

# Chapter 6

## The Definition of Minorities in the African Legal and Political Doctrine



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**Abstract** The definition of minorities under international law has always invoked intense debates. In the discourse on the criteria for defining minorities, one of the main arguments has been that such a definition is not necessary, after all the UN managed to establish the principle of self-determination of peoples without adopting an official definition of the term “peoples”. Apart from the issue of necessity, states have also failed to come to a consensus regarding the criteria for determining who minority groups are. Due to the foregoing reasons, a universally accepted definition of the term “minority” is yet to be achieved at the international level. The most acclaimed definition of the term was proposed in 1977 by Francesco Capotorti, Special Rapporteur of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities. This definition undoubtedly contributes to an understanding of the concept. However, it does not fully reflect the complex nature of the minority question in multi-ethnic Africa. While discussing the criteria for defining minorities at the international level, the author highlights the complexities involved in determining who minorities are in African states and points out why these criteria may not suit the dynamics on minority matters. Drawing from the experience at the universal level and taking into consideration the peculiarities of the African continent, elements to consider in defining minorities in Africa are suggested.

### 6.1 Introduction

Many decades on after the UN made minority rights protection one of its agendas, an authoritative definition of the concept “minority” remains elusive. While this is a universal flaw, it is particularly evident within the African regional human rights system. The African map as we know it is made up of artificial borders drawn up by the former colonial powers with no regard to the boundaries between different ethnic groups, linguistic variations and regional power bases. The statement of the British

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Prime Minister, Lord Salisbury, at the signing of the Anglo-French Convention on the Nigeria-Niger boundary in 1906 evidenced this arbitrary and under-informed approach: “We [the British and the French] have been engaged in drawing lines upon maps where no white man’s foot ever trod: we have been giving away mountains and rivers and lakes to each other, only hindered by the small impediments that we never knew exactly where the mountains and rivers and lakes were” [1]. Post-independent Africa inherited the challenge of maintaining these mythical nation-states carved out of disparate ethnic groups, and in doing so, many African states disavow cultural diversity as divisive and consider the minority “problem” as alien to the continent. Clearly, however, this approach does not conform with the realities of multi-national Africa where there are more “peoples” (including ethnic and religious minorities) than there are states.

Amidst the lack of attention paid to the rights and concerns of minority groups, many African indigenous populations, peoples, ethnic, religious and other minorities are marginalized by other dominant groups. This has often resulted in bloody conflicts. The 1992 Rwandan genocide, the 2012 Tuareg uprising in Mali, the ongoing religious conflict in the Central African Republic, the protracted ethnic conflicts in South Sudan, etc., are a testament to this fact.

In order to promote peace and secure stable socio-economic development, African states must abandon the status quo. Instead, they must strive to accommodate ethnic diversity, celebrate and promote the richness of ethnic groups’ values, combat political, economic and social exclusion and respect the rights of all ethnic groups in development matters in line with their fundamental rights as prescribed under international law. To achieve this goal, it is important to provide a legal definition or the criteria based on which a group could be considered a minority in the African context, for the central argument of most African states against minority rights is not “whether or not minorities have certain rights in accordance with international law” but “which groups are minorities to be accorded such rights?”

In this article, we shall discuss the existing definitions and criteria for determining minority groups, analyse the African experience with regard to the definition of the concept “minority” and suggest possible elements to be considered in determining which groups constitute minorities in Africa.

## 6.2 Results and Discussion

Article 27 of the ICCPR provides: “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 the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language” [2]. Despite this reference made to minority groups and their rights in the ICCPR and other international legal instruments, including the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Prevention and Punishment of the Crime of Genocide, etc., a universally accepted definition of

the concept is yet to be attained. Even the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, an instrument specially adopted by the UN General Assembly to address the rights of minorities, did not make an effort to define the term.

One of the first “official” attempts to define the concept “minority” was made by the Permanent Court of International Justice (hereinafter PCIJ) in its advisory opinion regarding the immigration of the Greco-Bulgarian communities. The PCIJ described a minority as “a group of persons living in a given country or locality, having a race, religion, language and traditions of their own, and united by the identity of such race, religion, language and traditions in a sentiment of solidarity, with a view to preserving their traditions, maintaining their form of worship, securing the instruction and upbringing of their children in accordance with the spirit and traditions of their race and mutually assisting one another [3].” Following this definition, a similar characterization of minorities was given 4 years later by the court in the Minority schools advisory opinion [4]. In defining the concept, the PCIJ applied two tests—objective and subjective. The objective test is the existence of facts such as race, religion, language and traditions while the subjective test refers to “a sense of solidarity” among persons belonging to minorities and “the desire to preserve their traditions”. It is important to note that the concept “minority” developed by the PCIJ did not contain a single reference to the numerical factor, non-dominant position or the factor of citizenship.

