

CASE NOTE

FOREIGN STATE ASSISTANCE IN ENFORCING THE RIGHT TO SELF-DETERMINATION UNDER THE AFRICAN CHARTER: *GUNME & ORS V. NIGERIA*

The African Charter on Human and Peoples' Rights (African Charter) allows any state party that has good reason to believe that another state party has violated the provisions of the Charter to make a complaint (communication) to the African Commission on Human and Peoples' Rights (African Commission).¹ But, in spite of persistent reports of widespread human rights violations in Africa, there is no evidence that state parties make use of this procedure to report each other to the African Commission for violations of the provisions of the Charter.² State parties are generally not keen to complain about human right violations by another state of its own nationals within its territory. The reason for this reluctance may lie in the well-known adage that people who live in glass houses should not throw stones. However, if the decision in the recent Nigerian case of *Gunme & Ors v. Attorney General of the Federal Republic of Nigeria*³ is good law and is followed in other countries, then an important way by which to overcome this reluctance on the part of state parties may have been established. In that case the Federal High Court of Nigeria in Abuja allowed 12 Cameroonians, who alleged that their right to self-determination under the African Charter had been violated by the Republic of Cameroon, to maintain an action in Nigeria for an order requiring Nigeria, as a state party to the African Charter, to present the case of the peoples of Southern Cameroons for self-determination and independence before the International Court of Justice (ICJ) and the United Nations General Assembly (UNGA).

In other words, victims of human and peoples' rights violations in one African country were able, by judicial process in another country (the innocent state), to compel the innocent state to complain at the international level about the violations of the plaintiffs' Charter rights in the plaintiffs' own state. The case rests on the assertion that a state party to the African Charter is under a legal duty to assist the plaintiffs in their claims to exercise the right of self-determination, including independence from another state party. This is a remarkable decision which raises questions about the controversial issue of the extent of the right to self-determination. This note examines the extent to which the plaintiffs' right to self-determination includes the right to secession or independence and whether it is correct to say that under the African Charter a state party is under a legal duty to assist a people in another state to assert or enforce their right to self-determination. Before dealing with those issues, it is helpful first to explain the claim and the basis on which the Nigerian court assumed jurisdiction.

¹ Articles 47 et seq. of the African Charter.

² All the reported cases that have come before the African Commission seem to have been brought by individuals under the individual complaints procedure (other communications): see articles 55 et seq.

³ Suit No. FHC/ABJ/CS/30/2002.

The claim

The plaintiffs were from that part of Cameroon which prior to independence in 1961 was known as Southern Cameroons and administered by the United Kingdom under the UN Trusteeship system. This part of Cameroon is often referred to as Anglophone Cameroon. To understand the plaintiffs' claim more fully, a brief note of the constitutional and political evolution of Cameroon may be helpful. In 1961 the people of Southern Cameroons voted in plebiscite to attain independence by joining French-speaking Cameroon (Francophone Cameroon) which had already attained independence from France and had become the Republic of Cameroon. Following unification the new country was known as the Federal Republic of Cameroon.⁴ The federation was later replaced by a unitary state under the name of the United Republic of Cameroon,⁵ which was subsequently changed to the current name of the Republic of Cameroon.⁶ Francophone Cameroon is by far the larger part of the union. Since independence and unification, political power in Cameroon has remained in the hands of the Francophone majority. It is common knowledge that there is widespread disaffection among the Anglophone people who feel marginalized and even discriminated against. This feeling of alienation has driven many in Anglophone Cameroon to advocate for a termination of the union and the independence of Southern Cameroons as a separate state.⁷ The applicants in this case share that aspiration. Their action before the Federal High Court of Nigeria was "in a representative capacity for themselves and on behalf of the peoples of Southern Cameroons".

Their claim in essence was that the right of the people of Southern Cameroons to self-determination has been violated by the state of Cameroon which has refused to yield to the democratic wishes of the people of Southern Cameroons for self government and independence. They supported their claim by reference to various historical documents going back to colonial times. They also based their claim on the results of an unofficial (i.e. privately conducted) signature-referendum which, they argued, clearly demonstrated that an overwhelming majority of the people of Southern Cameroons were in favour of independence. They then argued that under articles 1 and 20 of the African Charter the Federal Republic of Nigeria has "a legal duty to take up the claim of the Peoples of Southern Cameroons to self-determination and independence".⁸

By way of relief they sought three remedies. First, a *declaration* that under articles 1 and 20 of the African Charter Nigeria has a legal duty to place before the ICJ and UNGA the claim of the peoples of Southern Cameroons to self-determination and their declaration of independence. Second, an *order* compelling Nigeria to carry out the duty and place before the ICJ and UNGA and ensure diligent prosecution to conclusion, the claim of the peoples of Southern Cameroons to self-determination and their declaration of independence. And,

⁴ Under the 1962 Constitution.

