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Recognizing a Right to Autonomy for Ethnic Groups under the African Charter on Human and Peoples' Rights:

Katangese Peoples Congress v. Zaire

by Mtendeweka Owen Mhango*

In 1992 the African Commission on Human and Peoples' Rights (the Commission) delivered a landmark decision in *Katangese Peoples Congress v. Zaire*¹ (*Katanga*) on the inalienable right of self-determination under the African Charter on Human and Peoples' Rights (ACHPR).² The Commission held that self-determination under the ACHPR may only be achieved in a manner that is consistent with the sovereignty and territorial integrity of Zaire (now the Democratic Republic of Congo or DRC). The decision continues to have great normative value because it is the Commission's first decision directly addressing the right to autonomy in the post-colonial context since becoming operational in 1987. Since *Katanga*, many indigenous groups in Africa have vigorously asserted their right to self-rule, raising the critical question of whether these groups are seeking independence or simply autonomy. While no group has yet claimed the right to autonomy on the basis of *Katanga*, the legacy of its holding will greatly inform the potential realization of this right in the years to come.

The ACHPR is currently the only regional human rights instrument that permits the right of self-determination to be the subject matter of communications submitted by entities other than states. The right of self-determination is one of the most important and perhaps controversial rights enshrined in the ACHPR because it is the vehicle through which many African states achieved independence from colonialism. Even today, many ethnic groups continue to use self-determination to make claims for self-rule. These post-colonial claims of self-determination have put pressure on the Commission to define the scope of this right in Africa.

This article argues that *Katanga* exhibits the Commission's favorable view of self-determination under the ACHPR, and the likelihood that the Commission will recognize a right to autonomy regime.³ While its decision in *Katanga* should be commended for demonstrating that self-determination is justiciable under the ACHPR, the Commission can be criticized for leaving several unanswered questions. What is meant by "other forms of self-determination that are fully cognizant of recognized principles of sovereignty and territorial integrity"? Would the Commission have reached a different outcome had the complainant requested an autonomy regime that did not require *Katanga's* independence from the DRC? Are various ethnic and other minority groups within Africa similarly entitled to self-determination? This article seeks to address these questions and the lasting significance of the *Katanga* decision.

THE JUSTICIABILITY OF THE RIGHT OF SELF-DETERMINATION

Whether the right of self-determination is capable of judicial enforcement elicited heated debate at the United Nations during the drafting of the International Bill of Human Rights. The outcome of the controversy was the bifurcation of the Universal Declaration of Human Rights into the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR). The contention that self-determination is a political principle and not a right formed the basis for Western opposition to its inclusion in the two instruments. The West argued that self-determination was incompatible with a human rights convention based on the protection of the individual and, as such, this "collective" right could not be enforced by the Human Rights Committee (the Committee) in the same manner as individual rights. Other criticisms related to the economic aspect of the right of self-determination. Nevertheless, the West took part in drafting the text of Article 1 of the two Covenants. Its inclusion in both Covenants indicates that self-determination is both a civil and political right and an economic, social, and cultural right. Furthermore, the right's inclusion in Part I of each Covenant underlines its importance.

Another hotly debated issue was whether minorities (ethnic or otherwise) should be accorded the right of self-determination. The Soviet Union's proposal that protection of minorities be dealt with in the context of the right of self-determination under Article 1 was defeated because the rights of minorities are ensured in a separate provision of the ICCPR, Article 27. While the ICCPR has a provision for judicial enforcement through individual petitions pursuant to the First Optional Protocol, in *Lubicon Lake Band v. Canada*⁴ the Committee ruled that an individual could not bring a case for violation of Article 1 (i.e., for "peoples" rights). The Committee held that the First Optional Protocol only provides a procedure for petitions concerning violations of individual rights set out in Part II of the Covenant in Articles 6 through 27. Therefore, groups that attempt to assert their right of self-determination will have to depend on inter-state communication procedures and state reports — the former of which have yet to be used — in order to clarify the Committee's interpretation of this right under the ICCPR.

