

The normative power of the right to self-determination under the African Charter and the principle of territorial integrity: competing values of human dignity and system stability

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ABSTRACT: This article considers the interaction between the right of self-determination and the principle of territorial integrity, two powerful norms seemingly pulling in opposite directions, with reference to relevant texts and decisions of the African Commission on Human and Peoples' Rights. It posits that the enjoyment of complete self-determination is constrained by the somewhat skewed interpretation given to the norm by the Commission. The basic argument canvassed is that the right of self-determination is an enabling, ongoing collective human right applicable in colonial and certain post-colonial contexts. The case-law on self-determination shows that while the Commission readily upholds the right of internal self-determination it always declines claims to external self-determination. The dubious reasoning of the Commission is that this variant of self-determination is unavailable in post-colonial Africa because of its incompatibility with the principle of territorial integrity. And yet the right of self-determination is available to other oppressed peoples even in a non-colonial context to assert their humanity, dignity and freedom. The author concludes that while self-determination and territorial integrity appear to be pulling in opposite directions, in fact the two norms are not always in conflict. Sometimes they complement each other and are mutually reinforcing. Sometimes also, one norm yields to the other as a matter of law. In circumstances where the law is silent on the question of which norm prevails over the other, it seems meaningful that self-determination should prevail over territorial integrity on account of the fact that it is people who determine the destiny of territory and not the other way round.

TITRE ET RÉSUMÉ EN FRANCAIS:

Le pouvoir normatif du droit à l'autodétermination dans la Charte africaine et le principe d'intégrité territoriale: l'opposition entre les valeurs de dignité humaine et de la stabilité du système

RÉSUMÉ: Cet article examine l'interaction entre le droit à l'autodétermination et le principe d'intégrité territoriale, deux normes fondamentales qui, en référence aux textes et décisions pertinents de la Commission africaine des droits de l'homme et des peuples, semblent chacune tirer dans sa direction. Cet article suggère que la jouissance d'une autodétermination complète est limitée par l'interprétation quelque

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peu biaisée donnée à la norme par la Commission. L'argument principal est que le droit à l'autodétermination est un droit de l'homme collectif applicable dans les contextes coloniaux et dans certains contextes postcoloniaux. La jurisprudence en matière d'autodétermination montre que, si la Commission soutient facilement le droit à l'autodétermination interne, elle refuse toujours les demandes d'autodétermination externe. Le raisonnement douteux de la Commission est que cette variante de l'autodétermination n'est pas disponible dans l'Afrique postcoloniale en raison de son incompatibilité avec le principe de l'intégrité territoriale. Et pourtant, le droit à l'autodétermination est ouvert à d'autres peuples opprimés, même dans un contexte non colonial, pour affirmer leur humanité, leur dignité et leur liberté. L'auteur conclut que, alors que l'autodétermination et l'intégrité territoriale semblent aller dans des directions opposées, en réalité, les deux normes ne sont pas toujours en conflit. Parfois, ils se complètent et se renforcent mutuellement. Parfois aussi, l'une des normes cède la place à l'autre en droit. Dans les cas où la loi reste muette sur la question de savoir quelle norme prévaut sur l'autre, il semble logique que l'autodétermination l'emporte sur l'intégrité territoriale, du fait que ce sont les personnes qui déterminent le destin du territoire et non l'inverse.

KEY WORDS: norm, right, self-determination, state, territorial integrity

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1 INTRODUCTION

Self-determination is a norm of great power. It is an imperative principle of action inscribed in the United Nations (UN) Charter and key universal and regional human rights instruments. Its normative status is no longer the subject of controversy in contemporary international law. It is an enabling, collective human right for asserting claim to political autonomy within a state or to sovereign statehood. Claims to establish a sovereign state, based on the right of self-determination, have come before the African Commission but have all been declined on the ground of conflict with the principle of territorial integrity. The African Charter however makes no mention of the territorial integrity of African states apparently because its legal basis already rests in customary international law and the UN Charter. Territorial integrity is, however, mentioned in article 3 of the Constitutive Act of the African Union (AU) – not as a declared principle but simply as one of the objectives the AU commits itself to act on.

The principle of territorial integrity is emphasised by the AU because it protects the borders of African states, and forms an essential part of their sovereignty. A consequence of this emphasis is the rejection of any interpretation of self-determination that would violate territorial integrity. Seemingly, it is against this backdrop that the

African Commission has been unwilling to interpret the right of self-determination in a way that would, in its view, trump the principle of territorial integrity. The Commission has thus declined to uphold even what would seem to be legitimate and compelling external self-determination claims on the reasoning that the result would be the impairment of the integrity of the territory concerned. The instinctive reasoning of the Commission seems to be that in any situation of tension between the competing values of self-determination and territorial integrity, the latter must always prevail.

This article examines the contest between these two norms in the African continent. It explores and interprets the primary texts governing them, and critiques their interpretation by the Commission. Ultimately, it demonstrates how the normative power of self-determination is constrained by the principle of territorial integrity and the Commission's limited understanding of the two principles.

2 SELF-DETERMINATION

2.1 Peoples' aspirations, hopes and dignity

Self-determination is a fundamental right in contemporary international law. It creates aspirations and hopes for dependent and other oppressed peoples. The norm quickly evolved from a political principle to a universal human right that gives expression to certain fundamental values of the international community and for that reason it is of international concern. It is embodied in articles 1(2) and 55 of the UN Charter and finds expression in a number of UN human rights instruments as well as in article 20 of the African Charter. It has two interconnected aspects, internal and external.

When a community of people within a country claims internal self-determination it is asserting two things: (i) a right to autonomy within the state, that is, the right of the community freely to determine its constitutional political status (the form of state), and (ii) a right to regulate its own affairs in pursuit of its economic, social and cultural development.¹ These matters are purely of domestic concern. By contrast, external self-determination or 'complete self-determination' is a territorial concept. It is about the right of a people freely to assert sovereign control over territory as an independent state and a subject of international law. The territorial dimension of self-determination is governed above all by international law. This is so because it concerns the birth of a new state in the community of states and therefore impinges on world order and the Westphalia state system on which contemporary world order is based. There are at least four theories of international relations relevant to external self-determination. One theory insists that territorial sovereignty is more important than national self-determination. Another theory holds that self-

1 L Sohn 'Models of autonomy within the United Nations framework' in Y Dinstein (ed) *Models of autonomy*.

determination prevails over territorial integrity. According to still another theory, the expansion of global markets and cross-border cooperation diminishes the significance of territorial integrity, allowing for somewhat greater recognition of greater self-determination of peoples. A fourth theory ambitiously calls for political power to shift to a world government which would make secession and change of boundaries a relatively easy administrative matter, entailing the *de facto* end of self-determination of national groups.²

2.2 Self-determination in colonial and non-colonial contexts

Under the UN's decolonisation agenda, the right to self-determination could be exercised by dependent peoples and territories within existing colonial boundaries.³ In this setting, this right became a legitimate basis for statehood because it proclaimed the right of every people to establish a state within which they conduct their political affairs free from outside interference.⁴ The exercise of self-determination reinforced the state-centred system of international law and the perception of that right as an 'end norm', as a goal to be achieved. That goal is the establishment of a state that is independent from the colonial state, and is sovereign over the territory concerned. For, as Judge Dillard declared in the *Western Sahara Advisory Opinion*, '[i]t is for the people to determine the destiny of the territory and not the territory the destiny of the people.'⁵

When asserted within colonial boundaries, self-determination reinforces the principle of territorial integrity in protecting the territorial framework of the decolonised territory. As an inalienable and continuing collective human right, self-determination has developed to the point where it applies to situations of peoples within the territory of independent states.⁶ The UN itself extended the application of self-determination to two non-colonial situations, that of alien occupation (Israel's occupation of Palestinian territories) and that of racial discrimination (by white minorities in Zimbabwe and South Africa). International law-making since the adoption of the ICCPR and ICESCR in 1966 leaves no doubt that the right of self-determination applies beyond the context of decolonisation. For example, the 1970

2 A Pavkovic & P Radan 'In pursuit of sovereignty and self-determination: peoples, states and secession in the international order, index of papers' (2003) 1 *Macquarie University Law Journal* 1.

