific group as people.<sup>77</sup> As in the *Endorois* Communication, the African Commission defined these 'objective' features broadly and subsequently stated that:

*"More importantly, they [the people of Southern Cameroon] identify themselves as a people with a separate and distinct identity. Identity is an innate characteristic within a people. It is up to other external people to recognise such existence, but not to deny it."*<sup>78</sup>

Relying on identity in order to qualify for a legal status (people) to which certain rights are attached (right to self-determination) is common in other fields of international law, such as refugee law.<sup>79</sup> Although some criteria might be necessary in order to distinguish, the ultimate decision should not be left to the state to recognize a group as a distinct group.

74 Ernest Renan, 'Qu'est-ce qu'une nation?', in John Hutchinson, Anthony Smith (eds.), *Nationalism*, Oxford 1994, p. 17.

75 Kevin Mwanganga Gunme and others v. Cameroon, Comm. 266/03 (ACHPR, 27 May 2009), para 7.

76 Kevin Mwanganga Gunme and others v. Cameroon, Comm. 266/03 (ACHPR, 27 May 2009), para 178.

77 Kevin Mwanganga Gunme and others v. Cameroon, Comm. 266/03 (ACHPR, 27 May 2009), para. 169.

78 Kevin Mwanganga Gunme and others v. Cameroon, Comm. 266/03 (ACHPR, 27 May 2009), para 179.

79 See the 'social group' element in the refugee definition, Art 1A(2), Convention Relating to the Status of Refugees, 28 July 1951, UNTS Vol. 189, p. 137. For an advocacy of the 'social perception test' that relies on identity and identification, see, *James C. Hathaway, Michelle Foster, The Law of Refugee Status*, Cambridge 2014, pp. 428-432.



As the ‘objective’ criteria are secondary and the subjective criteria hopelessly vague, the African Commission primarily relies in its identification of what constitutes a ‘people’ on the rights that are claimed. In the *Dawda Jawara* case, one of its earlier cases, the Commission had defined the citizens of Gambia in the context of a military coup against a democratically elected government as a people. The Commission emphatically held that albeit the military coup occurred peacefully, “[t]his was not through the will of the people who have known only the ballot box since independence, as a means of choosing their political leaders” and thus constitutes “a grave violation of the right of the Gambian people” to freely choose their political leaders.<sup>80</sup> The Commission did not even engage in a legal discussion of whether the Gambian people constituted a people according to the meaning of the Charter, as it was seemingly taken for granted that the right of the citizens of Gambia to choose their government in free elections can only encompass the Gambian citizen as people. The notion of ‘people’ is, however, not drawn along existing boundaries. In *Open Society v Côte d’Ivoire*, the African Commission equally abstained from any discussion of whether the Dioula constitute a people for the purpose of Art 22 of the African Charter (right to development), but relied, as noted above, on the criteria of an ethnic group. The term ‘people’ was employed by the Commission to question existing formal boundaries of membership, i.e. the modes of acquiring Ivorian nationality.<sup>81</sup>

In its *Darfur* communication, the African Commission underlined its approach of interpreting the term people through the protection of rights:

*“There is a school of thought, however, which believes that the ‘right of a people’ in Africa can be asserted only vis-à-vis external aggression, oppression or colonization. The Commission holds a different view, that the African Charter was enacted by African States to protect human and peoples’ rights of the African peoples against both external and internal abuse.”*<sup>82</sup>

#### D. The Right to Self-Determination in a Post-Colonial Reading

Despite the absence of any clear-cut legal definition of the bearers of the right to self-determination, it is not the beneficiary of the self-determination that is contested, but the content of the *legal* right to self-determination. First, the most frequent – and disputed – corollary of the right to self-determination is seen as the right to remedial secession in cases of serious human rights violations. Lawyers have made it an object of both emphatic endorsement<sup>83</sup> and bitter contestation, and domestic and international courts have dealt with it as

80 Sir Dawda K. Jawara v. The Gambia, Comm. 147/95-149/96 (ACHPR, 11 May 2000), para 73.

81 Open Society Justice Initiative v. Côte d’Ivoire, Comm. 318/06 (ACHPR, 27 May 2016), para 185.

82 Sudan Human Rights Organisation and Centre on Housing Rights and Evictions (COHRE) v. Sudan, Comm. 279/03-296/05 (ACHPR, 27 May 2009), para 222.

