

1991

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Recommended Citation

Swanson, Julia (1991) "THE EMERGENCE OF NEW RIGHTS IN THE AFRICAN CHARTER," *NYLS Journal of International and Comparative Law*. Vol. 12 : No. 1 , Article 8.

Available at: https://digitalcommons.nyls.edu/journal_of_international_and_comparative_law/vol12/iss1/8

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THE EMERGENCE OF NEW RIGHTS IN THE AFRICAN CHARTER

I. INTRODUCTION

In 1981, the Organization for African Unity (OAU) adopted a Charter for the promotion and protection of human rights on the continent of Africa.¹ It proved to be a remarkable document for it represents a significant departure from international and regional human rights instruments which have preceded it, in that it is singularly African and responsive to uniquely African circumstances.²

Consistent with the pledge made by the OAU to "have due regard to the Charter of the United Nations and the Universal Declaration of Human Rights,"³ and to "reaffirm their adherence to the principles of human and peoples' rights and freedoms contained in the declarations, conventions, and other instruments adopted by the OAU, and the United Nations,"⁴ the African Charter enumerates conventional norms, rights, and freedoms ascribed to the individual.⁵ However, the Charter also embodies two startling innovations. For example, the Charter specifies peoples' rights. Five provisions, all aspirational in nature, name not the individual, but peoples, as beneficiaries.⁶ The drafters' philosophy that these peoples'

1. African Charter on Human and Peoples' Rights, June 27, 1981, O.A.U. Doc. CAB/LEG/67/4/Rev.5, reprinted in 21 I.L.M. 58 (1982) [hereinafter African Charter].

There has been some confusion over the title of the Charter, which is sometimes known as the Banjul Charter, after Banjul, Gambia, the site of the two Ministerial Conferences that resulted in the final draft of the Charter. Many States felt there would be confusion with the Charter of the Organization of African Unity. Their concern, if it was warranted, was not heeded, and today the document is known both officially and unofficially as the African Charter. Gittleman, *The African Charter on Human and Peoples' Rights: A Legal Analysis*, 22 VA. J. INT'L L. 667, n.1 (1982).

2. van Boven, *The Relations Between Peoples' Rights and Human Rights in the African Charter*, 7 HUM. RTS. L.J. 183, 186 (1986).

3. African Charter, *supra* note 1, preamble, cl. 3.

4. *Id.* cl. 9.

5. The authors of the African Charter recognized it was "prudent not to deviate much from the international norms solemnly adopted in various universal instruments by the different member states of the OAU." OAU Doc. CAB/LEG/67/3, Rev. 1, at 2.

6. Although the concept of "peoples" has enjoyed some currency in international law, the

rights are pivotal to the Charter's objective is reflected by the title: the African Charter on Human and Peoples' Rights.⁷

The five rights, which in the African Charter are ascribed to peoples, are "new rights" in the process of acquiring recognition as international norms. These rights are highly controversial and have provoked lengthy debate since they were first proposed as human rights norms in the 1970s.⁸ The African Charter is the first major legally authoritative human rights instrument to incorporate the new rights as independent provisions.⁹ Such official acceptance considerably enhances their judicial status and is highly significant for the international legal community.¹⁰

In addition, African traditions and the values of African civilization have been carefully utilized as the basis of the Charter,¹¹ the implication of which is that in the future cultural identity will be a much stronger factor in the drafting of regional human rights instruments.¹² This Note suggests that an enduring contribution to the development of global human rights norms has been made by the African Charter, for it demonstrates that human rights norms are not universally applicable but rather vary with time and according to regional cultural variations.

dynamic use made by the African Charter of the term "peoples' rights" has thrust it into much greater pre-eminence within international human rights law. Recently a number of international human rights instruments and General Assembly Resolutions have referred to the rights of peoples, "particularly those dealing with self-determination and sovereignty over natural resources." Rembe, *Africa and Regional Protection of Human Rights* (1985), quoted in Kiwanuka, *The Meaning of 'People' in the African Charter on Human and Peoples' Rights*, 82 AMER. J. INT'L L. 80, 81 (1988).

7. The full title of the Charter immediately raises the question of definition of 'peoples', which is conspicuously not offered by the Charter's authors. One goal of the Charter is to preserve the African perspective, a relevant aspect of which is that in Africa a person is viewed "not as an isolated and abstract individual, but an integral member of a group animated by a spirit of solidarity." Rapporteur's report, OAU Doc. CM/1149 (XXXVII), Annex 1, at 4, para. 13 (1981), quoted in Kiwanuka, *supra* note 6, at 82 n.11.

8. See Marks, *Emerging Human Rights: A New Generation for the 1980s?*, 33 RUTGERS L. REV. 441, 442-50 (1981).

9. Kiwanuka, *supra* note 6, at 81.

10. See *Klingenthal Symposium: On Peoples' Rights and Human Rights*, Strasbourg, Apr. 10, 1985, 7 HUM. RTS. L.J. 410, 413 (1986) (discussing individual and collective rights, noting that "for the first time in history, responsibilities of individuals vis-à-vis peoples in other nations were arising"). *Id.* at 413.

11. African Charter, *supra* note 1, preamble, cl. 4.

12. See Cobbah, *African Values and the Human Rights Debate: An African Perspective*, 9 HUM. RTS. Q. 307, 328-29 (1987).

II. PEOPLE'S RIGHTS IN THE AFRICAN CHARTER

The first eighteen of the twenty-nine articles of enumerated rights and duties that comprise Part I of the African Charter¹³ are conventional norms, while articles 19 through 24 specifically name "[a]ll peoples" as the beneficiaries.¹⁴ Chapter II of Part I elaborates upon the duties of the individual,¹⁵ while the remainder of the Charter is composed of measures for the organization of a Human Rights Commission¹⁶ and some general provisions.¹⁷

Article 19 provides for the equality of all peoples, which prohibits the domination of one people by another.¹⁸ This right, which is not amongst the "new rights," refers to the aim of the Charter to eliminate colonialism, apartheid, and discrimination.¹⁹ Article 20 sets out the right to self-determination as it interrelates with the right to development.²⁰ Article 21 claims the peoples' sovereignty over their own natural resources,²¹ and article 22 specifies the right to development, proclaiming that "[a]ll peoples shall have the right to their economic, social, and cultural development .

13. African Charter, *see supra* note 1.

14. *Id.* arts. 19-24.

15. *Id.* arts. 27-29.

16. *Id.* arts. 30-63.

17. *Id.* arts. 64-66.

18. Article 19 of the Charter provides: "All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify domination of a people by another." *Id.* art. 19.

19. *Id.* preamble, cl. 8.

20. Article 20 of the Charter provides:

1. 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.

2. Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community.

3. All peoples shall have the right to the assistance of the States parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.

Id. art. 20.

21. Article 21 of the Charter provides in relevant part: (1) All peoples shall freely dispose of their wealth and natural resources . . . (4) States parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity. *Id.* art. 21.