3 UN General Assembly 'Declaration on the granting of independence to colonial countries and peoples' UNGA Res 1514 (XV) 14 December 1960A/RES/1514(XV).

4 R Bereketeab *Self-determination and secession in Africa* (2014).

5 *Western Sahara Advisory Opinion* ICJ (16 October 1975) (1975) ICJ Reports 12.

6 MN Shaw *International law* (1997) 216; R McCorquodale 'Self-determination beyond the colonial context and its potential impact on Africa' (1992) 4 *African Journal of International and Comparative Law* 592; A Cassese *Self-determination of peoples: a legal appraisal* (1998); A Cassese *Self-determination of peoples: a legal appraisal* (1999).

Declaration on Principles of International Law⁷ refers to the colonial situation and goes further to note that the subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the right to self-determination. In Europe, the Helsinki Final Act of 1975 refers in clause VIII to the principle of equal rights and self-determination and provides that

All peoples have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development.⁸

The African Charter proclaims in article 20 that '[a]ll peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination' and, further, that '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.' The Declaration on the Rights of Indigenous Peoples⁹ states in article 3 that 'Indigenous peoples have a right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.' The Declaration also affirms that indigenous peoples have the rights to autonomy and self-government, culture, traditional knowledge, development, education, social services, the environment, and ownership of traditional lands and natural resources.

Self-determination may be claimed by the people of a country as a whole or by a section of it, whether in a colonial or non-colonial context. Minorities or majorities within a state may avail themselves of that right to assert internal self-determination by way of majority rule or a form of autonomy, including the right to freely determine the political regime of their choice and to democratically elect their political leaders without foreign interference.¹⁰ This variant of self-determination fuses with the principle of constitutional autonomy of the state and it has practically been hijacked by the state.¹¹ Internal self-determination does not conflict with the principle of territorial integrity and is hardly a contentious matter.

7 UN General Assembly 'Declaration on principles of international law concerning friendly relations and co-operation among states in accordance with the Charter of the United Nations' UNGA Res 2625 (XXV) 24 October 1970 A/RES/25/2625.

8 Clause VIII of the Helsinki Final Act.

9 UN General Assembly 'United Nations Declaration on the Rights of Indigenous Peoples' UNGA Res 61/295 13 September 2007 A/RES/61/295.

10 In *Sudan Human Rights Organisation and Centre on Housing Rights & Evictions (COHRE) v Sudan* (2009) AHRLR 153 (ACHPR 2009) (*Darfur case*), the African Commission clarified that in 'some cases groups of "a people" might be a majority or a minority in a particular state.' para 220; Compare sec 235 of the 1996 Constitution of South Africa which explicitly provides for self-determination in these terms: 'The right of the South African people as a whole to self-determination, as manifested in this Constitution, does not preclude, within the framework of this right, recognition of the notion of the right of self-determination of any community sharing a common cultural and language heritage, within a territorial entity in the Republic or in any other way, determined by national legislation'.

11 A Pellet 'Un principe confisqué: le droit des peuples à disposer d'eux-mêmes' (1980) *Revue juridique périodique internationale et de la coopération*; NQ Dihl, P Daillier & A Pellet *Droit international public* (1980) 427.

Separate statehood for an entity may legitimately be achieved in several ways: by agreement between the parties; by the exercise of a constitutional right to secede after following due constitutional processes;¹² by force as the appropriate remedy of last resort in the face of grave injustice and unremitting human rights abuses;¹³ through a legitimate referendum; or following the dissolution of a constitutive federation.¹⁴ It is the declared policy of the UN and of states in general to oppose any attempt at the partial or total disruption of the national unity and territorial integrity of a country. However, state practice and the consistent and cumulative view of the organs of the UN since the late 1980s show that the right of self-determination may be exercised even within independent states. The separation of Somaliland from Somalia, and the recent secession of South Sudan from Sudan and that of Kosovo from Serbia are clear examples, as are the Russian-recognised Georgian break-away regions of South Ossetia and Abkhazia.¹⁵

2.3 Self-determination and secession

When a nation within a state claims external self-determination it is in fact claiming a 'right' to secede. Secession clashes with the principle of territorial integrity. It results in the dismemberment of the state concerned and for that reason it is generally disapproved of. It is tolerated by the international community only in exceptional circumstances (as a remedy of last resort) such as cases of massive human rights violations against a distinct people or where secession is carried out with the acquiescence of the state concerned. Beyond these exceptional cases, self-determination by way of secession is generally frowned upon due to its adverse effects on the state system. Secession is considered too disruptive of international stability. Indeed, the number of self-identified nations today far exceeds the number of existing states. Moreover, even if there was a willingness on the part of the international community to redraw boundaries according to self-identified nations within states, there is no legal process for redrawing state boundaries according to the will of peoples.¹⁶ The same concern about international stability is also the reason for the disapproval of territorial aggrandisement or the annexation of territories. In this connection, while self-determination may be of some use in resolving cases of disputed frontier lines on the basis of the wishes of the

12 A Kreptul 'The constitutional right of secession in political theory and history' (2003) 17 *Journal of Libertarian Studies* 39.

13 A Buchanan *Justice, legitimacy and self-determination: moral foundations for international law* (2007).

14 N Jayawickrama *The judicial application of human rights law* (2002) 228.

15 For other examples of self-determination claims in the recent past, see C Anyangwe 'Manumission from black-on-black colonialism: Sovereign statehood for the British Southern Cameroons' in S Ndlovu-Gatsheni & B Mhlanga (eds) *Bondage of boundaries and identity politics in postcolonial Africa* 163, 166.

16 Pavkovic & Radan (n 2).

inhabitants of the borderland,¹⁷ it cannot be used to further larger territorial claims in defiance of internationally accepted boundaries. Examples of such impermissible claims are the former claims of Libya to the Aouzou strip, of Nigeria to the Bakassi Peninsula, of Somalia to Djibouti and Northeast Kenya, of Morocco to Mauritania and currently to the Western Sahara, and of République du Cameroun to the former Southern British Cameroons.

Secession is a pure fact situation, a meta-judicial phenomenon. The international community may acknowledge it as a matter of realism when made effective. International law deals with decolonisation but not with secession. It neither concedes nor denies a right to secede.¹⁸ It imposes no general prohibition of secession, which does not necessarily mean there is a right of secession. The nearest thing to prohibition of secession is the conditional protection of state territory available under the principle of territorial integrity. Secession disrupts the Westphalia state system. State expansionism revives imperialism, which had long been rejected because it also imperils the Westphalia state system.¹⁹ The object of the principle of territorial integrity is therefore to secure respect for the preservation of the territorial *status quo* of states. International law does not encourage secession, or even unions. It rejects annexation and territorial aggrandisement as invalid and inimical to international peace and security. Yet, international law cannot prevent state fission any more than it can prevent consensual fusion.

