

**INSTITUTIONALISING THE RIGHT TO SELF-DETERMINATION AS A HUMAN RIGHT  
SOLUTION TO PROBLEMS OF ETHNIC CONFLICT IN AFRICA: THE CASE OF ETHIOPIA  
AND SOUTH AFRICA**

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*'The guarantee of minorities' participation in political life is a sign of a morally adult society and an honour for countries in which all citizens are free to participate in the national life in a climate of justice and peace.'*

*John-Paul II,*

*'Ten Thoughts for the Year 2000,' 1994, p.183*

## Chapter I Posing the problem

### 1.1 Introduction

The political landscape of the state in Africa is coloured with widespread instability, internal violence and conflict. Most often than not, many of these destabilizing forces are fuelled with currents of ethnicity involving minorities, marginalized groups and dominated groups. If it is true that ethnicity engendered the greatest incidence of violence and is expected to fuel violent clashes of communities and states<sup>1</sup>, there is nowhere that this peril is more present and imminent than is in Africa.<sup>2</sup> In Africa ethnicity entails crisis of legitimacy, threat of fragmentation, and in extreme cases, possible collapse of the state. A glance at a cross section of African states vividly demonstrates these points.

In the Magreb region of Algeria it has been quite a while since the silence of peace turned its back as the Berbers protest against the hegemony of the Arab culture.<sup>3</sup> In Nigeria despite the recent seemingly return to democratic governance, the suppression of national minority groups such as the Ogoni, the Atyab, and the Bajju is heard loud.<sup>4</sup> In the Sudan secessionist warfare defying religious bigotry and the dominance of one socio-cultural group over the rest has left the country in a seemingly never-ending civil war.<sup>5</sup> Worse still, the long history of the Hutu–Tutsi rivalry for power culminated into one of the largest human tragedies in Africa as Rwanda was racked by the horrific genocide of 1994.<sup>6</sup> In not any less gravity, the struggle among warring groups for domination precipitated the collapse of the state in DRC and Somalia and its virtual explosion in Liberia. Whereas decades of internecine strife in a revolt against the state have devastated the political system of Chad<sup>7</sup>, it is only recently that the tedious and destructive war in

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<sup>1</sup> See J Wilson 'Ethnic groups and the right to self-determination' 11 *Connecticut Journal of International Law* (1996) 433.

<sup>2</sup> The diversity of the African state in its demographic composition, the artificiality of its borders, its authoritarian nature and its centralist tendency, among other things, make the African state vulnerable to the threats that ethnicity poses.

<sup>3</sup> See M Stone *The agony of Algeria* (1997) 198-209.

<sup>4</sup> See O C Okwa-Okafor 'Self-determination and the struggle for ethno-cultural autonomy in Nigeria: The Zangon-Kafaf and Ogoni problems' 6 *ASIL Proc.* (1994) 52.

<sup>5</sup> See generally K K Prah 'Constitutionalism, the National question and the Sudanese civil war' in A Beyene & G Mutababa *The quest for constitutionalism in Africa: Essays on constitutionalism, the nationality problem, military rule* (1994).

<sup>6</sup> See P Nugent 'Explaining the 1994 Genocide in Rwanda' 37 *Journal of Modern African Studies* (1999) 241-286.

<sup>7</sup> See S Decalo 'Chad: The roots of centre periphery strife' 79 *African Affairs* (1980) 317.

Angola ended. Albeit less serious in their intensity, trends of secession in Ethiopia, South Africa and Cameroon have been a cause for concern.<sup>8</sup> Expectedly, in its manifestation ethnic driven conflict is not limited to such forms of conflicts. It also takes the form of military coups.<sup>9</sup> It is thus revealed that the ethnic factor was central in more than 40 successful coups, 20 attempted coups, 80 plots and 17 mutinies.<sup>10</sup>

The persistence and indeed the rising trend of ethnic conflict in Africa<sup>11</sup>, as in the rest of the world, is explained by the increased political consciousness<sup>12</sup> and the spread of the idea or right of equality and the idea of group rights.<sup>13</sup> It is further recognized that legitimacy of the state is the function of the will of the people.<sup>14</sup> The state of affair in which the will of the members of the society constituting the state is ignored and suppressed gives birth to legitimacy crisis and invites the sub unites to search for other options of rectifying it.

The simple importation of liberal democratic values such as elections and multiparty system has proved to be unsuccessful to adequately address the challenge that ethnic conflict poses in

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<sup>8</sup> In Ethiopia there are two prominent secessionist movements with ethnic orientation. Oromo Liberation Front is the first and the other is Ogaden National Liberation Front. In South Africa the question of the Volkstat and the Zulu question have been points of tension. The quest for self-determination in reaction to domination by the majority French speaking people has been a cause of agitation for the English-speaking people of Cameroon.

<sup>9</sup> See D L Horowitz *Ethnic groups in conflict* (1985) 451–471.

<sup>10</sup> S Eisenstedt *Modernization: Protest and change* (1995) quoted in HO Kaya 'The political economy of Africa and continental challenges in the new millennium' in E Maloka & E le Roux *Africa in the New millennium* (2001) 6.

<sup>11</sup> Currently there are more than 15 movements for self-determination in 13 African countries. See T Felgenhauer Selected self-determination and interstate conflicts since 1990 in W Danspeckegruber (ed.) *The self-determination of peoples: Community, nation, and state in an interdependent world* (2002) 393-94, 404.

<sup>12</sup> As back as 1961 KW Deutsch put forward a proposition that increased political consciousness could be expected to 'strain and destroy' the cohesion of states with diverse populations. 'Social mobilization and political development' 55 *American political science review* (1961) 501.

<sup>13</sup> Horowitz as note 9 above (observing that the spread of the norms of equality has made ethnic subordination illegitimate and spurred ethnic groups every where to compare their standing in society against that of groups in close proximity) 5.

<sup>14</sup> 'In the twentieth century, ethnonationalism or politicised ethnicity represents a major legitimator and delegitimator of regimes. A government's legitimacy rests, in significant degree, on its ability to convince the governed that it either shares, represents, or respects their ethnicity.' PJ Magnarella 'Preventing Interethnic conflict and promoting human rights through more effective legal political, and aid structures: Focus on Africa' 23 *Georgia Journal of International and comparative Law* (1993) 330.

Africa.<sup>15</sup> This experiment failed to capture the essence of and frame resolution to the problem besetting the African state. The problem seems to demand policy and constitutional response inspired by the realities of diversity and the plurality of identities of the peoples of Africa.<sup>16</sup> It is important that minority groups or groups otherwise marginalized, victimized or oppressed within the existing structure of the multinational African state receive representation at the centre and be given a measure of local autonomy at the periphery to retain their identity and alleviate any impression of political suffocation.

It is contended here that the reality of diversity be legally acknowledged not only as a matter of political expediency but also necessity. The structures, norms and operations of the state must reflect the diverse cultures and values of the society and provide a framework for accommodating ethnic claims. Here, the question of 'how?' suggests itself.

## **1.2 Hypothesis/Research questions**

This paper relies on the belief that amelioration of the ethnic problem requires the recognition and entrenchment of ethnic claims as part of a constitutional settlement in Africa not only as a matter of practical expediency but also a human rights necessity. It is expected that institutionalising group rights in a way to allow political participation and self-administration by the sub state groups contains ethnic conflict and necessitates collaboration and national cohesion. It is, thus, submitted that self-determination as a human right is an overriding norm and institution in the contemporary African situation. It vindicates group rights and captures some of the fundamental tensions in the politico-legal set-ups of the state in Africa. As such, the potential of the right to self-determination in the realization of such objectives is closely considered.

The focus of this study is, therefore, to wrestle with the query of whether institutionalising the right to self-determination would address inter-ethnic tension in the context of Africa. Such questions as how the right to self-determination is related to ethnicity and group rights and what institutional and normative solutions are present in the right to self-determination are also examined. This is

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<sup>15</sup> Usually the liberal values imported by prescribing of human rights and democratic institutions in constitutions fail to effectively contain ethnic conflict for the reason that they are solely found on universal, individual rights. However 'Human rights abuses involving ethnies relate not only to universal, individual human rights but also to collective group rights.' R Stavenhagen 'Ethnic conflict and human rights: Their interrelationship' in K Rupesinghe (eds.) *Ethnic conflict and human rights* (1994) 21.

<sup>16</sup> '[N]o issue is more perplexing or more critical than how African societies should treat ethnic identity, A G.Selassie 'Ethnic identity and constitutional design for Africa', 29 *Stanford Journal of International Law* (Fall 1992-1993) 5.



done by way of examining the elements and various institutional dimensions of the right to self-determination and the experience of Ethiopia and South Africa.<sup>17</sup>

### **1.3 Significance of the study**

By examining the various aspects of the right to self-determination, the study aspires to assess if institutionalising the right provides politico-legal framework to ameliorate ethnic conflict. It makes a critique of the existing state of affair in the relationship of the state with sub state groups and proposes the institutionalisation of the right to self-determination to reformulate the relationship. This is instrumental to bring into focus the importance of group rights, which so far has held a marginal position in legal discourse and in the formulation of policy. The study aspires to examine the correlation between the widespread ethnic conflict in Africa and the right to self-determination.

The primary value of the research, therefore, lies in its capacity to benefit those who seek to guide scholarship and policy making by interrogating the potential of institutionalising the right to self-determination to provide a policy and constitutional solution to ethnic based conflicts.

It also enriches existing knowledge in the field by exploring the speciality and possible ways of approaching the subject matter and by clarifying the understanding of ethnic conflict and the right to self-determination in the African context.

### **1.4 Literature survey**

The issues that are addressed in this study have hardly been treated in the same way by other authorities. There are however several writings dealing with the issues, albeit with different depth, target and approach. Despite its original flavour, the study could not have taken its existing form without the tremendous inspiration and guidance drawn from existing literature.

It is not new to conceptualise the relationship of the state and its sub state groups; or to suggest that ethnic based conflicts are major challenges in today's Africa. There are ample literature providing such conceptions and suggestions.<sup>18</sup> Nor is it unheard of to link the disruptive forces of ethnic pluralism to the existing political set-up of the state in Africa.<sup>19</sup>

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<sup>17</sup> These are the only states in Africa that provide for the right to self-determination in their constitutions and in the case of Ethiopia it forms the basis of the organization of the state.

<sup>18</sup> See L Diamond 'Ethnicity and ethnic conflict' 25 J. Mod. Af. Stu. (1987); See also note 16 above.

<sup>19</sup> See generally J Herbst 'Responding to state failure in Africa' in M E Brown, O R Coté; Jr., S M Lynn-Jones & S E Miller (eds.) *Nationalism and Ethnic conflict* (1996-97) ; Also G.Selassie as note 16 above.

Even the resort to the right to self-determination to foster political participation and self-governance by sub state units is hardly novel. There are international lawyers who put forward this idea, albeit with a different style and substance.<sup>20</sup>

What is relatively novel in this work are: the conclusion that it draws from the relation between ethnic strife and the nature of the African state to respond to the needs of its diverse ethnic groups; the way in which it reads the right to self-determination and conceives it as capable of vindicating group rights; its examination of the potentials of the right in responding to the divisive forces of ethnic diversity; its effort to reveal the pitfalls that must be avoided in employing the right to self-determination; and the way in which it offers policy oriented recommendations as to the 'hows' of institutionalising the right to self-determination so as to address ethnic conflict.

## **1.5 Theoretical framework**

Central to this study are the concepts of ethnicity and the right to self-determination. In particular, this study seeks to build its discussion based on the assumed link between ethnicity and the right to self-determination. To put in perspective this predication and to give the study theoretical insight, a discussion of these concepts at a theoretical level is followed.

### **1.5.1 Ethnicity**

Ethnicity as a term denoting the complexity of human existence and behaviour defies a single universally accepted definition.<sup>21</sup> The fluidity that characterizes it as a phenomenon, its dynamism and lack of a common manifestation in time and space put resistance to any attempt to define it simply and in a way that applies globally.

The difficulty with definition aside, there is also an intense scholarly controversy on what accounts for ethnicity. This scholarly adversary to explain the nature and dynamics of ethnicity is played out along the cleavage between the two schools of thought: primordialism and constructivism. Yet instrumentalism is also portrayed as the third school of thought. What follows is a discussion of these schools of thought.

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<sup>20</sup> W Danspeckgruber Self governance plus regional integration: A solution to self-determination or secession claims in the emerging international system, <http://www.Princeton.edu/~lisd> accessed 8/26/02; IG Shivji, The right of peoples to self-determination: An African perspective, in w. Twining (eds.) *Issues of self-determination* (1991); D K Donnelly States and sub states in a free world: A proposed general theory of national self-determination 2 *Nationalism and Ethnic Politics* (1996) 286-311; T Regassa Ethnic federalism and the right to self-determination as a constitutional legal solution to problems of multi-ethnic societies: the Case of Ethiopia (Masters thesis, University of Amsterdam Faculty of Law) (2001) (unpublished).

<sup>21</sup> S Y Hameso *Ethnicity in Africa: Towards a positive approach* (1997) 91.

Primordialism, in its extreme form, treats ethnicity as a phenomenon akin to nature. Clifford Geertz<sup>22</sup>, a leading exponent of primordialism, aired the classical expression of this thought. According to him a primordial attachment is one that is based upon social 'givens', which also means that it is the *a priori* attachments which start with family relation but extend into 'givens' such as language, religion or particular social practice.<sup>23</sup> Ethnicity is therefore a kind of human element something in and unto itself as a product of the natural ties that bind human societies. In reality, however, far from representing a fixed and immutable set of static social facts, ethnicity has become dynamic and changeable, and in many respects tends to be situational and contextual.