...²² Article 23 asserts the "right to national and international peace and security. . ."²³ and lastly, article 24 declares that "[a]ll people . . . shall have the right to a general satisfactory environment favorable to their development."²⁴

Some scholars are of the view that peoples' rights are not rights in the legal sense at all, but, rather, are lofty ideals.²⁵ Others assert that they are mere political catchwords that are typical of those used by the developing countries as a manifestation of their call for a New International Economic Order.²⁶ However, these very same rights have been the theme of many important human rights instrument in the past and have become the subject of intense discussion within the arena of human rights legal scholarship.²⁷

A. *The Concept of New Rights*

1. The Three Generations of Rights

The birth of international human rights can be traced to the movement for the rights of man in eighteenth century Europe.²⁸ At that time the concerns of the bourgeois classes over their individual freedoms and political role led to the French and American Revolutions.²⁹ By taking power, the people were able to institute civil and political rights. These rights were conceived negatively as "freedoms from" rather than as positive "rights to."³⁰ They required the prohibi-

22. *Id.* art. 22.

23. *Id.* art. 23.

24. *Id.* art. 24.

25. See, e.g., Bondzie-Simpson, *A Critique of the African Charter on Human And Peoples' Rights*, 31 HOWARD L.J. 643, 657 (1988).

26. Alston, *Making Space for New Human Rights: The Case for the Right to Development*, 1 HARV. HUM. RTS. Y.B. 3, 22 (1988) (in which the author summarizes the approach of the Reagan administration to the right to development, in direct opposition to its foreign policy).

27. Alston, *A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law?*, 29 NETH. INT'L L. REV. 307, 308 (1982).

28. Marks, *supra* note 8, at 437.

29. *Id.* at 438. While the concept of human rights is neither exclusively nor essentially Western, the French and American Revolutions were pivotal in the elaboration of international law. For a discussion of the privileged position occupied by Western Europe and North America in the formulation of much of our international human rights law, see L. HENKIN, *THE RIGHTS OF MAN TODAY* (1978).

30. Marks, *supra* note 8, at 438.

tion of interference by the state with the freedom of the individual.³¹ Today they are embodied in the International Covenant on Civil and Political Rights.³²

A second wave of human rights, consisting of claims rather than freedoms, owes its emergence to the socialistic revolutions against exploitation that took place in the early 1900s.³³ This was a generation of social and economic rights that was designed to improve the material realities of social conditions, and required the intervention, rather than the abstention, of the state.³⁴ These rights correspond to the rights that are enumerated in the International Covenant on Economic, Social, and Cultural Rights.³⁵ The distinction between those rights that are "inalienable," permanent, and universal and those bestowed by the law of a state, gave rise to the concept of generations of rights.³⁶ Civil and political rights are those of the first generation, while second generation rights are those directed at economic security and independence.³⁷

The usefulness of the distinction may be found in Dr. Karel Vasak's vision of three generations of rights.³⁸ He perceived a correspondence

31. *Id.*

32. International Covenant on Civil and Political Rights (1966), G.A. Res. 2200(XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966) [hereinafter ICCPR]. These rights are essentially freedom of opinion, conscience and religion, freedom of expression and of the press, freedom of assembly, freedom of movement, freedom from arbitrary detention or arrest, and freedom from interference in correspondence. Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 AM. U.L. REV. 1, 23-24 (1982).

33. Sohn, *supra* note 32, at 33.

34. Marks, *supra* note 8, at 438. These rights are in essence the right to work, the right to social security and the right to opportunity for advancement, and have been expanded upon in the Universal Declaration of Human Rights to include the rights to form and join trade unions; the right to rest and leisure, including holidays with pay; the right to an adequate standard of living, including food, clothing, housing and medical care; the right to social security, especially against unemployment, sickness and old age; the right to education; the right to participate in the cultural life of the community; the right to protection of scientific, literary and artistic production. Universal Declaration of Human Rights, G.A. Res. 217A(III), 3 U.N. GAOR (I) 71, U.N. Doc. A/810 (1948) [hereinafter Universal Declaration]; see Sohn, *supra* note 32, at 45-48.

35. International Covenant on Economic, Social and Civil Rights, G.A. Res. 2200(XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966) [hereinafter ICSECR]; see Sohn, *supra* note 32, at 45-48.

36. See Marks, *supra* note 8, at 438.

37. *Id.*

38. Credited with development of the concept of the third generation of rights is Karel Vasak, when he headed the United Nations Human Rights Committee. Marks, *supra* note 8, at 441 (quoting K. Vasak, Lecture to the Tenth Study Session of the International Institution

between the first, second, and third generation rights, the latter of which are currently emerging, and the French ideals of "liberte, egalite, fraternite."³⁹ The third generation, he said, ". . . are human rights born of the brotherhood of men and their indispensable solidarity. Are these not tenets which would unite men in the finite world? Such is the orientation of these new human rights of the third generation."⁴⁰ The idea of generation, he continued, was intended to suggest the progression and development of society, with new rights evolving as earlier rights began to sink deeper roots.⁴¹

Vasak labels these rights 'new' in the sense that they represent new aspirations.⁴² It was part of the recent initiative, he said, to "infuse the human dimension into areas where it has all too often been missing, having been left to the State."⁴³ The notion of solidarity, he assured his dissenters, is not the perquisite of the third generation rights, for all

of Human Rights (July 1979).

For a concise summary of the principal assumptions behind the concept of solidarity rights, and the main sources of their analysis, see Alston, *supra* note 27. Alston argues that a third generation of solidarity rights would not devalue existing rights for a dynamic approach to formulating human rights is essential to their validity and adequacy over time. *Id.* at 322. He cautions, however, that the 'right' to draw up "international shopping lists" by "appealing to the favorite concerns of each of the main geopolitical blocs" would seem to "contribute more obfuscation than clarification in an area which can ill afford to be made less accessible to the masses than it already is." *Id.*

39. Marks, *supra* note 8, at 441.

40. *See id.*

41. *See id.* The concept of a third generation of rights has been highly controversial. *Id.* at 451. Opponents object that it tends to detract from the effective implementation of other rights, that the proliferation of new rights weakens those already recognized, and that the word "generation" connotes succession, implying that the "old" rights are outdated, no longer necessary, and have been replaced with new ones. *Id.* They claim the new rights are vague and imprecise, in fact are not rights at all, but political and social principles, or rights only in the moral sense, and they threaten to undermine the integrity of our existing human rights system. *Id.*; *see also* Sohn, *supra* note 32, at 61.

42. Vasak conceives that the new rights are innovative and progressive, and belong to the "New Frontier" where in no way can they interfere with the established domains of the other generations. *Id.* at 441. Other proponents of the third generation believe that it is a valid method of preserving and defining existing human rights while taking into account the dynamic nature of the emergence of human rights. *Id.* at 439-40. From this perspective, the concept of generations is a useful analytical tool because it enables us to see the manner and direction in which the human rights tradition has evolved. *See, e.g., id.* at 451. Professor Sohn believes the current relevance of the new human rights lies somewhere in between the two extremes, that the new rights establish new goals that can be achieved progressively, by one step after another. *See* Sohn, *supra* note 32, at 63.