The basic argument against the applicability of self-determination within sovereign states leading to secession²⁰ is that it would conflict with and be contrary to the principle of territorial integrity. Secession and territorial integrity appear to be conflicting norms. In reality, that is not always the case. Where secession is legitimate, a new state emerging from an existing one through self-determination, there is only an apparent conflict between both norms. Furthermore, a state may suffer part of its territory to secede. The breach of the principle of territory integrity in that case is not contrary to international law.

The practice of the UN and its members in the matter of secession has been inconsistent. In Africa, anti-secession rhetoric is often repeated and the principle of territorial integrity is usually proclaimed. But neither the Organisation of African Unity (OAU) Charter nor the AU Constitutive Act condemn nor proscribes secession in any member state. They do not because that would be interfering in the internal affairs of a member state. None of those documents exclude a legitimate

17 M Weller *Autonomy, self-determination and conflict resolution* (2007); J Baker (ed) *Sovereignty matters: locations of contestation and possibility in indigenous struggles for self-determination* (2005).

18 *Reference by the Governor in Council concerning Certain Questions relating to the Secession of Quebec from Canada* 115 *International Law Reports* 536; 1998 Can. Sup. Ct. LEXIS 39.

19 R Emerson *From empire to nation* (1960); S Touval *The boundary politics of independent Africa* (1972).

20 J Faundez 'International law and wars of national liberation: use of force and intervention' (1989) 1 *Revue Africaine de Droit International Comparé* 85, 90.

claim to self-determination in member states, a claim which may or may not extend to secession. It is doubtful whether exclusion is even feasible or morally and politically desirable. If part of the territory of a member state is sufficiently aggrieved as to claim the right of self-determination as a legitimate ground for seeking autonomy within or for seceding from the state, it is hard to see how the AU can force it to give up its right.²¹ Even if it were minded to do so it would lack both legal and moral justification for its action. The right of self-determination is not lightly asserted. It appears that when such a claim has been made it has often been as a result of a long train of some pernicious and un-sufferable injustices, policies and actions by a tyrannical and oppressive state.

3 SELF-DETERMINATION AND THE CASE LAW OF THE AFRICAN COMMISSION

African countries achieved independence as beneficiaries of territorial self-determination. But they then ‘forgot’ about this collective right of peoples and did not even mention it in the OAU Charter of 1963. The closest reference to self-determination in that document was the commitment to eradicate all forms of colonialism in Africa and to emancipate dependent African territories. This commitment, however, rested on a state-centred conception of territorial self-determination. It was not until two decades later that self-determination was conceptualised in Africa as a peoples’ right under the African Charter, a right claimable by peoples. Article 20 of that treaty guarantees four distinct but interconnected rights: (i) the right to existence, which has to do with living or human existence, and not with the right to food; (ii) the right to self-determination *eo nomine*, which has two dimensions – a territorial dimension entailing separate statehood, and a political or constitutional dimension entailing autonomy and economic and socio-cultural development; (iii) the right to freedom from domination, and (iv) the right to assistance from third states. Article 20 recognises two sets of ‘peoples’ as beneficiaries of self-determination: ‘all peoples’ generally, and ‘colonized or oppressed peoples’ (the ‘or’ is disjunctive, not conjunctive). Legal scholarship acknowledges and seldom contests these beneficiaries of self-determination, unlike the content of the *legal* right to self-determination which is often contested.

The right to existence bespeaks emphatic rejection of genocide, pogrom or other massacres, and other acts aimed at destroying or annihilating a people. Any people faced with an existential threat is entitled to appeal to the right of self-determination as a remedy of last resort in order to eliminate that peril and free itself from threatened extinction. Self-determination *eo nomine* in the African Charter is a right claimable by ‘all peoples’, dependent or non-dependent, and it is

21 The Organization may of course decline recognition of the seceding entity. But, as the case of Somaliland demonstrates, that will be ineffectual in trying to force the entity to renounce secession.

‘unquestionable and inalienable’. It is both a procedural and a substantive right. By contrast, the right to freedom from domination inures to and is exercisable by a specific category of people only, that is, those who either are colonised *or* are oppressed. A colonised or an oppressed people, whatever the source of that colonisation or oppression, are necessarily a dominated people and entitled to free themselves from the bonds of domination by resorting to any means recognised by the international community. The right to assistance from third states entails a corresponding obligation on states parties to the Charter to assist a people waging a ‘liberation struggle against foreign domination’.

The self-determination clauses in the African Charter are thus broader and more forceful than in both the ICCPR and ICESCR. The state obligation under the Charter is absolute, immediate and non-derogable. Article 19 enunciates the fundamental postulate that ‘nothing shall justify the domination of a people by another’ while article 20(1) posits that self-determination is ‘unquestionable and inalienable’. It follows that the political domination of a people by another people whether from within or from without, cannot possibly be justified. Self-determination may be claimed by any people dominated by another, whether or not in a colonial setting. It is relevant in cases of gross or severe human rights violations such as systematic discrimination, domination, persecution or oppression by a state against a particular community of people distinguished from the rest of the population on say ethnic, cultural or some other relevant grounds. It is also relevant in situations of re-colonisation in one form or another. In *Kevin Mgwang Gumne et al v Cameroon*, the Commission recognised that post-colonial Africa has not been free of domination, although it went on to say, without any elaboration, that domination does not constitute colonialism ‘in the classic sense’.²²

The exercise of the right of self-determination under the African Charter is constrained first by the equally important principle of territorial integrity, and second by the conservative and timorous interpretation of that norm by the African Commission. African instruments acknowledge and proclaim the right to self-determination.²³ But African states and the Commission are reluctant to uphold it in the post-colonial setting. They appear to have adopted the attitude that with the end of white colonisation and domination in Africa, self-determination became spent and unavailable. This suspect attitude focuses on the state-centred territorial dimension of self-determination. It ignores the phenomena of black-on-black colonialism and neo-colonialism that have since emerged in some parts of the continent. The end of white colonisation did not mean that all forms of colonialism were thereby eradicated. A number of continental

22 (2009) AHRLR 9 (ACHPR 2009) (*Gumne*) para 181. By this logic, contemporary forms of slavery should also be ignored because they are not slavery ‘in the classical sense’.

23 Including the African Charter, the OAU Convention on the prevention and combating of terrorism and the Protocol to the OAU Convention on the prevention and combating of terrorism.

documents affirm the right to self-determination and commit African states to the eradication of all forms of colonialism.²⁴ African countries fear that self-determination in post-colonial Africa could destabilise African states as inherited from colonisation. This exposes the fragility or even ‘artificiality’ of many African states. However, contrary to what has been suggested by some writers²⁵ African states have never unanimously, or even in the majority, subscribed to the view that self-determination applies only to African peoples under European colonisation. At least three African states recognised Biafra *de jure*, and some other states recognised it *de facto*.²⁶ Since then, a number of successful self-determination claims have arisen in post-independence Africa, such as Eritrea, the Western Sahara, and South Sudan.