Instrumentalism is virtually utilitarian in its approach to ethnicity. The main thrust of this theory is that objective interests underpin the emergence and continued presence of ethnicity. It stresses the primacy of material conditions in shaping ethnic consciousness. Thus viewed, ethnicity was a direct product of economic change brought about by the advent of modernity and such conditions as industrialism.<sup>24</sup> Parallel to this is of course the role of human agency. Paul R Brass succinctly captured the theme of instrumentalism in his two arguments:

The first is that ethnicity and nationalism are not 'givens'. But are social and political constructions. They are creations of elites, who draw upon, distort and sometimes fabricate materials from the cultures of the group they wish to represent in order to protect their well-being or existence or to gain political or economic advantage for their groups as well as for themselves. The second argument is that ethnicity and nationalism are modern phenomena inseparably connected with the activities of the modern state.<sup>25</sup>

Individuals may indeed have created ethnicity, but each individual engaged in such creation, distortion, fabrication or affirmation was also acting according to pre-existing set of normative practices in the framework of which the creation, affirmation, distortion or fabrication acquires meaning. Constructivism is born out of this critique against instrumentalism and it is instrumentalism informed by considerations of primordialism. Accordingly, ethnicity is a result of a complex social process in which 'symbolic boundaries are consciously constructed and reconstructed by the use of mythologies, an historical common past or language'.<sup>26</sup>

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<sup>22</sup> C Geertz (1963) 'The integrative revolution: Primordial sentiments and civil politics in new states' in C Geertz (ed.) *Old societies and new states: The quest for Modernity in Africa and Asia* (New York: Free press)

<sup>23</sup> See Geertz, as note 22 above 109-111.

<sup>24</sup> See E Gellner *Encounters with nationalism* 1994 34-46.

<sup>25</sup> P R Brass 1991 *Ethnicity and nationalism: Theory and comparison* 8.

<sup>26</sup> M Koenig 1999 'Democratic governance in multicultural societies' quoted in T Regassa as note 19 above 23.

Not any one of these theories by itself alone can entirely account for ethnicity. The phenomenon is neither entirely primordial nor completely instrumental. In Africa ethnicity as a political force is a relatively recent phenomenon and is in so many ways a result of its immediate past.<sup>27</sup> But it draws its existence upon certain characteristics defining its internal dimensions and outer borders, and 'was a universal fact of life in pre-colonial Africa'.<sup>28</sup>

Although there is no agreement on what ethnicity consists of, its certain elements feature commonly in most works on the subject. Horowitz identifies a wide spectrum of ethnic identity indicators, which he categorizes as visible and nonvisible cues.<sup>29</sup> Such cues as colour, physiognomy, hair colour and texture, height, and physic, which are birth-determined, and others like circumcision and earring holes are visible determinants of ethnic identity. And the nonvisible cues are tied to language and culture.<sup>30</sup> Culture and language are central to Adrian Hastings' definition of ethnicity.<sup>31</sup> Thus for him, ethnicity connotes 'a group of people with a shared cultural identity and spoken language'.<sup>32</sup> Religion and colour are also taken as elements of ethnicity. Hastings believes that religion is a constituent element of ethnicity.<sup>33</sup> In arguing against the attempt to divorce colour from ethnicity, Horowitz insisted that colour is an ingredient of ethnicity.<sup>34</sup> In sum, it may be right to say that common origin, culture and language are the main constituting elements of ethnicity but not necessarily in cummulation. Whether colour and religion are elements of ethnicity depends upon the racial configuration of a society and the extent to which religion is parallel to other group determinants such as language and culture.

### 1.5.2 The right to self-determination

The world is witnessing that there is an increase concern about all instances of blatant subjugation of groups or communities and inhibition of their quest for greater autonomy. This concern has motivated actions intended to recognize and protect minorities and ethnic groups. The general acceptance of a common obligation to protect other peoples' rights to individual and collective existence and self-expression, with the emergence of group rights norms within the domain of human rights law and the rising importance that it is earning, is a manifestation of such actions.

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<sup>27</sup> N Chazan et al. (1988) *Politics and society in contemporary Africa* 103.

<sup>28</sup> A Hastings (1997) *The construction of nationhood: Ethnicity, religion and nationalism* 149.

<sup>29</sup> See Horowitz as note 9 above 41-51.

<sup>30</sup> As above 46.

<sup>31</sup> See Hastings as note 28 above 3 & 167.

<sup>32</sup> As note 28 above 3.

<sup>33</sup> As note 28 above 4.

<sup>34</sup> See Horowitz as note 9 above 41-45.

The importance of the right to self-determination is recognizable in this regard. The institutional component of the right directly impinges upon political power and organization within and among states.<sup>35</sup> The normative component on the other hand determines the democratic behaviour (the process of governance and the operation of the institutions of the state) and the norms and principles that guide official action.<sup>36</sup> It is recognized that the application of the right to self-determination to the claims of ethnic groups is vexing subject fraught with ambiguities and controversies. There are not only differing but contrasting and conflicting views that defy a single approach. It is sought here to highlight on the main approaches to this query.

By exploring existing literature on the subject, three main approaches could be identified. The first approach is subsumed in the traditional approach to the status of the right to self-determination. It rejects self-determination as a legal instrument to the claims of ethnic groups. Rosalyn Higgins<sup>37</sup> is may be the most faithful adherent of this thinking. And for her, 'minorities *as such* do not have a right of self-determination. That means, in effect, that they have no right to secession, to independence or to join with comparable groups in other states.'<sup>38</sup> In practice most states and the UN have been pursuing this approach and therefore denied that ethnic groups have any right to self-determination.<sup>39</sup>

The second approach could be represented what Judge Dillard alluded to in the *Western Sahara Case*.<sup>40</sup> In his often quoted and succinct statement in a separate opinion, he prophetically said that 'it is for the people to determine the destiny of the territory and not the territory the destiny of the people.'<sup>41</sup> Quite in the same line Stalin earlier on contended that

The right to self-determination means that only the nation itself has the right to determine its destiny, that no one has the right forcibly to interfere in the life of the nation.... The right to self-determination means that a nation can arrange its life according to its own will. It has the right to arrange its life on the basis of autonomy. It has the right to complete secession. Nations are sovereign and all nations are equal.<sup>42</sup>

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<sup>35</sup> P Alston and H Stienen *International human rights in context: Law, politics and morals* (1996) 971.

<sup>36</sup> See Chapter III below.

<sup>37</sup> See R Higgins *Problems and processes: International law and how we use it* (1994) 111-128.

<sup>38</sup> As above 124.

<sup>39</sup> See T D Musgrave *Self-determination and national minorities* (1997) 102-108.

<sup>40</sup> See generally ICJ Rep. (1975) *Western Sahara case*.

<sup>41</sup> *Id.* 12, 122.

<sup>42</sup> J Stalin 'Marxism and the national question' (1913) in J Stalin *Marxism, national and colonial questions: A collection of articles and speeches* London (1941) 3-67 quoted in A Cassese (1995) *Self-determination of people: A legal reappraisal* 14 at 7.

The emergence of the right to self-determination as attached to the claims of ethnic groups into the international system is linked to the Versailles Settlement at the end of World War First to address the exigencies of European wars. With victory in the war for the Allies, Woodrow Wilson deemed that post war order should be informed by the notion that ethnically identifiable peoples or nations would govern themselves.<sup>43</sup>

What may be found amidst the two approaches is the third approach that self-determination as applied to claims of ethnic groups should be discouraged but is justified and permitted by the norms of the international system under certain circumstances. For example, such acclaimed scholars as Hurst Hannum and Allan Buchanan have read international law as being neither permissive nor prohibitive to the application of self-determination to the claims of ethnic groups. Allan Buchanan expressed the view that ethnic self-determination is justified only when the existing state refuses to cease perpetrating serious injustices or when a groups' survival is threatened.<sup>44</sup>

The three approaches have parallel in the practice of states at various times in the evolution of the right. Since the last decade of the 20<sup>th</sup> century, the practice of states, the assertiveness of groups and the increasing moral force of group rights have brought 'the right closer to that associated with judge Dillard's dictum than to various positivist attempts to deny recent practices relating to self-determination any legal status, or only a restrictive one.'<sup>45</sup> The focus of all these approaches revolves around the status of secession as a part of the right to self-determination. But the right to self-determination is wider in scope than secession.<sup>46</sup>

## 1.6 Methodology

The method used in this study is predominantly analytic although description is also employed whenever necessary. Legal method is employed as treaties, statues, case law and international custom are interrogated to shed light on the query of whether and how institutionalising the right to self-determination responds to problems of ethnic conflict in Africa. Much of the work is, however, assisted by information drawn from library sources and the Internet.

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<sup>43</sup> See Whelan 'Wilsonian self-determination and the Versailles settlement' 43 *International and Comparative Law Quarterly* (1994) 108.

<sup>44</sup>See A Buchanan *Secession: The morality of political divorce from Fort Sumter to Lithuania to Quebec* (1991)

<sup>45</sup> R Falk 'Self-determination under international law: The coherence of doctrine versus the incoherence of experience' in W Danspeckgruber (ed.) *The self-determination of peoples: Community, nations, and state in an independent world* (2002) 49.

<sup>46</sup> See below Chapter III the discussion on the various dimensions of the right to self-determination.

## **1.7 Summary of chapters**

The study is divided into four chapters. Chapter one outlines the context of the study, objectives and significance of the study as well as the hypothesis and literature review. It is sought in the second chapter to explore the ethnicity problem and the right to self-determination in Africa. Chapter three deals with analysing the elements of the right to self-determination, its potentials to address the ethnicity dilemma of Africa and the modalities of institutionalising it. Chapter four examines the recognition of the right to self-determination under the Federal Constitution of Ethiopia and the Constitution of the republic of South Africa, the manner in which it is entrenched and institutionalised in the set-ups of the two states and the lessons, good or ill, to be drawn from their experience. Finally, the study seeks to draw some conclusions that involve recommended suggestions.

## Chapter II Ethnicity and the Right to self-determination in Africa

This chapter focuses on the nature and process of ethnic conflict in Africa and the application of the right to self-determination to such conflicts. It involves an exposition of what characterizes ethnicity, how ethnic consciousness and conflict have evolved through time and the factors that affected this evolution. This offers factual basis to show ethnic conflict in Africa constitutes a manifestation of problems of human rights. Eventually, the interface between ethnic conflict and the human rights problems that underlie them on the one hand and the right to self-determination on the other hand is examined.

The argument put forward in this chapter is that ethnic conflict in Africa is best explained and appropriately examined for solution in terms of human rights norms, but without suggesting that human rights will finally solve ethnic conflict. It is particularly contended that ethnic conflict is essentially the deprivation of group rights and the concomitant lack of institutional protective mechanisms for groups, which are essential to the collectivist nature of African peoples.<sup>47</sup> On the basis of this, it is sought to demonstrate how ethnic conflict can be viewed as involving a struggle of groups for the right to self-termination.

### 2.1 Of ethnic diversity in Africa

African countries are unique in the breadth of their diversity. With the exception of such countries as Lesotho and Swaziland, almost all African countries are virtually heterogeneous. It is estimated that the 54 African countries are home to some 239 distinct ethnic groups<sup>48</sup> speaking over 800 languages.<sup>49</sup> The ethnic groups range in number from many millions as in the case of the Hausa, the Buganda or the Ashanti to some thousands as in the case of the Zemi.<sup>50</sup>

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<sup>47</sup> This group oriented nature of African societies is aptly captured by the philosophical statement that 'I am because we are and since we are therefore I am' J S Mbiti African religion quoted in E A Ankumah (1996) *The African Commission on Human and Peoples' Rights: practice and procedures* 159.

<sup>48</sup> Du Plessis Exploring the concept of identity in world politics in *Politics of identity and exclusion in Africa: From violent confrontation to peaceful cooperation* (2001) 54.

<sup>49</sup> Chazan et al. as note 27 above (1988) 4.

<sup>50</sup> J S Wunsch 'Foundations of Centralization: The colonial experience and the African context' in J S Wunsch & D Olowu (eds.) *The failure of the centralized state: Institutions and self-governance in Africa* (1990) 34.



Equally important in Africa is the centrality of ethnicity to the people. It is fundamental to the life of many Africans.<sup>51</sup> In some parts of Africa, loyalty to one's ethnic group is much more important and stronger than loyalty to the state.<sup>52</sup> The importance of ethnicity is vividly revealed by the overwhelming ethnic response that such open-ended questions as 'who are you?' tend to elicit.<sup>53</sup> Most individuals in Africa have found it meaningful and easy to identify themselves in terms of their ethnic membership instead of their nationality.<sup>54</sup> To a large extent this is engendered by the nature of state-ethnic relation and the policy pursued by the state towards ethnicity.

## **2.2 Ethnic conflict in Africa**

### **2.2.1 Preliminary considerations**

Ethnic conflict involves 'social, political and economic conflict between groups of people who identify each other in ethnic terms: colour, race, religion, language, national origin.'<sup>55</sup> Ethnic conflict does not necessarily imply and is not confined to war situations. The term covers a wide range of situations.<sup>56</sup> It involves a wide range of events from articulation of discontent, protest, mobilization, confrontation, sporadic or sustained violence, and civil war or insurrection in which ethnicity plays a significant factor.<sup>57</sup> It can also take the form of denial of linguistic or cultural rights as a result of state policy, whether deliberate or not.<sup>58</sup>

Various types of ethnic conflicts could be identified. Of particular interest for this study are the two types of conflicts identified by Rodolfo Stavenhagen. The first type of ethnic conflict is communal or tribal, which is essentially inter/intra ethnic conflict. 'Here', writes Stavenhagen, 'the conflict occurs between two relatively self-contained communities within the wider society, communities which identify themselves and each other in ethnic terms.'<sup>59</sup> The state is involved, if at all, only as

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<sup>51</sup> 'In much of Africa, ethnicity is the hub around which life revolves. The more important aspects of an individual's life are determined by rules emanating from the individual's ethnic group.' G.Silassie as note 16 above 12.