⁵ In 1972.

⁶ Since 1984.

⁷ This is the avowed objective of movements such as the Southern Cameroons National Council (SCNC), the organizers of the demonstrations which led to the arrests that resulted in the case of *Nya Henry* discussed in my article in this issue.

⁸ Paragraph 63 of the applicants' affidavit in support. It was also argued in the same paragraph that the Federal Republic of Nigeria has a similar duty under article 2(3) of the Charter of the United Nations. But this note is not concerned with that contention.

thirdly, a perpetual *injunction* restraining the Government of Nigeria from treating or continuing to treat or regard the Southern Cameroons and the peoples of that territory as an integral part of the Republic of Cameroon.

In answer to these claims the Attorney General of Nigeria filed a motion of preliminary objection. Three objections were advanced⁹: (i) that the court lacked jurisdiction to entertain the suit filed by the plaintiffs on the ground that the plaintiffs were “not Nigerians”, (ii) that the suit is an invitation to the Federal Republic of Nigeria to interfere in the domestic affairs of the Republic of Cameroon, and (iii) that the ICJ is the appropriate forum for the plaintiffs’ claim.

Jurisdiction

The argument that the court lacked jurisdiction was based primarily on the fact that the plaintiffs were “non-Nigerians”. The contention was that since the plaintiffs were not Nigerians and were not even resident in Nigeria they could not maintain a claim of this kind in a court in Nigeria. The Attorney General took the view that the court would have had jurisdiction if the claim was one in respect of a contract entered into by the plaintiffs with the Government of Nigeria or if the claim was in respect of a tort committed by the Federal Government of Nigeria. But since the claim was neither in contract nor tort but rather for an order of the court compelling the Government of Nigeria to take up their case to the ICJ and UNGA and for a perpetual injunction restraining the Federal Republic of Nigeria from regarding the Peoples and Territories of Southern Cameroons as an integral part of the Republic of Cameroon, the plaintiffs, it was argued, as foreigners not resident in Nigeria could not maintain the claim for the relief sought and therefore the court lacked jurisdiction. There are, I think, two aspects to this objection. The first stems from the fact that the plaintiffs were not Nigerian nor were they resident in Nigeria. The second flows from the nature of the remedy sought.

On the first issue, it is submitted that UKEJE, C.J., rightly held that it was a misconception for the Attorney General to argue that because the plaintiffs were foreigners not resident in Nigeria they could not sue the Government of Nigeria in Nigeria. The reason is because under section 6(6)(b) of the 1999 Constitution of the Federal Republic of Nigeria¹⁰ judicial powers “extend to all matters between persons, or between government or authority and any person *in Nigeria*, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person” (emphasis added). As the plaintiffs were in Nigeria at the time of the action, the learned Chief Judge held that the court clearly had jurisdiction in respect of the plaintiffs under the Constitution.

However, it is submitted that the Court of Appeal cases relied on by the learned Chief Judge in arriving at that conclusion were not directly relevant to the point in the case. It is important to notice that section 6(6)(b) deals with two

⁹ A fourth objection, that the suit was statute-barred under Nigerian law, was abandoned during the hearing when the Attorney General realized, after the filing of the Objection, “that the Limitation of Action Decree 1966 has been omitted from the Laws of Nigeria 1990, currently in force”.

¹⁰ The 1999 Constitution is applied by the courts even though it has been strenuously argued that, due to its provenance from a military junta that seized power by *coup d’etat*, the 1999 Constitution should be declared a nullity: see T.I. Ogowewo, “Why the judicial annulment of the Constitution of 1999 is imperative for the survival of Nigeria’s democracy” [2000] 44 JAL 135.

categories of case. The first relates to “matters between persons”. In this class of case the judicial powers of the court apply whether or not the plaintiff is in Nigeria. The second class of case covers matters “between government or authority and any persons in Nigeria”. In this class of case there is a requirement that the plaintiff should be in Nigeria.¹¹ All the Court of Appeal cases¹² cited by the Chief Judge are cases which fall in the first category (actions between persons). The learned Chief Judge failed to notice the difference between the two categories of case and therefore applied Court of Appeal cases dealing with the first category to the *Gunme* case which falls in the second category. There appears to be no precedent on the second category of case. Yet even in the absence of precedent, it is submitted that the actual decision arrived at by the Chief Judge is correct simply because the plaintiffs were in Nigeria at the time of the action so that the requirement in the second category was satisfied. The court therefore had jurisdiction in respect of the plaintiffs.