Three types of self-determination cases have come before the Commission. In one type the right to self-determination is alleged to have been violated, but the variant of self-determination involved is not mentioned, although a perusal of the facts suggests that some aspect of internal self-determination was at issue: *Sir Dawda Jawara v Gambia*;²⁷ and *DRC v Burundi, Uganda and Rwanda*.²⁸ The Commission has found little difficulty in upholding the right to internal self-determination but, unfortunately, without specifying its core content; that is to say, without indicating that internal self-determination has to do with constitutional autonomy, as well as with economic, social and cultural development. In the second type of self-determination cases a constituent part of a sovereign state asserts territorial self-determination consisting in a right to establish a separate independent state, in fact a secessionist self-determination claim: *Cabinda v Angola*;²⁹ *Katanga v Zaire*.³⁰ In a third type, re-colonisation is alleged and it is argued that this situation gives rise to an indisputable right to decolonisation as in the case of white colonisation: *Kevin Ngwang Gumne et al v Cameroun*.³¹ In all these cases political, (cultural as well, in *Gumne*), social and economic oppression or domination is additionally alleged. In *Katanga* and in *Gumne*

24 In the preamble to the African Charter, African states reaffirm the pledge in Article II (1)(d) of the OAU Charter “to eradicate all forms of colonialism from Africa” and affirm that they are conscious “of their duty to achieve the total liberation of Africa” and to eliminate colonialism, neo-colonialism, and apartheid.

25 Including McCorquodale (n 6) 592; J Dugard ‘Secession: is the case of Yugoslavia a precedent for Africa? (1993) 5 *RADIC* 163; T Boven ‘The relationship between peoples’ rights and human rights in the African Charter’ (1986) 7 *Human Rights Law Journal* 183.

26 Gabon, Ivory Coast and Tanzania recognised the ‘Republic of Biafra’ *de jure*. Zambia, Equatorial Guinea and France gave *de facto* recognition by welcoming visiting Biafra officials. France in addition actively supported Biafra through weapons supply.

27 (2000) AHRLR 107 (ACHPR 2000).

28 Communication 227/99, African Commission on Human and Peoples’ Rights, 20th Annual Activity Report (2006) (*DRC case*).

29 Communication 24/89, *Union National de Liberation de Cabinda v Angola*, African Commission on Human and Peoples’ Rights, 7th Annual Activity Report.

30 *Katangese Peoples’ Congress v Zaire* (2000) AHRLR 72 (ACHPR 1995).

31 *Gumne* (n 22).

statehood is furthermore claimed, but on fundamentally different grounds.

3.1 Internal self-determination at issue

3.1.1 *Sir Dawda Jawara v The Gambia (1995/96)*

In *Sir Dawda Jawara v The Gambia*, (Communications 147/95 and 149/96) the complainant alleged a violation of a number of rights in the Charter, including art 20, following the military *coup d'état* in The Gambia in July 1994. The Commission held that the *coup d'état*, even if it was without bloodshed, constituted a grave violation of the right of the people of The Gambia under article 20(1) to 'freely to choose their government'. The Commission thus interpreted art 20(1) as involving the right of a people 'freely to choose their government' (internal self-determination). But that provision does not deal with the right to freely choose a government. It guarantees two core rights of peoples: the right to existence; and the right to self-determination, which entails the right of a people to 'freely determine their political status and ... pursue their economic and social development according to the policy they have freely chosen'. Freely choosing a government is more of an electoral right and is not the same thing as freely choosing a political status. It is submitted that the Commission incorrectly interpreted the words 'determination of political status' to mean 'freely choosing a government', that is, voting a government into office. *Jawara* is nonetheless significant in its recognition of the availability of the right to self-determination (in its internal dimension) in a post-colonial context, at least in circumstances where the military have overthrown the established government of a country and seized power. Unconstitutional accession to power covers not only situations of *coups d'état*.³² It also covers cases of insurgency takeovers, and overstay in power through rigged elections.

3.1.2 *Democratic Republic of Congo v Burundi, Uganda and Rwanda (1999)*

The inter-state communication *Democratic Republic of Congo v Burundi, Rwanda and Uganda*³³ arose from the occupation of and activities in the eastern provinces of the DRC in 1998 by the armed forces of the three respondent states. The respondents did not deny their military occupation of the eastern DRC, but argued that the occupation was necessary in order for them to safeguard their interests. The Commission rejected this argument, holding that 'such interests would better be protected within the confines of the territories of the

32 C Anyangwe *Revolutionary overthrow of constitutional orders in Africa* (2012).

33 Communication 227/99, African Commission on Human and Peoples' Rights, 20th Annual Activity Report (2006) (DRC case).

Respondent States'.³⁴ It went on to hold that the occupation of the territories of the DRC was a flagrant violation of the right of the people of that country to self-determination. However, the Commission failed to elaborate on this curt finding. In this inter-state case, as in the case of *Jawara*, the term 'people' has the constitutional law meaning of the sovereign people of a country as a whole.

3.2 Secessionist self-determination claim

3.2.1 *Front for the Liberation of the State of Cabinda v Angola (2006)*

Cabinda (formerly Portuguese Congo) is an oil-rich territory situated in the south-east coast of Congo Brazzaville and north of Angola proper, separated therefrom by a 60 km wide strip of Congo Kinshasa territory at the mouth of the Congo River. Under the 1933 Portuguese constitution, Cabinda and Angola were overseas provinces of Portugal but Cabinda was administered as one of the districts of Angola. Angola achieved independence from Portugal in 1975 with Cabinda as an integral part of the Angolan State. In April 1988, a movement known as *Union Nationale de Libération de Cabinda* filed a case in the African Commission against Angola (Communication 24/89) claiming external self-determination (independence) for the exclave of Cabinda, under article 20 of the African Charter. Angola at that time was not yet a party to the Charter, and only ratified it on 2 March 1990. The Commission simply declared the communication inadmissible.

Sixteen years later, Cabinda again filed another communication against Angola: *Front for the Liberation of the State of Cabinda v Angola (Cabinda case)*.³⁵ The complainant alleged a denial of the right to self-determination by Angola in violation of article 20, and a violation of articles 14, 19, 21, 22 and 24 of the Charter. The complaint based on a violation of art 20 was not argued on Cabinda's 'political status' or its right to statehood, independent from Angola. The complainant explicitly submitted that it did not seek a decision on political self-determination or a right to secede from Angola. It maintained that its claim was strictly restricted to a request for a decision on economic self-determination and a determination of the right of the people of Cabinda to enjoy the use of natural resources located within Angola. The complaint was thus based on the failure of the Angola state to pursue economic and social development in Cabinda, a dimension of internal self-determination. In its decision issued on 5 November 2013, the Commission held that there was no

34 *DRC case* (n 33) para 76. See also paras 68 & 77 where the Commission found the conduct of the respondent's occupation of territories in the Complainant State 'a flagrant violation of the rights of the peoples of the Democratic Republic of Congo to their unquestionable and inalienable right to self-determination provided for by art 20 of the African Charter'.

35 Communication 328/06, African Commission on Human and Peoples' Rights, 54th Annual Activity Report (2013).

violation of art 20 of the Charter or any of the other articles alleged to have been violated.

The Commission interpreted the right of self-determination to mean 'the right of colonised *and* (sic) oppressed people to free themselves from domination',³⁶ and no more. It is submitted that the Commission erred in law when it interpreted the right of self-determination the way it did. The content of self-determination under the African Charter is much wider in scope than what the Commission understands it to be. The right to freedom from domination is a distinct right which inheres in 'colonized *or* oppressed peoples' only. The Commission states in paragraph 125 that the right of oppressed people to free themselves from domination is reserved for colonised peoples. But the concept of oppressed peoples in article 20(2) cannot legitimately be confined to the colonial context. Under a human rights perspective, the concept of 'peoples', in the expression 'oppressed peoples', is understood in a broader legal context. That context is one that concerns the relation between the people of a country and its government, a relation that is no longer a matter of exclusive municipal law but of international law because oppression involves a variety of human rights violations.