After entering into the force of the 1966 International Covenants on Human Rights, the open-ended working group established by the Commission on Human Rights at its 42nd session prepared the “Compilation of Proposals Concerning the Definition of the Term “Minority” [5]. This compilation featured the provisions of various studies carried out within the framework of the Sub-Commission on Prevention of Discrimination and Protection of Minorities. Among these studies, the most widely cited definition of the concept was proposed by the Special Rapporteur of the Sub-Commission, Francesco Capotorti. Capotorti’s definition has a limited purpose and was made solely with the application of Article 27 of the ICCPR in mind. In that context, Capotorti defined the term “minority” as “a group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members — being nationals of the State— possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language”.

At the heart of the failure to achieve a generally accepted definition of the term “minority” lies, among other reasons, the inability of states to come to a consensus regarding the criteria for determining minority groups. The divergence in opinion among states has limited their contribution towards formulating an authoritative definition of the concept during the processes of adopting the existing legal instruments that regulate minority rights. This, of course, does not mean that states have not contributed at all to the development of the concept under discussion. In this regard, it is worth mentioning that the Central European Initiative Instrument for the Protection of Minority Rights of 1994 (hereinafter CEI Instrument) provides a rare treaty

definition of the term. Pursuant to Article 1 of this instrument, a “national minority means a group that is smaller in number than the rest of the population of a State, whose members being nationals of that State, have ethnical, religious or linguistic features different from those of the rest of the population, and are guided by the will to safeguard their culture, traditions, religion or language” [6]. The Convention Guaranteeing the Rights of Persons belonging to National Minorities, adopted by the member states of the Commonwealth of Independent States, contains a definition [7] of the term similar to the one found in the CEI Instrument. These treaties were adopted within the framework of sub-regional international organizations with relatively small membership. Thus, their definition of the term “minority” cannot be considered as generally accepted neither in Europe nor at the universal level. However, the fact that these states could reach a consensus on the definition of a “minority” is a triumph in the discourse on the definition of this term. This shows that a compromise on this issue is possible; this requires efforts by states in terms of not only their readiness to respect the rights of minorities, but also the willingness to make certain compromises in order to ensure the protection of the rights of minorities in their territories.

Another notable definition of the term was proposed in 1985 by Jules Deschênes, who sought to refine Capotorti’s definition at the behest of the UN Sub-Commission. According to this definition, a minority is “a group of citizens of a State, constituting a numerical minority and in a non-dominant position in that State, endowed with ethnic, religious or linguistic characteristics which differ from those of the majority of the population, having a sense of solidarity with one another, motivated, if only implicitly, by a collective will to survive and whose aim is to achieve equality with the majority in fact and in law” [8].

While the definitions discussed above undoubtedly contribute to an understanding of the concept of minorities, they come with their shortcomings. To begin with, the criterion of citizenship is not entirely convincing as it advocates the exclusion of certain groups from their rights as minorities. Indeed, this criterion poses a challenge to the protection of the rights of certain minority groups like the Rohingya in Myanmar and the nomadic Fulani in Ghana, who are considered non-citizens of their respective states. It must be added that the language employed under Article 27 of the ICCPR does not imply the “minorities” in question must be citizens, while Article 2 of the ICCPR enjoins states to [...] “respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”. The UN Human Rights Committee (HRC) has also reaffirmed in its General Comment to Article 27 of the ICCPR that a State party may not restrict the rights under Article 27 to its citizens alone [9]. Since it does not promote the rights of minorities to exist, to be treated without discrimination and to the preservation of their cultural identity wherever they are, the citizenship criterion should be rejected.