Unlike the ICCPR, the ACHPR extends similar enforcement mechanisms to all categories of rights. The Convention allows for communications from states (Article 47) and individuals (Article 55) alleging violations of any rights, and the standing requirements for bringing communications before the Commission are often liberally construed. Unlike the First Optional Protocol of the ICCPR, where the individual complaint procedures are severed from the Covenant itself, individuals as well as NGOs with observer status can bring communications against a state under the ACHPR.

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Because of this, the Commission has identified self-determination as a justiciable right under the ACHPR. In both *Katanga* and *Casamance Communication*⁵ (*Casamance*), the Commission accepted communications by ethnic groups alleging violations of the right of self-determination. In both instances, the communications were brought by non-state parties, both requesting self-determination in the form of secession or independence. Overall, these communications demonstrate that self-determination under the ACHPR is justiciable like the Convention's other enumerated rights.⁶

THE DISPUTE IN KATANGA

In 1992, Gerard Moke, in his capacity as leader of the Katangese Peoples Congress (KPC), the only political party representing the people of Katanga, brought a communication before the Commission. The applicant presented the history of colonial definition of the DRC's political boundaries and its effect on the territory of Katanga. It emphasized the disparate treatment of the Katanga area by the colonial powers in the 19th century. The complainant requested that the Commission: (a) recognize the KPC as a liberation movement entitled to support to achieve independence for Katanga; (b) recognize the independence of Katanga; and (c) help secure the DRC's withdrawal from Katanga. The complaint was brought under Article 20(1) of the ACHPR, which protects the "inalienable right to self determination."⁷ The request for some form of assistance for the people of Katanga was presumably brought under Article 20(3), which provides national liberation movement's the right to assistance from ACHPR States Parties.

The Commission found that there were no remedies available under national law that would guarantee the independence of Katanga from the DRC. Furthermore, the Commission could not identify any specific allegations of violations of the ACHPR in the complaint. Because neither the Commission nor the responding state could justify dismissal on grounds that the complainant failed to exhaust local remedies, in light of the fact that no such remedies were available, the complaint was found presumptively admissible.

THE RIGHT TO SELF-DETERMINATION & PARTICIPATION IN GOVERNMENT

The Commission has emphasized that all peoples have the right of self-determination. It stated this right may be "exercised in any of the following ways: independence, self-government, local government, federalism, confederalism, unitarism, or any other form of relations that accords with the wishes of the people but fully cognizant of other recognized principles such as sovereignty and territorial integrity."⁸ The Commission also suggested that where a people is able to establish a breach of the right to participate in government coupled with other verifiable human rights violations (a scenario common in Africa), self-determination in the form of secession may be possible under the ACHPR. Even though the Commission correctly recognized the close relationship between the right to self-determination and the right to participate in government — as guaranteed in Articles 20 and 13, respectively — it was also mindful to emphasize its duty to uphold the fundamental character of the principles of territorial integrity and sovereignty.

The Commission recognized that the *Katanga* communication involved not the self-determination of all peoples of the DRC,

but rather only the people of Katanga, a province within the DRC. Yet because there was no evidence as to whether Katanga consisted of more than one ethnic group, the Commission did not have to define the term "peoples" in the context of self-determination.⁹ As a result, it intentionally neglected to discuss the legal effect of recognizing the inhabitants of Katanga as "peoples." It instead opted to focus its discussion of the right of a people to participate in government.

It is in this respect that scholar Li-ann Thio has rightly criticized the Commission's decision as politically motivated and lacking any precise legal reasoning.¹⁰ According to the Commission, granting the people of Katanga's request would contravene the principle of *uti possidetis*, which the former Organization of Africa Unity (OAU), now African Union, had pledged to uphold in the Cairo Resolution.¹¹ Ultimately, the Commission avoided discussing the more pertinent question of whether the term "peoples" in the ACHPR includes ethnic groups by focusing on the question of whether the right to participate in government was breached by the DRC.

