

THE ACHPR IN THE CASE OF SOUTHERN CAMEROONS

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1 Introduction

International Human Rights Law (IHRL) is known for indeterminacy. There is a common problem with international law: complex rules are formulated in the absence of proper dispute settlement procedures (CRAWFORD, 1994, p. 23). For example, Robert Lansing famously described the right of self-determination as “loaded with dynamite” (CASSESE, 1996, p. 22). For this reason, the “need for a principled stance on self-determination has never been greater. Most large-scale violent conflicts now occur within states rather than between them, and in many cases of large-scale intrastate conflict, self-determination is an issue – sometimes *the* issue” (BUCHANAN, 2003, p. 332). “In recent years, people have been slaughtering each other over the proper application of national self-determination in Ethiopia, Afghanistan, Bosnia, Iraq, Sri Lanka, Azerbaijan, Vietnam, and many other parts of the world” (TILLY, 1993, p. 31). The problem cannot be exaggerated:

At present, there are about 26 ongoing armed self-determination conflicts. Some are simmering at a lower level of irregular or terrorist violence; others amount to more regular internal armed conflicts, with secessionist groups maintaining control over significant swathes of territory to the exclusion of the central government. In addition to these active conflicts, it is estimated that there are another 55 or so campaigns for self-determination which may turn violent if left unaddressed, with another 15 conflicts considered provisionally settled but at risk of reignition. Self-determination conflicts, therefore, remain highly relevant, as the most recent episode involving Georgia has demonstrated.

(WELLER, 2009, p. 112).

Even though the dynamite right of self-determination is about 90 years old, still, “international law [...] fails to provide coherent conceptual and institutional support for forms of self-determination short of full independence and for a principled way of ascertaining when more limited modes of self-determination are appropriate” (BUCHANAN, 2003, p. 331). Indeed, “It remains today for the world to decide the validity of secession, and international law must provide the mechanism to evaluate that decision” (WASTON, 2008, p. 292-293). It is arguable that “a law of secession that strikes the proper balance between self-determination and territorial integrity will promote the greatest stability by providing peaceful means to address ethnic disputes and bringing de facto independent pseudo-states into the light” (WASTON, 2008, p. 292-293). In fact, going further, some hold that “Creating and implementing default rules in international law for partition and secession has significant potential to reduce the risk of conflict at relatively low cost” (RICHARDSON, 2009, p. 716).

However, while noting the indeterminacy of IHRL, it is important to admit that, regardless of the intensity of codification, law cannot be free of ambiguity to the extent that courts and judges are unnecessary. It is for this reason that international law--specifically, Article 38 of the Statute of the International Court of Justice (ICJ)--recognizes “judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law”. When indeterminacy is unavoidable, the solution has been sought from procedures and adjudicative tribunals. IHRL has many judicial and semi-judicial institutions that have contributed to the process of norm specification beyond human rights treaties “both through the application of the standards to specific cases and through the general interpretation of treaty provisions” (CAROZZA, 2003, p. 59). In fact, norm specification seems one of the most important contributions of the largely toothless human rights protection apparatus.

Unfortunately, this important task of interpreting IHRL is not well-used. Not only are rulings given after a long time, but the reasoning is also not always profound, for which reason alone it fails to command respect. In addition, aggrieved sides that deserve encouragement for seeking solution to their grievances from tribunals of reason, as opposed to from the force of the gun, are sometimes unconvincingly told that they have no remedy in the international plane.

The main reason appears to be that the quasi-judicial institutions mandated to consider human rights violations and interpret rights are inadequately equipped. They are often confronted with complex problems that they tend to prefer to avoid. The African Commission on Human and Peoples’ Rights (ACHPR), which is one of the monitoring institutions of the African Charter on Human and Peoples’ Rights (African Charter) is a good example. In the past, the blame was directed to the African Union for not adequately funding the ACHPR. However, even with resources, the “creativity, and wisdom of those who run the system,” sometimes disappointingly missing, “are absolutely crucial” (HEYNS, 2004, p. 701). For example, the procedure of litigation before the ACHPR has been convincingly criticized not only as unduly time-consuming but also as not conducive for the advancement of jurisprudence (WELDEHAIMANOT, 2010, p. 14-38).

In 1995, the ACHPR had an opportunity to articulate the right of self-determination in the post-colonial context in an important case, *Katanga*. In *Katanga*, the ACHPR was asked to recognize the Katangese Peoples' Congress as a liberation movement entitled to support in the achievement of independence for Katanga, a region in Zaire (AFRICAN COMMISSION ON HUMAN AND PEOPLE'S RIGHTS – ACHPR, *Katangese Peoples' Congress v Zaire*, 1995, para. 1). In addition, the ACHPR was asked to recognize the independence of Katanga and then “help secure the evacuation of Zaire from Katanga”. The ACHPR disposed *Katanga* in less than half a page and it has been deservedly criticized for not developing the jurisprudence of the right of self-determination.

In 2003, the ACHPR was presented with a substantially similar case, *Southern Cameroons*. Fourteen Cameroonians from an area they called Southern Cameroons petitioned the ACHPR alleging violations of many rights of Anglophone Cameroonians, one of which is the right of self-determination. The violation is allegedly caused by the abrogation of a federal constitution and replacement by a unitary state in which Anglophone Cameroonians have allegedly been dominated. In this case, not only did the ACHPR fail to elaborate *Katanga*, but it confused the one important point that *Katanga* contributed to the jurisprudence of the right of self-determination.

Part II of this article alludes to the indeterminate but most feared right of self-determination. Part III critiques the unsound reasoning of the ACHPR by comparing it to the convincing jurisprudence that was available before *Southern Cameroons* that the ACHPR should have consulted. In addition, Part III discusses the sound jurisprudence established before the ACHPR's ruling and updates it further by reflecting on a recent advisory opinion from the ICJ. Considering the specificity the right of self-determination has acquired as a result of scholarly and judicial discourses, Part IV concludes by noting that the remedies the ACHPR eventually gave could have been more specific. Norm-specification or jurisprudence building, rather than proving actual relief for victims of human rights violations, has been the most notable achievement of the quasi-judicial human rights monitoring institutions. However, more elaboration is still needed.