83 Judge Trindade found words that are even more salient in his separate opinion to the ICJ’s Kosovo Advisory Opinion: “Human nature being what it is, systematic oppression has again occurred, in

well.<sup>84</sup> The African Commission was the first forum where this question was dealt with and has since repeatedly addressed this question. I argue, first, that the case law of the African Commission on a remedial right to secession functions there more to bolster a weak regional human rights system rather than to give legal effect to the right to self-determination. Second, an obsession with a territorial reading of the right to self-determination confuses right and legal effect (which does not exist as a matter of *de lege lata* anyway) and is detrimental to seeing other legal consequences that are attached to the right to self-determination.

### *I. A Right to Remedial Secession?*

Already in the Western Sahara Advisory Opinion, Judge Dillard powerfully pronounced that “[i]t is for the people to determine the destiny of the territory and not the territory the destiny of the people.”<sup>85</sup> Although the argument was made in connection to the people of Namibia under the rule of the Apartheid regime of South Africa, the argument remains essentially identical: if human rights ought to be meaningful, they ought to prevail over territory. This argument links self-determination, more precisely, the denial of the right to self-determination, to the right to secede from the oppressive state. Although the African Commission was the first international body that pronounced a possible right to remedial secession, it received scarcely any attention by international and domestic courts.<sup>86</sup> In the Katanga decision, the Commission famously pronounced that

*“In the absence of concrete evidence of violations of human rights to the point that the territorial integrity of Zaire should be called to question and in the absence of evidence that the people of Katanga are denied the right to participate in Government as guaranteed by Article 13(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.”<sup>87</sup>*

This passage in the brief Katanga decision essentially reflects the Declaration on the Principles of International Law, which provided an early argument for proponents of a remedial

distinct contexts; hence the recurring need, and right, of people to be free from it. [...] [P]eople cannot be targeted for atrocities, cannot live under systematic oppression. The principle of self-determination applies in new situations of systematic oppression, subjugation and tyranny.” Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010, Separate Opinion of Judge Trindade, para. 175.

84 Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010; Canadian Supreme Court.

85 Western Sahara, Advisory Opinion, I.C.J. Reports 1975, p. 114, Separate Opinion of Judge Dillard.

86 Only Judge Yusuf mentioned the Katanga case in his Separate Opinion in the Kosovo Advisory Opinion (Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010, Separate Opinion Judge Yusuf, para 14).

87 Katangese Peoples' Congress v. Zaire, Comm. 75/92 (1995) ACHPR, para 6.

right to secession. The main legal argument for such a view is to be found in a negative reading of a passage of the Declaration on the Principles of International Law:

*“Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.”<sup>88</sup>*

Accordingly, a state ought to represent its entire people. The inverted reading concludes that if a state commits human rights violations against a particular group on the basis of their ethnic distinction, it flagrantly violates the right to self-determination. Like the Declaration on the Principles of International Law, the brief statement of the African Commission has been widely read in the negative: the Katangese people should exercise their right to self-determination internally, unless they clearly demonstrate that their human rights are egregiously violated and their participation in the government denied.<sup>89</sup>

In the *Gunme* decision, the Commission, referring to the Katanga decision, introduced a two-pronged ‘test’ for invoking the right to self-determination:

*“The Commission holds the view that when a Complainant seeks to invoke Article 20 of the African Charter, it must satisfy the Commission that the two conditions under Article 20.2 namely oppression and domination have been met.”<sup>90</sup>*

To view this passage as a further step into the direction of an emerging right to remedial secession would fail to grasp the larger dimension. Instead of pondering the exact meaning of each of these two criteria, oppression and domination, this statement rather has to be considered in the broader context of weak regional and domestic human rights systems. Upholding the perpetual possibility of a remedial right to secession, as vague and abstract as it might be, likely increases the incentives of African states to treat the people within their territories more justly. An interpretation to the contrary would fall back on regarding the right to self-determination as an end norm, as it was under colonialism. Unlike self-determination as an end norm in the colonial context, the legal effects of a remedial right to secession are anything but clear. International humanitarian law does not grant secessionists a favorable status, and the support of the secessionists by other states is prohibited by the principles on the use of force and the principle of non-interference. Moreover, it remains

88 UN GA Res 2625 (XXV), 24 October 1970, Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

89 Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010, Dissenting Opinion Judge Yusuf, para 14.