<sup>52</sup> Saro-wiwa's peril *Economist* (Nov. 4, 1995) 46. It has been noted that in Nigeria, as in the rest of Africa, ethnicity, language and culture, but not nationality, are becoming the touchstones of personal identity.

<sup>53</sup> Horowitz as note above 6.

<sup>54</sup> For example, 'I am a Hausa' instead of 'I am a Nigerian' " 'I am a Kikuyu' instead of 'I am a Kenyan' are labels often used to identify oneself". G.silassie as note 16 above 8.

<sup>55</sup> R Stavenhagen as note 15 above 17.

<sup>56</sup> As above.

<sup>57</sup> Z K Smith (2000) 'The impact of political liberalization and democratisation on ethnic conflict in Africa: An empirical test of common assumptions' 38 *Journal of Modern African Studies* 22.

<sup>58</sup> Such are, for example, dealt with under Art. 27 of the ICCPR.

<sup>59</sup> Stavenhagen as note 15 above 19.

a keeper of the peace. The other type is what may be called state centered ethnic conflict. This is the case where the state is itself a part of the conflict. It happens where the state is strongly identified with a dominant or majority ethnic group. Where in such a situation 'ethnic conflict involves an ethnic minority or an oppressed ethnic majority, then the ensuing conflict may take place between the group and the state itself.'<sup>60</sup>

In Africa ethnic conflict invariably takes the second form. Often the state is processor and primary allocator of societal values and resources that are the object of inter-group competition, and itself becomes a participant in the struggle.<sup>61</sup> How did this come about? What is the nature of the conflict? How did it evolve?

### 2.2.2 The nature and process of ethnic conflict in Africa

Ethnic conflicts generally involve a clash of interests or a *struggle over rights*: rights to land, to education, to the use of language, to political representation, to freedom of religion, to the preservation of ethnic identity, to autonomy or self-determination, and so forth.<sup>62</sup>

Contrary to the flawed view of some westerners<sup>63</sup>, in Africa ethnicity is not so much a result of deeply ingrained primordial sentiments; remnant of some ancient African past. Ethnicity has acquired significant prominence as a powerful political phenomenon through an evolutionary process of construction and deconstruction.<sup>64</sup> Thus viewed, ethnicity is to a large extent a relatively recent phenomenon. It is primarily since the advent of colonialism that it increasingly manifested particular social and political presence. There is therefore a trend among most students of African society and politics to locate the origin of ethnicity in the colonial period.<sup>65</sup> Jean-François Bayart emphasized that 'the precipitation of ethnic identities becomes incomprehensible if it is divorced from colonial rule'.<sup>66</sup> This is only to suggest that colonial rule has

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<sup>60</sup> As above.

<sup>61</sup> O C Okafor *Re-defining legitimate statehood: International law and state fragmentation in Africa* (2002) 95.

<sup>62</sup> Stavenhagen as note 15 above 20.

<sup>63</sup> The trend of western scholars has been "to treat ethnicity as an endemic 'African problem', the legacy of a backward past and the manifestation of a continued backwardness'. E H Osaghae 'Ethnicity in Africa or African ethnicity: The search for a contextual understanding' in Ulf Himmelstrand et al. (eds.) *African perspectives on development* (1994) 141.

<sup>64</sup> This process involves the perception and subsequent consciousness of group distinctness and the portrayal by outsiders of such, usually on the basis of what Andrea Astings called 'observable characters' as note 28 above.

<sup>65</sup> Osaghae as note 63 above 141.

<sup>66</sup> J Bayart (1993) *The state in Africa: The politics of the belly* 51.

artificially catalysed the drawing up of ethnic cleavages.<sup>67</sup> How did colonial rule affect ethnicity? How did that have bearing on ethnic conflicts in Africa?

Colonial powers settled their rivalry for territorial conquest in Africa by partitioning the continent among themselves in the infamous Berlin Conference of 1885.<sup>68</sup> This was achieved by carving up new boundaries that provided a fixed and definite territorial component to political authority.<sup>69</sup> The boundaries thus drawn do not have parallel to the cultural preferences and ethnic configuration of African societies.<sup>70</sup> The impact of this on the socio-political evolution of Africa transcended well beyond the colonial times into the times of independence and after.<sup>71</sup>

This new political system forced the reorganization of pre-colonial African societies. It agglomerated numerous, distinct and unequal socio-cultural groups within one political pot. There resulted an increase in the interactions among these diverse groups 'as the relative mutual isolation of pre-colonial times decline.'<sup>72</sup> This brought about ethnic self-consciousness into the fore and set the stage for ethnic rivalry.<sup>73</sup> The result was a 'more pronounced cleavages between groups which have given rise to lasting patterns of tension in post colonial times.'<sup>74</sup>

An important feature of the colonial administrative system was 'its ambivalent centralised, military and homogenizing character.'<sup>75</sup> The centralization and homogenisation tendency of the colonial

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<sup>67</sup> Okafor as note 61 above 98.

<sup>68</sup> See Okafor as above 26-28.

<sup>69</sup> This new arrangement contrasted the pre-colonial political organization of African societies where 'boundaries were more fluid and permeable than a static notion of a primordial ethnicity might suggest'. D Welsh 'Ethnicity in sub-Saharan Africa' 72 *International Affairs* (1996) 481.

<sup>70</sup> In the *Libya v. Chad* case Judge Ajibola noted that 'the colonial penchant for geometric lines led to the creation of an Africa where many state frontiers were delineated with little thought for geography, ethnicity, economic convenience, or communication'. Separate opinion of Judge Ajibola Case Concerning the Territorial Dispute (*Libya v. Chad*) I.C.J Rep. (1994) 6, 52-53.

<sup>71</sup> 'The colonial era ... was a very short period in Africa's longest development. But it was a time of profound upheaval and irreversible change for all of Africa's peoples. Nothing would be the same again' B Davidson *Modern Africa: A social and political history* as quoted in Okafor as note 61 above 30.

<sup>72</sup> See Welsh as note 69 above 481.

<sup>73</sup> '[W]ith the placement of communities with antagonistic histories within the same territorial unit ... the stage was set for the suppression of many ethnic nations, the eruption of genocide, and inter-tribal conflict.' Li-ann Thio 'Battling balkanisation: Regional approaches toward minority protection beyond Europe' 43 *Harvard Law Journal* (2002) 446.

<sup>74</sup> D Rothchild 'Reconfiguring state-ethnic relations in Africa: Liberalization and the search for new routines of interaction' in P Lewis (eds.) *Africa: Dilemmas of development and change* (1998) 215.

<sup>75</sup> Okafor as note 61 above 31.

state involved the crushing of African systems and diverse peoples. Writing about Nigeria Oke Chukwu Oko has made the following observation

The creation of a nation state and the attendant modernization transformed the society from homogeneous and autonomous, bound by shared cultural values, to a highly fragmented society in which citizens were forced to re-adjust to an alien order.... The re-adjustment proved especially traumatic as powerless inhabitants painfully watched the colonialists discard, discredit, and at times, desecrate traditional institutions and customs that preserved order in the society.<sup>76</sup>

The uneven distribution of the goods of modernization process that accompanied the introduction of the nation state system also affected ethno-genesis in Africa. Coastal zones and people living in those areas were exposed 'to greater administrative intensity, more commercial activity, and a more active missionary and education presence'<sup>77</sup> than peoples in the hinterland.<sup>78</sup> This resulted in unequal access to, and control over, economic and political resources among the groups, a factor which in most cases heighten ethnic conflict.<sup>79</sup>

Ethiopia, as a country that was never colonized, presents an exception, albeit not so much in substance. As such ethnic conflict in Ethiopia is rather a result of the historic union of the state with a dominant culture and the resultant subordination of other cultures. Apart from this, the following part applies to Ethiopia to a large extent.

The end of the colonial period did not sever the continuity of the forces that initiated ethnic self-consciousness and engendered the incidence of ethnic conflict in Africa. Having inherited a deeply divided state in urgent need of sustained socio-economic development, the leaders of the post colonial African state set as their mission the construction of a cohesive nation state. Thus, the first thing that they did was to settle the issue colonial of borders. Alarmed by the peril inherent in the arbitrarily drawn up borders, the leaders opted for affirming the *status quo ante* independence.<sup>80</sup> Uniting into one nation of the diverse ethnic communities within the newly sanctified colonial borders became the next top agenda in the construction of the post-colonial

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<sup>76</sup> 'Partition or perish: Restoring social equilibrium in Nigeria through reconfiguration' *Indiana International and Comparative Law* (1998) 317.

<sup>77</sup> Welsh as note 69 above 479.

<sup>78</sup> The uneven exposure to modernization further intensified the process of ethnic self-consciousness which involved 'tension between ethno-regions that were advantaged by close contact with western education, infrastructural improvement, and agricultural and industrial development and those in the hinterland that remained neglected'. See Rothchild as note 74 above 215.

<sup>79</sup> See Osaghae as note 63 above 144.

<sup>80</sup> A resolution of the Assembly of Head of states and Governments of the Organization of African Unity sanctified the colonial borders by legitimising in law. See Organization of African Unity Resolution on Border Disputes, 1964.

African state.<sup>81</sup> What this required was the active strategy of 'nation-building', which in the wake of independence was pursued religiously.<sup>82</sup>

The nation-building project was meant to facilitate homogenisation of intra-state diversity by supplanting the individual's ethnic ties, usually through repression. It assumed that ethnic affiliation is an ailment that stood on the way of the nation building process.<sup>83</sup> Thus, in affirming the oneness and indivisibility of the state, the nation building process was sought to stamp out socio-cultural differences.<sup>84</sup> For that, while some took an abolitionist path others attempted to supplant the differences by forging artificial cross cutting identities.<sup>85</sup>

The endeavour of homogenizing the state had an inherent tendency to foster the co-option of the institutional apparatuses of the state by one or more dominant groups to the relative exclusion of others.<sup>86</sup> And when one or two groups are found in control of the state apparatus, the repression of other groups take the 'form of state sanctioned imposition of cultural or political motifs of one or more groups on the rest of the population'.<sup>87</sup> This has been a dominant feature of the conflicts in such countries as Liberia<sup>88</sup>, Sudan<sup>89</sup>, Burundi and Rwanda.<sup>90</sup>

The institutionalisation of single functional and institutional systems has also been instrumental to the coercive nation-building project of the post-colonial state. Many African states have, therefore, adopted the use of European languages as their national language. In a similar vein, they have

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<sup>81</sup> See S K B Asante 'Nation building and human rights in emergent African nations' 2 *Cronell International Law Journal* (1969) 83-84.

<sup>82</sup> As Welsh put it "In the heydays of independence, began in Ghana in 1957 and accelerating in the 1960s and beyond, 'nation building' was assumed to be the priority of all the newly emerging [African] states." As note 69 above 477.

<sup>83</sup> Historically diverse nationhood has been perceived as divisive. Thus, 'the intense fragmentation [ethnic diversity] of the new [African] states was seen as quite negative, extremely divisive, and intolerably centrifugal'. Okafor as note 61 above 101.

<sup>84</sup> FRELIMO, the Mozambiquan ruling party, in the 1970s solemnly pledged 'to kill the tribe to build the nation' M. Cheg 'Remembering Africa' 71 *Foreign Affairs* (1992) 146.

<sup>85</sup> See Wunsch as note 50 above 36.

<sup>86</sup> See Okafor as note 61 above 102.

<sup>87</sup> As above.

<sup>88</sup> The domination by American-Liberians of the government and the concomitant exclusion of indigenous Liberians to a large extent explains the conflict in Liberia.

<sup>89</sup> The civil war in the Sudan resulted from the policy pursued by successive governments to Arabize and Islamize the largely Christian and animist South. See generally A A An-Na'im 'Constitutionalism and Islamisation in the Sudan' 99 *Third World Legal Studies* (1988).

<sup>90</sup> According to Crawford Young 'Rwanda is unambiguously associated with Hutu domination, as Burundi is with Tutsi.' Quoted in G.silassie as note 16 above at 48, 10.

also retained the colonial legal system and institutions.<sup>91</sup> The centralized political of the colonial state also targeted all avenues that might encourage ethnic loyalty and reduce the level of control exercised by the centre over groups and provinces within the state.<sup>92</sup> Consequently, with rare exceptions, African leaders eschewed, 'federation, minority rights and other techniques that sought to place limits on the powers of the ruling party.'<sup>93</sup> Such rights as freedom of speech and association as used by groups to advance their particular interests have been routinely discarded.<sup>94</sup>

This trend continued for 30 years until the unceremonious end of the bipolar era of the cold war at the end of the 1980s. Beginning from 1989 a new wave of change blew over Africa.<sup>95</sup> This had two components. On the one hand it involved the fall of authoritarian regimes<sup>96</sup> and the increase in the voices of suppressed groups. On the other hand, it forced the shift by the state to wards democracy as manifested through widespread constitutional making, adoption of new electoral systems and multipartysm and liberalization.<sup>97</sup>

Despite the hangover of the past, the resultant tendency in some places to heed to Africa's diversity aroused expectations. As Rothchild put it:

With political liberalisation gaining momentum and, in certain quarters at least, ethnicity gaining a grudging acceptability, the 1990s has come to represent an opportune time to explore the possibility of a new national consensus on reconfiguring state-society relations.<sup>98</sup>

The only countries that have made such an attempt are Ethiopia and South Africa. Keeping the examination of this attempt of the two countries for later chapters, now let us turn to the discussion on how international human rights law treats the claims of ethnic groups.