The Commission further reasoned that

article 20 of the Charter has a particular historical context in the sense that it is one of the provisions of the Charter that was aimed at addressing the situation of Africans who remained under colonial domination at the time the Charter was drafted.³⁷

The Commission went on to posit in para 126 that

[i]n post-colonial Africa, the right to self-determination can be enjoyed within the existing territories and with full respect for the sovereignty and territorial integrity of States parties to the Charter.

This reasoning is not supported by any authority. It is most improbable that a provision as robust as article 20 could possibly have been written into the Charter merely to cater for a temporary situation – the remaining situation of white colonial domination in Namibia and South Africa, the only two surviving colonial situations as of 1981 when the Charter was drafted. It is submitted that this is an incorrect interpretation of article 20. There is a wealth of authority to the effect that self-determination, a continuing collective human right, applies even in a non-colonial context.³⁸ Besides, it is a notorious fact that apart from white colonialism, colonialism might continue in post-colonial Africa in the form of neo-colonialism or in the form of black-on-black colonialism, that is, the colonisation of an African country by an adjacent African state, or the domination or marginalisation of a people or nation by an oppressive state or by another group within that

36 *Cabinda* case (n 29) para 125.

37 *Cabinda* case (n 29) para 124.

38 For example, the views of former ICJ Judge Rosalyn Higgins in R Higgins 'Africa and the convention on civil and political rights during the first five years of the Journal: Some facts and some thoughts' (1993) 5 *African Journal of International and Comparative Law* 55 at 64: "many ... African countries have accepted that self-determination ... is an ongoing right, and is not limited to colonial peoples only".

state.³⁹ The complaint in *Cabinda* included allegation of neo-colonialism in the form of exploitation of the natural resources in Cabinda by the Angolan government and economic and social marginalisation of the Cabinda people. The Commission applied its mind to this neo-colonialism argument in paragraphs 59-62 and 90 and did not reject it on formal grounds; nor did Angola itself. Similarly, in *Gumne* the argument of re-colonisation or black-on-black colonisation was made. This too was not formally rejected. In that case, Commission simply grounded its argument on the anti-secession rhetoric by claiming dogmatically that secession is not a variant of self-determination under the African Charter and that allowing it would imperil the territorial integrity of the respondent state.

The Commission in effect ousts the applicability of self-determination within independent states. It interprets self-determination under the Charter as limited in time and space: self-determination inapplicable in a post-colonial context and meant to apply only to those territories which as of 1981 were still under white colonial domination. Going by the reasoning of the Commission, since the remnant of white colonialism in Africa was vanquished by 1994, self-determination became irrelevant in Africa; art 20 though not expunged from the Charter, is devoid of content; it is dead law and has become an empty shell. This denial of the applicability of self-determination in contemporary Africa is tantamount to denial of a remedial right to secede from an oppressive state. And yet in *Sudan Human Rights Organisation and Centre on Housing Rights and Evictions (COHRE) v Sudan*, the Commission itself stated that the African Charter was enacted 'to protect human and peoples' rights of the African peoples against both external and internal abuse'.⁴⁰

If the framers of the Charter intended self-determination to be confined to the situation of white colonialism, they would surely have said so. Furthermore, many African countries do recognise that self-determination is an ongoing right, claimable not only by colonised peoples.⁴¹ Additionally, there are exceptional situations in which reasons for secession, by a people from an existing state, are particularly compelling and legitimate.⁴² International law scholarship endorses remedial secession as a derivative of the right of self-determination. In the case *Accordance with International Law of the*

39 S Salomon 'Self-determination in the case law of the African Commission: Lessons for Europe' (2017) 50 *Verfassung und Recht in Übersee* 217-241 <https://www.nomos-elibrary.de/agb> (accessed 1 August 2018). Salomon argues that besides the largely historical meaning of 'colonized people', 'colonialism might continue in the hyphenated terms of post-colony or neo-colonialism, that is, the domination or marginalization of a group by a state or another group within the state'.

40 *Darfur* case (n 10) para 222.

41 Higgins (n 38).

42 A Cassese *Self-determination of peoples* (1995) 120; J Stromseth 'Self-determination, secession and humanitarian intervention by the UN' (1992) *American Society of International Law Proceedings* 370; C Okeke *The theory and practice of international law in Nigeria* (1986) 276; L Brilmayer 'Secession and self-determination: a territorial interpretation' (1991) 16 *Yale Journal of International Law* 177; M Haile 'Legality of secession: the case of Eritrea' (1994) 8

Unilateral Declaration of Independence in Respect of Kosovo, Judge Trindade powerfully declared:

Human nature being what it is, systematic oppression has again occurred, in 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.⁴³

The African Commission itself, in a welcome show of progressive thinking, was the first human rights body to adumbrate a possible right of remedial secession. In *Katanga*, the Commission held (para 6):

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.

The legal *a contrario* logic in this passage essentially reflects the Declaration on the Principles of International Law. The Declaration is regarded as an authoritative interpretation of the UN Charter and supports the argument for remedial secession.

So why does the Commission systematically decline external self-determination claims? The reason for this paradox seems to be 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' and that the Commission's 'obsession with a territorial reading of the right to self-determination confuses right and legal effect.'⁴⁴ Furthermore, the attitude of the Commission reflects anxieties about a continent in permanent conflict. The Commission fears that a broad recognition of the right to self-determination of African peoples would result in further weakening of admittedly fragile African countries and probably leading to the disintegration of African states. This point was made in *Frontier Dispute* case,⁴⁵ where the ICJ argued that *uti possidetis* has a particular importance in Africa as it seeks to prevent newly independent African states from 'fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power'. But a less pessimistic view holds, in the context of internal self-determination, that recognising the rights of Africa's many peoples 'could lead to more democratic, decentralised governments, thereby enhancing local decision making and respect for human rights within existing states, and strengthening them in the long run.'⁴⁶

Emory International Law Review 479; V Nanda 'Self-determination under international law: Validity of claims to secede' (1981) 13 *Case Western Reserve Journal of International Law* 257; J Klabbbers 'The right to be taken seriously: self-determination in international law' (2006) 28 *Human Rights Quarterly* 186.

43 *Accordance with international law of the unilateral declaration of independence in respect of Kosovo* Advisory Opinion (*Kosovo Advisory Opinion*) ICJ (22 July 2010) (2010) ICJ Reports Separate Opinion of Judge Cañado Trindade para 175.

44 Salomon (n 39).

45 *Case concerning the frontier dispute (Burkina Faso v Mali)* (*Frontier Dispute*) ICJ (22 December 1986) (1986) ICJ Reports 554.

46 Salomon (n 39).

3.2.2 *Congrès du Peuple Katangais v Zaire (1992)*

In Communication 75/92, the Commission was requested to recognise the Complainants as a liberation movement entitled to support in its efforts to secure independence for Katanga; to recognise the independence of Katanga; and to assist in persuading Zaire (DRC) to withdraw from Katanga. The communication hinged on article 20(1). Apart from the allegation of a denial of the right to self-determination, the communication made no allegation of specific breaches of other human rights. After considering the case, the Commission ruled that there was no evidence of violations of any right under the Charter. It held in paragraph 5 that it was 'obliged to uphold the sovereignty and territorial integrity of Zaire, member of the OAU and a party to the African Charter'. The Commission further held in paragraph 6 that Katanga province is entitled 'to exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire.'