90 Kevin Mwanganga Gunme and others v. Cameroon, Comm. 266/03 (ACHPR, 27 May 2009), para 197.

unclear who has the “authentic voice” to decide.<sup>91</sup> Who should decide on whether the threshold of triggering such a right, domination or oppression, is met? Domestic courts are barred from deciding such a question (*par in parem, non habet imperium*), and it is highly unlikely that an international court or tribunal, including the African Commission or the African Court, will decide on such a question.

## II. Self-Determination as an Enabling Right

Two conclusions can be drawn from the case law of the African Commission on the right to self-determination. The first (pessimistic) conclusion is that the broad recognition of the right to self-determination of African peoples would result in further weakening the governance structures and institutions and eventually disintegrate the African states. In the *Frontier Dispute* case, the ICJ reflects these anxieties. To prevent the newly independent African states from “fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power”, the ICJ argued that the principle of *uti possidetis* gains particular importance in Africa.<sup>92</sup> Apart from reiterating anxieties about a continent in permanent conflict, this conclusion remains in a purely territorial logic.

The contrasting (positive) view holds that recognizing the “rights of Africa’s many peoples could lead to more democratic, decentralized governments, thereby enhancing local decision making and respect for human rights within existing states, and strengthening them in the long run.”<sup>93</sup> The common characteristic to all cases on self-determination before the African Commission is the issue of political, social or economic marginalization. Marginalization, however, only makes sense if understood in relation to other groups or communities. Marginalization does not stand in isolation; one is always marginalized by another community or group.

When in the *Gunme* case the plaintiffs alleged issues of economic marginalization, the denial of basic infrastructure, as ongoing violations and the refusal of the government to address their grievances, the government responded with statistical data indicating budget allocation to the people of Southern Cameroon. The African Commission found that the relocation of the businesses and economic projects from the Anglophone to Francophone areas violated the right to self-determination and the right to equality.<sup>94</sup> Although the Southern Cameroonians claimed that economic marginalization stemmed from the illegitimacy of the UN plebiscite of 1961 or the unification of 1971, as they had no voice, the African Commission refused on *ratione temporis* grounds to deal with the legitimacy of both and

91 Allen Buchanan, ‘Secession’, The Stanford Encyclopedia of Philosophy, in: Edward N. Zalta (ed.), Fall 2017, <https://plato.stanford.edu/archives/fall2017/entries/secession/> (last accessed on 14 July 2017).

92 Frontier Dispute (Burkina Faso v Republic of Mali), Judgment, I.C.J. Reports 1986, para 20.

93 Shelton, note 64, p. 69.

94 Kevin Mwanganga Gunme and others v. Cameroon, Comm. 266/03 (ACHPR, 27 May 2009), para 157-161.

instead focused on the constitutional framework in regard to self-determination. The Commission found that the constitution “did not address the Southern Cameroonians’ demands, particularly since it did not accommodate the concerns expressed [by the people of Southern Cameroon]”.<sup>95</sup>

Similarly, in the *Cabinda* case the complainants argued that the unequal share of petroleum exploitation in their region, the lack of providing public goods and welfare improvements to the Cabinda people would result in a violation of their right to self-determination.<sup>96</sup> The African Commission connected again the right to self-determination to the constitutional framework in a state and the possibility to be involved in decision-making processes.<sup>97</sup> This could be described as the procedural leg of the right to self-determination. Decision making processes, the African Commission argued,

*“imposes a duty on the Respondent State to ensure that resources are effectively managed for the sole and equal benefit of the entire peoples of the state. Accordingly, the African Commission is of the view that one aspect of the right in Article 21 of the African Charter is the duty of the State to involve representatives of its peoples in decisions concerning the management of national wealth and natural resources.”*<sup>98</sup>