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<sup>91</sup> This undermined the use of national languages and African cultural and legal institutions. See G. silassie as note 16 above 19.

<sup>92</sup> According to Crawford Young the adoption not only of "unitary doctrine of the 'one nation, one people, one party, one leader variety' but also 'monopolistic formulations of governance, whether through single parties, military rule or combination of the two" has been the order of the day. C Young 'Ethnicity and the colonial and post colonial state in Africa' in P Brass (eds.) *Ethnic groups and the state* (1985) 84.

<sup>93</sup> Welsh as note 69 above 483. This led to struggles for regional power, local autonomy and for decentralization, which in some cases escalated into violent conflicts. Okafor as note 61 above 103.

<sup>94</sup> See Asante as note 81 above 86.

<sup>95</sup> See L Diamond 'Africa: The second wind of change' in Lewis as note 74 above (1998) 263-272.

<sup>96</sup> See S Decalo 'The process, prospect and constraints of democratisation in Africa' 91 *African Affairs* (1992) 7.

<sup>97</sup> Diamond as note 95 above.

<sup>98</sup> As note 74 above 222.

## 2.3 Ethno-national claims in international human rights law and discourse

To a large extent international law is still state centric. It treats the state as the principal, if not the only actor whose voice matters at the international plane.<sup>99</sup> The increase in the voice and influence of other actors necessitated inroads into the founding principle of the state centric international law, state sovereignty.

This trend began with the elevation up to the international plane of the norms of human rights following the Second World War. This involved the recognition of the human rights of the individual.<sup>100</sup> In the preamble to the UN Charter, the united nations of the world proclaimed 'faith in fundamental human rights, in the dignity and worth of the human person, in the rights of men and women'.<sup>101</sup>

This development has not been extended to include various groups within independent states of the world. States have resisted possible recognition of rights of ethno-national groups under international law, except in Africa. Thus, the international human rights system entertains the claims of groups only marginally. That is only 'to the extent that the claims of ethno-national groups can be characterized in terms of individual rights'.<sup>102</sup>

For good or ill, however, the costs that demands of ethno-national groups have invited have been tremendous. According to David Moyninam 'by far the greatest incidence of violence since (World War II) has been ethnic in nature and origin.'<sup>103</sup> As a result of this and owing to the proliferation of human rights norms, there has emerged a trend in human rights discourse to include group rights within the international human rights system. This trend has acquired legal manifestation with recognition of certain rights of groups particularly in the African human rights system.<sup>104</sup>

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<sup>99</sup> International law is predicated in large part on 'the presupposition that the voice that matters in the international arena'. See D Wippman 'Hearing voices within the state: Internal conflicts and the claims of ethno-national groups' 27 *New York University Journal of International Law and Politics* (1995) 585.

<sup>100</sup> 'After the Second World War, international system,..., accepted penetration of the monolithic state, and made the welfare of individual human beings within every state a concern of international politics and a subject of international law' L Henkin *International law: Politics and values* (1995) 184.

<sup>101</sup> Para. 2 Preamble the Charter of the United Nations.

<sup>102</sup> Wipman as note 104 above.

<sup>103</sup> As note 1 above.

<sup>104</sup> At the international level the recognition of group rights is found in the declarations of the UN. A good example of this is the Declaration of The Rights of People Belonging to National, Ethnic, Religious or linguistic Minorities, General Asssmbly Resolution 47/135 of 18 Dec. 1992.

### 2.3.1 Claims of ethno-national groups and the individual human rights system

Some of the claims of ethnic groups may easily be translated into issues of human rights proper.<sup>105</sup> To that extent they can therefore be entertained within the framework of individual, universal human rights. Such is the case, for example, with respect to claims for equality and non-discrimination of members of different ethnic groups as they seek to participate in the institutions and processes of the state to which they belong. In Africa instances of ethnic conflicts based, but not exclusively, on such claims include Liberia, Rwanda and Burundi.<sup>106</sup>

All international instruments on human rights include some provision on discrimination.<sup>107</sup> Thus established, the right to freedom from discrimination is meant to allow all persons, regardless of their ethnic identity, enjoy their human rights and fundamental freedoms in full equality with everybody else. In the jurisprudence of international judicial bodies, non-discrimination has been the primary avenue, first as a principle and later as a right, to channel the claims of groups.<sup>108</sup> In the international human rights system, the Human Rights Committee, the European Court of Human Rights and the African Commission had also to deal with cases on the basis of claims of discrimination. In the African Context, the use of the right to freedom from discrimination to entertain the claims of ethno-national groups is vividly demonstrated in the decision of the African Commission regarding a number of Communications against Mauritania.<sup>109</sup> In its decision the Commission held that

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<sup>105</sup> See M McDonald 'Should communities have rights? Reflections on liberal individualism' 4 *Canadian Journal of Law and Jurisprudence* (1991) 227 (discussing the translatability of collective rights).

<sup>106</sup> In Liberia, the indigenous population was denied equal treatment and participation by American-Liberians who dominated the government. In Rwanda the Minority Tutsis were victims of discrimination as the Hutus were in Burundi.

<sup>107</sup> Articles 2 and 7 of the Universal Declaration of Human Rights (UDHR); Articles 2(1) and 26 of the International Covenant on Civil and Political Rights (ICCPR); Article 2(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR); Article 2 of the African Charter on Human and Peoples' rights; Article 1(1) of the American Convention on Human Rights and Article 14 of the European Convention on Human Rights and Fundamental Freedoms.

<sup>108</sup> In the post World War I period, the Permanent Court of International Justice had the occasion to employ the principle of non-discrimination. In its advisory Opinion on *Minority Schools in Albania*, the Court found that the abolition of charitable religious and social institutions, schools and other educational establishments would be discriminatory. See PCIJ, Ser. A/B, No. 64 (1935) 5.

<sup>109</sup> This is evident from the Commission's deliberate reference to the UN Declaration of the Rights of People Belonging to National, Ethnic, Religious or Linguistic Minorities. As note 117 below.



for a country to subject its own indigenes to discriminatory treatment only because of colour of their skin is an unacceptable discriminatory attitude and a violation of the very spirit of the African Charter and of the letters of its Article 2.<sup>110</sup>

Another important individual human rights provision that has been instrumental to entertain the claims of ethno-national groups is Article 27 of the ICCPR.<sup>111</sup> Based on this provision, individuals belonging to ethnic minorities lodged a number of cases before the Human Rights Committee.<sup>112</sup>

The *Kitok v Sweden* case may be taken to appreciate the protection available to members of distinct cultural groups under Article 27. In this case the Human rights Committee elucidated the scope of application of Article 27. Without finding violation of the rights under Art. 27, the Committee stated:

The regulation of an economic activity is normally a matter for the state alone. However, where that activity is an essential element in the culture of an ethnic community, its application to an individual may fall under Article 27 of the covenant.<sup>113</sup>

This is proof enough that certain collective goods, minority cultures, have been covered within the ambit of the ICCPR.

### 2.3.2 Ethno-national claims and collective rights

It is discernable from the above that ethno-national groups have only a peripheral position under the individual, universal human rights system.<sup>114</sup> The recognition of their claims has essentially been accessory. First, their claims can be entertained only to the extent that they can justifiably

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<sup>110</sup> Communications 54/91, 61/91, 98/93, 164/97 to 196/97 and 210/98, *Malawi African Association, Amnesty International, Ms.sarr Diop, Union Interfricaine des Droits de l'Homme and RADDHO, Collectif des Venues et Ayants-Droits, and Association Mauritanienne des Droits de l'Homme v. Mauritania*, Tenth Annual Report 1999/2000 para. 131.

<sup>111</sup> The article reads: 'In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group to enjoy their own culture, to profess and practice their own religion, or to use their language'

<sup>112</sup> See for example HRC Communication No. 24/1997 *Lovelace v. Canada*; Communication No. 197/1985 *Kitok v. Sweden*; Communication No. 359/1989 *Ballantyne and Elizabeth Davidson v. Canada*; and Communication No. 511/1992 *Länsman et al. v Finland*.

<sup>113</sup> As above 229.

<sup>114</sup> For a discussion on the inefficacy of the individual centred system see generally A Anghie 'Human rights and cultural identity: New hope for ethnic peace?' 33 *Harvard International Law Journal* (1992).

be brought within the ambit of the rights proclaimed. And second, even when they are justifiably defensible within the scope of individual rights, they cannot be asserted as group entitlements.<sup>115</sup>

In recent years the international community seems more ready to accept the view that the individual-centred system combined with the non-discrimination rule alone are not sufficient to protect the rights of individuals as members of a group, and of course not the group as such.<sup>116</sup> Since major issues involving ethnic conflicts have to do with collective rights<sup>117</sup>, it is primarily through a system of collective rights that it is possible to effectively respond to the increasing and destructive demands of ethnic conflict in Africa.<sup>118</sup>

Currently, various rights have been identified as belonging to groups.<sup>119</sup> These rights range from the right to cultural identity to the right to self-determination. Within this range are included such rights as language, land, environment, development, representation and participation, compensatory rights and self-governance.<sup>120</sup> The following table shows the relationship between these rights and the claims of ethnic groups.

<b>Claims</b>	<b>Corresponding rights</b>
1. Legal recognition	Cultural identity/rights to promote and practice once culture, history and language;
2. Inclusion	Right to participation, representation and right to democratic governance
3. Autonomy/independence	Right to self-determination
4. Protection from exploitation, benefiting from economic opportunities	Land rights; the right to development; the right to environment; economic self-determination
5. Fair treatment in political and economic affairs	Affirmative action; protection from domination and discrimination
6. Physical security of the group	Guarantee against persecution; right of existence as a group

<sup>115</sup>See Art. 2 First Optional Protocol to the ICCPR

<sup>116</sup> N Lerner 'The evolution of Minority rights in international law' in C Brölmann, R Leteber & M Zieck (eds.) *Peoples and minorities in International law* (1993) 91.

<sup>117</sup> See Stavenhagen as note 15 above 21.

<sup>118</sup> See G.sillasie as note 16 above 25-35 discussing the case for collective rights.

<sup>119</sup> See generally G.silassie as note 16 above; Anghie as note 114 above.

<sup>120</sup> These various rights are legally provide for the constitutions of various states and in the African Charter.I

Most of these rights are translated into normative provisions under the Africa Charter, which particularly provides for what are called peoples' rights. Article 19 guarantees equality of all people and prohibits the domination by one or more people of another.<sup>121</sup> The right to self-determination is provided for under Article 20.<sup>122</sup> Article 21 guarantees all peoples the right to freely dispose of their wealth and natural resources in their exclusive interest.<sup>123</sup> It is under Article 22 that the right to development is stipulated. Article 23 provides for the right to national and international peace and security.<sup>124</sup> The right to a general satisfactory environment is enunciated under Article 24.

The above discussion brings to the surface how the claims of ethnic groups, which lies at the heart of ethnic conflicts in Africa, are inseparably linked with collective rights. It also reveals how they are best approached within the human rights framework from the perspective of collective rights.

## **2.4 The special place of the right to self-determination**

It is submitted here that the main feature of ethnic conflicts in Africa is that they are manifestations of the people's quest for taking its destiny into its hands.<sup>125</sup> Whether the conflict involves claims of recognition of cultural identity as the one in Algeria or a claim for independence as the one in the Sudan, it essentially mirrors the interest of the groups to be in charge of their affairs and treated equally. All that is ultimately a question of the right to self-determination. This makes the norm of the right to self-determination particularly valuable to Africa.<sup>126</sup>

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<sup>121</sup> Fear of domination and the quest to end subordination has fuelled the conflicts in such countries as DRC, Rwanda, Burundi, and Liberia.

<sup>122</sup> The quest for the right to self-determination has been a cause for many conflicts in Africa and currently it is at heart of the conflict in Sudan

<sup>123</sup> The most important complaint in the SERAC case is violation of this article. See the Communication 195/96 *The Social and Economic Rights Action Centre & the Centre for Economic and Social Rights v. Nigeria* paras. 55-58.

<sup>124</sup> In Africa peace and security are treated as the conditions for elaborating the humanity of Africans and the promise for the place of Africa in economic reconstruction in the next century. See H G Campbell 'The US security doctrine and the Africa Crisis Response Initiative' Africa Institute of South Africa Occasional Paper No.62 (Dec. 2000) 3.

<sup>125</sup> See generally C C Mojekwu 'Self-determination: The African perspective in Y Alexander & R A Friedlander (eds.) *Self-determination: National, regional and global dimensions* (1980)

<sup>126</sup> For a discussion on the significance of self-determination see C R Ezetab (1999) 'Legitimate governance and statehood in Africa: Beyond the failed state and colonial self-determination' in E K Quashigah & O C Okafor (eds.) *Legitimate governance in Africa: International and domestic legal perspectives* (1999) 442-456.