The Commission appears to suggest that the principle of territorial integrity *always* trumps a claim to any form of self-determination. This can hardly be correct. The Commission itself asserts that Katanga would have been entitled to claim independence from Zaire if the Complainant had adduced concrete evidence of violations of individual human rights in Katanga, including evidence of denial to the people of Katanga of the right to participate in the government of Zaire. Had this evidence been forthcoming, the territorial integrity of Zaire would surely have been called into question. In other words, Katanga's claim to self-determination would have trumped Zaire's appeal to the principles of sovereignty and territorial integrity.

3.3 **Re-colonisation giving rise to an indisputable right to decolonisation**

In *Kevin Ngwang Gumne et al v Cameroun (Southern Cameroons case)*,⁴⁷ the Commission found that there was an unresolved dispute between the former UN Trust Territory of the Southern British Cameroons and the French-speaking state of Cameroun Republic. The unresolved dispute is of a territorial nature. According to Cameroun Republic the territory of the Southern Cameroons is part of its territory. For over half a century, this claim continues to be forcefully rejected and opposed as annexation and re-colonisation. The Commission found, contrary to the claims of Cameroun Republic, that the basic population of the Southern British Cameroons indeed constitute a *people* within the meaning of international law (para 179), and consequently enjoy the inalienable and unquestionable right to determine their destiny. The Commission found Cameroun Republic to

47 *Gumne case* (n 22 above); see also C Anyangwe 'The right to self-determination in the African Charter: a critique of the African Commission's jurisprudence in *Kevin Gumne et al v Cameroun*' in J Takougang and J Amin (eds) *Post-colonial Cameroon: politics, economy, and society* (2018) 65.

have committed a long list of human rights abuses and violations. On the all-important question of self-determination for the people of the Southern Cameroons (that is, the right to decolonisation from annexation and colonial occupation by Cameroun Republic), the Commission failed to rise to the occasion. The expectation kindled by the case turned out to be an evanescent hope.

The Commission characterised the Southern Cameroons long struggle for decolonisation and full control over its territory as 'engaging in secession'. It declared that 'secession' is not a variant of self-determination recognised under the Charter (paragraph 192, 202). The ruling that the basic population of the Southern Cameroons constitutes a 'people' clearly has implications for the rights which attach to that term under international law. One such right is that of self-determination. The Commission further declared that the Southern Cameroons is part of Cameroun Republic and that its claim to independence would violate the territorial integrity of that country. The Commission did not say how the Southern Cameroons could mysteriously be part of the territory of the French-speaking state of Cameroun Republic which achieved independence from France on 1 January 1960 without the Southern British Cameroons within its boundaries before or at independence. How could the UN's purported 'decolonisation' of British-administered Southern Cameroons in 1961 have possibly taken place within the French-speaking independent state of Cameroun Republic which itself was a UN trust territory separate and distinct from the Southern Cameroons? It is sometimes claimed that the Southern Cameroons 'joined' Cameroun Republic in October 1961. But a 'joining' of peoples or of territories cannot be informal. It is always formal, underpinned by an agreement concluded between the parties, which in this case is lacking.

The salient facts in *Gumne* were these. The date of the independence of the Southern British Cameroons was set by the United Nations for 1 October 1961 to coincide with the date of termination of United Nations trusteeship of the territory.⁴⁸ The achievement of that independence was unlawfully suppressed by Cameroun Republic. On the same day of termination of trusteeship, the departing British colonial authorities unlawfully handed the instruments of power, not to the functional government of the Southern Cameroons as required by international law (UN Declaration on the Granting of Independence, 1960) but inexplicably to the French-speaking foreign state of Cameroun Republic, which then assumed an illegitimate oppressive power over the Southern Cameroons as successor colonialist. The result of these two events (Cameroun Republic's unlawful suppression of the independence of the Southern British Cameroons and the British transfer of the Southern British Cameroons to the sovereignty of Cameroun Republic) was re-colonisation of the Southern British Cameroons rather than decolonisation of the territory. This colonisation by the adjacent French-speaking state of Cameroun

48 UN General Assembly 'The Future of the Trust Territory of the Cameroons Under United Kingdom Administration' A/RES/1608) 21 April 1961.

Republic was the central and salient plank on which the self-determination claim was based.

The Commission in arriving at its decision erroneously interpreted its own ruling in *Katanga* to mean that no claim to self-determination under article 20 of the African Charter can succeed in the absence of proof of massive individual human rights violations. Contrary to the averments of the Commission in *Gumne*, the *Katanga* case did not posit a universal proposition that the right to self-determination is unavailable in the absence of proof of massive human rights violations. Under the Charter oppression can ground a claim to secessionist self-determination. However, such a claim to secession would have to be matched against the principle of territorial integrity. The Commission applied the *Katanga* ruling to the Southern Cameroons case when the one case is not on all fours with the other. In the context of the African Charter, only two questions need to be answered to determine entitlement to external self-determination under article 20. First, do the people claiming the right to self-determination qualify as a 'people' within the meaning of international human rights law? Next, are the said people colonised or oppressed, or alternatively, following the *Katanga* test, are they the subject of massive individual human rights violations and denied participation in the governance of the country?

The Commission grounded its ruling against self-determination for the Southern Cameroons on an obligation on its part to uphold the principle of territorial integrity. But it did not properly apply its mind to that principle. The boundaries of Cameroun Republic became frozen on 1 January 1960 when it achieved independence from France. The Southern Cameroons was then still a British-administered trust territory. The concept of territorial integrity is not univocal. It has an external dimension: territorial integrity threatened from outside the territory; and an internal dimension: territorial integrity threatened from inside the territory itself. Since the Southern Cameroons is not part of Cameroun Republic territory, no question arises of the territorial integrity of Cameroun Republic being threatened from within. Furthermore, arguably, the principle of territorial integrity does not apply to peoples.⁴⁹ The prohibition of the use or threat of force against territorial integrity applies to external military attacks, and not necessarily against subversion by self-determination. The question of secession is relevant only in respect of the internal aspect of territorial integrity. In *Katanga*, the boundaries of Zaire were not in dispute. The province of Katanga has always been within the boundaries that Zaire inherited from colonisation on the date of Zairian independence from Belgium in 1960. The inhabitants of Katanga never disputed the fact that Katanga is legally part of Zaire. Their claim was that they simply did not want to be part of Zaire *any longer*. Among the principles enshrined in the AU Constitutive Act is that of the intangibility of frontiers inherited from colonisation. To uphold territorial integrity in the African context means to uphold boundaries which were inherited from colonisation on the date of independence. The obligation to

respect pre-existing international frontiers in the event of state succession derives from a general rule of international law, whether or not the rule is expressed in the formula of *uti possidetis*.⁵⁰

In sum, it is submitted that the Commission neither applied its mind to the question of re-colonisation nor to the equally important one of acquisition of territory in international law, given the fanciful claim of Cameroun Republic to the territory of the Southern Cameroons. It did not direct its mind to the concept and nature of inalienable rights. It did not appreciate the fact that colonisation amounts to both oppression and domination. The Commission's decision on the issue of self-determination was anchored neither in law, principle, or cogent argument. It did not rest on any evidence, forensic or even anecdotal. It was not grounded in any legal authority, be it case law, legal instrument, legal principle, or academic writing.⁵¹

4 TERRITORIAL INTEGRITY: STATE SYSTEM AND STABILITY

Africa's emphasis on the principle of territorial integrity stems from a compound of three inter-related principles that appear to characterise the continent's attitude, namely, the long term goal of African 'unity'; the intangibility of borders inherited from colonisation; and the primacy of the principle of territorial integrity over the right of self-determination, effectively ousting the applicability of self-determination in post-colonial Africa.