Reading the right to pursue economic and social development (Art 20 of the African Charter) and the right to freely dispose of the wealth and natural resources (Art 21 of the African Charter) together, as the African Commission has done in the *Cabinda* case, does not create rights *in rem*, or property rights. The African Commission held that, although the people of Cabinda are entitled to benefit from the natural resources found on ‘their’ land, the “Commission believes that the enjoyment of that aspect of the right should not be to the detriment of other communities and groups in the State.”<sup>99</sup> Reading the right to development in relation to other groups and communities in a state bars the exercise of the right of self-determination to the sole benefit of one group. And in *Open Society v Côte d’Ivoire*, the African Commission held that the unlawful non-recognition of the legal status of nationality deprived the Dioulas of the possibility to take part in the development of the Ivorian society:

*“This lack of recognition of nationality as legal status also prevented them from participating in the shaping and enjoyment of the socio-economic development witnessed by Côte d’Ivoire since independence. With regard to the Dioulas in particular, the im-*

95 Kevin Mwanganga Gunme and others v. Cameroon, Comm. 266/03 (ACHPR, 27 May 2009), para 202.

96 Front for the Liberation of the State of Cabinda v Republic of Angola, Comm. 328/06, (2013) ACHPR (54<sup>th</sup> Ordinary Session), para 60-61.

97 Front for the Liberation of the State of Cabinda v Republic of Angola, Comm. 328/06, (2013) ACHPR (54<sup>th</sup> Ordinary Session), para 126.

98 Front for the Liberation of the State of Cabinda v Republic of Angola, Comm. 328/06, (2013) ACHPR (54<sup>th</sup> Ordinary Session), para 131.

99 Front for the Liberation of the State of Cabinda v Republic of Angola, Comm. 328/06, (2013) ACHPR (54<sup>th</sup> Ordinary Session), para 109.

*possibility to be recognized as Ivorians prevented them from accessing public jobs, participating in public and political life by voting in elections and getting voted for. This, in turn, hinders every possibility for them to decide with other Ivorians choices relating to the destiny of the Ivorian nation [...].*<sup>100</sup>

In this regard, the right to self-determination imposes upon the government the duty to involve the people specifically affected in decision-making processes and give special consideration to their concerns. Self-determination should less be understood as a substantive right in its own sense, but as a procedural right that enables the claiming of other rights. Self-determination thus ought to be viewed as an enabling right. The vagueness of the legal effects of the right to self-determination does not impair its legal nature. The legal effects of the legal status of nationality or refugee status under international law are upon closer inspection anything but clear.<sup>101</sup> Yet, their legal nature is undisputed. By being linked to other rights, self-determination, like nationality or refugee status, enables claiming the violation of other rights.

The African Commission pointed out that “[i]t is incumbent on State Parties, therefore, whenever faced with allegations of the nature contained in the present communication, to address them rather than ignore them under the guise of sovereignty and territorial integrity.”<sup>102</sup> In a similar vein, Jan Klabbers cautiously termed self-determination a “right to be taken seriously” in intra-state decision making processes, or, in other words, “a right of peoples to take part in decisions affecting their future.”<sup>103</sup> The right to self-determination in this sense does not remain a vague right to participate but is equipped with certain qualitative standards to review processes of participation or their lack at the domestic legal level. Arguably, participation would not be limited to actual economic projects but would also entail participation in the development of the legal order.<sup>104</sup> To deny participation to a people who are particularly concerned by new or the amendment of existing legal norms on formal grounds, for instance that as non-citizens they are formally excluded from participatory processes, could raise issues within the scope of the right to self-determination by linking it to the substantive right that is at question (e.g. right freedom of religion). In other words, the *pouvoir constituant* would not be considered as an *a priori* given, but as a concept open to

100 Open Society Justice Initiative v. Côte d’Ivoire, Comm. 318/06 (ACHPR, 27 May 2016), para 185.

101 *Wilhelm Wengler*, Betrachtungen zum Begriff der Staatsangehörigkeit, in Erik Brüel / Dimitri Constantopoulos (eds.), *Internationalrechtliche und staatsrechtliche Abhandlungen: Festschrift für Schätzel*, Düsseldorf 1960, p. 545.

102 Communication 328/06, *Front for the Liberation of the State of Cabinda v Republic of Angola* (2013) ACHPR (54<sup>th</sup> Ordinary Session), para 139.

103 *Jan Klabbers*, *The Right to be Taken Seriously: Self-Determination in International Law*, *Human Rights Quarterly* 28 (2006), p. 189.