2 The Indeterminate Right of Self-Determination

From its origin until now, the right of self-determination is, of course, controversial. Almost every writer has lamented the indeterminate nature of the right. The most prophetic has been Robert Lansing, who warned that “an application of this principle is dangerous to peace and stability [...] The phrase is loaded with dynamite. It will raise hopes that can never be realized. It will,” so Lansing shared his fear, “cost thousands of lives. In the end it is bound to be discredited, to be called the dream of an idealist who failed to realize the danger until too late, to check those who attempt to put the principle in force. What calamity that the phrase was ever uttered! What misery it will cause!” (CASSESE, 1996, p. 22) To Klabbers, the “right of self-determination easily qualifies as one of the more controversial norms of international law” (KLABBERS, 2006, p. 186). To Jennings, the doctrine of self-

determination of peoples “was in fact ridiculous, because the people cannot decide until someone decides who are the people” (JENNINGS, 1956, p. 55-56). To Grant, “self-determination has notoriously lacked concrete legal content. In particular, it has lacked a procedural framework for its realization” (GRANT, 1999, p. 11). “Self-determination,” so it seemed to Fox, “has become either everything or nothing” (FOX, 1995, p. 733). To Castellino, “within international law, self-determination has become all things to all men” (CASTELLINO, 2000, p. 1).

The people in a state do not have homogeneous aspirations, preferences and demands; and the right of self-determination does not explain how conflicting desires should be reconciled or arbitrated. In addition, the indeterminacy is related to the “self or people” which is entitled to the right, the content of the right and the circumstances under which the right can be exercised. Furthermore, almost every writer on the area has noted conflict between the right of self-determination and the principle of territorial integrity of states.

The right of self-determination is stated in many treaties and different soft laws. Even though a word-for-word reading of all the pronouncements of self-determination appears useless, a brief restatement is important. In an unclear manner, article 1(2) of the United Nations (UN) Charter states that one of the purposes of the UN is to “develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples”. “With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples,” article 55(c) of the Charter further required the UN to promote “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion”.

Paragraph 2 of the 1960 UN General Assembly Declaration on the Granting of Independence to Colonial Countries and Peoples states that “All peoples have the right of self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development” (UNITED NATIONS, 1960). But, paragraph 6 of the same declaration adds a qualification which subsequent pronouncements of the right of self-determination almost consistently follow: “Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations”. Furthermore, paragraph 7 adds that all States are required to “observe faithfully and strictly the provisions of the Charter of the United Nations [...] on the basis of equality, non-interference in the internal affairs of all States, and respect for the sovereign rights of all peoples and their territorial integrity” (UNITED NATIONS, 1960). Common article 1(1) of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) reads, “All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development” (UNITED NATIONS, 1966a, 1966b).

However, the wording of the Declaration on Friendly Relations and Cooperation among States is specifically important as it hinted that in some cases, the right of self-determination can override territorial integrity of a state and warrant secession. For their territorial integrity to be maintained, the Declaration indicates that states must be “conducting themselves in compliance with the principle of equal rights and self-determination of peoples [...] and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour” (UNITED NATIONS, 1970). Therefore, the Declaration Resolution gives an indication of the fact that there is self-determination that can be realized without affecting the territory of the state (*internal self-determination*), and there is another one, which affects the territory (*remedial secession or external self-determination*).

Article 20(1) of the African Charter on Human and Peoples’ Rights gives to “all peoples” “the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen” (AFRICAN UNION, 1981). Article 3 of the Declaration on the Rights of Indigenous Peoples states that “Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development” (UNITED NATIONS, 2007). These are not the only documents in which the right of self-determination is provided.

3 Determining the Indeterminate

It is not, however, helpful to indefinitely lament the indeterminate nature of the right of self-determination and do nothing about it. International law (article 38 of the ICJ Statute) recognizes “judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law”. In reality, judicial decisions flesh-out indeterminate rules in a more reasonable and coherent manner. Therefore, the following sections try to fill the indeterminacy based on sound judicial decisions.

3.1 *Jurisprudence before Southern Cameroons*

As of 1920, some aspects of the right of self-determination were detailed. As norms have evolved, the interpretation of the right has evolved. However, there is no need to chronicle the contradictory history here. The ICJ had six opportunities to touch on the right of self-determination. In the *Frontier Dispute Case* (INTERNATIONAL COURT OF JUSTICE – ICJ, *Burkina Faso v. Mali*, 1986, p. 567), the ICJ argued that “the maintenance of the territorial status quo in Africa is often seen as the wisest course, to preserve what has been achieved by peoples who have struggled for their independence, and to avoid a disruption which would deprive the continent of the gains achieved by much sacrifice” (ICJ, *Burkina Faso v. Mali*, 1986, p. 567).

In *Katanga*, the ACHPR was also confronted with the issue of secession based on the right of self-determination vis-à-vis territorial integrity of an African state. In this case, the ACHPR offered one significant point. It realized that self-

determination may be exercised in different approaches to autonomy systems such as self-government, local government, federalism, confederation or any other form of relations which have to be fully cognizant of other recognized principles such as sovereignty and territorial integrity. Establishing the basis for what is later called remedial secession, the ACHPR noted that:

In the absence of concrete evidence of violations of human rights to the point 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 [...] Katanga is obliged to exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire.

(ACHPR, *Katangese Peoples' Congress v Zaire*, 1995, para. 6).

Afterwards, the Human Rights Committee of the ICCPR reflected on the right and contributed one significant point. Many states and some scholars hold that after decolonization is completed, the right of self-determination expires. In this context, the Human Rights Committee clarified that the scope of self-determination is not restricted to colonized peoples but continues to regulate the constitutional and political processes within states (UNITED NATIONS, 1994, para. 296). Later on, in its opinion on Quebec's claim to secede unilaterally from Canada, the Supreme Court of Canada stated "international law expects that the right of self-determination will be exercised by peoples within the framework of existing sovereign states and consistently with the maintenance of the territorial integrity of those states. Where this is not possible, in the exceptional circumstance [...] a right of secession may arise" (CANADA, *Reference re Secession of Quebec*, 1998, para. 130, 311).