The numerical disadvantage has also been criticized. Critics of this element draw inspiration from situations where there may be no clear numerical minority or majority. They argue that where a distinct ethnic group constitutes a numerical majority yet

is in a non-dominant position, it is similarly entitled to the application of many minority standards in order to ensure their rights to non-discrimination and to protection of their identity. Thus, to such critics, the numerical disadvantage is not a decisive factor in determining who minority groups are [10]. It is doubtful in our opinion, however, that such groups can be considered “minorities”. According to Francesco Capotorti, in cases of dominance of a majority in a state by a numerical minority, the issue at stake is not about protection of minority rights but about self-determination of peoples as a whole [11]. Indeed, this statement is consistent with UN practice. For example, the UN treated the situation of the black population of South Africa during the apartheid period as a question of the right to self-determination of peoples as a whole rather than the protection of the rights of a racial minority despite the fact that the non-dominant black population constituted and still constitutes the numerical majority.

The criteria for defining minorities elaborated at the international level may not fully reflect the complexity of the minority question in multi-ethnic Africa. Most African states have highly diversified ethnic, religious and linguistic populations. Nigeria and Cameroon, for example, are made up of more than 250 different ethnic groups [12]. This diverse ethnic composition has often been exploited by political elites for political ends, further making it difficult to determine minority status especially in terms of the non-dominance of particular groups.

Another dimension to the minority question in Africa is that some numerically smaller groups sometimes forge alliances with other groups in order to attain political dominance. Changes in the political fortunes of such alliances inevitably lead to a change in the situation of an ethnic group from a dominant position to that of a non-dominant one. The Efik or the Ijaw in Nigeria are examples of such historically dominant minorities who now find themselves marginalized politically (*ibid.*).

Historically, Africa has witnessed many examples where a numerical minority have dominated the majority. The colonial minority white dominance in Rhodesia (now Zimbabwe), Angola, Mozambique, South-West Africa (now Namibia) and apartheid in South Africa are but a few examples. Even in the present day Africa, numerically large groups—as is the case of the Hutu in Rwanda and the Oromo in Ethiopia—have been largely excluded from political power (*ibid.*). Such precedents have therefore given a negative connotation to the term “minority” in the eyes of some African states.

Moreover, the distinction between minority groups and indigenous peoples is not always well defined, and this is no different in the African context. By their nature, both groups are usually not dominant in the society in which they live, whereas their cultures, languages or religious beliefs may differ from the rest of the population. Thus, indigenous peoples can claim the rights of minorities in accordance with international law. Despite this, international law provides separate mandates and mechanisms dedicated specifically to protect indigenous peoples’ rights.

Both indigenous peoples and minorities strive to protect, preserve and promote their identities. There are cases when indigenous peoples may find themselves in a minority-like situation. An example is the Fulani tribe in some West African states. On the other hand, some minorities, akin to indigenous peoples, may have strong and

long-standing relationships with their lands [13] and territories, as is the case with the people of Saramanka in Suriname. However, this is usually an exception rather than the rule since minorities are not usually identified by the criterion of a long ancestral, traditional and spiritual attachment to their lands and territories. In the literature, this has been proposed as the main difference between these two collectives.

With the difficulties in establishing minority status as well as reluctance by states to accord such status to groups, self-identification has been touted as a key criterion. Self-identification implies that it is groups themselves, who must “self-identify” as minorities or indigenous, irrespective of the position of the state of their residence on the matter. At the international level, indigenous peoples often emphasize their differences with minorities and thus advocate for separate standards under international law. However, indigenous peoples or ethnic communities on the African continent adopt a more flexible approach, with many of them describing themselves as indigenous minorities. For instance, the Ogieks of Kenya refer to themselves as an indigenous minority ethnic group [14].

The considerations in this paper do not signify a departure from the general standards at the international level. Instead, the focus of this work is to discuss the question of determining minority status from the African perspective. Keeping this in mind, we note right from the onset that none of the legal instruments within the African human rights system offers a definition of the term minority in spite of the African Charter on Human and Peoples’ Rights (hereinafter the African Charter) boasting the widest catalogue of collective rights—the rights of peoples [15]. Indeed, even the definition of the term “peoples” as contained in the African Charter has not been given. However, a brief look at the jurisprudence of the African Commission shows that the notion of “peoples” has evolved from covering only the nation-state to include sub-state groups. Similarly, even though the Charter does not specifically mention “minorities”, the African Commission has attributed such rights to the “rights of peoples”. The reporting guidelines for Article 19 of the African Charter also reflect a minority rights approach as they charge states to provide information on “the constitutional and statutory framework which seeks to protect the different sections of the national community” and the “Precautions taken to proscribe any tendencies of some people dominating another as feared by the Article” [16]. The guidelines further enjoin states to provide information on “measures and programmes” they have taken which are “aimed at promoting awareness and enjoyment of the cultural heritage of national ethnic groups and minorities and of indigenous sectors of the population” [ibid., Para. III.14 (iv)].