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DEFINING “PEOPLES” UNDER THE ACHPR

For years, the debate on the criteria of the right of self-determination has centered on the definition of "peoples." Since the ACHPR purposely did not define the term, it could be argued that this task was left to the Commission. It is, therefore, important for the Commission to clarify this term in future jurisprudence.

In Africa there appear to be two schools of thought on the term. The first is represented by Commissioner Isaac Nguema, who holds that "peoples," as understood by the framers of the ACHPR, applies to the entire population of the country — e.g., those that had formerly been colonized by European states, such as Nigerians — without making a formal distinction between the Yoruba or Minas.¹² The African states have individually (under the auspices of the former OAU) taken the position that self-determi-

nation does not apply outside the colonial context because post-colonial application would undermine African unity. This school of thought has been criticized for denying ethnic groups, many of whom feel dominated by another group within their state, the right to meaningfully participate in government.

The second school is represented by Commissioner Oji Umzurike, who holds that it denotes groups of people that have an identifiable interest, such as tribes or fishermen. For instance, Article 19 provides that “no people may dominate another people,” but does not stipulate that “people” means all the people of the country.¹³ Instead, the term could refer to members of ethnic groups or even other social groups.

The Commission is well aware of these competing positions but has failed to issue a definitive ruling to clarify the law in its decisions in *Katanga*¹⁴ and *Social and Economic Rights Centre and the Centre for Economic and Social Rights v. Nigeria*.¹⁵ For all practical purposes, *Katanga* seems to uphold the conservative position represented by Commissioner Nguema, continuing to view the right to self-determination within the colonial context. If the construction of the term “peoples” in the ACHPR is restricted to all persons located within a state, then the people of *Katanga* and others may not be able to enjoy certain rights under the ACHPR, such as those enshrined in Articles 19 to 24.

It is doubtful, however, that the framers of the ACHPR intended to create a self-liquidating right of self-determination only for those people who were formerly colonized. They must have envisaged that Africa would eventually be free from colonialism but still burdened by other social and political problems that necessitate claims to self-determination. It is important for the Commission to construe self-determination as directly applicable to ethnic groups as “peoples” entitled to this right. This interpretation is consistent with the ACHPR because it effectively recognizes the ethnic composition of Africa.

Assuming Commissioner Nguema is correct to suggest that the term “peoples” in the ACHPR only refers to those formerly colonized, then it could be equally accurate to suggest that Article 20 and others similar to it were probably nullified when the last colonized state in Africa became independent in 1994. Yet a correct interpretation is more in tune with Commissioner Umzurike’s view that the ACHPR was created to prevent human rights atrocities occurring both before *and* after its adoption. Accordingly, the ACHPR should be interpreted in light of the changing circumstances on the continent where self-determination is viewed as an ongoing process relevant to current conflicts in Africa.¹⁶

THE CAIRO RESOLUTION

Commissioner Nguema’s position that self-determination does not apply outside the colonial context was the position adopted in 1964 by the OAU Assembly of Heads of State and Government in Cairo. The Cairo Resolution solemnly declared “that all Member States pledge themselves to respect the borders existing on their achievement of national independence”¹⁷ in a manner that is in harmony with the principles of sovereignty and territorial integrity in the OAU Charter. The Cairo Resolution is relevant to the post-colonial application of self-determination because it formed the basis on which *Katanga* was decided. The Commission relied on this political resolution in setting the standard by which self-determination would be implemented in Africa.

The Cairo Resolution was motivated by boundary conflicts in early 1963 between Somalia and Ethiopia and Kenya. Somalia had attempted to exercise the right of self-determination for Somalis living in Ethiopia and Kenya. This claim was rejected by the former OAU in favor of Ethiopia’s contention that a claim for self-determination in the post-colonial context was unacceptable.¹⁸ The former OAU also favored Ethiopia’s position because of fear that African governments would not ratify the ACHPR absent such a prohibition.