104 *Konrad Ginther*, Reflections on International Law in Respect to African Customary Law, in: Ulrich Beyerlin / Michael Bothe / Rainer Hoffmann / Ernst-Ulrich Petersmann (eds.), *Recht zwischen Umbruch und Bewahrung: Festschrift für Rudolf Bernhardt*, Berlin 1995, p. 81.

constant contestation. The constitution has to enable its own modification, taking into account not only the institutional aspects, but also the legally external realities that impact and transform a society. As a single concept of the legal embodiment of the state does not exist on the international plane,<sup>105</sup> the constitution as the legal embodiment of a state has to deal with a heteronomous, domestic reality, consisting of different peoples with differing social norms and moral conceptions. In this regard, self-determination is not merely “vital to the present African situation” as a useful tool for resolution of disputes and “a pillar of the African conception of human rights” but might also inform human rights beyond an African context.<sup>106</sup>

### F. Lessons for Europe: Some Concluding Remarks

The German legal theorist Ernst-Wolfgang Böckenförde famously pointed out that liberal democratic constitutional states cannot command legitimacy but that they depend on premises the states cannot themselves guarantee.<sup>107</sup> States ultimately have to derive their moral orientation from citizens, who engage in projects of self-determination. In the global north, these projects of self-determination often are uttered in the vernacular of identity and rights.<sup>108</sup> The annexation of Crimea by Russia and the constitutional debates about the independence of Scotland and Catalonia brought politics of recognition couched in the vernacular of self-determination back to prominence. What is at issue is the claiming of differences. The preoccupation with traditional family conceptions, cultural, sexual or religious identity, represent a “struggle for recognition” of legitimate rights, of collective experiences of violated integrity.<sup>109</sup> In that, contemporary claims differ from claims to self-determination in the first half of the 20<sup>th</sup> century or in the 1990s. The indeterminacy of human rights norms, including the right to self-determination, as a structural condition of international law, renders them susceptible to being used as a strategic instrument in political struggles. Moreover, rights are not above politics, but their meaning is constantly embattled, as the U.S. Justice of Department torture memos illustrate.<sup>110</sup> If one takes these two assumptions, the

105 *Olivier Beaud*, *Conceptions of the State*, in Michel Rosenfeld / Andras Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford 2012, p. 270.

106 El-Obaid & Appiagyei-Atua, note 42, p. 839.

107 *Ernst-Wolfgang Böckenförde*, *Recht, Staat, Freiheit*, Berlin 2006, p. 112.

108 On a convincing genealogy of the transformation of global legal thought and the shift towards identity/rights, see: *Duncan Kennedy*, *Three Globalizations of Law and Legal Thought: 1850-2000*, in: David Trubek, Alvaro Santos (eds.), *The New Law and Economic Development: A Critical Appraisal*, Cambridge 2013, pp. 65-71.

109 *Axel Honneth*, *Kampf um Anerkennung*, Berlin 1992.

110 Memorandum for John Rizzo, Acting General Counsel of the Central Intelligence Agency, U.S. Department of Justice, Office of the Legal Counsel, 1 August 2002, <https://www.nytimes.com/interactive/projects/documents/justice-department-memos-on-interrogation-techniques> (last accessed on 10 July 2017).

right/identity shift and the indeterminacy together, what might that mean for self-determination in Europe?

The broad definition of people adopted by the African Commission potentially applies not only to indigenous peoples or minorities (nationals of a state), but also to other groups within African societies, including the descendants of European colonial settlers, white Afrikaans-speaking descendants of former Apartheid apparatchiks, Asian immigrant communities, or nomadic societies. The African Commission points out that “[a]s it is, the African Charter guarantees equal protection to people on the continent, including other racial groups whose ethno-anthropological roots are not African.”<sup>111</sup> The recent surge in the arrival of refugees and immigrants to European states not only transforms the cultural and thereby also ethical composition of these states, but also their legal structures. If, as Jürgen Habermas argues, “every legal system is also the expression of a particular form of life and not merely a reflection of the universal content of basic rights”,<sup>112</sup> every legal community and every democratic process is permeated by ethics in that they reflect the political will and different visions of what constitutes the good life. With the inclusion of the conviction that “we are not a country of immigration” in legal norms, political utterances of *Leitkultur* which take legal form in norms that set forth an obligation of cultural integration of those newly arrived (in the form of value courses),<sup>113</sup> introduction of apparently neutral laws that ban religious symbols and de facto target Muslim women,<sup>114</sup> and the tightening of asylum laws and immigration legislation, European States remain blind to the importance of such cultural and ethical forms of life. Such visions link political integration to cultural and ethical acculturation that likely results in parts of the population feeling that they do not, and cannot, see themselves as the authors of these laws. Rather, they might consider it as an encroachment of their private autonomy with detrimental effects on the democratic process itself.