The claims of ethnic groups as are articulated in terms of group rights find expression in the grand norm of the right to self-determination. This can be appreciated from the constituent elements of the norm as elaborated under international law.<sup>127</sup> But the right to self-determination includes a certain amount of group control over political institutions and the political decision making process whereby the lives and livelihoods of the group are affected. It, therefore, caters for the interests of ethno-national groups and thereby contributes to stem ethnic conflict in Africa.

The right to self-determination is currently conceived as having economic, political, social, cultural and linguistic dimensions.<sup>128</sup> Arguably, its institutionalisation would avail groups traditionally dominated, excluded or marginalized in the political and economic life of the larger society. The right is also instrumental for reconfiguring state-society relationship in which the interests of members of society are well heard.

As has already been observed, the advent of colonialism and the nation-building project of the post-colonial state involved attempts to replace pre-colonial socio-political organization of African societies. These attempts were made without consultation with and participation of the peoples. Their values, institutions and cultures were demeaned and discarded. The peoples have, therefore, been denied from having any say on the process of their socio-political reorganization. Essentially, this denial constitutes denial of the fundamental right to self-determination. This gives the right to self-determination a special place in the quest of African peoples for democratic system. It is instrumental to regain their dignity back and 'take into their own hands the full responsibility of determining, without coercion, their political, economic and cultural destinies.'<sup>129</sup> Thus conceived, the right to self-determination is a right that enables communities as communities to exercise, develop, and transmit their culture as well as to participate fully in the political, economic and social process and to have their distinct character reflected in the institutions of government under which they live.

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<sup>127</sup> See Chapter III below.

<sup>128</sup> See Common Art. 1 of the ICCPR & the ICESCR.

<sup>129</sup> Mojekwu as note 125 above 288.

## **Chapter III The right to self-determination: Its legal nature, content and modes of institutionalisation**

Central to this study is the question of the utility of the right to self-determination in offering mechanisms for entertaining the claims of ethnic groups and thereby addressing the challenges that ethnic conflict in Africa poses. This requires demonstrating not only the link between the problem of ethnic conflict in Africa and the right to self-determination but also the significance of the right to self-determination as a viable response to ethnic conflict in Africa. That involves examination of the legal nature, the contents and the modes of institutionalising the right to self-determination.

### **3.1 The right to self-determination in history and international law**

The emergence of self-determination into the international arena is associated with its employment to redraw the map of Europe in the aftermath of World War I.<sup>130</sup> It was President Woodrow Wilson who proposed it to be the basis of the post war order.<sup>131</sup> In its application to the post war settlement the right to self-determination was destined to cater the interests of ethnic groups.<sup>132</sup> Despite that, Wilson was most importantly using the term 'self-determination' as a pseudonym for a right to democracy.<sup>133</sup>

During the era of the League of Nations self-determination was only 'an imperative principle of action' and did not crystallize into a 'right'.<sup>134</sup> It is only later on in the UN era that it is transformed into a legal right of peoples. This transformation did not, however, take place either by the time of the drafting of the UN Charter or in the initial UN era. The Charter of UN makes reference to self-

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<sup>130</sup> 'The territories of the former [Austro-Hungarian and Ottoman] empires required new sovereignties, and the principle of self-determination as a means of drawing new 'nationstate' boundaries became the vehicle for legitimising the victorious powers' re-division of Europe.' See H Hannum 'Rethinking Self-determination' 34 Va. J. Int'l L. 1 as reproduced in :Steiner & Alston as note 35 above.

<sup>131</sup> See Whelan (1994) as note 43 above 100. According to Wilson "national aspirations must be respected; peoples may now be dominated and governed only by their own consent. 'Self-determination' is not a mere phrase. It is an imperative principle of action, which statesmen will henceforth ignore at their peril." Quoted in Hannum as above.

<sup>132</sup> That led to the formulation of a scheme whereby identifiable peoples were to be accorded statehood and those ethnic groups too small or too dispersed to be eligible for their course of action were to benefit from the protection of special minorities regimes. See Whelan as note 43 above 100-101.

<sup>133</sup> Hannum as note 130 above 973.

<sup>134</sup> Since self-determination was not applied at the time on a universal basis but only selectively, Antonio Cassese concluded that it cannot be said a 'right' to self-determination existed in the inter-war period. See Cassese as note 42 above 26.

determination but merely as principle.<sup>135</sup> The other fundamental text of the UN, the Universal Declaration of Human Rights, does not even mention self-determination.<sup>136</sup>

The metamorphosis of self-determination into a fundamental right to self-determination took place in the course of the use of the principle of self-determination as an instrument for decolonisation and for justifying movements against racist white regimes in Africa or alien occupiers of the land of Palestine.<sup>137</sup> These practices precipitated the recognition under Article 2 of the UN General Assembly (GA) Resolution 1514(XV)<sup>138</sup> that: 'All 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.' But the right was framed to apply to traditional situations such as to peoples under colonial rule, alien subjugation, domination or exploitation and was not universal.<sup>139</sup> And unlike the emphasis of the interwar period on internal self-determination, in this context, self-determination 'carried the unmistakable signification of external self-determination, i.e. the right to reject alien subjugation, colonial or otherwise.'<sup>140</sup>

The 1970 GA Declaration on Friendly Relations<sup>141</sup> also referred to self-determination and equal right of peoples but required, like the 1960 Declaration, the exercise of the right to respect territorial integrity and political unity of a state. Unlike the 1960 declaration, however, this declaration suggests that states, which do not represent all their peoples, might be vulnerable to

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<sup>135</sup> Art. 1(2) states one purpose of the UN is 'to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples'. Art. 55 of the Charter also refers to 'respect for the principle of equal rights and self-determination of peoples'.

<sup>136</sup> Article 21 of the declaration does, however, state that 'Every one has the right to take part in government of his country, directly or through freely chosen representatives .... *The will of the people shall be the basis of the authority of government*'. [emphasis added]

<sup>137</sup> See Cassese as note 42 above 44-45.

<sup>138</sup> Declaration on the Granting of Independence to Colonial Countries and Peoples GA Res. 1514 (XV) UN GAOR 15<sup>th</sup> Sess. Supp. No. 16 at 66 UN Doc. A/4684 (1960).

<sup>139</sup> The Declaration limited the scope of the right to self-determination to colonial territories by providing that: '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 United Nations.' As above.

<sup>140</sup> M Clech Lâm *At the edge of the state: Indigenous peoples and the right to self-determination* (2000) 114.

<sup>141</sup> Declaration on the Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations Annex to GA Res. 2625(XXV) UN GAOR, 25<sup>th</sup> Sess. Supp. No. 28 121 UN Doc.A/8028 (1970).

further actions of self-determination by its peoples.<sup>142</sup> Self-determination is also established as a right of 'all peoples' under Article 1 of the two UN covenants, the ICCPR and the ICESCR.<sup>143</sup>

In Africa the trend has been to equate the right to self-determination to decolonisation. Since its formation the Organization of African Unity (OAU) has dogmatically affirmed, in principle, 'respect for the sovereignty and territorial integrity of every state.'<sup>144</sup> It is judicially recognised that there is a consensus among African states that this principle constitutes the framework and the limitation of the implementation of the right of peoples to self-determination.<sup>145</sup> But later under the African Charter on Human and Peoples' Rights<sup>146</sup> self-determination is controversially used as a right of all peoples, which term includes states and sub-state entities. Thus the Charter declares under Article 20:

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.<sup>147</sup>

### 3.2 On the scope and application of the right to self-determination

The developments noted above have over the years established self-determination as a super norm of international law to be a right of 'peoples'. Who are the 'peoples'? What are the bases for determining the group of individuals constituting 'people'? Who determines the 'self' of self-determination?

It is not questionable that peoples under colonial or other comparable alien domination are entitled to the right to self-determination.<sup>148</sup> It is neither contested that the whole population, that

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<sup>142</sup> The declaration insists that nothing about the right to self-determination can affect 'the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples... and thus *possessed a government representing the whole people belonging to the territory without distinction as to race, creed or colour.*' [emphasis added]

<sup>143</sup> The article provides: 'All 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.'

<sup>144</sup> Art. 3 (6) of the Charter of the Organization of African Unity of 1963.

<sup>145</sup> In its decision on the *Burkinafaso v. Mali* frontier dispute the ICJ observed: 'The essential requirement of stability in order to survive, to develop and gradually to consolidate their independence in all fields, has induced African states to judiciously consent to the respecting of colonial frontiers, and *to take account of it in the interpretation of the principle of self-determination of peoples.*' [emphasis added] ICJ Rep. (1986) 567.

<sup>146</sup> June 27, 1981 OAU Doc. CAB/LEG/67/3/Rev.5.

<sup>147</sup> In a separate paragraph the applicability of the right to self-determination to 'colonial or oppressed peoples' is affirmed.

is, people of an independent state are vested with the right to self-determination.<sup>149</sup> What is less clear is the issue of what and how other category of group of individuals may constitute 'peoples' for the purposes of self-determination. Yet the application of the right to self-determination is not limited to colonial peoples or the population of a state in its entirety. As we noted from the first and second chapters ethnic groups within many states invoke the right to self-determination, claiming political rights which range from internal autonomy to total independence. This raises the question of whether a portion of the population of a state may qualify to be 'peoples'.

In its early years, the GA used the term 'peoples' to refer to ethnic group within a state.<sup>150</sup> In its series of resolutions regarding the Tibet question, the GA referred to the ethnic group as a people.<sup>151</sup> The ethnic factor has also loomed large when the Bengal people<sup>152</sup> and the people of Western Sahara<sup>153</sup> were determined eligible to exercise the right to self-determination. Further, the language that the principal GA resolutions dealing with the right to self-determination employed does not preclude an interpretation that the term 'peoples' can mean ethnic groups.<sup>154</sup> Common Article 1 of the two UN human rights Covenants pronounces the right to self-determination as inhering in all peoples.<sup>155</sup> The subject of the right as enunciated by the Covenants is broader than colonial peoples or the entire population of a state.<sup>156</sup>

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<sup>148</sup> In the *Namibia* case the ICJ said that 'the subsequent development of international law in regard to non-self-governing territories (colonies), as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them.' ICJ Rep. (1971) 31.

<sup>149</sup> It is defensible to hold the 'view that a customary rule of internal self-determination as a right of the whole population of a sovereign state is currently taking shape in the international community' Cassese as note 42 above 347.

<sup>150</sup> Musgrave as note 39 above 157.

<sup>151</sup> As above.

<sup>152</sup> The International Commission of Jurists in its report on Bangladesh stated that 'if one of the constituent peoples of a state is denied equal rights and is discriminated against, it is submitted that their full right of self-determination will revive.' Quoted in McCorquodale (1994) 'Self-determination: A human rights approach' 43 *International and Comparative Law Quarterly* 862.

<sup>153</sup> The ICJ declared the group in Western Sahara a 'people' for the purposes of self-determination ICJ Rep. (1975).

<sup>154</sup> Resolution 2625(XXV) used a language suggesting that the right is available to peoples within independent states in the absence of representative government. In Resolution 1541(XV), Principle IV tended to describe the 'people' more in terms of ethnic variables. See *Principles Which Should Guide Members in Determining Whether or not an Obligation exists to transmit the information called for Article 73e of the Charter of the UN* U.N Doc. A/Res/1541 (XV).

<sup>155</sup> See note 147 above.

<sup>156</sup> The Human Rights Committee also makes evident that: 'the obligations [under Article 1] exist irrespective of whether a people entitled to self-determination depends on a state party to the covenant [i.e. colonial



Defining people in ethnic terms is also common in legal literature. Here, the approach is to use a combination of some objective characteristics and subjective elements to determine whether a group of individuals qualify to be a people for self-determination.<sup>157</sup> The United Nations Economic and Social Cooperation Organization (UNESCO) identified the following defining elements: 1) that the group or individuals enjoy some or all of the following common features as a) a common historical tradition; b) racial or ethnic identity; c) cultural homogeneity; d) linguistic unity; e) religious or ideological affinity; f) territorial connection; and g) common economic life; and 2) the group on a whole must have the will to be identified as a people or the consciousness of being a people.<sup>158</sup> The first category constitutes the objective characteristics defining the term 'people' and the second category the subjective element. The essence of this definition is primarily formulated in terms of ethnic criteria.

The trend to define people in ethnic terms is also observed in judicial pronouncements. In *Katangese people Congress v. Zaire*<sup>159</sup>, the African Commission said that

In the absence of concrete evidence of violations of human rights to the point that the territorial integrity of Zaire should be called to question and in the absence of evidence that the people of Katanga are denied the right to participate in government as guaranteed by Article 13(1) of the African Charter, the Commission holds the view that Katanga is obliged to exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire.<sup>160</sup>

The commission addressed itself on the issue of the aspect of self-determination normally available to the Katanga people and the conditions necessary for exercising the type of self-determination requested by the complainant representing the people. Implicit in this approach is the assumption that ethnically identifiable groups qualify to be 'peoples' for the purposes of the right to self-determination. Unlike this indirect approach of the African Commission, the Supreme Court of Canada was straight forward on this matter:

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peoples]. It follows that all States Parties to the Covenant should take positive action to facilitate realization of and respect for the right of peoples to self-determination.' See General Comment 12(21) (1984) para.6 A/39/40 143.

<sup>157</sup> Thus Yorma Destein defines people as follows: 'Peoplehood must be seen as contingent on two separate elements, one objective and the other subjective. The objective element is that there has to exist an ethnic group linked by common history.... It is not enough to have an ethnic link in the sense of past genealogy or history. It is essential to have a present ethos or state of mind. A people is both entitled and required to identify itself as such. Quoted in Musgrave as note 39 above 161.