43. Marks, *supra* note 8, at 441.

human rights require solidarity for their achievement, but the new rights are based on the concept of solidarity, without which the chief concerns of the world community, such as peace, development, and the environment, cannot be realized.⁴⁴

2. Candidates for Recognition as New Rights

The waiting list of rights seeking consideration for inclusion in the new rights category is lengthy and varied, but only seven have survived as truly serious candidates.⁴⁵ They are the right to development,⁴⁶ the right to the environment,⁴⁷ the right to peace,⁴⁸ the right to communicate,⁴⁹ to right to share in the common heritage of mankind,⁵⁰ the right to be different,⁵¹ and the right to receive humanitarian assistance.⁵² All but the last two are specifically enumerated as peoples' rights in the African Charter.⁵³

The problem with the new rights is not so much their proliferation as their haphazard manner of expansion.⁵⁴ Every interest group seeks to locate its cause under the banner of Human Rights.⁵⁵ However, no qualified body, such as the United Nations or the United Nations Education, Social, and Cultural Organization (UNESCO), has ever established any kind of formalized procedure for their evaluation and recognition.⁵⁶

44. Marks, *supra* note 8, at 441.

45. Alston, *supra* note 27, at 307.

46. See *infra* text accompanying notes 96-105.

47. See *infra* text accompanying notes 118-25.

48. See *infra* text accompanying notes 106-17.

49. INT'L COMM'N FOR THE STUDY OF COMMUNICATION PROBS., MANY VOICES, ONE WORLD 172 (1980).

50. Declaration of Principles Governing the Sea-Bed, 22 U.N. GAOR C.1 (1516th mtg.) at 3, U.N. Doc. A/C.1/PV.1516 (1967); Charter of the Economic Rights and Duties of States, G.A. Res. 3281(XXIX), 29 U.N. GAOR, Supp. (No. 31) at 50, U.N. Doc. A/9631 (1974) [hereinafter Charter of the Economic Rights and Duties].

51. UNESCO, UNESCO'S STANDARD-SETTING INSTRUMENTS III.c.1 (1981).

52. See Geneva Convention for the Amelioration of the Wounded and Sick, Aug. 12, 1949, ch. 1, art. 7, 6 U.S.T. 3115, 3318, T.I.A.S. No. 3362 (1949); International Committee of the Red Cross, Protocols Additional to the Conventions of 12 August 1949, 16 I.L.M. 1391 (1977).

53. African Charter, *supra* note 1, arts. 19-24.

54. See Alston, *Conjuring Up New Human Rights: A Proposal for Quality Control*, 78 AM. J. INT'L L. 607, 608 (1984).

55. *Id.*

56. *Id.* at 613.

Voicing their opposition to recognition of new rights are detractors who claim that they are too vague and exaggerated, which allows states to vote in favor of them without commitment to their realization.⁵⁷

3. Pressures to Proclaim New Rights

The proclamation of human rights as a means of gaining support for a cause is a time-honored technique, ever since the Magna Carta.⁵⁸ Many human rights documents come into being because of someone's just cause.⁵⁹ The adoption of the Universal Declaration of Human Rights⁶⁰ was different, for it represented agreement by the international community on a common standard of human rights. This was only possible because member states accepted the General Assembly as arbiter, recognizing its authority to determine which claims could be deemed rights and which could not.⁶¹ Article 13 of the United Nations Charter mandates the General Assembly to "initiate studies and make recommendations for the purpose of . . . assisting in the realization of human rights and fundamental freedoms for all."⁶² Therefore, the authority that the states vested in the General Assembly rested on firm legal foundations.⁶³

Previously, this international standard was sufficiently inclusive to allow for stabilization and the realization of extant rights.⁶⁴ However, at the present time, there are pressures to proclaim more rights.⁶⁵ Human rights are by nature dynamic. The challenge is to find the balance between the integrity and credibility of the human rights tradition on the one hand, and the inherent dynamism of these rights on the other, so that we may continue to respond appropriately to new threats to human dignity.⁶⁶

57. *Id.*

58. *Id.* at 608.

59. *Id.*

60. Universal Declaration, *supra* note 34.

61. Many members of the drafting committee lost confidence that consensus could be achieved, and suggested that a much lesser goal be set. UNESCO, HUMAN RIGHTS: COMMENTS AND INTERPRETATIONS 93-95 (1949).

62. U.N. Charter art. 13.

63. Alston, *supra* note 54, at 609.

64. *Id.*

65. *Id.*

66. *Id.* Fears that the addition of new rights would seriously damage our concept of human rights have proved groundless, for the success of many recent instruments in which they are contained, including the African Charter, has encouraged demand for their adoption. *Id.* at 610-11.

B. Legal Status of New Rights

Analysis of the international legal character of the new rights in order to determine their usefulness as global norms may be enhanced by their review within the context of the African Charter. In other words, these rights must be viewed as belonging not to states but to peoples.⁶⁷

International human rights are human needs that have received formal recognition as rights through sources of international law, including treaties, custom, and general principles.⁶⁸ When a right is first proposed, it really is not a right at all, but a desire for the realization of that right.⁶⁹ Recognition of the rights expressed in the African Charter is a crucial step toward securing them.⁷⁰

The new rights are new in more than simply the sense of having been recently enumerated.⁷¹ Prior to recognition as a legitimate human right, a candidate must undergo a maturation process.⁷² The rights that were incorporated into the Universal Declaration and the International Covenants were already recognized in national and domestic legislation and in constitutions.⁷³ Claims arising from those rights had been heavily scrutinized at the national level and had been presented confidently to the international level after many years of analysis, reflection, and revision.⁷⁴ The new rights, on the other hand, are conceived directly in international fora, where they are presented for endorsement as rights, before they have received the benefit of careful prior scrutiny.⁷⁵ Consequently, they are in danger of being characterized as social values rather than as legal principles.⁷⁶ Nevertheless, because society values these principles so

67. Kiwanuka, *supra* note 6, at 84.

68. Marks, *supra* note 8, at 436.

69. Lopatka, *The Right to Live in Peace as a Human Right*, 10 BULL. PEACE PROPOSALS 361, 362 (1979).

70. Sohn, *supra* note 32, at 59.

71. See Marks, *supra* note 8, at 441.

72. See *id.*

73. Alston, *supra* note 54, at 614.

74. *Id.*

75. *Id.*

76. *Id.* The fundamental skepticism of opponents to the new rights is that their recognition as rights rather than simply as aspirational principles represents an erosion of the concept of human rights and that it demonstrates the inability of the international community to resist the "temptation of enumerating so-called rights, that would be no more than the ephemeral ideals of a transient age." Alston, *supra* note 27, at 312 (quoting Address by Pierre de Senarclens, Colloquium on the New Human Rights: The Right of Solidarity (Aug. 1980)).