Since the Cairo Resolution, which was affirmed by the decisions in *Burkina Faso v. Mali*¹⁹ and *Katanga*,²⁰ claims of self-determination in the form of secession are prohibited under the ACHPR in favor of claims that can be implemented without altering existing state boundaries. This, however, raises the question of whether the Cairo Resolution, and the subsequent decisions affirming it, amount to an implicit approval of autonomy claims given that they can only be implemented in harmony with Article 3(3) of the former OAU Charter. In other words, since self-determination has been recognized as a justiciable right under the ACHPR, does the prohibition of secessionist claims suggest the approval of other claims of self-determination, which are not inimical to sovereignty and territorial integrity of states? If so, did the decision in *Katanga* recognize such a right to autonomy regime under the ACHPR?



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Displaced persons on Lake Upemba, Katanga, Democratic Republic of the Congo

INSIGHT FROM THE CANADIAN CONTEXT

In *Reference re Secession of Quebec (Quebec)*,²¹ the Canadian Supreme Court was presented with a challenge that raised a legal issue similar to that in *Katanga*. The *Quebec* decision is relevant to the analysis of *Katanga* because both the factual setting in which the case arose and the legal conclusion reached by the Canadian Supreme Court are similar. From a factual point of view, the complainants in both cases requested the right of self-determination in the form of secession and alleged a breach of their right to participate in government. In both decisions the request for secession was rejected, and no breach of the right to participate in government was found.

Similar to the Commission, the Court in *Quebec* recognized the relationship between the right to self-determination and the right to participate in government.²² Unlike the Commission, the

Court went a step further and investigated the history of Quebec peoples' participation in government and found that Québécois have held important positions in the Federal Cabinet; during the eight years prior to 1997, the Prime Minister and the Leader of the Official Opposition in the House of Commons were both Québécois. At the time of the advisory opinion, the Prime Minister, the Right Honorable Chief Justice and two members of the Court, the Chief of Staff of the Armed Forces, the Canadian Ambassador to the United States, and the Deputy Secretary

ple" under the ACHPR as was done in *Quebec*. The Commission has scrutinized this issue in the past when it considered claims for secession from the Casamance of Senegal.²⁶ There, the Commission considered arguments put forward by a group claiming secession on grounds of "historical legitimacy"; "feelings of frustrations for being governed by outsiders, and not truly sharing their cultural traditions and aspirations"; and "the firm conviction of being able to live better in a free and independent Casamance, occupied chiefly with the well-being of its population and neigh-

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General of the United Nations, were all Québécois.²³ Based on this finding, the Court concluded that Quebec cannot plausibly argue that it has been denied the right to participate in government.

If the Commission were to apply a similar test, the outcome would be very different from Canada's case. Many ethnic groups who seek self-rule in Africa often have a *prima facie* case against their state for recognition of their meaningful right to participate in government. Many of these ethnic groups have failed to test their claims against the ACHPR because of the restricted understanding of "peoples" entitled to self-determination and participation in government.

In debating the definition of "peoples," the Canadian Court agreed with the views of Commissioner Umozurike when it explained in *Quebec* that:

It is clear that "a people" may include only a portion of the population of an existing state. The right to self-determination is generally used in documents that simultaneously contain references to "nation" and "state." The juxtaposition of these terms is indicative that the reference to "people" does not necessarily mean the entirety of a state's population.²⁴

It is not clear whether this language resembles the Commission's view when it declared that "Katanga is obliged to exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of the DRC."²⁵ On the one hand, it is possible for one to conclude that the former language resembles the latter text because the Commission's view is that the people of Katanga may exercise self-determination in some restricted sense, thereby acknowledging that "people" may include ethnic groups. On the other hand, it could be impossible for one to conclude that these texts resemble each other because if they did, the Commission's conclusion in *Katanga* would have been different. The Commission would have had to clarify the term "peo-

ple" under the ACHPR as was done in *Quebec*. The Commission has scrutinized this issue in the past when it considered claims for secession from the Casamance of Senegal.²⁶ There, the Commission considered arguments put forward by a group claiming secession on grounds of "historical legitimacy"; "feelings of frustrations for being governed by outsiders, and not truly sharing their cultural traditions and aspirations"; and "the firm conviction of being able to live better in a free and independent Casamance, occupied chiefly with the well-being of its population and neigh-

bors like Senegal." The Commission rejected the claim for independence, partly out of fear that a claim of secession by one ethnic group would provoke other ethnic groups in Senegal to do the same.²⁷