Whether the court had jurisdiction in respect of the subject matter of the claim turned on whether the action involved a determination of the plaintiffs’ “civil rights and obligations” within the meaning of section 6(6)(b). On this point the court did not have much difficulty. For, although the phrase “civil rights” in that provision was very early construed narrowly to mean “private legal rights”,¹³ thus excluding privileges,¹⁴ even under the narrow interpretation it is clear that the plaintiffs’ action in this case involved a determination of their civil rights, namely, rights conferred under the African Charter which was in force in Nigeria.¹⁵

The second aspect of the objection focused on the nature of the relief sought (injunction or specific performance against the Government). The objection suggested that the courts do not have jurisdiction to grant such remedy in an action of this kind. But UKEJE, C.J., rejected that view as misguided. The learned Chief Judge accepted the submission advanced for the plaintiffs that the Constitution gives the courts jurisdiction to grant such relief against the Government. UKEJE, C.J., cited the proviso to section 251(1)(s) of the Constitution which states that “nothing in the provisions of paragraphs (p), (q) and (r) of this subsection shall prevent a person from seeking redress against the Federal Government or any of its agencies in an action for damages, injunction or specific performance, where the action is based on any enactment, law or equity”. Since, as the judge held, “all the claims of the plaintiffs are provided for in the African Charter of Human and Peoples’ Rights”, it followed that the plaintiffs’ claims were based on an enactment, namely, the African Charter on Human

¹¹ It has even been suggested that the phrase “in Nigeria” should be deleted from section 6(6)(b) to make it clear that the courts have judicial power to adjudicate in a case between the government and a person outside Nigeria: see Tunde I. Ogowewo, “Wrecking the law: how article III of the Constitution of the United States led to the discovery of a law of standing to sue in Nigeria” (2000) 26 Brooklyn J.L. 527, 576, n. 199.

¹² Namely, *MBCI Ltd v. Europa Traders Ltd* (1990) 6 NWLR (Pt 154) 36 and *Watamal (Singapore) v. Liz Olofin* (1998) 1 NWLR (Pt 533) 311.

¹³ E.g. *Adesanya v. President of the Federal Republic of Nigeria* (1981) 1 All N.L.R. (part 1) 1, 39.

¹⁴ Such as the grant of a licence. For a damning account of the dramatic consequences flowing from this interpretation see Ogowewo, *op. cit.* n. 12.

¹⁵ Although there was at one time some doubt as to the extent to which the African Charter was applicable in Nigeria (e.g. U. Umzurike, *The African Charter on Human and Peoples’ Rights*, The Hague, 1997, 111), these doubts have now been laid to rest by the decision of the Nigerian Supreme Court in *General Sani Abacha v. Chief Gani Fawehinmi* [2000] 6 NWLR 228, where it was held that the African Charter has full force of law in Nigeria and the courts must give effect to it just as any other laws.

and Peoples' Right (Ratification and Enforcement) Act 1983¹⁶ which gives the African Charter force of law in Nigeria.

Having dismissed the Attorney General's objection based on lack of jurisdiction, the judge declined to rule on the other two issues raised in the preliminary objection, namely, (i) whether the plaintiffs' action is an invitation to interfere in the internal affairs of the Republic of Cameroon and (ii) whether the ICJ is the proper forum for the plaintiffs to take their action. The judge took the view that those were issues to be determined at the substantive trial rather than at the interlocutory stage. Following the ruling that the court had jurisdiction to entertain and to determine the substantive claims, the parties arrived at a settlement as a result of which the proceedings were stayed. The terms of the settlement are set out in the order of the Federal High Court as follows.

"The Federal Republic of Nigeria shall institute a case before the International Court of Justice concerning the following:

- (a) Whether the Union envisaged under the Southern Cameroons Plebiscite 1961 between La Republique du Cameroun and Southern Cameroons legally took effect as contemplated by the relevant United Nations Resolutions particularly United Nations General Assembly Resolution 1352 (XIV) of 16 October 1959 and United Nations Trusteeship Council Resolution 2013 (XXIV) of 31 May 1960.
- (b) Whether the termination by the Government of the United Kingdom of its trusteeship over the Southern Cameroons on 30 September 1961 without ensuring prior implementation of the constitutional arrangements under which the Southern Cameroons and La Republique du Cameroun were to unite as one Federal State was not in breach of Articles 3 and 6 of the Trusteeship Agreement for the Territory of the Cameroons under British Administration approved by the General Assembly of the United Nations on 13 December 1946, the United Nations General Assembly Resolutions 1352 of 16 October 1959, 1608 of 21 April 1961, the United Nations Trusteeship Council Resolutions 2013 (XXIV) of 31 May 1960 and Article 76(b) of the Charter of the United Nations.
- (c) Was the assumption of Sovereign Powers on 1 October 1961 and the continued exercise of same by the Government of La Republic du Cameroun over Southern Cameroons (after the termination of the Government of the United Kingdom of its Trusteeship over the territory) legal and valid when the Union between Southern Cameroons and La Republique du Cameroun contemplated by the Southern Cameroons Plebiscite 1961 had not legally taken effect?
- (d) Whether the peoples of Southern Cameroons are not entitled to self-determination within their clearly defined territory separate from La Republique du Cameroun.
- (e) Whether it is the Southern Cameroons and not La Republique du Cameroun that shares a maritime boundary with the Federal Republic of Nigeria.

The Federal Republic of Nigeria shall take any other measures as may be necessary to place the case of the peoples of the geographical territory known as at 1 October 1960 as the Southern Cameroons for self-determination before

¹⁶ Chapter 10 of the Laws of the Federation of Nigeria 1990.

the United Nations General Assembly and any other relevant international organizations.”

The questions in (a) to (c) involve interesting points concerning the United Nations and the termination of the United Kingdom Trusteeship over Southern Cameroons. But these are beyond the scope of this note. Here the question raised in (d) relating to self-determination and the right to secession will be considered as well as the question in (e) which makes a link between this case and the boundary dispute case between Cameroon and Nigeria currently before the ICJ.

Self-determination and the right to secession

The question whether the people of Southern Cameroons have a right of self-determination which includes secession or independence from the Republic of Cameroon is a controversial one in international law. It is true that self-determination is now a legal principle in international law.¹⁷ But the parameters of the principle are not yet clearly defined. It is now settled that, in the context of decolonization the right of all peoples to self-determination is a recognized right in international law.¹⁸ And it is also clear that beyond the context of decolonization self-determination has an application within the territorial framework of independent states. This *internal* self-determination concerns the right of peoples to participate in the governance of their state.¹⁹ But, beyond this, the question whether there is a right of *external* self-determination in the form of secession is not free from controversy. And on this point, it is submitted that the position under international law may not be identical with that under the African Charter.

Under international law

It is by no means clear whether a right of secession from an independent state is recognized under international law in any circumstances. The difficulty with a right of secession is that it appears to conflict with a well-established principle of international law, namely, the principle of territorial integrity of states.²⁰ This principle protects the territorial framework of independent states in order to maintain international peace and security. A particular application of this doctrine is the principle of *utis possidetis juris*, which is to the effect that boundaries existing at the time of independence cannot be altered except with the consent of all the relevant parties.²¹ Therefore one view is that because of the principle of *utis possidetis juris* the right of self-determination does not include the right of secession

¹⁷ The principle is referred to in articles 1 and 55 of the United Nations Charter, emphasized in the Declaration on the granting of Independence to Colonial Countries and Peoples adopted by the general Assembly in 1960 (Resolution 1514 (XV)), the 1966 International Covenant on Human Rights, and the 1970 Declaration of Principles of International Law Concerning Friendly Relations (Resolution 2625 (XXV)).

¹⁸ See e.g. the *East Timor (Portugal) v. Australia* case (ICJ Reports, 1995, pp. 90, 102) where the ICJ accepted that the right of peoples to self-determination, has an *erga omnes* character.

¹⁹ This necessarily involves other human rights principles relating to democratic governance, such as the right to take part in the conduct of public affairs and to vote, freedom of assembly, freedom of association and freedom of speech.

²⁰ This principle is emphasized in the Colonial Declaration (General Assembly resolution 1514 (XV) 1960 and in the Declaration on Principles of International Law Concerning Friendly Relations (Resolution 2625 (XXV) 1970. See also Organization of African Unity resolution 16(1) 1964.