The right to self-determination then would not be the right of an already established political community to ‘defend’ itself against a perceived threat of immigration, but an actualization of basic rights through the changing composition of the State. It might also put into question the very boundaries of the composition of States. It is still common to read the

- 111 Kevin Mwanganga Gunme and others v. Cameroon, Comm. 266/03 (ACHPR, 27 May 2009), para 178.
- 112 Jürgen Habermas, Struggles for Recognition in the Democratic Constitutional State, in Amy Gutman (ed.), Multiculturalism, Princeton 1994, p.124.
- 113 Bundesgesetz zur Integration rechtmäßig in Österreich aufhaltiger Personen ohne österreichische Staatsbürgerschaft, BGBl. Nr. 68, 8 June 2017.
- 114 E.g. in France, see, Law of 2010- 1192: Law prohibiting concealment of the face in public space; in Austria, see, Bundesgesetz über das Verbot der Verhüllung des Gesichts in der Öffentlichkeit, BGBl. I Nr. 68/2017 (Statute prohibiting the concealment of face) For a legal-aesthetic critique of the Austrian law, see, *Miloš Vec*, Dressing Right: Die Mode der “neuen Rechten”, IWM Post 120 (2017), p. 8 (arguing that the statute prohibiting the concealment of the face is itself an act of concealment as it remains silent of the real purpose of the law: to prohibit face veils worn by Muslim women).



term ‘people’ in constitutional discourses synonymous with citizens,<sup>115</sup> although there is no convincing basis for doing so.<sup>116</sup> The term ‘people’ might also mean a qualification of every person present on the territory of a State instead of applying to a limited class of persons along the lines of the formal status of citizenship and thus inform the boundaries of the phrase “we the people” in constitutional preambles.<sup>117</sup>

The translation of cultural or ethical claims of self-determination from the political into the legal sphere is not straightforward. What legally remains is essentially the individual claim, but not the collective dimension, i.e. collective identities that are at stake. Self-determination in this sense does not mean cultural self-determination as the protection or preservation in time of a specific cultural identity. Such a view falsely conflates the ecological preservation of species with the preservation of cultures that are constantly changed because of and adapted to new circumstances. What is at stake is the relation between different communities through the interpretation of what constitutes public space or an open and democratic society.<sup>118</sup> Whereas historically self-determination focused on established political institutions, which in turn informed the identity of people,<sup>119</sup> turning this historical purpose of self-determination on its head might then result in informing the constitution of societies.

- 115 In Austria and Germany constitutional courts limited their interpretation of the term people to citizens regarding the question of whether legislation could be introduced that permits non-citizens to vote in regional elections. See: VfGH, G218/03, 30 June 2004. For the German context, see: BVerfGE 83, 37; StGH Bremen, Urteil v. 31. 1. 2014 – St 1/13, Leitsatz 1. Still relevant in the U.S. context: *Dred Scott v. Sanford*, 60 U.S. 393 (1857).
- 116 *Hans Meyer*, Grundgesetzliche Demokratie und Wahlrecht für ansässige Nichtdeutsche. Oder: Über die Wirkung fixer Ideen in der Verfassungsrechtsprechung, *Juristische Zeitschrift* 2 (2016), p. 121.
- 117 *Linda Bosniak*, Persons and Citizens in Constitutional Thought, *International Journal of Constitutional Law* 8 (2010), 9, pp. 23-24.
- 118 e.g. *SAS v France*, App no 43835/11 (ECHR, Judgment of 1 July 2014); C-157/15 *Samira Achbita v G4S*, [2017] CJEU, ECLI:EU:C:2017:203.
- 119 *James Summers*, The internal and external aspects of self-determination recognized, in: *Duncan French* (ed.), *Statehood and Self-Determination: Reconciling Tradition and Modernity in International Law*, Cambridge 2013, p. 232.