much, it is necessary to determine what kind of efforts can be made in order to accord them legal sufficiency. Peace, for example, has a remarkably high value in society.⁷⁷ Although it is so important, no one has been able to accomplish it by faith or morals, so we desire that its realization has to be given the force of law.⁷⁸

The distinction between a desire that a right exist and the right itself resides in its legal basis.⁷⁹ The Universal Declaration is widely regarded as part of customary international law and therefore, all states are bound by the principles and obligations therein.⁸⁰ The International Covenants are binding on member states but, unless and until they attain the status of customary international law, the occurrence of which is a function of time and general acceptance by the world community, states that are not party to the Covenants are not legally bound by them.⁸¹ In other words, the rights enumerated therein possess a less than absolute degree of legal force.⁸²

C. Test of Viability of Rights

Professor George Abi-Saab proposes three indices by which to test the viability of a legal norm:⁸³ the degree of consensus over the social value in question;⁸⁴ the concreteness of the content, that is whether the content of the social value is specific enough to become operational as law;⁸⁵ and the existence of a follow-up mechanism that operates as a continuous pressure for compliance.⁸⁶

The first step towards determining the recognition afforded a norm amongst the international community is to identify an already established body of law on the subject.⁸⁷ Without such a body of law, the requisite

77. Lopatka, *supra* note 69, at 361, 363.

78. *Id.* at 363.

79. *Id.* at 365.

80. See Sohn, *supra* note 32, at 17.

81. See *id.* at 20.

82. See *id.*

83. Abi-Saab, *The Legal Formulation of a Right to Development*, in *LE DROIT AU DÉVELOPPEMENT AU PLAN INTERNATIONAL [THE RIGHT TO DEVELOPMENT AT THE INTERNATIONAL LEVEL]* 159, 160 (R. Dupuy ed. 1980).

84. *Id.* at 161.

85. *Id.* at 161-62.

86. *Id.* at 174.

87. Marks, *supra* note 8, at 436.

maturation cannot occur, for no opportunity is available for close examination of, and experience with, the proposed right.⁸⁸ International law is made by treaties and other international agreements and by customary behavior and expectations.⁸⁹ Inclusion of a norm in legal documents and its establishment as the subject of study, analysis, and observation by international agencies enhance the standing of the norm.⁹⁰

The second criterion established by Professor Abi-Saab is more difficult to ascertain. Unless a qualified expert body, such as the United Nations Human Rights Commission, speaking for the world community, has studied, analyzed, and reached a general consensus on the precise definition of the norm in question, its meaning remains somewhat speculative.⁹¹

The third index of juridical viability depends upon the existence of a mechanism that will generate pressure for compliance.⁹² The appearance of peoples' rights in the African Charter such as the right to development, the right to peace, and the right to a satisfactory environment presents an opportunity to apply Professor Abi-Saab's analysis in order to determine whether these rights may be said to have achieved the status to which they aspire, that of legitimate, juridical human rights norms.

1. The Right to Development

The right to development is well advanced in acquiring the status of an internationally recognized right.⁹³ There is a branch of international law on development, with related text-books, specialized courses, and conferences.⁹⁴ It was first formulated as a human right by Keba M'Baye, the first president of the Supreme Court of Senegal, and president of the International Court of Jurists, during the 1972 Strasbourg Inaugural Lecture, in which he elaborated upon the economic, legal, moral, and political justifications for the existence of the right to development.⁹⁵ The United Nations followed with an exhaustive study of the international

88. *Id.*

89. L. CHEN, *CONTEMPORARY INTERNATIONAL LAW* 3 (1989).

90. Lopatka, *supra* note 69, at 365.

91. Alston, *supra* note 54, at 613.

92. Abi-Saab, *supra* note 83, at 160.

93. Marks, *supra* note 8, at 444.

94. *Id.*

95. M'Baye, *Le droit au développement comme un droit de l'homme*, 5 HUM. RTS. J. 505 (1972), quoted in Marks, *supra* note 8, at 444.

dimensions of the right to development in relation to other human rights, which led to a vote by the Commission on Human Rights that "the right to development is a human right."⁹⁶ In December 1986, the United Nations General Assembly adopted the Declaration on the Right to Development.⁹⁷

Considerably more important than the very political and highly polemical debate over the legal existence of the right to development is continued dialogue in an attempt to reach a consensus on the content, purpose, and dimensions of this right.⁹⁸ Briefly summarized, this right consists of the right of the individual to benefit from a development policy based on material and nonmaterial needs and to participate in that development policy, and also the collective right of a developing country to the establishment of a new international economic order.⁹⁹ This would enable each individual to realize his or her potentialities in harmony with the community. In other words, the human being is viewed as the subject and not the object of the development process.¹⁰⁰ On a practical level, this translates into the right of communities of particularly indigenous peoples to develop their culture and maintain possession of their land and cultural resources in the face of economic development policies that threaten their extinction.¹⁰¹ This concept is distinctly controversial¹⁰² and its precise definition is extremely complex. However, it is clear that the notion of solidarity, or international cooperation and shared responsibility for the welfare and prosperity of all, is central to the realization of this new right.¹⁰³

2. The Right to Peace

The law of peace is a part of the classical subdivision of the subject matter of international law.¹⁰⁴ The principles of peaceful coexistence, peaceful change, and the prohibition of coercion all find expression in

96. Marks, *supra* note 8, at 445.

97. Declaration on the Right to Development, G.A. Res. 41/128, Annex, 41 GAOR Supp. (No. 53) at 186, U.N. Doc. A/41/53 (1986).

98. See Alston, *supra* note 26, at 20-21.

99. Marks, *supra* note 8, at 445.

100. Sohn, *supra* note 32, at 53-56.

101. *Id.*

102. Alston, *supra* note 26, at 40.

103. See Marks, *supra* note 8, at 445.

104. *Id.*

a variety of national and international legal instruments.¹⁰⁵

The express aim of the United Nations, as delineated in article 1 of the Charter, is the preservation of peace and international security.¹⁰⁶ Many other basic documents contain a broad reference to a right to peace.¹⁰⁷ In 1978, the General Assembly, in a Resolution entitled the Declaration on the Preparation of Societies for Life in Peace,¹⁰⁸ reaffirmed "the right of individuals, States and all mankind to a life in peace."¹⁰⁹

Although the right to peace has been the subject of an important General Assembly Resolution¹¹⁰ and has now been included in the African Charter,¹¹¹ a regional document of landmark significance, its elements have never been determined. No effort has yet been undertaken to elevate the term beyond the level of generalities or to allow it to develop a practical usefulness.¹¹²

The principle that the right to peace, and the right to live in peace, entail more than the obligation of states not to engage in aggressive war is already firmly established in international law.¹¹³ Some possible extensions of this right involve related rights, duties, and obligations, many of which are already implied in existing rights and guarantees.¹¹⁴ For instance, the right of all people to participate in the decisions of their government regarding war and peace is implicit in recognized

105. *Id.*

106. U.N. Charter, *supra* note 1, art. 1, para. 1.

107. A right to peace was specifically advocated for the first time in 1929 in the Kellogg-Briand Pact. The right to peace may also be deduced from the Declaration on Principles of Friendly Relations, the Final Act of Helsinki, and many others. See Marks, *supra* note 8, at 445-46.