The Court further noted that a "state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its own internal arrangements, is entitled to the protection under international law of its territorial integrity" (CANADA, *Reference re Secession of Quebec*, 1998, para. 130, 311).

When it comes to the "people" who are entitled to the right, in one respect, there is consensus: people under colonial rule or alien domination. At present, there are no such right-holders. However, given that self-determination has post-decolonization application, it has become important to define the self who is entitled to the right. The most helpful question to define the self is to consider who has been asking for the right of self-determination. Permanent identification marks are helpful but even with these marks, such as sex, group autonomy is not always demanded. Women, for example, even though oppressed in many states, have never asked for a separate state or autonomous province where men become aliens with a different passport. The same is certainly true with workers, gays or lesbians.

However, race, ethnicity, culture, economic lifestyle and historical separateness are essential factors for seeking a separate state. There is a growing consensus in defining "people". In *Southern Cameroons*, the ACHPR, relying on experts, concluded that where a group of people manifest common historical tradition, a racial or ethnic identity, cultural homogeneity, linguistic unity, religious

and ideological affinities, territorial connection, and a common economic life, it may be considered to be a “people” (ACHPR, *Kevin Mgwanga Gunme et al v. Cameroon*, 2009, para. 170). In the ICJ’s *Kosovo Case*, a separate opinion employed a “conjugation of factors, of an objective as well as subjective character, such as traditions and culture, ethnicity, historical ties and heritage, language, religion, sense of identity or kinship, the will to constitute a people”. To these factors “a significant one” was added – “*common suffering*” – common suffering creates a strong sense of identity (ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, 2010, para. 228).

There has been some doubt as to whether different peoples who experienced a common colonial experience for decades can indeed be considered “people”. But even this issue is well-settled. The case of the Eritreans is similar to the situation in Southern Cameroons. Eritreans belong to nine different ethnic groups with different languages, culture, religion and economic and political history but they spent more than 60 years under one colonial roof. The colonial experience forged a common identity. In regard to Eritreans, the Permanent Peoples’ Tribunal ruled:

Eritrean people do not constitute a national minority within a state. They have the characteristics of a people [...] In their quality as a people they have the right to live freely, and without prejudice to its national identity and culture, within the boundaries of their own territory as delimited during the colonial period up to 1950.

(ROAPE, 1982, p. 39-52).

Therefore, in *Southern Cameroons*, the ACHPR is right in finding that the people of Southern Cameroon qualify to be referred to as a people (ACHPR, *Katangese Peoples’ Congress v Zaire*, 2009, para. 179).

It is true that in *Kosovo*, the ICJ noted that many aspects of self-determination are “subjects on which radically different views were expressed” (ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, 2010, para. 82). The lack of consensus may justify disqualification of publicists as subsidiary means for the determination of international law. Yet the wealth of the debate should have enriched the reasoning of the ACHPR in *Southern Cameroons*.

3.2 Southern Cameroons: jurisprudential disruption and regression

The root cause of the matter in *Southern Cameroons* is typical of the crisis linked to Africa’s colonial history and the inherited identity. The present day Cameroon became a German colony in the late 19th Century (KONINGS, 2005, p. 278). As part of the developments of First World War, the defeated Germany was obliged to renounce its over-sea colonies. Thus, the present day Cameroon was divided into French and British administrations under the mandate system of the League of Nations and, later on, the Trusteeship System of the United Nations (MCPHEETERS, 1960, p. 367-375). French Cameroon constituted the larger part and Northern and Southern Cameroons territories administered by Britain consisted of “two narrow non-contiguous regions bordering Nigeria and stretching from

the Atlantic coast to Lake Chad” (KONINGS; NYAMNJOH, 2003, p. 23). Later on, Northern Cameroons became part of Nigeria while Southern Cameroons later on joined French Cameroon.

The French-Cameroon gained independence on 1 January 1960 as the Republic of Cameroon or *La République du Cameroun*. Under the auspices of the United Nations, a plebiscite was conducted in Southern Cameroons on 1 October 1961 to determine the decolonization fate of the territory and the people of Southern Cameroons decided to join the independent Republic of Cameroon (EBAI, 2009, p. 632). It needs to be noted that the reunification of Southern Cameroons with the Republic of Cameroon took place despite the Anglophone-Francophone divide (KONINGS; NYAMNJOH, 1997, p. 207-229). Up to now, as the complainants stressed:

Southern Cameroons was [...] under British rule from 1858 to 1887, and then from 1915 to 1961, a total period of nearly 80 years. That long British connection left an indelible mark on the territory, bequeathing to it an Anglo-Saxon heritage. The territory's official language is English. Its educational, legal, administrative, political, governance and institutional culture and value systems are all English-derived.

(GUNME et al., 2004 apud ACHPR, *Kevin Mgwanga Gunme et al v. Cameroon*, 2009, para. 11).

For this reason, the initial association of the two territories took the form of a federal republic consisting of the two parts. From the outset, the political leadership of the French-speaking Republic of Cameroon preferred a unitary instead of federal structure: federalism was taken “as an unavoidable stage in the establishment of a strong unitary state” (KONINGS; NYAMNJOH, 1997, p. 210). Therefore, the federal constitutional and administrative structures adopted at the time of the reunification of Southern Cameroons with the Republic of Cameroon as a result of the 1 October 1961 plebiscite were progressively altered (STARK, 1976, p. xx). In the end, the federal structure of the state was abolished on 20 May 1972 in violation of the constitutional clauses establishing the federation. In short, this move has disappointed the people of Southern Cameroons, pushing them from demanding the restoration of the federal constitution to complete separation from Cameroon.