²¹ See *Burkina Faso/Mali* case, ICJ Reports, 1986, pp. 554, 566–567; 80 ILR, 440, 470–471.

from an independent state. For example, in Opinion No. 2 of the Arbitration Commission of the European Conference on Yugoslavia,²² it is said that “*whatever the circumstances*, the right to self-determination must not involve changes to existing frontiers at the time of independence (*uti possidetis juris*) except where the states concerned agree otherwise”.²³ Some commentators argue that this view represents the true position of international law.²⁴ But others regard such a view as too rigid. A contrary, more flexible view which has been advanced is that the principle of territorial integrity is important and must be taken into account, but it is not so paramount that it completely negates the right of secession whatever the circumstances. According to this view, the right of self-determination includes the right of secession from an independent state, but only in exceptional circumstances. Thus Cristescu, a Rapporteur of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, states²⁵ that: “The right of secession unquestionably exists, however, in a special, but very important case: that of peoples, territories and entities subjugated in violation of international law. In such cases, the peoples have the right to regain their freedom and constitute themselves independent sovereign States.” Other commentators have taken a similar view that the right of secession is available, as a last resort, at least where a people is prevented from a meaningful exercise of the right of self-determination internally.²⁶ And it has been said that “without a right to secession in the case of unreasonable discrimination, which cannot be evaded by other means, the right to self-determination would be a hollow shell.”²⁷

The uncertainty in international law, as manifested in the conflicting opinions above, is reflected in the recent opinion of the Supreme Court of Canada in relation to a question whether international law gives Quebec the right to secede from Canada unilaterally.²⁸ The court noted that a number of commentators have asserted that when a people is blocked from meaningful exercise of its right of self-determination internally, it is entitled, as a last resort, to exercise it by secession. The Court then went on to say that “the Vienna Declaration requirement that governments represent ‘the whole people belonging to the territory without distinction of any kind’ adds credence to the assertion that complete blockage may potentially give rise to a right of secession”.²⁹ The court concluded that “it remains unclear whether this . . . proposition actually reflects an established international law standard”.³⁰ It declined to make a determination one way or the other because it was unnecessary to do so in the circumstances of the case, since in the Quebec context the circumstances did not even approach

²² Opinion No. 2 of the Arbitration Commission of the European Conference on Yugoslavia, 92 I.L.R., 167, 168.

²³ Emphasis added.

²⁴ M. Shaw, *International Law*, Cambridge, 1997, 355.

²⁵ A. Cristescu, *The Right to Self-Determination: Historical and Current Development on the Basis of United Nations Instruments*, UN Doc. E/CN.4/Sub.2/404/Rev.1, New York, 1981, para. 173.

²⁶ See, e.g. A. Cassese, *Self-Determination of Peoples. A Legal Appraisal*, New York, 1995, 334; see also C. Tomuschat, “Self-determination in a post-colonial world”, in C. Tomuschat (ed.), *Modern Law of Self-Determination*, Dordrecht, 1993, 1, 16, for a view that all relevant international instruments are adamant in rejecting a right of secession “except as a remedy of last resort”.

²⁷ D. Murswiek, “The issue of a right of secession—reconsidered”, in Tomuschat op. cit., 21, 26.

²⁸ *Reference re Secession of Quebec* [1998] 1 SCR 217. This was a reference by the Government of Canada relating to the secession of Quebec. Quebec declined to appear before the Supreme Court but an *Amicus Curiae* was appointed and the court heard the opinions of a number of international lawyers.

²⁹ *Ibid.*, 285.

³⁰ *Ibid.*, 286.

the threshold of a blockage from exercising internal self-determination. It is worthy of note that, in its opinion, the Supreme Court of Canada left open the possibility of the right of secession under international law in extreme cases.

So, even if in the current state of international law the principle of self-determination is not wide enough to include the right to secession from independent states, it is clear that there is a tide of opinion rising in that direction. In recognition of this trend, one commentator has remarked that “self-determination as a concept is capable of developing further so as to apply to sovereign states in various ways including secession, but that has not as yet convincingly happened”.³¹ That may be the position under international law. But it has already happened under the African Charter, as I will endeavour to show below.

Under the African Charter

The right to self-determination under the African Charter is stated in article 20(1) in these terms:

“All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.”

It has been suggested that under the African Charter the principle of self-determination is to be interpreted in a narrow sense as a right belonging to the state as a whole rather than to sections of the population within a state.³² In other words, self-determination under the African Charter does not include the right to secession or independence from an already independent state. Thus one commentator has suggested that under the African Charter the word “peoples” is likely to be interpreted to mean only independent states and that this view “was confirmed in the *Katangese Peoples’ Congress v. Zaire*, where the [African] Commission declared that Katanga was obliged to exercise a variant of self-determination that was compatible with the sovereignty and territorial integrity of Zaire”.³³ It is true that on the facts of that case the African Commission rejected Katanga’s claim to independence. But it is wrong to suggest that the Commission took the view that the people of Katanga did not have a right to self-determination because they were only a part of a sovereign state. Indeed, as will be shown, the Commission expressed the opposite view, that the right to self-determination includes the right to independence in extreme cases, as a last resort.