<sup>158</sup> Quoted in E A Ankumah *The African Commission on Human and Peoples' Rights: Practice and procedures* (1996) 160-161.

<sup>159</sup> Communication 75/92 Eighth Annual Report 1994/95.

<sup>160</sup> As above.

It is clear that 'a people' may include only a portion of the population of an existing state....To restrict the definition of the term to the population of existing states would render the granting of a right to self-determination largely duplicative, given the parallel emphasis within the majority of the source documents on the need to protect the territorial integrity of existing states, and would frustrate its remedial purpose.<sup>161</sup>

Self-determination normally begins by self-definition or identity determination.<sup>162</sup> On the issue of what constitute a people for purposes of the right to self-determination, the consciousness and assertion by the group of its distinctness is crucial.<sup>163</sup> Thus, the primary criteria for identifying the 'self' should be the physical and political manifestation of a group that believes itself to be culturally and politically distinct, and its express assertion of the right.<sup>164</sup>

It may be concluded that peoples under colonial or other comparable alien domination and the whole populations of existing states are indubitably qualified to exercise the right to self-determination. The eligibility of ethnic groups in independent states to qualify as peoples for self-determination is neither established nor totally prohibited in international law and practice.<sup>165</sup> There is, however, a trend, to define 'peoples' to mean ethnic groups.

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<sup>161</sup> *Reference re Secession of Quebec* [1998] 1 SCR 217 (paras. 123-24)

<sup>162</sup> As Regassa noted The right to determination of one's identity is not an independent right in itself. It is only the first step in the process of orchestrating the demand for local or state self-government. Regassa as note 20 above 70.

<sup>163</sup> The International Commission of Jurists in investigating the events in East Pakistan emphasised this point as an essential and indispensable characteristic of a people saying that 'a people begins to exist only when it becomes conscious of its own identity and asserts its will to exist'. Quoted in Musgrave as note 39 above 160-161.

<sup>164</sup> Nanda writes that 'it can be persuasively argued that the subjective factors of one's identity and a common destiny should control.' V Nanda 'Self-determination out side the colonial context: The birth of Bangladesh in retrospect' in Alexander and Friedlander as note 125 above 203.

<sup>165</sup> The tendency has been to discourage an interpretation that ethnic groups qualify to be peoples for the purposes of self-determination. In his Agenda for Peace the General Secretary of the UN stated in 1992 that 'if every ethnic, religious or linguistic group claimed statehood, there would be no limit to fragmentation, and peace, security and economic well being for all would be ever more difficult to achieve' *Agenda for peace: Preventive diplomacy, peacemaking and peace-keeping* UN Doc.No.A/47/277-S/24111 (1992).

### 3.3 Dimensions of the right to self-determination and Modalities of its institutionalisation

There is a trend to make distinction between two dimensions of the right to self-determination: external self-determination and internal self-determination.<sup>166</sup> In the Helsinki Final Act Principle VIII thus declares:

By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, *their internal and external political status*, without external interference, and to pursue as they wish their political, economic, social and cultural development.<sup>167</sup>

#### 3.3.1 External self-determination

Self-determination in this sense implies the exercise of sovereign rights associated with statehood. There are basically three main forms of exercising external self-determination: the establishment of a sovereign and independent state (secession), the free association or integration with an independent state or the emergence into any other political status freely determined by a people.<sup>168</sup> Five of the eight faces of self-determination identified by Frederic Kirgis, Jk are linked with external self-determination. These are: a) freedom from colonial domination; b) right to remain dependent (e.g. Puerto Rico), c) right to peacefully dissolving of a state (e.g. former USSR and Czechoslovakia); d) right to secede (very disputed); and e) right of divided states to reunite (e.g. Germany).<sup>169</sup> Notably, secession is one form of external self-determination and only an aspect of the right to self-determination. But it is the most frequently claimed and deeply contested area of self-determination.<sup>170</sup>

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<sup>166</sup> See generally Cassese as note 42 above.

<sup>167</sup> Final Act of the Conference on Security and Cooperation in Europe. See 14 *International Legal Materials* 1292 (1975) [emphasis added]

<sup>168</sup> See Res. 2625(XXV) as note 146 above.

<sup>169</sup> F Kirgis, Jk 'The degree of self-determination in the UN era' 88 *American Journal of International Law* (1994) '307.

<sup>170</sup> The Katanga people of Zaire, the Zulu in South Africa, English speaking Cameroon, the Southern Sudan people and sections of Oromo people in Ethiopia have demands for secession. But secession as part of the right to self-determination is not yet established under international law. The Inter-American Commission on Human Rights some years back concluded that international law does not recognise a right to secede- or more precisely, a right to independently choose the form of its political organization-of an ethnic group such as the Miskito population of Nicaragua. Inter-American Commission On Human Rights (1983) *Report on the Situation of Human Rights of a segment of the Nicaragua population of Miskito Origin* OAS Doc. OEA/ser/LV/II.62, doc. 10, rev.3.

It is only in a few countries that external right to self-determination has been formally institutionalised either through their constitutions or governmental policies.<sup>171</sup> Some are of the opinion that providing the right to secession in founding documents would render the power of the central government ineffective, hamper national cohesion and ultimately invite fragmentation.<sup>172</sup> It may be added that such a right negates the possible incentive of groups to integrate and cooperate. However, one may as well say that such right put upon central government a responsibility to always respect the rights of peoples.<sup>173</sup> The instrumentality of secession clause is particularly high where the various groups in a polity lack trust and confidence about the union.<sup>174</sup> On the balance however, it is prudent to provide for the right to self-determination without mention of secession explicitly.

When secession is, however, stipulated in a constitution, it is necessary to provide for mechanisms that enhance national integrity and cohesion in a democratic fashion.<sup>175</sup> And such stipulation must also answer such questions as who and how the demand for secession can be initiated; who participate in the referendum; and the ways of asset division, territorial transfer etc.

### **3.3.2 Internal self-determination**

Probably in Africa an important dimension of the struggle for self-determination is the quest of groups for recognition of their collective rights rather than a collective struggle for national independence.<sup>176</sup> In that setting the right to self-determination is concerned with the exercises of a

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<sup>171</sup> According to the constitution of former Soviet Union, the Union republics had the right to secede. Czechoslovakia was divided into two independent states in a peaceful and orderly manner. Quebec has the right to secede from Canada if it so wishes.

<sup>172</sup> See S Assefa 'Two concepts of Sovereignty' *Addis Tribune* (March 24, 2000) 6; M Haile 'The new Ethiopian Constitution: Its impact upon unity, human rights and development' 20 *Suffolk Transnational Law Review* (1996) 32-36; G. silassie as note 16 above 46-49.

<sup>173</sup> Cass R. Sunstein 'Constitutionalism and Secession' 58 *University of Chicago Law Review* (1991) 633, 635.

<sup>174</sup> 'In countries experiencing profound ethnic divisions, the existence of a secession right is essential to allay ethnic fears and suspicions.' G. silassie as note 16 above 47.

<sup>175</sup> It is instrumental for this that the constitution provides for the supremacy of national policies and laws over the policies and laws of regional authorities.

<sup>176</sup> Anaya wrote 'the concept of self-determination is capable of embracing much more nuanced interpretations and applications [than that of independent statehood]'. S J Anaya 'The capacity of international law to advance ethnic or nationality rights claims' 7 *Iowa Law Review* (1990) 842.

degree of say by sub-state groups in the political and economic processes within a state, while at the same time enjoy their distinct identity and be in charge of their local matters.<sup>177</sup>

Among the various faces of self-determination that Kirgis, JK. Identified the ones that fall within the internal dimension of the right to self-determination are: a) right of limited autonomy; b) right of minority groups (as recognized in Art. 26 of ICCPR and in the General Assembly's 1992 Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities); and c) right to internal self-determination to one's chosen form of government (i.e. democratic self-governance).<sup>178</sup>

Right of autonomy is manifestation of self-governance.<sup>179</sup> Usually it involves exercise of a certain form governmental powers on matters within the autonomous jurisdiction of a people. In its formulation the autonomy could either be territorial or thematic. When right of self-governance is territorial<sup>180</sup>, it may take the form of component part of a federal government, or of a regional government to which powers have been devolved within a unitary state.<sup>181</sup> The creation of such arrangement involves power allocation, which is usually defined by a constitution or a law that is above the ordinary law.<sup>182</sup> The area of competence of the unites or local government can range from autonomy over most policies and laws in the region or part of the state to a people having exclusive control over only aspects of policy, such as education, social or cultural matters.<sup>183</sup> In such a way, territorial autonomy, particularly federalism vindicates the cause of cultural groups by

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<sup>177</sup> 'In group settings, internal self-determination involved the linking of movements for cultural and political autonomy for distinct peoples with the right of self-determination.' Falk as note above 45.

<sup>178</sup> As note 173 above.

<sup>179</sup> This is the best form of internal self-determination since it leaves certain matters to the exclusive determination of sub-state groups. Despite its vague meaning autonomy signifies independence from governmental or political interference in internal affairs is its core component . See H Hunnum & R Lillich 'The concept of autonomy in international law' *74 American Journal of International Law* (1980) 858, 860.

<sup>180</sup> Territorial autonomy, if it takes the form of federalism, is particularly instrumental only where conflicting ethnic groups are territorially based. See Rothchild as note 74 above 225.

<sup>181</sup> Steiner and Alston as note 35 above 991.

<sup>182</sup> 'The jurisdiction of the autonomy should be determined in detail by law and there should be a legal procedure for resolving jurisdictional disagreement' and the existence of the autonomy should not be dependent upon the will of the state. L Hannikainen 'Self-determination and autonomy in international law' in M Suksi (eds.) *Autonomy: Applications and implications* (1998) 91.

<sup>183</sup> McCorquodale as note 152 above 863.

providing room for modes of self-governance which are peculiar to local needs and interests while at the same time making cooperation at the centre possible.<sup>184</sup>

The formulation of autonomy regimes that cover certain aspects of the lives of groups is essentially thematic. One such type of regime is what may be called personal law.<sup>185</sup> When autonomy regimes are formulated as such, members of definite ethnic groups will be governed with respect of such matters as marriage, divorce, adoption or perhaps inheritance by law distinctive to them.<sup>186</sup> Although the law is usually religious in character, it may as well be customary.<sup>187</sup>

The other aspect of internal self-determination involves protection of cultural integrity of groups. Here using one's language, practicing one's culture and recognition of one's cultural identity as well as special arrangement for minority protection are important components.<sup>188</sup> Within this category, language is of particular significance.<sup>189</sup> Thus, in according the right to cultural self-determination, it is imperative that language rights are constitutionally guaranteed. According some languages official status at the national or regional level must be done with cogent justifications. Even if some languages do not otherwise become official, the rights of ethnic groups to teach in their languages or to use them in local government should be respected.<sup>190</sup>

Linked to these components of internal self-determination are non-discrimination principle and freedom from domination.<sup>191</sup> In culturally diverse societies, equal treatment and non-discrimination are crucial ingredients of legal and constitutional mechanisms that supplement the enjoyment of other rights as are guaranteed to groups by making nurturing a system in which every one is at a par.

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<sup>184</sup> In a federalism "the different groups in the constituent states as a whole form a 'nation by will'. The groups do not melt into a central state, but into a voluntary association". H J Heintze 'On legal understanding of autonomy' in Suksi (eds.) as note 182 above 24.

<sup>185</sup> Steiner and Alston as note 35 above 991.

<sup>186</sup> As above.

<sup>187</sup> The formulation of such regimes is usually accomplished by recognition of religious or/and customary laws and traditional institutions in a constitution or a law of high authority.

<sup>188</sup> The minority rights component in Kirgis, JK. formulation of the various faces of self-determination falls in this category of internal self-determination.

<sup>189</sup> 'In the ethnic context, language is both the vehicle and the expression of cultural values'. L Green 'Are language rights fundamental?' Osgoode Hall Law Journal quoted in G.silassie as note 16 above 39.

<sup>190</sup> As above 42.

<sup>191</sup> Domination basically does not go along with self-determination as it involves interference or denial of free exercise of choices by the dominated group. Thus, Article 20 of the African Charter prohibits the domination of one group by another.

Yet another important component of internal self-determination is what Kirgis, JK referred to as the right to a democratic form of government. This concerns the right of peoples within a state to choose their political status, the extent of their political participation and the form of their government.<sup>192</sup> Democracy is not however just about institutionalising multiparty system and periodic elections. It involves both representative and participatory democracy. Resolution 2625(XXV) emphasised that there be 'a government representing the whole of the people belonging to the territory without distinction as to race, creed or colour.'<sup>193</sup>

In ethnically divided societies the determination of representativeness of a government depends on the extent to which diverse groups are represented in the power structures and value systems of a government of a state. Such is a system of power sharing at the political centre that allows groups to have influence and authority in the management of the affairs of the country and encourages collaboration among the groups.<sup>194</sup> This is accomplished by providing constitutional or other institutional mechanisms whereby every group is involved in the power structure of governments. A strategy of representing major ethnic groups in the ruling coalition is one mechanism.<sup>195</sup> Where autonomy regimes are formulated territorially along ethnic lines, representation at the centre could be achieved by requiring the involvement of groups in the national parliament or even the executive. It can also be achieved by providing for a proportional representation electoral system.