On 9 January 2003, *Kevin Mgwanga Gunme* and 13 others filed a complaint before the ACHPR against the Republic of Cameroon giving rise to a case already referred to in this article as *Southern Cameroons*. They alleged, among other violations, that for decades, the inhabitants of Southern Cameroons were victims of the denial of the right of self-determination. Two important points here are the relief that was sought and the remedy that should have been given. The complainants were not clear on the relief they sought. Among other things, they asked the ACHPR “to reaffirm the inherent, unquestionable and inalienable right of the people of the Southern Cameroons to self-determination” (GUNME et al., 2004 apud ACHPR, *Kevin Mgwanga Gunme et al v. Cameroon*, 2009, para. 11). The declaration issued on 3 April 1993 by elites of Southern Cameroons, the Buea Declaration, elaborates the relief further. It was declared that “the only redress adequate to right the wrongs done to Anglophone Cameroon and its people since the imposition of

the Unitary state is a return to the original form of government of the Reunified Cameroon” (ACHPR, *Kevin Mgwanga Gunme et al v. Cameroon*, 2009, para. 14). A declaration issued a year later in May 1994, the Bamenda Proclamation, laments that the constitutional proposals were not reacted upon. “Should the Government either persists in its refusal to engage in meaningful constitutional talks or fail to engage in such talks within a reasonable time,” the Proclamation hinted that there will follow a declaration of independence of the “Anglophone territory of Southern Cameroon” (ACHPR, *Kevin Mgwanga Gunme et al v. Cameroon*, 2009, para. 15). The said declaration of independence was made on 30 December 1999. In fact, there is a government in exile. It is, therefore, apparent that endorsement of this declaration was impliedly sought as a relief.

For a case or communication to be considered by the ACHPR, there are about seven admissibility requirements to be met but not all of them are relevant to this article. According to article 56(2) of the African Charter, Communications shall be considered by the ACHPR if they are “compatible” with the Charter of the Organization of African Unity or with the African Charter. The Charter of the Organization of African Unity is now replaced by the Constitutive Act of the African Union. The literal interpretation of this provision is that the complained violation should be compatible with one but not necessarily with both. This seems to be the position of the ACHPR because it stated only the “condition relating to compatibility with the African Charter” which the ACHPR found to have been met in *Southern Cameroons* (ACHPR, *Kevin Mgwanga Gunme et al v. Cameroon*, 2009, para. 71-72).

However, it seems that compatibility has been interpreted in such a manner that the main objectives and principles in the Constitutive Act are taken as the limits within which the rights in the African Charter shall be established. One of the main objectives of the African Union, as stated in article 3(b) of the Constitutive Act, is to “defend the sovereignty, territorial integrity and independence of its Member States”. One main principle stated in article 4(b) is “respect of borders existing on achievement of independence”. Indeed, in affirmation of *Katanga*, in *Southern Cameroons* too, the ACHPR felt “obliged to uphold the territorial integrity of the Respondent State. As a consequence, the ACHPR cannot envisage, condone or encourage secession, as a form of self-determination for the Southern Cameroons that will jeopardise the territorial integrity of the Republic of Cameroon” (ACHPR, *Kevin Mgwanga Gunme et al v. Cameroon*, 2009, para. 190). Very clearly, the ACHPR went to the extent of stating that the “African Charter cannot be invoked by a complainant to threaten the sovereignty and territorial integrity of a State party” (ACHPR, *Kevin Mgwanga Gunme et al v. Cameroon*, 2009, para. 191).

For a case to be considered by the ACHPR, local (national) remedies must have been exhausted, or their non-availability or ineffectiveness convincingly argued. Another interesting point in *Southern Cameroons* is that the complainants submitted that “there are no local remedies to exhaust in respect of the claim for self-determination because this is a matter for international forum and not a domestic one” further asserting that “the right of self-determination is a matter that cannot be determined by a domestic court” (ACHPR, *Kevin Mgwanga Gunme et al v. Cameroon*, 2009, para. 81). This claim is rather true. The fundamental problems that

societal heterogeneity posed for newly emerging African states when they began their political existence have not abated even more than forty years after the first African country achieved independence from colonial rule (SELASSIE, 2003, p. 52). In the face of this reality, the solution many African states adopted to this problem is forced national unity. Fearing that official recognition of diversity would foster divided loyalties and separatism, virtually all African states have avoided coming to terms with their heterogeneity and until the 1990s, it was highly uncommon for any state to reflect its diversity in its constitution or laws (SELASSIE, 2003, p. 53).

In fact, in *Southern Cameroons*, the respondent state agreed that “no local remedies exist with respect to the claim for self-determination” and it seemed to justify its position by arguing that the right of self-determination for the people of Southern Cameroon was solved when the latter, in the context of decolonization, used that right in favor of becoming part of the present day Cameroon (ACHPR, *Kevin Mgwanga Gunme et al v. Cameroon*, 2009, para. 82). There is some truth in this position in the sense that external self-determination in the context of former colonies is assumed to be a one-time choice and, once used, it is irreversible at will. The case of Somaliland and Eritrea are good examples. Because Somaliland voluntarily joined the other Somaliland to form what is now Somalia, it is argued that the right is irreversibly used (WELLER, 2008, p. 39-40). The case of Eritrea, a former Italian colony, was denied much sympathy from international law because in the 1950 Eritreans were considered to have chosen to be part of Ethiopia – a fact contested by Eritreans.

Yet, the fact that external self-determination in the colonial context is waived does not mean that there is no internal self-determination or remedial secession. In this sense, the respondent state erred gravely. As the ICCPR’s Human Rights Committee noted, the scope of self-determination is not restricted to colonized peoples but within states continues to regulate the constitutional and political processes (UNITED NATIONS, 1994, para. 296). The complainants’, as well as the main demand of the Anglophone part of Cameroon, has been for internal self-determination. It was only when this demand for a constitutional reform was not heeded that remedial secession was demanded. Self-determination is a peoples’ right and the ACHPR found that “the people of Southern Cameroon can legitimately claim to be a ‘people’” (ACHPR, *Kevin Mgwanga Gunme et al v. Cameroon*, 2009, para. 178).