In *Katangese Peoples’ Congress v. Zaire*³⁴ the complainant requested the African Commission (i) to recognize the Katangese Peoples’ Congress as a liberation movement entitled to support in the achievement of independence for Katanga, (ii) to recognize the independence of Katanga and (iii) to help secure the evacuation of Zaire from Katanga. The complaint was based on article 20(1) of the African Charter. There was no evidence, or even allegations, of specific violations of other human rights apart from the claim of denial of self-determination. The Commission rejected the complaint because of this lack of

³¹ Shaw, *op. cit.* n. 24, 182.

³² *Ibid.*, 293.

³³ *Ibid.*, 293–294.

³⁴ Case No. 75/92, 8th Annual Activity Report 1994–1995 (ACHPR/RP/8th).

evidence of other human rights violations. In other words, there was no evidence of exceptional circumstances³⁵ to make independence justifiable. This is how the Commission expressed its view.

“In the absence of concrete evidence of violations of human rights to the point that the territorial integrity of Zaire should be called to question and in the absence of evidence that the people of Katanga are denied the right to participate in Government as guaranteed by Article 13(1) of the African Charter, *the Commission holds the view that Katanga is obliged to exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire.*”³⁶

The error into which some commentators have fallen is that they have confined their reading of this crucial paragraph to the italicized words. Yet these words must be put in the context of the statement that precedes them. It is clear from the paragraph as a whole that if the complainants had produced concrete evidence of serious violations of other human rights (such as domination or unreasonable discrimination) and evidence that they were denied the right to exercise self-determination internally (i.e. they were prevented from participating in Government) then the decision could have been different, in the sense that the territorial integrity of Zaire could have been “called into question”, to use the words of the Commission. The important point is that the Commission recognized that there is a degree of human rights violations which reaches “the point that the territorial integrity of [a state] should be called to question”.

The Commission expressly recognized that there may be “controversy as to the definition of peoples and content of the right” to self-determination. But it clearly adopted a meaning of “peoples” which includes a portion of a population of an existing state rather than the whole state.³⁷ And it adopted a view of self-determination which includes the variant of independence or secession. It must be stressed that the right to independence recognized by the African Commission is not an unlimited right that is available in all circumstances. The Commission, taking full account of the no less important principle of territorial integrity, made it clear that the right to independence is only available in exceptional circumstances. Thus, commenting on the *Katangese Peoples’* case, a former Chairman of the Commission remarked that, “[t]he independence variant of self-determination will not be lightly entertained in the absence of compelling circumstances.”³⁸

In the light of what has been said above, it is submitted that if the claimants in the *Gunme* case should decide to take their complaint to the African Commission then, following the principle laid down in the *Katangese Peoples’* case, the Commission may be willing to call into question the territorial integrity of Cameroon provided that the plaintiffs could show that the circumstances fall within the threshold spelt out in the *Katangese Peoples’* case. Whether in such a complaint the complainants will be able to provide concrete evidence to that

³⁵ Such as subjugation in violation of international law or unreasonable discrimination which could not be avoided by peaceful means.

³⁶ Emphasis added.

³⁷ It is interesting to note that the Supreme Court of Canada has also arrived at a similar conclusion, when it held that it is clear that “a people” may include only a portion of the population of an existing state. The court took the view that to restrict the meaning of the term “peoples” in the context of the right to self-determination would frustrate the remedial purpose of the right which has developed largely as a human right: [1998] 1 SCR 217, 281.

³⁸ Umozurike, *op. cit.* n. 13, 53.

effect is another matter altogether.³⁹ But it should now be beyond controversy that under the African Charter the right of self-determination includes the right of independence, in extreme cases, as a last resort. It is therefore curious to observe that the claimants did not proceed to the African Commission but instead decided to seek an order from a Nigerian court to compel Nigeria to take their claim of independence to the ICJ and the UNGA (where the existence of the right of secession or independence is open to some doubt).⁴⁰

Cameroon v. Nigeria at the ICJ: any connection?