108. Declaration on the Preparation of Societies for Life in Peace, G.A. Res. 33/73, 33 U.N. GAOR Annex I (Agenda Item 50) at 1, U.N. Doc. A/33/486 (1979) [hereinafter Declaration on the Preparation of Societies].

109. *Id.* The Declaration asks States to observe the principle that [e]very nation and every human being, regardless of race, conscience, language or sex, has the inherent right to life in peace. Respect for that right, as well as for the other human rights, is in the common interest of all mankind and an indispensable condition of advancement of all nations, large and small, in all fields.

Id. at 2.

110. See Declaration on the Preparation of Societies, *supra* note 108.

111. African Charter, *supra* note 1, art. 23, para. 1.

112. See Alston, *Peace as a Human Right*, 11 BULL. PEACE PROPOSALS 126, 133 (1981).

113. See Bilder, *The Individual and the Right to Peace*, 11 BULL. PEACE PROPOSALS 387, 387 (1982); see also Alston, *supra* note 112, at 130-31.

114. See Bilder, *supra* note 113, at 388.

rights of political participation. Furthermore, the right of conscientious objection is already contained in the guarantee of freedom of conscience.¹¹⁵

3. The Right to the Environment

The right to the environment possesses the most extensive specialized body of law than do the other new generation rights. This developed as a result of popular pressure against mismanagement of the environment and in favor of improved ecological coexistence.¹¹⁶ Its first formulation as a right was in the Stockholm Declaration in 1972.¹¹⁷ Since then, numerous efforts have been made to achieve international recognition for the right to a clean and healthy environment. Several national constitutions have already incorporated this right.¹¹⁸

The individual dimension is the right of any victim or potential victim of an environmentally damaging activity to obtain reparation for harm suffered, while the collective dimension involves the duty of the state to assist in cooperating internationally to resolve environmental problems.¹¹⁹ This right rests on the same basis as all solidarity rights, that is, that the State has a duty to place the human interest before the national or individual interest.¹²⁰

In summary, the rights to development, peace, and the environment each have an established body of law, but are rather weak in the area of

115. See *id.* Asbjorn Eide believes that the right also embraces the freedom of the individual to refuse to participate in aggressive military operations. *Id.* This freedom goes beyond refusal purely on the grounds of pacifism, but imposes on the individual the obligation of not complying with orders which, if carried out, would be a violation of the right to live in peace. See Lopatka, *supra* note 69, at 366.

116. Marks, *supra* note 8, at 443.

117. *Id.* This formulation was adopted by the UN Conference on the Environment in 1972. *Id.*; Report of the United Nations Conference on the Human Environment, Stockholm, June 5-16, 1972, 1 U.N. GAOR, U.N. Doc. A/Conf. 48/14, reprinted in 1 B. RUSTER & B. SIMMA, INTERNATIONAL PROTECTION OF THE ENVIRONMENT: TREATIES AND RELATED DOCUMENTS 118 (1975) [hereinafter 1972 Stockholm Declarations].

118. For example, the Federal Republic of Germany has proposed an additional protocol to the European Convention. Express national provisions exist in the constitutions of Spain, Portugal, Peru, and Yugoslavia. Finally, constitutions that stipulate that the government shall protect the environment include Greece, Switzerland, Czechoslovakia, German Democratic Republic, USSR, PRC, Sri Lanka, and Bulgaria. See Marks, *supra* note 8, at 443-44.

119. Marks, *supra* note 8, at 444.

120. See *id.*

content.¹²¹ Sufficient discussion and study, however, have already taken place to extract elements that can be utilized as a basis for their official definition.¹²²

D. The Notion of Solidarity

The third prong for evaluating the juridical viability of these rights is their mechanism for enforcement,¹²³ the key to which is their relevance to the notion of solidarity.¹²⁴ The realization of solidarity rights lies not in law enforcement, but in "inter-nation" unity and cooperation. Implicitly, the achievement of solidarity rights springs from the ability to establish solidarity within society.¹²⁵

The principles that dominated international law in the 1970s have evolved from an emphasis on sovereign equality, prohibition of the use of force, self-determination, and non-intervention into the more modern and progressive orientation of international law, with the establishment of a new International Economic Order,¹²⁶ and recent United Nations Declarations such as the Charter of Economic Rights and Duties of States.¹²⁷ Even in this new realm of law, states remain the bearers of rights and duties.¹²⁸ The African Charter develops the law of cooperation one further step.¹²⁹ While it acknowledges the existing governmental and state order of Africa, at the same time it makes it clear that the state is not an end in itself, but rather derives its meaning and legitimacy from its peoples.¹³⁰ By ascribing the new rights specifically to peoples, the African Charter has clarified the relationship between these rights and the notion of solidarity.¹³¹

Ultimately the expression of norms matters less than compliance with

121. See Alston, *supra* note 27, at 309; Alston, *supra* note 112, at 135.

122. Alston, *supra* note 27, at 309; Alston, *supra* note 112, at 135.

123. Abi-Saab, *supra* note 83, at 160-61.

124. Alston, *supra* note 112, at 128.

125. *Id.* at 135.

126. van Boven, *supra* note 2, at 189 & n.11.

127. Charter of the Economic Rights and Duties, *supra* note 50. Professor van Boven calls this phenomenon the law of coexistence giving way to the emerging law of cooperation. van Boven, *supra* note 2, at 189.

128. See *id.* at 190.

129. See *id.*

130. See *id.*

131. Kiwanuka, *supra* note 6, at 84.

them. Unlike domestic law, international law does not require a system of courts and sanctions to accomplish its objectives. The most powerful tool the international community can utilize in order to secure compliance with an international mandate is the support of world public opinion.¹³² War itself, for example, and in particular, nuclear war, is unlawful, but no international tribunal can prevent it.¹³³ Only the concerted effort of nations working together to prevent its outbreak can succeed. The existence of economic and other disparities is inconsistent with the maintenance of world peace and stability.¹³⁴ At the same time, the increasing interdependence of all peoples underscores the need to spread responsibility for the promotion of peace, development, and a healthful environment amongst all nations. The notion of solidarity is therefore the essence of the realization of the new rights.¹³⁵

E. *The Contextual Approach*

In order to promote and preserve human rights in societies with various social and political backgrounds, a contextual interpretation is required.¹³⁶ This type of approach has been the prevailing one ever since third world nations have become active participants in the human rights debate¹³⁷ and have subsequently pressed for international recognition of a right to development in the face of injustices in the present world economic order.¹³⁸

Legal documents express policy. The policy theme of the African Charter is freedom from domination by another power, and this theme is also applied to the area of development.¹³⁹ If this theme is further utilized as the motivation for peoples' rights, these very rights are then related within the body of the Charter to the actual conditions of life of the peoples of Africa, though these conditions are clearly not necessarily restricted to Africa alone.¹⁴⁰ In this way, the African Charter is an

132. Alston, *supra* note 112, at 135.

133. Lopatka, *supra* note 69, at 361-62.

134. Alston, *supra* note 112, at 128.

135. *Id.*

136. See van Boven, *supra* note 2, at 186.

137. *Id.* at 187.