As demonstrated in *Katanga* and *Casamance*, it is unclear whether the Commission may eventually recognize the right to an autonomy regime for ethnic groups to exercise self-determination internally. This article argues that the Commission would likely recognize such a right given that self-determination for distinct ethnic groups within states, according to the Commission, is understood by reference to the idea of political autonomy or self-government in the territory in which they reside and not based on secession.²⁸ This suggests that so long as a distinct ethnic group wants to exercise its right to self-determination by way of creating an autonomy regime within its state, the Commission would be inclined to uphold such a claim.

CONCLUSION

For Africa, the *Katanga* decision marked a renewed commitment by the Commission to the implementation of the right of self-determination. It demonstrated that this right is justiciable, and established strong precedent for its judicial enforcement in states. Importantly, *Katanga* is the first communication before the Commission relating directly to the right of self-determination in the post-colonial context.

By basing so much of its ruling on political considerations, however, the Commission effectively undermined arguments for the recognition of a right to an autonomy regime or the classic claim for self-determination in the post-colonial era. Many of the legal issues in *Katanga* will likely be adjudicated again, either before the Commission or the soon to be established African Court of Human and Peoples' Rights, in the context of recent

indigenous groups' claims of self-determination. Thus, it is important that several of the unanswered questions raised in *Katanga* be resolved.

Katanga would have been more productive had it gone a step further rather than simply upholding outdated notions that seem to stand against stability in Africa. Since the Commission recognizes that the implementation of the right of self-determination has internal as well as external dimensions, it should have clarified the scope of the internal application of this right. Moreover, the Commission should have held that the term "peoples" under the ACHPR may apply only to a portion of the population of a state, such as Africa's various ethnic groups. Otherwise, the Commission's descriptions of the different forms of self-determination are meaningless if the term "peoples" only refers to the entire population of the state. Given that there is no definition of "peoples" in international law, this

article recommends that the Commission should liberally construe the term.

Additionally, it seems likely, based on *Katanga*, that the Commission would entertain claims of autonomy regimes rather than full independence in light of its analysis of the different forms of self-determination and its concern over sovereignty issues. Indeed, the Commission would favor an autonomy regime because of its goal of preventing conflict and the break up of states, all of which appear to be essential elements of self-determination. Given this analysis, had the KPC requested autonomy as opposed to independence, the Commission could have reached a different conclusion. To test the utility of *Katanga*, future litigants should clearly indicate a request for autonomy rather than independence. In the end, self-determination remains a remedial principle that should be liberally construed to encompass suitable ethnic groups seeking autonomy within ACHPR States Parties. HRB

ENDNOTES: Recognizing a Right to Autonomy for Ethnic Groups under the African Charter

1 *Katangese Peoples' Congress v. Zaire*, Comm. No. 75/92 (African Commission for Human and Peoples' Rights 1995) in *Eighth Annual Activity Report of the African Commission on Human and Peoples' Rights (1994–1995)*, ACHPR/RPT/8th, Annex VI (1995) (hereinafter *Katangese Peoples' Congress*).

2 The ACHPR was adopted by the former Organization of African Unity (OAU now African Union) Assembly of Heads of State and Government (AHSG) in 1981 and entered into force in 1986.

3 This thesis is supported by the Commission's decision with regard to the conflict between Senegal and the separatist movement in Casamance. In its decision, the Commission rejected the claims of independence for Casamance in favor of a certain measure of autonomy in the administration of public affairs for the region of Casamance. It recommended that Senegal post in Casamance officials native to the region to enhance their participation in government and allow them to realize their right of self-determination. See *Report on Mission of Good Offices to Senegal of the African Commission on Human and Peoples' Rights (1–7 June 1996)* in *Tenth Annual Activity Report of the African Commission on Human and Peoples' Rights (1996–1997)* (hereinafter *Report on Mission of Good Offices to Senegal*), ACHPR/RPT/10th, Annex VIII (1997).