It is no secret that on 29 March 1994 Cameroon instituted proceedings in the ICJ against Nigeria concerning a dispute relating essentially to the question of sovereignty over the oil-rich Bakassi Peninsula.⁴¹ The Bakassi Peninsula is on the frontier between what was Southern Cameroons and Nigeria. So, if Bakassi is part of present day Cameroon it is because it is part of Southern Cameroons (Anglophone Cameroon). Therefore Cameroon's claim against Nigeria in respect of the Bakassi area can only be maintained on the ground that the area was part of Southern Cameroons at the time that it achieved independence by joining Francophone Cameroon so that the principle of *utis possidetis juris* precludes Nigeria from questioning the boundaries today. However, if Southern Cameroons is in law no longer a part of Cameroon, as the plaintiffs in the *Gunme* case contended, then Cameroon will have no basis on which to make a territorial claim against Nigeria so far as the Bakassi area is concerned. To put it another way, independence for Southern Cameroons may serve Nigeria well so far as the current Bakassi dispute is concerned.⁴²

Not surprisingly, the *Gunme* decision was received with a good deal of suspicion in Cameroon. The fire of suspicion was fanned by the fact that the proceedings in the Abuja case were going on at about the same time as the ICJ was sitting to hear oral arguments of the parties in the *Cameroon v. Nigeria* case.⁴³ And it is a matter of some surprise that, in the *Gunme* case, although jurisdiction was assumed on the basis that the claims were founded on the African Charter, the plaintiffs specifically asked Nigeria to take their case to the ICJ rather than the

³⁹ In their affidavit of 66 paragraphs the plaintiffs raised the issue of human rights abuse only in paragraph 51 where they stated that a letter had been sent to the Commonwealth Secretariat appealing for a fact-finding mission to be sent to Southern Cameroons to investigate "acts of State terrorism and violations of Human Rights of the peoples of Southern Cameroons by La Republique du Cameroun". The thrust of their contention was that the people of Southern Cameroons wished to be independent of the rest of Cameroon. It is unlikely that the African Commission will regard the wish of a people, without more, as sufficient to call into question the territorial integrity of a state.

⁴⁰ A complaint may of course be made to the African Commission by Nigeria under the wide terms of the last paragraph of the terms of settlement which requires Nigeria to take the case to "any relevant international organization". But the fact that the African Commission was not specifically mentioned in the terms of settlement is revealing.

⁴¹ Cameroon's application was later amended requesting the ICJ to specify definitively the frontier between the two states from Lake Chad to the sea: *Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*.

⁴² Of course even if Southern Cameroons were to achieve independence so that Cameroon's claim against Nigeria fails, that will not mean that Bakassi is part of Nigeria. Cameroon's claim against Nigeria will simply pass over to Southern Cameroons. But it may be that Nigeria is confident that an amicable solution would more easily be achieved with Southern Cameroons than with the Republic of Cameroon, especially if Southern Cameroons gains independence with the assistance of Nigeria.

⁴³ The proceedings in the Abuja case were commenced on 14 February 2002 and the order was made on 5 March 2002. Oral hearing at the ICJ commenced on 18 February 2002.

African Commission.⁴⁴ Moreover, the fact that the Attorney General of Nigeria did not defend the action vigorously but instead settled with the plaintiffs does little to dispel any suspicions. One line of argument which Nigeria could have pursued in the *Gunme* case is that Nigeria was under no legal duty to assist the plaintiffs with their claim to independence. This point deserves closer attention.

A legal duty to assist?

The main plank of the plaintiffs' claim was that "under Articles 1 and 20(1)(2)(3) of the African Charter on Human and Peoples' Rights . . . the Federal Republic of Nigeria has a legal duty to take up the claim of the Peoples of Southern Cameroons to self-determination and independence".⁴⁵ It is submitted that no such legal duty arises under those provisions. Under article 1, all that is required of Nigeria, as a state party, is that Nigeria should "recognize the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them". Nigeria does recognize, and has given effect to, those rights, duties and freedoms by legislation.⁴⁶ It may be said that the plaintiffs in the *Gunme* case were not asking Nigeria to take any legislative action but rather to take "other measures" to give effect to the rights under the Charter and that therefore Nigeria was under such a duty even though it has already taken legislative measures. But such an argument would be a fallacy, since under article 1 state parties are under a duty only to take "legislative or other measures". The duty is in the alternative. In other words, if a state party adopts legislative measures to give effect to the rights and freedoms under the Charter it discharges its duty on that provision. There is no additional duty under article 1 to take other measures to the same effect.

Moreover, even if the word "or" in article 1 was replaced with "and" so that there was an additional duty to take "other measures", it is submitted that such a duty would not extend to a duty for a state party to prosecute in the ICJ claims of violations of the Charter by another state party. The phrase "other measures" in article 1 is to be read *ejusdem generis* with the word "legislative" to mean measures which a state party can take within its own territory. Accordingly, several states have established National Human Rights Committees⁴⁷ to help in the protection of the rights and freedoms in the Charter. The phrase "other measures" in article 1 does not include a legal duty on state parties to take up individual claims of violations in other states and prosecute them in various international organizations such as the ICJ or UNGA. State parties of course have the right to present complaints of violations of the Charter by other state parties to the African Commission. But this is a *right* not a duty.⁴⁸ It is a matter of discretion for a state party whether or not to exercise the right to make a complaint to the African Commission.