In institutionalisation of the right to self-determination by recognizing wide ray of group rights and entrenching them in the structures of government, regard must also be had to develop and nurture national cohesion and integration. The rational for recognizing the right to self-determination is to make the political system home to every group in the sense of Robert Frost's line, the place where, when you got to go there, they have got to get you in. As such the

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<sup>192</sup> McCorquodale as note 152 above 864. According to T M Frank there is an emerging entitlement to democratic government under international law and 'self-determination is the historic root from which democratic entitlement grew. T M Frank 'The emerging right to democratic governance' 86 *American Journal of International law* (1992) 52.

<sup>193</sup> As note 141 above. Frank argued that there is an emerging entitlement of peoples to democratic government that crystallized into a legal right under international law. And according to him 'self-determination is the historic root from which the democratic entitlement grew. As above.

<sup>194</sup> Rothchild as note 74 above 235.

<sup>195</sup> As above 225.

existence of a properly functioning national political organization is vital. It is even necessary for the enjoyment of the right to self-determination.<sup>196</sup>

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<sup>196</sup> This is essentially because 'self-determination can only be produced jointly, through a political cooperation: No Ethiopia, Ethiopian or Oromo can achieve self-determination as Ethiopia, Ethiopian, or Oromo by itself or herself.' P H Brietzke "Ethiopia's 'leap in the dark': Federalism and self-determination in the new Constitution" 39 *Journal of African Law* (1995) 33.



## **Chapter IV Institutionalizing the right to self-determination: the Case of Ethiopia and South Africa**

In the foregoing chapters, it has been noted that what ultimately accounts for and engendered ethnic conflict in Africa are human rights problems. And the conflict is essentially a manifestation of struggle of groups for the right to self-determination. Further, the potential of institutionalizing the right to self-determination to cater for the interest of ethnic groups and thereby contribute in addressing ethnic conflict has been analyzed. What is left is to explore the application of this approach in Africa. This is to be done in this chapter by examining the attempt of Ethiopia and South Africa to contain ethnic conflict by institutionalizing the right to self-determination.

### **4.1 Ethnicity and ethnic conflict in Ethiopia and South Africa**

#### **4.1.2 Ethiopia**

In Ethiopia ethnicity has become an important realm for understanding Ethiopian history and for analyzing contemporary politics within the Ethiopian state. Ethiopia is populated by a great variety of ethnic groups with distinct cultural traditions.<sup>197</sup> The major groups include the Oromo (32%), the Amhara (30), Tigre (6%) and Somali (5%).<sup>198</sup> Other ethnic groupings include, but are not limited to, the Afar, Sidamo, Hadiya, Gedeo, Yem, and Agaw.

Ethiopia has a long history of statehood in Africa.<sup>199</sup> The creation of modern Ethiopia is, however, a result of the unification and modernization process that started in the mid of the 19<sup>th</sup> century.<sup>200</sup> In this process, the territorial expansion of the state into the peripheral lands of the south, west and east under Emperor Menelik II resulted in the incorporation of hitherto independent peripheral communities with varying religious and ethnic backgrounds.<sup>201</sup> It transplanted the religion, language and culture of the northern lands to the newly conquered peoples.<sup>202</sup> The state imposed

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<sup>197</sup> No one can tell for sure how many ethnic groups live in Ethiopia. According to the 1994 population census some 80 various cultural groups have been identified. See Ethiopian Federal Democratic Government Statistics Authority The 1994 population census of Ethiopia summary report at country and regional level (1998).

<sup>198</sup> As above.

<sup>199</sup> 'In Ethiopia, the origins of the state can be traced back twenty-five centuries into the mists of antiquity.' C Young as note 92 above 72.

<sup>200</sup> See B Zewde *A history of modern Ethiopia (1855-1974)* (1991) 60-68

<sup>201</sup> F Nahum (1997) *Constitution for a nation of nations* 13.

<sup>202</sup> Amharic was the official language.

taxes and appropriated land in these areas.<sup>203</sup> This engendered the subordination of the languages, cultures and religions of the various peoples to the culture of the 'historic Ethiopia'.<sup>204</sup> The cultural origin of the state and its inseparable association with this dominant culture, which is essentially assimilationist,<sup>205</sup> later informed the articulation of the national question in Ethiopia during the reign of the last Emperor, Haile Selassie I of Ethiopia.

There is no one reason for the crystallization of the nationalities issue in Ethiopia. Nor is there a consensus in the interpretation of the historical process through which the country evolved. While those who may be called Ethiopianists view this process as 'in-gathering-of peoples' bound by cultural destiny to union<sup>206</sup>, those espousing the colonial interpretation view it as a process of conquest, exploitation and assimilation.<sup>207</sup> Influenced by socialist literature, particularly Stalin's *The national question*, university students of the time bent to adopt the second view.<sup>208</sup> The articulation of the problems of the masses by the students in terms of 'nations, nationalities and peoples' brought ethnicity into the core of the state-society struggle and conflict in Ethiopia. This led to the creation of Ethnic-based movements<sup>209</sup> that launched armed resistance, along side class-based movements<sup>210</sup>, against first the monarch and later the self-declared socialist regime. This struggle culminated in the success of the ethnic-based movements in 1991. At the collapse of the socialist regime of Mengistu, political power fell into the hands of these groups, which have sought to restructure Ethiopia anew.

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<sup>203</sup> See C Clapham 'Ethnicity and the national question in Ethiopia' in P Woodward & M Forsyth (eds.) *Conflict and peace in the Horn of Africa: Federalism and its alternatives*

<sup>204</sup> The historic Ethiopian state normally known as Abyssinia had the Tigray (speaking Tigrigna), the Chirstain Agew (speaking Agewigna) and the Amhara (speaking Amharic) as its core and as the components of its nationhood, although the Tigray and the Amhara were preponderant .... The uniting or core culture consisted of common history and Christianity, not Amharic or the Amhara core culture' A Hilemariam (1994) 'Mutation of statehood and contemporary politics' In A Zegeye & S Paausawang (eds.) *Ethiopia in change* 19.

<sup>205</sup> See Clapham as note 206 above 28-31 (discussing this peculiar feature of the dominant culture).

<sup>206</sup> One proponent of this approach is Donald N. Levien *Greater Ethiopia: The evolution of a multiethnic society* (Chicago: University of Chicago Press, 1974)

<sup>207</sup> A prominent champion of this school is Clapham as note 207 above.

<sup>208</sup> They argued that the Amhara had colonized and suppressed all ethnic groups in the country. R R Balsvski 'An important root of the Ethiopian revolution: The student movement' in Zegeye Paausawang as note 208 above.

<sup>209</sup> These included such organizations as ELF (Eritrean Liberation Front) in 1961, which spawned the EPLF (Eritrean People's Liberation Front) in 1970, the Somali Youth League and Western Somali Liberation Front in 1960 OLF (Oromo Liberation Front) in 1974 and TPLF (Tigray peoples liberation front).

<sup>210</sup> Ethiopian People's Revolutionary Party (EPRP), and the Ethiopian Democratic Union (EDU)

#### 4.1.2 South Africa

Taking the case of South Africa, one finds that its people speak at least twenty languages, of which none is the first language of a majority of the population. The ethno-racial categories are approximately 27.1 million Blacks, 4.9 Whites, 2.8 coloured and 1.2 million Asians.<sup>211</sup>

In South Africa the prominence of ethnicity in the political arena is a relatively recent phenomenon. Although there existed various groups previously, race has been the important basis of the group categorization. First colonial domination and later the introduction of the apartheid system has geared group conflict along race groups, particularly between the numerically majority blacks and the politically dominant whites.

Ethno-genesis began in South Africa during the time of apartheid. Under apartheid apart from the classification of the South African population into four racial groups, blacks were further classified to constitute separate homeland along ethnic lines.<sup>212</sup> Within the black population, Zulus, with long history and monarchical tradition, have shown a separate ethnic identity.<sup>213</sup> Although whites at the time constituted a single ethnic group, the Afrikaner group, descended from South Africa's first white settlers and possessed of a long history of exclusivist self-definition, has evolved into a distinct ethnic group.<sup>214</sup> When the demise of apartheid and the emergence of majority rule became eminent, these developments gave ethnicity in the negotiation of a new order.

As a new constitutional order has been negotiated, two minorities in particular have demanded recognition of their separate identity. Right-wing Afrikaners demanded the right to establish their own state. Zulus, represented by the Inkatha Freedom Party, resisted the ANC's commitment to a unitary state, calling instead for South Africa to become a loose federation of ethnically delineated regions in which special recognition would be given to a virtually independent Zulu kingdom.

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<sup>211</sup> E I Udogu 'Ethnicity and democracy in Sub-Saharan Africa' in J M Mbaku (eds.) *Preparing Africa for the Twenty-First Century* (1999) 141.

<sup>212</sup> This is manifested in the creation of the TVBC states (Transkei, Bophuthatswana, Venda and Ciskei) and other six 'self-governing' territories within South Africa.

<sup>213</sup> This is manifested in the Zulu nationalism movement that centred on Chief Buthelezi's *Inkatha* Party. On Zulu ethnicity and Inkatha, see especially R J Southall 'Buthelezi, Inkatha and the politics of compromise' 80 *African Affairs* (1981) 453-81.

<sup>214</sup> See E G Tjønneland 'Class, ethnicity and racially exclusive state apartheid South Africa and the politics of continuity and change' in K Rupesinghe as not 15 above 86-89.

The important parallel with Ethiopia is that the demand of these groups is articulated in terms of the right to self-determination.<sup>215</sup> The social and political forces that invited ethno-genesis and ethnic conflict are, however, distinct. In South Africa, the apartheid system, the interest of Afrikaners and Zulus to a separate identity and the fear of losing their political privilege and significance informed the process of ethnic conflict. In Ethiopia, on the other hand, what ethnicity is politicised owing to the nature of state formation, the process of social change and the rise in the political consciousness of the group through the instrumentality of university students.

## **4.2 Institutionalising the right to self-determination as instrument of addressing the ethnic challenge in Ethiopia and South Africa**

In the 1990s both Ethiopia and South Africa formulated a new constitutional order for their respective peoples. Ethnicity was one of the most important issues that featured in the constitutional debate of these two countries. In Ethiopia, although the new leadership expressed its commitment to fully accommodate the demands of the historically marginalized and excluded groups in the new constitutional dispensation, the danger of disintegration of the Ethiopian state has been a cause for concern. In South Africa, While non-racialism is the "core ideology of the new South African state," the challenge is "to demonstrate that within a culture of non-racialism, various cultural, religious and linguistic communities can prosper and jointly provide content" to the new South African society.<sup>216</sup> As far as addressing the ethnic challenge is concerned, the two countries opted for institutionalising the right to self-determination and there by cater the interests of various groups. The manner in which this is achieved is explored next.

### **4.2.1 The case of Ethiopia**

A new constitutional order has been established in Ethiopia with the adoption of the Federal Democratic Republic of Ethiopia (FDRE) Constitution in 1994. Under this constitution Ethiopia is structured as a federal state in which ethnicity is an important component. Rights of equality, non-discrimination, language and cultural rights, and most of all the right of groups to self-determination including secession are also guaranteed.

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<sup>215</sup> See H A Strydom 'Self-determination and the South African Interim Constitution' 19 *South African Year Book of International Law* (1993/1994) 42-48, 48-49 discussing on the cases for Afrikaner self-determination and Zulu self-determination respectively.

<sup>216</sup> H.A. Strydom 'Minorities rights issues in post apartheid South Africa' 19 *Loyal of Los Angeles International and Comparative Law Journal* (1997).

- **Self-determination under the FDRE Constitution**

The success of ethnic based liberation groups has made self-determination an item so important as to be spelled out in the Constitution since 1995. Probably, in present day Ethiopia self-determination is the super norm from which the new constitutional system owes its current shape and on which it is premised. This is evident from its appearance in the very first paragraph of the Preamble to the Constitution.<sup>217</sup>

The full content of the right is, however, presented in an elaborated text under Article. 39. Accordingly self-determination includes the rights to: a) secede (sub 1 and sub 4); b) promote one's language, culture and history (sub-2); and c) to exercise full measure of self-government. Thus provided, the right is established quite uniquely to contain both the external and internal dimension of the right to self-determination. In addition to defining the contents of the right, the FDRE Constitution has gone further in identifying the 'self' to which the right is made available.<sup>218</sup> It is therefore clearly provided that the 'self' is any people group with common culture, language, identity, psychological make-up and territory.<sup>219</sup> This definition is strikingly consistent with the definition provided by UNESCO. It consists of both the objective characters and the subjective element of the definition of 'people' as discussed in the previous chapter.

What has surprised observers in this new orientation of state-ethnic relation is the constitutional sanctification of the right of secession as the penultimate form of self-determination.<sup>220</sup> The textual fact that secession is not only recognized but also had its procedures spelt out<sup>221</sup> and the fact that no condition is attached to its exercise is an evidence of this sacred status accorded to secession. This forms a constitutional manifestation of Judge Dillard's dictum that 'it is for the people to determine the destiny of the territory and not the territory the destiny of the people.' To proponents of the secession clause, it is the guarantee of democratic government.<sup>222</sup> To most of its pro- Ethiopian critics, it is a threat to the unity of the country leading to eventual

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<sup>217</sup> The paragraph makes it clear that the creation of the new system is based on 'full and free exercise of' the right of 'nations, nationalities and peoples' of Ethiopia.

<sup>218</sup> This is contrastable with the various international documents in which the definition of the 'self' is left open. See the discussion in Chapter III.

<sup>219</sup> See Art. 39 (5) the FDRE Constitution of 1994.

<sup>220</sup> The introduction into the Constitution of the right to secession is a result of the lack of trust that the various groups represented at the time of forming the transitional government in 1991 had to the central authority. It was sought by the groups to be to be guarantee for good central authority.