4 *Chief Ominyak and Lubicon Lake Band v. Canada*, Comm. No. 167/1984 (United Nations Human Rights Committee 1990), U.N. Doc. Supp. No. 40 (A/45/40) at 1 (1990).

5 *Report on Mission of Good Offices to Senegal*, *supra* note 3.

6 Some human rights scholars writing in the early history of the ACHPR questioned whether peoples' rights in the ACHPR were appropriate for consideration by the Commission. They argued that peoples' rights in the ACHPR were simply aspirational and the Commission's function was simply promotional and, therefore, peoples' rights should not be the subject of communication before the Commission.

7 African Charter on Human and Peoples' Rights, art. 20(1), *opened for signature* Oct. 21, 1986, 1520 U.N.T.S. 217.

8 *Katangese Peoples' Congress* at para. 4.

9 Likewise, the Commission did not define this term in its recent decision in *Social and Economic Rights Centre and the Centre for Economic and Social Rights v. Nigeria*, but found that the right of the Ogoni people to dispose of their wealth and natural resources under Article 21 of the ACHPR had been violated. By inference, however, the Commission viewed both the inhabitants of Katanga and Ogoni as "peoples." See *The Social and Economic Rights Action Center for Economic and Social Rights v. Nigeria*, *African Commission on Human and Peoples' Rights*, Comm. No. 155/96 (African Commission for Human and Peoples' Rights 2001) (hereinafter *Social and Economic Rights Action Center*).

10 Li-ann Thio, *Battling Balkanization: Regional Approaches Toward Minority Protection Beyond Europe*, 43 Harv. Int'l L.J. 409, 466 (2002).

11 The principle of *uti possidetis* states that newly decolonized states should inherit colonial administrative borders held at the time of independence.

12 ACHPR, *Examination of State Reports (Libya-Rwanda-Tunisia)* in *General Discussions* (9th Session.; Mar. 1991), available at <http://0-www1.umn.edu.innopac.up.ac.za:80/humanrts/achpr/sess9-toc.htm>. At its 16th Session in October 1994, the ACHPR authorized the Danish Center for Human Rights to publish, in its name, the transcripts of the examinations of state reports which have taken place thus far.

13 *Id.*

14 *Katangese Peoples' Congress*, *supra* note 1.

15 *Social and Economic Rights Action Center*, *supra* note 9.

16 Most African states have been independent for more than 20 years, yet there are more conflicts than secure independent states on the continent.

17 *Resolution on Border Dispute Among African States*, AHG/Res. 16(I) (1964). See also Saadia Tauval, *International Organizations*, "The Organization of African Unity and African Borders," (vol 21, 1967) at 102-127 (discussing historical events leading to the adoption of the Cairo Resolution).

18 Tauval, "The Organization of African Unity and African Borders" at 112-122.

19 *Frontier Dispute (Burkina Faso v. Mali)*, 1986 I.C.J. 554 (Dec. 22).

20 *Katangese Peoples' Congress*, *supra* note 1.

21 *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 (Can.).

22 *Id.*

23 Even though the advisory opinion is binding, Quebec had not acted unilaterally to declare independence from Canada.

24 *Id.* at para. 124.

25 *Katangese Peoples' Congress* at para. 12.

26 *Report on Mission of Good Offices to Senegal of the African Commission on Human and Peoples' Rights* at Section V.

27 The Commission concluded that, "Given the separatist position, it is easy to demonstrate that the reasons advanced are not unique to the Casamance, but can be invoked with a certain measure of profit by other regions of Senegal." *Id.*

28 Rachel Murray and Steven Wheatley, *Hum. Rts. Q.*, "Groups and the African Charter on Human and Peoples' Rights," (Vol 25, 2002) at 234.