⁴⁴ Even though Nigeria may still make a complaint to the African Commission pursuant to the settlement under the final paragraph which is expressed in very general terms, requiring Nigeria to place the case of the peoples of Southern Cameroons before "any other relevant international organizations".

⁴⁵ Paragraph 63 of their affidavit. In the same paragraph, the duty was also alleged to arise under article 2(3) of the United Nations Charter. But this note is not concerned with the UN Charter.

⁴⁶ See Cap. 10 of the Laws of the Federation of Nigeria.

⁴⁷ E.g. Cameroon, Gambia.

⁴⁸ Under article 47 of the African Charter it is provided that a state party "may" (not "shall") make a complaint.

The other provision relied on by the plaintiffs under the African Charter is article 20. But it is not obvious that this provision imposes a legal duty on state parties to assist peoples in other independent states to exercise their right to self-determination. Nothing in article 20(1) suggests any legal duty on a foreign state to assist a people in another state to exercise their right to self-determination. Paragraph (2) of article 20 deals with the right of colonized or oppressed peoples "to free themselves from the bonds of domination". It says absolutely nothing about a duty of state parties to assist them in doing so.

It is paragraph (3) of that article which gives all peoples the right to the assistance of state parties. Article 20(3) reads: "All peoples shall have the right to the assistance of the States Parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural." It is clear that the right is available only in the case of a struggle against *foreign* domination. The relevant question here is whether the people of Southern Cameroons were under foreign domination. It may of course be argued that since Cameroon is a union of what was the Republic of Cameroon and Southern Cameroons, then domination of the people of Southern Cameroons by the people of the Republic of Cameroon may be regarded as foreign domination within the meaning of article 20(3). But it is at least arguable that upon unification in 1961 the country became one, so that domination of one people by the other, although it amounts to a violation of the African Charter,⁴⁹ is not foreign domination. Since there is no right to assistance of state parties in the case of internal domination,⁵⁰ it follows that if the domination of the people of Southern Cameroons is not foreign domination, there is no right to state assistance, and therefore no corresponding legal duty on Nigeria, as a state party, to provide such assistance. Seen in this light, it is clear that Nigeria did not have to settle the case as it did.

Conclusion

This comment has endeavoured to show that the right of all peoples to secession or independence in exceptional circumstances, as a last resort, is recognized under the African Charter. This is so even though the position under international law appears to be uncertain. Self-determination is a principle which continues to evolve and expand. The process of evolution and expansion has gained added impetus from the growing significance of human rights in international law. As a result, the right to secession in extreme cases may come to be recognized as an established standard under international law, if it is not yet the case. And if indeed international law, as it currently stands, does not recognize the right to secession *whatever the circumstances*, then it is lagging behind legal developments in Africa. Seen in this light, it is clear that the plaintiffs in *Gunme v. Nigeria* have a better chance of succeeding at the African Commission⁵¹ than at the ICJ.

Yet, for whatever reasons, the plaintiffs did not take their complaint to the African Commission. Instead they commenced proceedings in the municipal court of a foreign state to compel that state to provide them with assistance in

⁴⁹ Article 19 condemns "domination of a people by another".

⁵⁰ Cf. Umozurike, *op. cit.*, 54.

⁵¹ Provided always that they can supply the concrete evidence required by the Commission.

asserting their right of independence from another state. The claim was based on the ground that a state party to the African Charter has a legal duty to provide them with assistance in their attempt to exercise their right to self-determination. But, as this note has endeavoured to show, although the right to independence is recognized under the African Charter, there is no corresponding legal duty on state parties to provide assistance to peoples who seek to exercise that right. There is only a right for a state party to make a complaint to the Commission where it has good reason to believe that another state party has violated the provisions of the Charter. Therefore, although the Federal High Court in Abuja was right to reject Nigeria's preliminary objection to jurisdiction, it is doubtful that the plaintiffs would have succeeded in obtaining the remedies sought had the parties not reached a settlement. In other words, absent the Bakassi factor (which might have induced Nigeria into the settlement), it was open for Nigeria to argue that there was no legal basis for granting any of the remedies sought, since Nigeria was not under the legal duty alleged.

NELSON ENONCHONG

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