4.1 African 'unity'

From the onset of the decolonisation process in Africa, Pan-Africanists strongly argued for the 'unity' of the African continent. For them, the 'rectification' of 'arbitrary' African borders was feasible and attainable. Unity and border rectification were considered goals that could be attained in the short term. But these goals were subsequently 'revised' to become long term objectives. Had African political unification been achieved, the matter of self-determination and the headache of border and territorial disputes would simply have become intra-African domestic matters of an administrative and constitutional nature. Strong opposition by a number of African states to immediate continental political integration led to a reconceptualisation of African unity in terms of what has variously been described as 'gradualism', 'solidarity', and 'functional co-operation' or 'federalism without tears' in the form of regional economic communities. The AU, successor to the OAU in 2002, has re-centred the desideratum of continental

50 *Frontier Dispute* 554.

51 Anyangwe (n 32); D Shelton 'Self-determination in regional human rights law: From Kosovo to Cameroon' (2011) 105 *American Journal of International Law* 60 <https://doi.org/10.5305/amerjintlaw.105.1.0060> (accessed 5 August 2018).

integration. A Pan-African Parliament has been created as the continental legislature to make law for the peace, order and good government of Africa, though it does not yet have full legislative mandate. The African Union Commission together with the AU Chairperson and the Peace and Security Council represent what may be regarded as the executive arm of a continental government in gestation. The role of the African Standby Force includes ensuring continental peace, security and safety. The right of the AU to intervene in member states under certain circumstances is enshrined in article 4(h) of the Constitutive Act and is accepted as a limitation on the principle of non-interference and non-intervention in the internal affairs of AU member states. In this context, the principle of territorial integrity is unlikely to have the same power as it appears to have now.

4.2 Intangibility of borders inherited from colonisation

Africa has adopted the attitude that in the short term, and in the absence of a better alternative solution to border problems, boundaries inherited from colonisation are to be retained. Decolonisation was not to be the occasion for new sources of doubt and controversy about boundaries. The Resolution on Border Disputes adopted in 1964 recites that 'the borders of African States, on the day of independence, constitute a tangible reality'. It declares the solemn pledge by all member states 'to respect the frontiers existing on their achievement of national independence'. This policy of maintaining the colonial territorial *status quo* at independence, for want of something better, is repeated in article 4(b) of the AU Constitutive Act. It represents a rejection of frontier revisionism which could result in the disintegration of most of the existing states and even the complete disappearance of some of them.⁵² The policy appears to have a great deal of good sense behind it. Boundary and territorial disputes represent some of the most explosive sources of conflict in Africa. The policy prioritises avoidance of disputes and of threats to the peace in Africa.⁵³ It is a qualification of the right of self-determination in the sense that the territorial framework of the various colonial territories are accepted as the units of self-determination within which sovereign statehood is achieved. This precludes self-determination involving claims to territory not comprised within each such unit at independence no matter the cultural, religious or ethnic justification for the claims. The continental organisation therefore refuses to uphold the right to self-determination entailing changes in existing frontiers. This refusal is additionally based on the principle of respect for the sovereignty and territorial integrity of each African State.

52 T Imobighe *The OAU, African defence and security* (1989) 31.

53 I Brownlie *African boundaries: A legal and diplomatic encyclopaedia* (1979) 7; I Brownlie *Basic documents on African affairs* (1971) 360; see also, CG Widstrand (ed) *African boundary problems* (1969).

The Resolution on Border Disputes confirms the continuity of colonial boundaries in principle. It is very similar to the principle *uti possidetis juris* adopted in Latin America in the wake of the Spanish Empire and its internal administrative divisions. However, the Resolution does not erase the existing agenda of disputes. It does not affect demarcation disputes, or frontiers in dispute in colonial times, or frontiers in dispute before the colonial intervention. New states inheriting an obscure or an un-demarcated colonial alignment just have to face the said boundary problems, but no more.⁵⁴ It does not seem that the Resolution was originally binding on member states. At least Somalia and Morocco did not consider themselves bound by it and appeared to have expressed reservations.⁵⁵ At that time Somalia was still dreaming of 'Greater Somalia' and Morocco of 'Greater Morocco'. Over time, however, by its general acceptance and repeated reference to it by states, the resolution has evolved into a binding legal principle.⁵⁶ The resolution came to be considered through the conduct of, and repeated pronouncements by, African states and the continental Organisation as embodying the principle according to which frontiers do not lapse when decolonisation or secession takes place. The principle is now enshrined in the basic constitutional text of the AU and in the treaty on peace and security in Africa.

The principle of territorial integrity protects the territorial framework that is legally that of a state. It is secured by a series of consequential rules, namely, rules prohibiting interference or intervention in matters which are essentially within the domestic jurisdiction of any state, rules prohibiting the threat or use of force against the territorial integrity and political independence of any state, rules imposing respect for borders as of the date of independence, and the rule of obligatory non-recognition of territorial changes brought about in breach of international law.

The territory of each African state consists of the spatial area it inherited from colonisation. In most cases the alignment would have been described and delimited (even if imprecisely) or demarcated as an international boundary by the relevant colonial powers. In some other cases it would have been defined as an intra-colonial boundary of the units of a larger territory of the colonial power, it becoming international on achievement of independence. The Constitutive Act of the AU proclaims the defence of the territorial integrity of its members as one of its objectives (article 3(b)). But this simply has to do with the relations between the Organisation and its members. It has nothing to do as between AU members *inter se* or between such a member and a non-member or between a member and component parts of its territory. It has nothing to do with what happens within a given state because the principle of territorial integrity is relevant only as regards

54 Brownlie (n 53) 11.

55 Brownlie (n 53) 11.

56 C Anyangwe 'International law and the acquisition of colonial territories in Africa' (2005) 37 *Zambia Law Journal* 21; T Maluwa 'International law-making in the Organisation of African Unity: an overview' (2000) 12 *African Journal of International and Comparative Law* 201.

the external relations of a state and not as regards what happens within the state itself. The principle does not protect the state from internal convulsion leading perhaps to the disintegration or even the disappearance of the state (for example Yugoslavia, the USSR, and Czechoslovakia). Nor does it protect the state from subversion by a legitimate claim to external self-determination. The AU Constitutive Act envisages only two situations in which the AU may intervene in a member state. Under article 4(h), the Organisation may decide to intervene 'in respect of grave circumstances, namely, war crimes, genocide and crimes against humanity.' Under article 4(j), it may, at the request of a member state, also intervene 'in order to restore peace and security.' The Constitutive Act does not permit the AU to intervene in a member state to ensure and to guarantee the integrity of its territory as such. The AU espouses the doctrine of sanctity of territorial borders inherited from colonisation, a doctrine stated as a principle in art 4(b) of the Constitutive Act which, in fact, is a codification of the 1964 resolution on border disputes. But a good many African states have never hesitated to lay territorial claim to contiguous territory outside their lawful state boundaries. Moreover, there is no legal or other basis on which the AU can compel a break-away entity to renounce its self-determination claim simply for the sake of preserving the territorial integrity of the oppressive state it is escaping from. It follows that in practice not all AU members in fact subscribe to the principle of territorial integrity and that the principle does not necessarily protect states which consider it as binding on them. The principle of territorial integrity in the African context is therefore probably not as sacrosanct as may at first appear.⁵⁷ Already, in 1977, the then OAU Secretary General, Eteki Mboumoua, was able to declare that:

Le respect des frontières héritées de la colonisation n'est pas un principe sacrosaint. C'est certes, une base de travail irremplaçable, mais devant être dépassée, ou révisée dans le cadre d'un consensus car il faut tenir compte à long terme du droit à l'autodétermination.⁵⁸

4.3 Apparent primacy of territorial integrity over self-determination

The principle of territorial integrity protects the territorial framework of independent states and is part of the overall concept of the sovereignty of states. The frontiers of decolonised states become frozen at the moment of independence. African boundaries on the date of independence may not be altered except by consent of the relevant parties. Territorial integrity and self-determination when used conjunctively in the decolonisation process serve to protect the territorial framework of the colonial period and to prevent a rule from arising that permits secession from independent states. Akweenda notes that the principle of territorial integrity was used in certain UN

57 Okeke (n 36) 260

58 Cited in SKN Blay 'Changing African perspectives on the right of self-determination in the wake of the Banjul Charter on human and peoples' rights' (1985) 29 *Journal of African Law* 147 at 155.

resolutions to indicate that Walvis Bay and the Penguin Islands are part of the territory of Namibia.⁵⁹ He also notes, still in the case of Namibia, that the UN appealed to that principle in order to prevent the government of apartheid South Africa from declaring Namibia a fifth province of South Africa.

The Declaration on Principles of International Law prohibits any action which will dismember or impair, totally or in part, the territorial integrity or political unity of sovereign independent states *conducting themselves in compliance with the principle of equal rights and self-determination of peoples*. On the face of it, this prohibition establishes the primacy of the principle of territorial integrity over the right of self-determination. In reality, that primacy holds only where the principle of territorial integrity and the right of self-determination conflict. It ceases to hold where the state concerned does not conduct itself 'in compliance with the principle of equal rights and self-determination of peoples', or where it is not 'possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.' Besides, the international community is likely to be more sympathetic towards secession (breach of the principle of territorial integrity) and consider it legitimate in the following circumstances: where, as stated in *Katanga*, the population of a defined territory are the subject of massive individual human rights violations and are denied participation in the governance of the country from which they want to secede; where past claims to territorial sovereignty have been overridden; where serious human rights violations have been perpetrated against a population of a definable territory; where a federal state made up of distinct nationalities breaks up; where the people seeking secession differ in ethnicity, religion, culture and language and are separated geographically by land or water; where part of the territory of a state secedes following a self-determination referendum conducted with the consent of the national government; where it is apparent that internal self-determination is absolutely beyond reach; or in cases of extreme and unremitting persecution and there is no reasonable prospect for peaceful change.⁶⁰

5 CONCLUSION

The principle of self-determination does not necessarily conflict with that of territorial integrity. According to the UN, the ICJ, the Helsinki Final Act of 1975 and international law scholarship, there is no contradiction between the principles of self-determination and territorial integrity, with the latter taking precedence.⁶¹ The principle of territorial integrity is confined to the sphere of relations between states.

59 S Akweenda 'Territorial integrity: A brief analysis of a complex concept' (1989) 1 *African Journal of International and Comparative Law* 500 at 505.

60 Cassese (n 6) 120; R Rosenstock 'The declaration on principles of international law' (1971) 65 *American Journal of International Law* 713

61 H Hannun *Autonomy, sovereignty and self-determination: the accommodation of conflicting rights* (1996)

It cannot be implicated in cases of the exercise of the right of self-determination against colonial rule, oppression, or expansionism. A colonial territory has a status separate and distinct from the territory of the colonial power.

Self-determination and territorial integrity seem to be antinomies, involving a clash of norms: the unavoidable conflict between the efforts of peoples to achieve independence and the demands of existing states to preserve their territorial integrity.⁶² The competing values of human dignity and system stability seem to be pulling in opposite directions. However, a close analysis shows that there is a dynamic interplay of both norms. Sometimes they are mutually reinforcing as when self-determination is a function of the right to a distinct and clearly defined territory. In that situation, the right of self-determination protects the territory from impairment. Sometimes also both norms are antagonistic, as when a self-determination claim involves the break-up of the legitimate territory of a state. The interplay of both norms results in the primacy of self-determination over territorial integrity in certain situations, and the primacy of territorial integrity over self-determination in certain other situations. In some situations therefore human dignity trumps the demands of state system and state integrity; in some other situations the demands of state system and state integrity prevail over the demand of human dignity. The precise or exact circumstances in which one norm prevails over the other invites examination in the light of the provisions of the African Charter, the provisions of the AU Constitutive Act, and the African Commission's jurisprudence on this subject.

It is not clear which of the two competing powerful norms, self-determination or territorial integrity, necessarily prevails in all situations.⁶³ Case-law authority on this point is lacking. But the post-colonial history of this continent teaches that such matters are ultimately decided by armed struggle rather than by forensic battles or even diplomacy. In the case of Biafra, despite the fact that there were massive human rights violations in the form of a pogrom committed against the aggrieved people, the principle of territorial integrity prevailed over what seemed a compelling case for remedial secession. In the case of South Sudan, the secessionist self-determination claim which was asserted through a combination of force and third party diplomatic intervention prevailed over the principle of Sudan's territorial integrity trumpeted in Libya by the second African-Arab summit. Eritrea vindicated its right to self-determination by force of arms and the matter of Ethiopia's territorial integrity hardly came in for consideration by intergovernmental political organisations. The Western Sahara followed the same path, although the territory is still

62 Shelton (n 51).

63 V Gudeleviciute 'Does the principle of self-determination prevail over the principle of territorial integrity?' (2005) 2 *The International Journal of Baltic Law* 48; P Szasz 'The irresistible force of self-determination meets the impregnable fortress of territorial integrity: a cautionary tale about clashes in Kosovo and elsewhere' (2000) 38 *Georgia Journal of International and Comparative Law* 493.

occupied by Morocco. Nevertheless, the admission to Membership of the AU of the Saharawi Republic, the independence name and style of the Western Sahara proclaimed by the territory's leadership in exile, is significant. It stands as a rejection of Morocco's occupation as an attempt at territorial aggrandisement. Morocco's recent readmission to the AU does not change this fact. The Organization has not withdrawn its recognition and admission of the Western Sahara.

All things considered, if the right of self-determination is to be meaningful, it ought to be placed above that of territorial integrity, sanctity of colonial borders, and non-intervention. It is psychologically and, to some extent, legally important to proclaim and uphold these principles for the purposes of the community of nations and international peace and security. But in the last resort a legitimate claim to the right of self-determination, even in a non-colonial setting, ought to prevail and be valid under international law. As Judge Dillard strongly asserted in his separate opinion appended to the Advisory Opinion in the *Western Sahara* case, it is for the people to determine the destiny of the territory and not the territory the destiny of the people. Thus, if human rights ought to be meaningful, they ought to prevail over territory.