138. *Id.*

139. African Charter, *supra* note 1, preamble, cls. 3, 8; see Charter of the Organization of African Unity, May 25, 1963, arts. 9, 11-13, No. 6947, 479 U.N.T.S. 76, 78 (1963).

140. African Charter, *supra* note 1, preamble, cls. 3, 8.

excellent example of the contextual approach to human rights. The contextual factor is in fact clarified in the preamble, which specifies that the "virtues of African historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples' rights" will be taken into consideration.¹⁴¹

F. *The Judicial Character of New Rights*

Although much remains to be done in the areas of definition and formal recognition, the rights to peace, development, and a healthful environment appear to exhibit all the necessary characteristics of legal norms. Each has an established body of law, a sufficient degree of consensus as to content, and is increasingly well-supported by world public opinion. The African Charter, by nominating peoples rather than states to become the bearers of the new rights, makes it quite clear, however, that the effectiveness of these norms, and their durability as legal mechanisms, depends upon the existence of solidarity within society.¹⁴² In other words, whether or not the high ideals expressed in human rights agreements achieve their realization is not simply a question of legal classification, but rather, depends upon the ability to build inter-nation cooperation on a world-wide scale.¹⁴³

Despite the strong resistance to the idea of new human rights,¹⁴⁴ the dynamic quality of these rights has enabled them to surface.¹⁴⁵ Their appearance in the African Charter¹⁴⁶ has renewed debate over their legal significance, but not one of this group of new rights is unknown in the international human rights arena, whether as a stated provision in the U.N. Charter, the Universal Declaration, or other prominent human rights instruments.¹⁴⁷ Nevertheless, a question remains as to whether the African Charter is similar to the Universal Declaration, with its solid legal foundations, or is more akin to the Communist Manifesto of 1848 or the

141. *Id.* preamble, cl. 4.

142. Kiwanuka, *supra* note 6, at 101.

143. *Id.* at 100.

144. Marks, *supra* note 8, at 440.

145. *Id.* at 451.

146. African Charter, *supra* note 1, arts. 19-24.

147. See, e.g., UNESCO Declaration, *supra* note 51, art. 3 (1978); Charter of the Economic Rights and Duties, *supra* note 50; Declaration on the Right to Development, *supra* note 97; Declaration on the Right of Peoples to Peace, G.A. Res. 39/11, Annex, 39 U.N. GAOR Supp. (No. 51) at 22, U.N. Doc. A/39/51 (1984).

Atlantic Charter of 1941, both of which were stellar catalysts to reform or revolution.

The enduring vitality of the human rights movement depends on the extent to which it can respond to concerns with which the majority of the world's peoples are preoccupied.¹⁴⁸ The African Charter is the embodiment of the mandate of the Organization for African Unity. This organization is a legal entity and the African states have agreed to be bound by its edicts.¹⁴⁹ In this way, it rests upon valid legal foundations.¹⁵⁰ The new rights appear to be ready to emerge. By substantiating their legal status, the African Charter has made a significant contribution not only to the cause of African human rights, but also to international human rights.

III. THE CHARTER'S USE OF AFRICAN CULTURE

Human rights emanate from philosophical, ideological, and economic bases.¹⁵¹ Just as norms have emerged in response to changes in social and political circumstances over time, so they are affected by geographical and cultural conditions.¹⁵²

A. *Philosophical Development of Human Rights in the West*

The question of whether or not the concept of human rights is entirely Western is the subject of an ongoing debate.¹⁵³ If it is, then the inquiry should be focussed upon whether contemporary international human rights instruments can be said to apply to people from non-Western cultures.¹⁵⁴ The conception of human rights that forms the basis of the Universal Declaration¹⁵⁵ and the two International Covenants¹⁵⁶ as well as the European and American regional instruments¹⁵⁷ stems from the doctrine

148. See Alston, *supra* note 54, at 609.

149. See Gittleman, *supra* note 1, at 667.

150. See *id.* at 669-70.

151. See Motala, *Human Rights in Africa: A Cultural, Ideological and Legal Examination*, 12 HASTINGS INT'L & COMP. L. REV. 373, 408-09 (1989).

152. See *id.* at 373.

153. Cobbah, *supra* note 12, at 309.

154. *Id.*

155. See Universal Declaration, *supra* note 34.

156. ICCPR, *supra* note 32; ICSECR, *supra* note 35 (together constituting an International Bill of Rights).

157. European Convention for the Protection of Human Rights and Fundamental Freedoms,

of liberalism.¹⁵⁸ Until liberalism emerged as a reaction to medieval political thought, the individual was simply a part of society. He was without rights other than those traditions which existed for him as a member of an ongoing, established community.¹⁵⁹ In seventeenth and eighteenth century Europe, a new intellectual and political tradition was born out of the writings of Hobbes and Locke, in which the individual was liberated from the holistic totality of medieval society.¹⁶⁰ The revolutionary theory of natural rights developed from liberalism. This theory consisted of the belief that autonomous man possessed rights in nature which were prior to and supreme over the sovereignty of all other associations, including that of the state.¹⁶¹ Individual man had become isolated from his collective associational identity.¹⁶²

This drastic change in philosophy caused feudalistic tradition to give way to an industrialized, capitalistic society.¹⁶³ People demanded participation in the political process, and individual rights became a legal tool. In America, the settler mentality, which rewarded the virtues of competition and initiative, served to extend the individualistic tradition, that by now had become the customary norm throughout the Western world.¹⁶⁴

Thus, the Universal Declaration embodies a tradition that is entirely Western in its philosophical development.¹⁶⁵ The freedoms it cherishes are those which pertain directly to the right of the autonomous individual to do as he likes. The claims for enhancement of material conditions are expressed from an individual perspective and not from the collective entity.¹⁶⁶ The European Convention is based on the Universal Declaration¹⁶⁷ and the concepts of the latter bear close resemblance to those in

213 U.N.T.S. 22 [hereinafter European Convention]; American Convention on Human Rights, O.A.S.T.S. No. 36 at 1, O.A.S. off. Rec. Doc. OEA/ser.L/V/II.23, doc. 21 rev. 6, reprinted in 9 I.L.M. 99 (1970) [hereinafter American Convention].