Having found that Southern Cameroonians are “peoples”, the ACHPR then continued to address whether they are entitled to the right of self-determination (ACHPR, *Kevin Mgwanga Gunme et al v. Cameroon*, 2009, para. 182). This was a wrongly framed question as the right is explicitly provided in the African Charter. Rather, the ACHPR should have asked whether internal or external self-determination is justified. The ACHPR’s failure to separate internal from external self-determination (remedial secession) is fatal, and it explains the ACHPR’s confusion. The ACHPR seemed to deny remedial secession as part of the right of self-determination when it held that the “African Charter cannot be invoked by a complainant to threaten the sovereignty and territorial integrity of a State party”. However, *Katanga* established that a high scale of perpetual human rights violations can justify calling the territorial integrity of a state (ACHPR, *Katangese Peoples’ Congress v Zaire*, 1995, para. 6).

Again, the ACHPR set the cost of internal self-determination too high by using the standard for external self-determination (secession). The ACHPR resolved to investigate if the demand for constitutional reform (towards a federal constitutional order) is within the right of self-determination (ACHPR, *Kevin Mgwanga Gunme et al v. Cameroon*, 2009, para. 182). Rightly so, the ACHPR was convinced that the matter merits its determination and it “accepted that autonomy within a sovereign state, in the context of self-government, confederacy, or federation, while preserving territorial integrity of a State party, can be exercised under the Charter (ACHPR, *Kevin Mgwanga Gunme et al v. Cameroon*, 2009, para. 184-191). The respondent state wrongly asserted that internal self-determination “may be exercisable by the Complainants on condition that they establish cases of massive violations of human rights, or denial of participation in public affairs” (ACHPR, *Kevin Mgwanga Gunme et al v. Cameroon*, 2009, para. 191). The ACHPR wrongly agreed with the position of the State “that in order for such violations to constitute the basis for the exercise of the right of self-determination under the African Charter, they must meet the test set out in the Katanga case” (ACHPR, *Kevin Mgwanga Gunme et al v. Cameroon*, 2009, para. 194). The standard in *Katanga* is that there must be “concrete evidence of violations of human rights [...] coupled with the denial of the people, their right to participate in the government” (ACHPR, *Katangese Peoples’ Congress v Zaire*, 1995, para. 6). “Going by the Katanga decision,” the ACHPR thought that “the right of self-determination cannot be exercised, in the absence of proof of massive violation of human rights under the Charter” (ACHPR, *Kevin Mgwanga Gunme et al v. Cameroon*, 2009, para. 194).

However, this standard is for calling into question the territorial integrity of the state party. It is the standard that justifies external self-determination (remedial secession), not a federal order or any system of autonomy. The various autonomy systems must be exercised without affecting territorial integrity but to say that massive violations of human rights is the price of federalism or some sort of autonomy deprives the right of self-determination any meaningful content. The ACHPR would have been sound in concluding that the scale of violation that justifies remedial secession is not present in the respondent state. The ACHPR also turned internal self-determination almost unavailable to peoples who are minorities in a state by requiring that any form of internal self-determination “must take into account the popular will of the entire population, exercised through democratic means, such as by way of a referendum, or other means of creating national consensus. Such forms of governance cannot be imposed on a State Party or a people by the ACHPR” (ACHPR, *Kevin Mgwanga Gunme et al v. Cameroon*, 2009, para. 199).

It is apparent that there are majorities and minorities in almost every country. While the majorities, as in Cameroon, prefer a highly centralized form of government, minorities prefer autonomy and self-government. If the nature of government is left to a majoritarian democracy, minorities will be denied the autonomy they want. The case of Sri Lanka is a good example. It is for this reason that the Complainants argued that there is no domestic remedy and the respondent State agreed.

Given that the cost for internal self-determination is set too high, in the end, the ACHPR “is not convinced that the Respondent State violated Article 20 of the Charter”. Even though, in giving recommendations, the ACHPR tried to mitigate the error in not finding a violation of the right of self-determination by asking the state to “abolish all discriminatory practices against” the targeted people, the recommendations remain weak. Rather than ordering restoration of the federal constitutional order of 1961, which seems to satisfy the demand for internal self-determination, the ACHPR recommended the state enter “into constructive dialogue with the Complainants [...] to resolve the constitutional issues” (ACHPR, *Kevin Mgwanga Gunme et al v. Cameroon*, 2009, para. 215). The ACHPR should have been more specific and bolder with its recommendations.

3.3 *Kosovo: jurisprudence corrected*

The most serious consideration the right of self-determination has had is in the recent *Kosovo Advisory Opinion* of the ICJ, given two years later than *Southern Cameroons*. The reasoning of the ICJ clearly demonstrates the limitations of the ACHPR.

The *Kosovo Advisory Opinion* arose because the General Assembly asked the ICJ to decide if the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo is in accordance with international law (UNITED NATIONS, 2008). The ICJ pondered “[w]hether, outside the context of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation, the international law of self-determination confers upon part of the population of an existing State a right to separate from that State” (ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, 2010, para. 82). The majority opinion dodged many pertinent questions. However three judges were aware of the important task of norm-specification of international judicial institutions. They held that “Many of the legal issues involved in the present case require the guidance of the Court” and thus they offered separate opinions (ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Separate Opinion of Judge Sepúlveda-Amor, 2010, para. 35).