African states have accordingly taken a cue from the African Commission to treat the notion of “peoples’ rights” as something that transcends the nation-state. For instance, during the examination of the state report of Ghana in 1993, Article 19 of the African Charter: “All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another” was interpreted by the Ambassador of Ghana as referring to the domination of one ethnic group by another and not simply as the domination of one state over another [17]. The Assembly of Heads of State and Government of the Organization of African Unity also adopted a Declaration on a Code of Conduct for

Inter-African Relations in which they reaffirmed their “deep conviction that friendly relations among our peoples as well as peace, justice, stability and democracy call for the protection of ethnic, cultural, linguistic and religious identity of all our people including national minorities and the creation of conditions conducive to the promotion of this identity” [18]. This document is particularly significant in the struggle for the recognition and protection of minority rights in Africa since it remains the only legal document within the African Union which explicitly recognizes and calls for the protection of minority rights.

In a communication, the African Commission addressed allegations of discrimination against black Mauritians and expressed the following view:

“At the heart of the abuses alleged in the different communications is the question of the domination of one section of the population by another. The resultant discrimination against Black Mauritians is, according to the complainants, the result of a negation of the fundamental principle of the equality of peoples as stipulated in the African Charter and constitutes a violation of its art. 19” [19].

Similarly, in 2001 the Commission referred to Article 24, which states: “All peoples shall have the right to a general satisfactory environment favourable to their development” as applying to the Ogoni community of Nigeria. In its decisions, the Commission in various parts referred to the Ogoni as “people”, “communities” and “society” [20].

Taking into cognizance the discussion above, the following criteria should be kept in mind when determining who a minority is in the African context:

A minority is an ethnic, linguistic or religious group, which is distinct from other groups within a state; it is numerically smaller than the rest of the population of that state; it is non-dominant in that state; it consists of individuals who have a sense of belonging to that group; members of that group are discriminated against or marginalized on the grounds of their ethnicity, language or religion; members of that group are determined to preserve and develop their distinct ethnic identity. The group may also self-identify as a minority.

The above list is, of course, non-exhaustive. It encompasses a suggestion of both objective and subjective factors to consider when establishing minority status on the African continent. Indeed, there are many ethnic groups to which some or all the aforementioned characteristics would apply, although they may or may not identify themselves as minorities, for example: the Wayeyi, Bakalangain Botswana, the Herero in Angola, the Twa in Burundi, the Fulani in Ghana, the Haratin and black Africans in Mauritania, the Afar in Djibouti, the Khoisan in South Africa, etc.

### 6.3 Conclusion

The main challenge regarding the protection of minority rights in Africa has always been misgivings by African states that such rights are detrimental to national cohesion. It is therefore safe to state that recognition of minorities would lead to achieve the aims of preserving their identities and of obtaining equality with all other groups

in that state, including in relation to participation in political life as well as in development matters. Over the past few decades, an emerging shift in the mindset of states—from the perceived threat that minorities pose to nation building, to the increasing understanding of how the protection of these groups facilitates conflict prevention and resolution—has been made evident through the adoption of normative instruments such as the 1994 Declaration on a Code of Conduct for Inter-African Relations. It is noteworthy that the African Commission, through its jurisprudence and guidelines for state reports, has championed this paradigm change.

## 6.4 Recommendations

Moving forward, the African human rights system should strive towards establishing a mechanism specifically dedicated to minority rights' matters. As a key objective, such a mechanism should be tasked with formulating the criteria for determining who minority groups are in Africa, taking into consideration the peculiarities of the continent. Moreover, given that a lot of conflicts in Africa are ethnic or religious in nature, it should be tasked with identifying and addressing causes of ethnic tensions and conflicts, helping resolve situations involving minorities that might develop into conflicts and giving thematic recommendations and guidelines that contain advice on common challenges and best practice as it is done by the Organization for Security and Cooperation in Europe's High Commissioner on National Minorities. Adopting a treaty or, at least, a declaration on minorities will certainly boost recognition and the protection of the rights of minority groups. Sub-regional arrangements, such as the Commonwealth of Independent States (CIS) and the Central European Initiative (CEI), have proven this is possible. Why not Africa?

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