158. See Cobbah, *supra* note 12, at 312.

159. *Id.*

160. See *id.* at 312-13.

161. *Id.* at 314.

162. See *id.* at 313.

163. *Id.* at 315.

164. *Id.*

165. Motala, *supra* note 151, at 373.

166. See Cobbah, *supra* note 12, at 316.

167. Motala, *supra* note 151, at 377.

the American Bill of Rights.¹⁶⁸ In turn, these principles are likewise the basis for the American Declaration.¹⁶⁹

B. Colonialism and Its Aftermath

During the colonial period, Western political and legal systems were superimposed upon the customary traditions of the African people.¹⁷⁰ At the time of independence, African countries inherited Western notions of individual rights and constitutional law.¹⁷¹ However, these philosophical constructs failed to take account of the actual development of African social traditions, and therefore cannot be considered a comprehensive study of the elements necessary to the well-being and enhancement of the African citizen.¹⁷²

The elements that constitute acceptable human rights practice depend on the cultural and historical perspective of those in power. For instance, at one time feudalism, slavery, and colonialism were not considered incompatible with human rights.¹⁷³ The individualistic conception of human rights that is reflected in the Universal Declaration indicates the domination of the Western world.¹⁷⁴ The English author Maurice Cranston asserts that human rights are universal because human nature is the same everywhere.¹⁷⁵ Many scholars oppose his point of view and argue that there are crucial differences in the political cultures of different countries.¹⁷⁶ From their point of view, the rights contained in the United Nations documents are not necessarily valid for all peoples at any time.¹⁷⁷

At the end of World War II, almost every African country was occupied by a Western power.¹⁷⁸ During the 1950s and '60s, a great liberation movement arose throughout the continent, as one country after another began to demand freedom from colonial domination and economic

168. *See id.*

169. *See id.* at 375.

170. Cobbah, *supra* note 12, at 315.

171. *Id.* at 315-16.

172. Motala, *supra* note 151, at 383-86.

173. *See, e.g.,* Marks, *supra* note 8, at 439.

174. *See* Motala, *supra* note 151, at 377.

175. *See generally* M. CRANSTON, WHAT ARE HUMAN RIGHTS? (1973).

176. *See, e.g.,* Motala, *supra* note 151, at 376.

177. *Id.* at 377.

178. *See* Cobbah, *supra* note 12, at 316.

exploitation.¹⁷⁹ Those decades were years of great turbulence for Africa, as dozens of new nations struggled to achieve national unity and to gain a political and economic foothold in the international community.¹⁸⁰

C. Birth of the African Charter

1. Purpose

Many Africans believed that at the time the Universal Declaration and the International Covenants were drafted most of the member states of the United Nations were states "with white populations and largely Christian traditions."¹⁸¹ Therefore, they were determined to create a uniquely African document more responsive to African needs.¹⁸² The paramount concern of those jurists, lawyers, and law professors who were participants in discussions early in the 1960s, was that the masses within non-independent Africa become aware of their rights, "thereby giving them impetus to free themselves."¹⁸³ These discussions ultimately led to the formation of the African Charter. On October 1, 1986 the Charter was entered into force with 26 ratifying African nations agreeing to be bound by its provisions.¹⁸⁴ It became the third, and is now the largest, of the three regional human rights instruments.¹⁸⁵

The African Charter is the legal embodiment of one of the central aims of the Charter of the Organization of African Unity, that is, the aim of freeing the African continent from the grip of colonialism.¹⁸⁶ The

179. See Marks, *supra* note 8, at 440.

180. See Motala *supra* note 151, at 383-84.

181. Seminar on the Regional Commission on Human Rights with Special Reference to Africa, U.N. Doc. ST/TAO/HR/39 (1969), U.N. GAOR Supp. No. [], (held in Cairo, United Arab Republic, Sept. 2-15, 1969). This seminar was organized by the U.N. Division on Human Rights and the Government of the United Arab Republic to study the possibility of the establishment of regional commissions on human rights as specifically related to Africa. Gittleman, *supra* note 1, at 671.

182. See Gittleman, *supra* note 1, at 671.

183. The International Commission of Jurists convened the African Conference on the Rule of Law in Lagos, Nigeria. The resulting resolution of the Conference made clear the responsibility of the world legal order to devise a regime for the protection of individuals. INTERNATIONAL COMMISSION OF JURISTS, A REPORT ON THE PROCEEDINGS OF THE CONFERENCE 11 (1961) (African Conference on the Rule of Law, Lagos, Nigeria, Jan 3-7, 1961).

184. Bondzie-Simpson, *supra* note 25, at 643.

185. The two other regional conventions are the European Convention, *supra* note 157, and the American Convention, *supra* note 157.

186. African Charter, *supra* note 1, preamble, cl. 8, provides:

core of the Charter reflects a reaction to Africa's colonial history through the expression of the desire for self-determination, and for sovereignty over domestic resources.¹⁸⁷ The preamble proclaims its essential objectives as the realization of "freedom, equality, justice and dignity."¹⁸⁸ It embodies a pledge to eradicate colonialism and achieve the total liberation and genuine independence of the African people, through the elimination of all forms of discrimination and the dismantling of all foreign aggressive military bases.¹⁸⁹

2. Rooted in Tradition

In contrast to the prevailing individual norm of human rights instruments inspired by Western philosophy,¹⁹⁰ the African Charter bases its protection of freedoms on the group norm.¹⁹¹ African societies are communitarian.¹⁹² They exhibit a cohesiveness and sense of kinship much more strongly than do Western societies.¹⁹³ In the West, the nuclear family is the essential unit, whereas in African culture the extended family is of far greater significance.¹⁹⁴ The survival of the entire community, and the ideals of cooperation and collective responsibility are the essentials of African society. The African Charter does not make the assumption that individualism is an inevitable progression from the collectivism of African societies. Rather, it approaches the enhancement of human dignity, which is the goal of the human rights movement, as flowing naturally from African traditions.¹⁹⁵

Conscious of their duty to achieve the total liberation of Africa, the peoples of which are still struggling for their dignity and genuine independence, and undertaking to eliminate colonialism, neo-colonialism, apartheid, zionism and to dismantle aggressive foreign military bases and all forms of discrimination, particularly those based on race, ethnic group, color, sex, language, religion or political opinions.

Id.

187. African Charter, *supra* note 1, preamble, cl. 3.

188. *Id.* preamble, cl. 2.

189. *Id.* preamble, cl. 8.