3.3.1 On secession and territorial integrity

Surprisingly, against the fairly established jurisprudence, the *Kosovo* majority opinion came with a disruptive stand. It held that “the scope of the principle of territorial integrity is confined to the sphere of relations between States” (ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, 2010, para. 81). Hence, “the Court considers that general international law contains no applicable prohibition of declarations of independence” by forces leading a province (ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, 2010, para. 84). Nevertheless, the seemingly disruptive ruling had support from some scholarship. According to article 2(4) of the UN Charter, “All members shall refrain in their international relations from the threat

or use of force against the territorial integrity [...] of any state”. Some scholars take article 2(4) as prohibiting “external military attacks, but not necessarily against subversion by Self-Determination” (SZASZ, 2000, p. 2). Article 2(4) does not imply that a state’s subjects are not bound to rebel. Indeed, in some of the hearings of the *Kosovo Advisory Opinion*, some states argued that the international legal norm of respecting the territorial integrity of States does not apply to peoples. The position of the ICJ has placed the ruling of the ACHPR in *Southern Cameroons* at the other extreme. In fairness, however, the majority opinion in *Kosovo* is not without criticism.

While taking the principle of territorial integrity as a matter of inter-state relation appears true to the early development of the principle among European states, in other parts of the world, and in Africa in particular, where the principle has taken other factors of legitimatization. Previously, the ICJ endorsed this line of argument stating famously that “the maintenance of the territorial status quo in Africa is often seen as the wisest course, to preserve what has been achieved by peoples who have struggled for their independence, and to avoid a disruption which would deprive the continent of the gains achieved by much sacrifice” (ICJ, *Burkina Faso v. Mali*, 1986, p. 554). In *Katanga* the ACHPR hinted that only higher proportion violations of human rights can bring territorial integrity of an African state into question. In the absence of such level of violations, *Katanga*, the province of Zaire that demanded endorsement of its desire to secede by the ACHPR, “is obliged to exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire”. Thus, the ACHPR felt “obligated to uphold the sovereignty and territorial integrity of Zaire” (ACHPR, *Katangese Peoples’ Congress v Zaire*, 1995, para. 5-6).

Indeed, “international law has developed a powerful reverence for the finality of national borders” (GEORGE, 2007, p. 188). Many scholars “assume some support for regarding *utipossidetis** as a norm of regional customary law in Latin America and Africa, if not a general norm as well, in the context of decolonization” (RATNER, 1996, para. 599). Some tried to determine if self-determination or territorial integrity is more powerful and “on whose side is International Law”. Admitting that such a decision is “a close call”, they note, “that important round appears to have gone to Territorial Integrity” (SZASZ, 2000, p. 3-4). Even though there have been a few situations where the international community has ignored the *utipossidetis* principle, “the preemption of the ‘*UtiPossidetis*’ principle by the international community is definitely the exception rather than the norm” (SHAH, 2007, p. 35). However, the ICJ has refused to regard *utipossidetis* as a peremptory norm (RATNER, 1996, p. 615). In addition, *utipossidetis* does not bar post-independence changes in borders carried out by agreement (RATNER, 1996, p. 600).

Therefore, the argument that territorial integrity is not a conflicting norm to the exercise of the right of self-determination by way of secession is not sound. To the contrary, the “people (population) of a territory, incarnated after

**Uti possidetis*, “as you possess” in Latin, is a principle in international law that territory and other property remains with its possessor. The principle was used to require that former colonies develop into states following colonial boundaries.

independence as the State, has a right to territorial integrity. It holds this right, post-independence, against the international community, and also against its own citizens and component ethnic groups, who are generally under a duty to respect it” (WHELAN, 1994, p. 114). In addition, state practice is clearly in favor of territorial integrity and self-determination is widely understood as meaning some sort of autonomy within the boundaries of the state.

One of the separate opinions in *Kosovo*, though countered by a dissenting opinion, is the most sound and most agreeable with the majority of scholarship. In this separate opinion, and taking the issue of self-determination in relation to territorial integrity, Judge Yusuf observed that “the right of self-determination has neither become a legal notion of mere historical interest nor has it exhausted its role in international law following the end of colonialism”. However, he added that “international law disfavors the fragmentation of existing States and seeks to protect their boundaries from foreign aggression and intervention. It also promotes stability within the borders of States”. Thus, post-colonial self-determination “is a right which is exercisable continuously, particularly within the framework of a relationship between peoples and their own State”. “In this post-colonial conception,” reasoned Judge Yusuf, “the right of self-determination chiefly operates inside the boundaries of existing States in various forms and guises [...] in which the population or the ethnic group live, and thus constitute internal rights of self-determination” (ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, separate opinion by Judge Yusuf, 2010, para. 7-9).

Judge Yusuf further noted that claims to external self-determination by such ethnically or racially distinct groups pose a challenge to international law as well as to their own State, and most often to the wider community of States. To him, “there is no general positive right under international law which entitles all ethnically or racially distinct groups within existing States to claim separate statehood, as opposed to the specific right of external self-determination which is recognized by international law in favor of the peoples of non-self-governing territories and peoples under alien subjugation, domination and exploitation”. “Thus,” he continued, “a racially or ethnically distinct group within a State, even if it qualifies as a people for the purposes of self-determination, does not have the right to unilateral secession simply because it wishes to create its own separate State, though this might be the wish of the entire group”. The reason, according to Judge Yusuf, is that the “availability of such a general right in international law would reduce to naught the territorial sovereignty and integrity of States and would lead to interminable conflicts and chaos in international relations” (ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, separate opinion by Judge Yusuf, 2010, para. 10).

However, in view of its growing emphasis on human rights and the welfare of peoples within state borders, Judge Yusuf also noted that international law “pays close attention to acts involving atrocities, persecution, discrimination and crimes against humanity committed inside a State”. Judge Yusuf also recognizes that international law does not turn a blind eye to the plight of such groups, particularly in those cases where the State not only denies them the exercise of their right of

internal self-determination but also subjects them to discrimination, persecution and egregious violations of human rights or humanitarian law. “Under such exceptional circumstances,” wrote Judge Yusuf, “the right of peoples to self-determination may support a claim to separate statehood provided it meets the conditions prescribed by international law, in a specific situation, taking into account the historical context” (ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, separate opinion by Judge Yusuf, 2010, para. 7, 11).

Judge Yusuf added that:

If a State fails to comport itself in accordance with the principle of equal rights and self-determination of peoples, an exceptional situation may arise whereby the ethnically or racially distinct group denied internal self-determination may claim a right of external self-determination or separation from the State which could effectively put into question the State’s territorial unity and sovereignty.

(ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, separate opinion by Judge Yusuf, 2010, para. 12).

He then offered helpful examples, which may legitimize a claim to external self-determination:

Such as the existence of discrimination against a people, its persecution due to its racial or ethnic characteristics, and the denial of autonomous political structures and access to government [...] Nevertheless, even where such exceptional circumstances exist, it does not necessarily follow that the concerned people has an automatic right to separate statehood. All possible remedies for the realization of internal self-determination must be exhausted

(ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, separate opinion by Judge Yusuf, 2010, para. 16).

3.3.2 Majorities v. minorities on self-determination

As noted above, the people in a state are not homogeneous in their aspirations. For this reason, no state can devise a system of governance that satisfies every citizen or resident. This makes the search for a formula that maximizes the level of satisfaction of a state’s population on a given policy relevant but such a formula has not been simple.

The existence of groups of people with the same desires seems a fortunate situation – smaller group of people can be permitted to be governed based on their desires and preferences. This postulation, however, assumes that one population group’s desire is not a source of disappointment to others – an assumption which would allow dividing the population of a state into smaller population groups with similar desires. However, this assumption is not always true. For example, federalism pleases one segment of Sri Lankans and deeply disappoints others. Union with Greece pleases Greek Cypriots and annoys Turkish Cypriots. Religious

fundamentalists of one state are not pleased when same-sex marriage is permitted in the state next door, and those wishing an end to capital punishment are not happy when the neighboring state allows it.

In addition, for a state to allow groups to be governed in accordance with their desire and will, for practical purposes the group should be defined on more permanent bases and there should be many areas of agreement such as regarding language, culture, livelihood and geography. It is this communality with a higher level of permanency that makes the argument of dividing the “peoples” to further smaller “peoples” with common desires attractive. Ethnic minorities and indigenous peoples, as defined below, satisfy the permanency of the communality requirement. If the two requirements are not met, a state cannot continue to form and reform smaller groups in order to maximize the will of the people. In addition, endlessly dividing peoples to smaller and smaller groups would eventually end into leaving individuals live their life as they wish. In such a situation, group affairs, as public governance is, becomes irrelevant. There is no need for administration if every individual can live freely as he or she desires.

There is little literature on the will of the people as the basis of the authority of government – a concept set out in article 21 of the Universal Declaration of Human Rights (UDHR). Works on the drafting history of the UDHR do not tell anything about who the people are and whether the people are divisible (MORSINK, 1999, p. 66). Even in the most detailed attention to article 21 where the UDHR is treated article by article, it evaded the mind of the participants that the “people” needs a definition and more rules are needed to regulate a situation of divided will. Thus, “there is a more immediate challenge relating to article 21: how to ensure that the right of individuals, groups and peoples to a minimum of ‘internal’ self-determination” (ROSAS, 1999, p. 451).

Regarding mutually exclusive desires, a state has to have a formula by which a certain desire overrides others. For a long time, this formula has been majoritarian democracy. However, majoritarian democracy has injustices, especially in situations when segments of a state’s population *continuously* find themselves losing to the majority. To avoid the harshness of this formula, democracies protect minorities through entrenched rights and the use of dispassionate judges. Of course, this comes in the context of the majorities willfully putting a limit to their might. “Although one may believe that majority rule needs to be limited and constrained in various ways,” some scholars convincingly argue that in a creation *ex nihilo* (creating for the first time), “these limits and constraints can ultimately have no other normative foundation than a simple majority decision”. Any legal limitation on the will of the majority is a result of “a simple majority deciding that a simple majority may not be the best way to decide some issues” (ELSTER, 1994, p. 179-180).

Before the advent of IHRL, a constitution-making may have been creation *ex nihilo*. At present, however, to some extent IHRL regulates the constitutional order of states. This means that not everything is at the mercy of the simple majority. It is not fair, nor does it serve the purpose of international law, to tell complainants to go back home and accept the result of a referendum. In this context, the ACHPR should have been more specific and bolder with its recommendations.

It is helpful to recall that the Human Rights Committee of the ICCPR has convincingly held that the right of self-determination has not expired with the end of colonialism but within states continues to regulate the constitutional and political processes (UNITED NATIONS, 1994, para. 296). A constitution-making or revision process is not a one-time event relegated to history. Rather, “We live in an era of constitution making. Of close to 200 national constitutions in existence today, more than half have been written or re-written in the last quarter century” (HART, 2003, p. 1). Indeed, there is an increase in revision of constitutions. Especially as the Arab Spring has led to the fall of many dictatorships and autocratic regimes, there is a proliferation of demands for new constitutions.

In writing a new constitution or revising the old one, grievances of minorities are likely to arise. For this reason, the role of IHRL in framing or revising a constitution for a state is getting serious attention. Recently, two scholars took the ICCPR as the principal source of universal procedural norms that all states contemplating the drafting or revision of their constitutions are well advised to consider (FRANCK; THIRUVENGADAM, 2010, p. 3). A notable book on a constitution-making or revising process notes a recent and growing role of IHRL as a body of guiding principles for the process of writing and content of a constitution (BRANDT et al., 2011, p. 62). Indeed, throughout the twentieth century, IHRL has grown from a narrow set of norms to governing detailed issues concerning the way in which governments ought to be structured. Therefore, IHRL is now an embryo of an emerging *world constitution* (EVANS, 2005, p. 1048).

The ruling of the ACHPR appears even weaker when examined in the light of its previous ruling that “international human rights standards must always prevail over contradictory national law,” including a constitution, because to “allow national law to have precedence over the international law” “would defeat the purpose of” international law (ACHPR, *Media Rights Agenda, Constitutional Rights Project, Media Rights Agenda and Constitutional Rights Project v. Nigeria*, 1999, para. 66). In this context, *erga omnes* obligations, ratified (by the state about to write or revise a constitution) or un-ratified treaties of almost universal ratification, customary international law and soft-laws have different levels of authority ranging from being binding to merely persuasive.