<sup>221</sup> See Art. 39 (4) as above.

<sup>222</sup> The right to secession is a 'basis for unity in diversity and serves as a litmus test for democracy' Nahum as not 205 above 53.

dismemberment in the face of pressure for fragmentation.<sup>223</sup> This danger is particularly imminent in the presence groups with tendency to walk-away. If it dose not encourage secessionist movements, it negates the incentive to exhaust available alternatives before resorting to secession. Where the right to self-determination is recognised under the Constitution and autonomy, power sharing and cultural rights are guaranteed, it is not advised to provide secession in a constitution.

- **Autonomy – Federalism and Self-government**

The federal system along which the state is framed is based on the right of ethnic groups to self-determination. The basis of state-formation is a mixture of ethnicity and territory, although ethnicity takes primacy.<sup>224</sup> The nomenclature of the states also reflects their ethnic content. Out of the nine states of the federation, seven of them take the name of the dominant ethnic group in the region.<sup>225</sup> The juxtaposition of the federal arrangement with secession makes Ethiopian federalism loose. It puts in the hands of the federated unites a weapon to flout constitutional obligations. This seriously compromises the ability of the federal government to protect the rights of citizens against encroachment by regional governments and authorities.<sup>226</sup> During the nine years operation of the federation, nothing of that fear has been born out by events. The federal government enjoys strong hold over the regional states of the federation. And with the introduction of a new bill authorising federal government to intervene in regions without invitation to restore order and peace there is a fear that the power of the regional states would be compromised.

One of the components of the right to self-determination as enunciated under Article 39 of the FDRE Constitution is the right of every nation nationality and people to ‘a full measure of self-government’. It confers upon every group the power to institute its own system of government. While this provides regional states the latitude to be in charge of their local affairs, at a higher level it is translated into equitable representation in all branches of the federal government.<sup>227</sup> The constitutional provision that allocates 20 seats within the federal legislature for minority nationalities, the representation of each nationality in the House of Federation are aspects of equitable representation.

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<sup>223</sup> See generally Haile as note 172 above.

<sup>224</sup> Art. 46(2) provides that "States shall be admitted on the basis of the settlement patterns, language, identity and consent of the people concerned."

<sup>225</sup> See Art. 47 (1) as note 223 above. The other two states the names of which is not attached with any of its ethnic component are Gambela and Southern Nations, Nationalities and Peoples Regional State.

<sup>226</sup> Assefa as 172 above 7.

<sup>227</sup> See Nahum as note 205 above 156.

- **Language and culture**

Linguistically, the constitution interprets self-determination to mean that every nation, nationality and people in Ethiopia has the right to speak to write and develop its language. The constitution further provides under Article 5 both for the equal recognition by the state of all languages and for determination by states of their official language. It seems that this puts an obligation on the state to support the development of its language by every group. This is a corrective measure of the historical past in which the lack of official status for the languages of non-Amharic speakers engendered feelings of resentment, subordination, and denigration of self-worth.<sup>228</sup>

The constitution also guarantees the right to cultural self-determination. Every nation, nationality and people is accordingly guaranteed to exercise, promote and develop its language within the limits of the constitution.<sup>229</sup> What is more interesting in this regard is the constitutional guarantee to preserve one's history as an exercise of the right to self-determination.<sup>230</sup> In the past, the mainstream historiography's focus is the historic Ethiopia (or more accurately "Abyssinian") core. The history of Ethiopia had thus meant largely the history of the Amhara and Tigre at times even vis-à-vis the other groups. In this regard the constitutional guarantee for every group to preserve its history would be a basis for rectifying such past wrongs.

#### **4.2.2 South Africa**

- **The right to self-determination**

One of the distinct features of the South African Constitution is its provision for the right to self-determination. The final constitution that came into force in 1996 is premised on the 34 constitutional principles that resulted from the multi-party negotiation process for the new South Africa. The right to self-determination was included as part of these constitutional principles. The principle stated that the recognition of the right of the South African people to self-determination, "shall not be construed as precluding . . . constitutional provision for a notion of the right to self-determination by any community sharing common cultural and language heritage, whether in a territorial entity within the Republic or in any other recognized way." This is later translated into Section 235 of the South African Constitution of 1996.

When compared with its Ethiopian counterpart, this provision is general. It does not provide for the content of the right nor does it clearly define the 'self' entitled to the right. It does not provide

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<sup>228</sup> See G.silassie as note 26 above 41.

<sup>229</sup> Art. 39 (2) FDRE Constitution.

<sup>230</sup> As above.

the form that the right may take and the procedures for its exercise. This would inevitably render the application of the right complex and unpredictable when compared to the one envisaged under the FDRE constitution. Notably, it is framed negatively and in such a way as to exclude an interpretation that self-determination involves secession. The right is also placed under the sub-heading 'other matters' in a chapter entitled 'General Provisions.' This indicates the marginal attention sought to accord the right.

- **Autonomy : provincial and local government system**

Under the 1996 Constitution, the South African government consists of national, provincial, and local spheres that are distinctive, interdependent, and interrelated.<sup>231</sup> It established nine provinces, of which at least four, Natal, Northern Transvaal, North-West and Eastern Cape, substantially corresponded with former homelands. The provinces are made to have boundaries that they have at the time the constitution took effect. In so many ways they do not correspond with any distinct cultural or racial group. Traditional Afrikaner districts were included in those provinces that substantially corresponded with former black homelands.<sup>232</sup> Alternatively, traditional Afrikaner provinces included parts of black homelands.<sup>233</sup> Afrikaner cities, like Pretoria, the former Boer capital of the Transvaal Republic, were grouped in the same province with more populous black cities, such as Soweto. This constitutes the effort of the Constitution to erase the past racial division instituted territorially.

Provinces are conferred with limited, individual executive<sup>234</sup> and legislative powers.<sup>235</sup> They have also concurrent legislative powers with the national government.<sup>236</sup> They can adopt their own constitution.<sup>237</sup> It is in this manner by dispersing governmental power, that an attempt is made to accommodate local interest and the aspirations of various groups but without risking the unity of the country. The constitution in this regard is lopsided in favour of strong central authority unlike its Ethiopian counter part.

As part of its scheme to ensure self-government, the Constitution also established at a lower level than provinces the system of local government.<sup>238</sup> This local sphere of government consists of

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<sup>231</sup> Section 40 of the 1996 Constitution of the Republic of South Africa.

<sup>232</sup> For example, the Ellisras and Warmbad districts were included in the Northern Transvaal Province and districts such as Aberdeen, Graaff-Reinet, and Jansenville were included in the Eastern Cape Province.

<sup>233</sup> For example, Thaba Nchu was included in the Orange Free State Province.

<sup>234</sup> See as note 231 above Sections 125-14.

<sup>235</sup> See as above 104-124; schedule 5.

<sup>236</sup> See as above Schedule 4.

<sup>237</sup> As above Section 142. The process of adopting provincial constitutions laid down under Sections 143-145

<sup>238</sup> As above Section 151.



municipalities that have legislative and executive powers.<sup>239</sup> It is at this level that the interests of various cultural groups in administering their own affairs is sought to be fulfilled.<sup>240</sup>

- **Language and culture**

Under the 1996 Constitution, the Bill of Rights prohibits unfair discrimination based on ethnic origin, culture, or language.<sup>241</sup> The Constitution also guarantees the right to receive education in the official language or language of one's choice where it is reasonably practicable.<sup>242</sup> This is comparable with the equal recognition of languages by the state under the FDRE Constitution. Other rights include: the right to establish and maintain, at one's own expense, educational institutions<sup>243</sup>; the right to use the language and participate in the culture of one's choice<sup>244</sup>; and the right of persons belonging to a cultural, religious, or linguistic community not to be denied the right to enjoy their culture, religion, and language and the right to form cultural, religious and linguistic associations.<sup>245</sup> Owing to the quest of Zulu for self-determination, a provision is included in the constitution for the institution, status and role of traditional leadership and for recognizing indigenous law.<sup>246</sup>

One distinctive nature of the formulation of these rights is that they are provided not as group rights but only as individual rights, which is in stark contrast with the Ethiopian formulation. But the advance of the South African Constitution when compared with the FDRE Constitution is that it takes account of past status of languages in its treatment of the eleven official languages. Indigenous languages are singled out by the state for 'advancement and status elevation' by reason of their historically 'diminished use and status'.<sup>247</sup> This invites equitable treatment as distinct from equal treatment. This is important in rectifying past wrongs and enhance the self-esteem of those deprived of equal treatment in the past.

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<sup>239</sup> As above.

<sup>240</sup> One of the purposes of local government is to provide accountable and democratic government for local communities as above Section 152 (1) (a). This read with Section 235 suggests the interest to provide self-government to cultural communities in as long as they live in a contiguous territory.

<sup>241</sup> See As above Section 9 (3).

<sup>242</sup> As above Section 29 (2).

<sup>243</sup> As above Section 29 (3).

<sup>244</sup> As above Section 30.

<sup>245</sup> As above Section 31 (1) (a) & (b).

<sup>246</sup> As above See Sections 211 & 212.

<sup>247</sup> See as above Section 6 (2).

## **Conclusion**

The focus of this study has been to explore the problem of ethnic conflict in Africa, the nature of the conflict and the interface between ethnic conflict and human rights. Most importantly, however, it has been about how ethnic conflicts in Africa can be articulated in terms of the right to self-determination and the potential of the right to self-determination to accommodate the interests of ethnic groups by vindicating collective rights. It has also been about the ways of institutionalising the right to self-determination to ameliorate ethnic conflict in Africa and the experience of Ethiopia and South Africa in this respect.

In Africa ethnic conflict poses serious challenges to the authority and existence of the African state. With the increase in their political consciousness and the ambivalence of the state to attend to demands of the masses, the discontent and resentment of groups towards the state rises. This fosters the incidence of ethnic conflict in Africa. We therefore find ethnic conflicts in almost all the quarters of Africa. In the first chapter this problem is particularly noted.

It has been noted that in Africa ethnic conflict is a result of the inter-play of multiple factors and forces. Examined from the perspective of state-ethnic relation, the most important of such forces include the advent of colonialism, the nature of the state system inherited and sanctified at independence and the process of the nation building project pursued by African states. The partition of Africa along arbitrary borders without regard to the cultural and ethnic make up of the African people, the differential treatment that various groups received in the hands of the colonial powers, the centralised and authoritarian system of administration that was instituted by the colonial powers fostered ethnic difference and invited incidence of conflict among various groups. In the post colonial period, the coercive approach employed for nation building, the pessimistic policy pursued against group identification, the identification of the state with dominant groups and the consequent suppression of other groups and the failure to meet the survival needs of the society have forced many groups to take up arms against the state. All these are problems inherent in the nature of the state and its structure.

The most important feature of these problems, as shown in this study, is that these problems are basically human rights problems. The institution of the nation state system is violation of the sovereign rights of the people to a political system of their choice. The disproportionate access to and control of societal resources is against the right of equality and is discriminatory. The coercive attempt to forge a common identity by erasing the particular identities of groups is denial of the groups' right to distinct cultural identity. Most importantly, the centralised and authoritarian

system of government prevented groups from having a control over their affairs, which is denial of the right to self-governance.

It has been argued that what these human rights problems ultimately centred around is the quest of groups to enjoy the right to self-determination. Putting it differently, this suggests that ethnic conflict in Africa is manifestation of the struggle of groups for the right to self-determination. Premised on this argument, the study affirmed that the right to self-determination has the potential to cater for the interest of groups by vindicating group rights. As a natural consequence of this, the study proposed the institutionalisation of the right to self-determination as a human rights necessity to ameliorate ethnic conflict in Africa.

The workability of this proposition is shown by examining the dimensions and constituent elements of the right to self-determination as articulated under international law. The study further affirmed this proposition by offering an overview of the ways in which the right to self-determination can be institutionalised.

It is suggested that in institutionalising the right to self-determination, to guarantee ethnic groups with group rights to preserve their identities, to use their languages, to practice and promote their cultures and to administer their internal affairs is essential for ensuring inter-group equality, a sense of belongingness to the nation, and genuine ethnic accommodation.

The case study on the attempt of Ethiopia and South Africa has shown the nature of this approach and the problems surrounding it. From the comparison between the two countries, one can see how the attempt of striking a balance between recognising and institutionalising group rights and at the same time maintaining national unity and effective central authority is determined by the particular history of different societies. From the example of Ethiopia, it was noted that providing for the right to secession, as part of the right to self-determination, is often controversial and pregnant with potential dangers in the maintenance of effective government and national unity. Because, as Samuel Assefa observed, 'a state which is not likely to be broken, may well be needlessly broken, by establishing a rule for how to break it up.'<sup>248</sup> As the South African case demonstrated, it is important that the content, form and procedure of exercising the right to self-determination is clearly spelt out to avoid difficulty in application.

It is firmly believed by the author that this study provides good insights into the problems of ethnic conflict in Africa, particularly how it can be articulated in terms of human rights norms and

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<sup>248</sup> S Assefa Of federalism and secession (a photocopied article that the author found without being able to find the source from which it is copied)

institutions. The proposition of the study also helps in reconsidering the reconfiguration of the African state in a way to cater for the rights of groups. For constitutional design and practice, the study helps to identify areas of concern and issues to be cautiously approached. The study is an important contribution in the field of human rights by its attempt to articulate ethnic conflict in Africa in terms of human rights norms and by neatly demonstrating the role of human rights norms and institutions in addressing problems as serious as ethnic conflict.

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