So far, a constitution-making or revision process and the content of a constitution have been explained by terminologies and concepts of political science and constitutional law. However, these concepts and terminologies are closely related to provisions of IHRL. For example, the right of self-determination (as a component of IHRL) and federalism (as a concept of government, thus the area of political science and constitutional law) are related, but one must note that the latter carries a binding legal element. For this reason, numeric minorities are likely to use international law as a supreme law with which the national constitution must comply and they are more likely to petition treaty monitoring bodies for enforcement. Such cases, complex as they are, should be welcomed as the alternative is that minorities will rise with arms to realize their claim.

Even after identifying the “people/s”, the content of the right of self-determination needs fleshing out. There is no reason why “peoples” who have

the right of self-determination should not get the protection accorded to ethnic minorities who are regarded as not having a right to territorial autonomy. The rights of ethnic minorities are the most proximate provisions to define the content of internal self-determination within a state that must be respectful of territorial integrity.

4 Conclusion

Many provisions of IHRL are indeterminate. However, legislation alone does not make the law so specific that judges are unnecessary: the specific part of the law is provided by those institutions authorized to interpret or apply the law to facts. It must be for this reason that international law explicitly recognizes judicial decisions and the teachings of the most highly qualified publicists of the various nations as subsidiary means for the determination of rules of law. Judicial and quasi-judicial human rights treaty monitoring bodies have contributed to the process of norm specification beyond human rights treaties through general comments, resolutions and case law, perhaps to the extent that it looks too much like law-making from the bench. On the other hand, in many instances, these bodies have avoided complex principles that desperately need elaboration or they have disposed of them by inferior reasoning that further obscures the principles. In fairness, these bodies suffer from a severe lack of resources that has clearly affected the quality of their products.

On the right of self-determination, which so vital in Africa, the ACHPR had two relevant cases. In the first one, *Katanga*, the ACHPR offered less than one page of reasoning though, significantly, the existence of remedial secession as part of the right of self-determination is indirectly acknowledged. More than ten years later, the ACHPR was confronted with *Southern Cameroons*. Unfortunately, not only did the ACHPR fail to elaborate *Katanga*, but it also obscured the important contribution of *Katanga* by failing to distinguish internal from external rights of self-determination. Consequently, the ACHPR set the standard for internal self-determination too high by using the standard for secession. Furthermore, the ACHPR has made the right of internal self-determination almost unavailable for “peoples” (the main claimants) who could be numeric ethnic minorities. The ACHPR did so by subjecting the nature of self-determination to majoritarian democracy. As a result, the ACHPR gave soft recommendations that lack specificity.

The ACHPR erred in holding that that the current political regime (unitary state) and constitution of Cameroon do not violate the right to self-determination of the people of Southern Cameroons. Facts before the ACHPR show that the English-speaking Cameroon opted to be part of the French-speaking Cameroon with great hesitation and on the condition that when the two became one state, the form of government would be federal. Shortly after, the federal constitution was dismantled without the consent of the people in Southern Cameroons. The move from a federal to a unitary form of government entails a violation of the right to self-determination of Southern Cameroons. This is exactly the case between Eritrea and Ethiopia – a case on which the complainants relied in part. In 1952,

the UN federated Eritrea and Ethiopia, giving the first broad autonomy. In less than ten years, Ethiopia abrogated and replaced the federal constitution with a unitary one. Eritreans were outraged. The Permanent Peoples' Tribunal found this to be a violation of the right of self-determination of Eritreans. Eventually, a lengthy (30 years) war brought settlement to the case, as a victorious Eritrea went beyond internal self-determination to "secession".

The ACHPR would have been right in inviting Cameroon, the respondent state, to return to the federal constitutional order of 1961 under which the complainants and the people they represent had meaningful levels of internal self-determination. By failing to do so, the ACHPR may as well have contributed to the belief that the right of self-determination is realized not in a court of reason or diplomatic quarters but when claimants go to the bush and amass power.

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RESUMO

Os órgãos de monitoramento dos tratados de direitos humanos têm contribuído para o processo de especificação de normas além dos próprios tratados. No entanto, em alguns casos, esses órgãos têm evitado princípios complexos que precisam urgentemente de elaboração. Em relação ao direito à autodeterminação, vital na África, a Comissão Africana dos Direitos Humanos e dos Povos (CADHP) teve dois casos relevantes: *Katanga* (disposto em menos de uma página) e *Southern Cameroons*, que, em vez de aperfeiçoar, obscureceu a importante contribuição do caso *Katanga* ao não distinguir os aspectos interno e externo do direito à autodeterminação. Consequentemente, a CADHP fez com que o direito à autodeterminação interna quase não esteja disponível aos “povos”. Este artigo examina criticamente o raciocínio da CADHP.

PALAVRAS-CHAVE

Autodeterminação – Direito Constitucional – Autonomia – Secessão – *Southern Cameroons*

RESUMEN

Los órganos de vigilancia de los tratados de derechos humanos han contribuido con el proceso de especificación de las normas más allá de los tratados de derechos humanos. Sin embargo, en algunos casos, dichos órganos no se han ocupado de principios complejos que necesitan desesperadamente ser elaborados. Sobre el derecho a la autodeterminación, un derecho esencial para África, la Comisión Africana de Derechos Humanos y de los Pueblos (CADHP) tuvo dos casos relevantes: *Katanga* (cuya decisión tiene menos de una página de largo) y *Southern Cameroons*, el cual, en lugar de ampliar *Katanga*, ocultó el importante aporte de este último caso al no distinguir el derecho a la autodeterminación interna y externa. En consecuencia, la CADHP ha hecho que el derecho a la autodeterminación interna prácticamente deje de estar disponible para los “pueblos”. El presente artículo examina en forma crítica el razonamiento de la CADHP.

PALABRAS CLAVE

Autodeterminación – Derecho constitucional – Autonomía – Secesión – *Southern Cameroon*