190. See *supra* text accompanying notes 151-66.

191. Kiwanuka, *supra* note 6, at 84.

192. Cobbah, *supra* note 12, at 320.

193. *Id.*

194. *Id.*

195. See *id.* at 325.

3. Comparison with Other Regional Documents

The main difference between the African Charter and its European and American counterparts is its conscious use of African legal philosophy and African tradition in the selection and presentation of human rights.¹⁹⁶ The concept of peoples' rights is drawn directly from the African tradition of the collective and represents a perfect actualization of the Charter's determination to base itself on the values of African civilization.¹⁹⁷

The Charter also protects conventional rights.¹⁹⁸ All three regional conventions stipulate the most elementary rights to be the protection of life and liberty,¹⁹⁹ the right to protection from torture and degrading or inhumane treatment,²⁰⁰ and liberty of the person and a fair trial.²⁰¹ The Charter's stated intent to draw on African values and traditions may be seen as reflected in its other provisions. For instance, while the European and American Conventions protect individual privacy and family life,²⁰² the African Charter imposes on states the positive duty "to assist the family which is the custodian of morals and traditional values recognized by the community."²⁰³ In the realm of property considerations, the American Convention ensures

196. See Okere, *Human Rights and the African Charter*, 6 HUM. RTS. Q. 141, 153-56 (1984).

197. See Motala, *supra* note 151 at 397.

198. See Okere, *supra* note 196, at 153. The African Commission is encouraged to draw inspiration from international instruments, and the preamble of the Charter specifically reaffirms to promote international cooperation with "due regard for the Universal Declaration and the U.N. Charter." U.N. CHARTER, *supra* note 1, preamble, cl. 1. Therefore, it is not surprising that many of the essential rights and freedoms to be found in the African Charter are similar to those in the other regional documents. Okere, *supra* note 196, at 153.

199. European Convention, *supra* note 157, arts. 1, 2, 4, 5 & 6; American Convention, *supra* note 155, arts. 4, 6 & 7; African Charter, *supra* note 1, art. 6.

200. European Convention, *supra* note 157, art. 3; American Convention, *supra* note 157, art. 5; African Charter, *supra* note 1, art. 5.

201. European Convention, *supra* note 157, arts. 5, 6; American Convention, *supra* note 157, art. 7; African Charter, *supra* note 1, arts 4, 5, 6.

202. European Convention, *supra* note 157, art. 8; American Convention, *supra* note 157, art. 17.

203. African Charter, *supra* note 1, art. 18, para. 2. Slightly surprising is the fact that while the American Convention, but not the European, has a provision for the equal treatment of illegitimate children, the African Charter, despite its tradition of polygamous marriages, has no such provision. *Id.* This, say the Charter's authors, is for the sake of not giving offense to the Moslems and Christians. Okere, *supra* note 196, at 155.

compensation to everyone deprived of his property,²⁰⁴ while the African Charter states that property rights "may only be encroached upon in the interest of public need or in the general interest of the community. . . ."²⁰⁵

Lastly, the African Charter does not provide a court system for the settlement of disputes.²⁰⁶ In Europe, claims brought under the European Convention may be heard by the European Court of Human Rights.²⁰⁷ Similarly, claims brought under the American Convention are submitted to the Inter-American Court of Human Rights.²⁰⁸ Disputes or claims that arise under the African Charter are limited to amicable and diplomatic settlement.²⁰⁹ The authors of the Charter insisted that this feature, like much of the Charter, is more suited to traditional methods of settling disputes through friendly arbitration than to the adversarial approach of the West.²¹⁰ However, there are many busy courts all over Africa, where litigation is a highly successful and accepted mechanism for settlement of disputes.²¹¹ The more likely explanation is that African nations are still understandably jealous of their new found sovereignty and are therefore less than willing to surrender even a small part of it for the sake of disputes.²¹²

Overall, the African Charter is closer to the American Convention concept of guaranteed rights than it is to the European, because of the emphasis it places upon social and economic rights rather than civil and political rights.²¹³

204. American Convention, *supra* note 157, art. 21, para. 2.

205. African Charter, *supra* note 1, art. 14.

206. Bondzie-Simpson, *supra* note 25, at 662.

207. Okere, *supra* note 196, at 156. The European Commission on Human Rights receives approximately 3000 applications for cases to be heard each year. *Id.* at 154. The Commission has legal authority, and it either pronounces a case inadmissible, issues its own judgment on the merits, or refers the case to the Court for decision. *Id.* Each year, five percent of applications are referred to the Court. *Id.*

208. *Id.* at 156-57.

209. *Id.* at 156.

210. Bondzie-Simpson, *supra* note 25, at 662.

211. *See id.* at 663-64. The author strongly advocates the establishment of an African Court of Human Rights, for the Commission is limited in its ability to resolve disputes, and although a number of cases coming before the courts have defied settlement, courts may also favour and encourage amicable settlement. *Id.* at 663.

212. Okere, *supra* note 196, at 158.

213. *Id.* at 155.

IV. CONCLUSION

Those human rights norms that are characterized as civil and political emerged in response to the political revolutions of the eighteenth century that arose in reaction to abuse and violation of those rights.²¹⁴ Social, economic, and cultural norms emanated from the socialist revolutions of the early twentieth century.²¹⁵ The new human rights norms can be traced to events of the present era.²¹⁶ The dominant universal social trend of the 1980s is a movement away from the concept of the nation-state toward a global perspective, with the concomitant need for international cooperation.²¹⁷ The fundamental awareness that, without global cooperation, the survival of the planet is unlikely, much less the establishment of a decent standard of life, brings the new rights sharply to the fore, and demands their immediate implementation.²¹⁸

Interference with the ecosystem and pollution of the environment have multinational consequences and can no longer be dealt with by a single nation. Dozens of Third World countries aspire to development, having at last achieved independence from the centuries old yoke of colonialism, and aspire to the civilization of the industrialized nations. Natural disasters occur more frequently than ever before and no nation is beyond their reach. Organizations such as the Red Cross are unable to cope with the havoc that such disasters wreak and humanitarian assistance from the world community is required.

Most significantly, the right to live in international peace represents a reaction to the nuclear threat, for a nation no longer can remain unaffected by a war of aggression between other nations possessing nuclear weapons. Further, even non-nuclear conflict is nothing but a precursor to major power involvement and a threat of imminent nuclear destruction. Consequently, peoples of all nations are demanding that their governments actively support international peace measures.

The drafters of the African Charter, through their ingenuity, and their progressive and courageous spirit, have succeeded in bringing many important issues to the attention of the international legal community. The resistance to awarding legal status to the new rights

214. See *supra* text accompanying notes 29-32.

215. See *supra* text accompanying notes 33-35.

216. Marks, *supra* note 8, at 440.

217. See *id.* at 441.

218. See Sohn, *supra* note 32, at 63.

appears to arise from states tending to conceive of rights in terms of their concrete realization via systems of law enforcement. International law, however, does not work in the same manner. Rather, it evolves from custom and general expectation, not by means of a system of universal law enforcement, and although there is a world court, compliance is most frequently achieved by the pressure of world public opinion.²¹⁹

There has been some skepticism about the African Charter's ability to enforce its provisions without a court. However, enforcement of the rights to peace, development, and the environment, would not appear to be effected by means of a court-ordered system, but rather by the pressure of public opinion. These new rights first need to be given legal recognition. The immediate future may not seem to yield much, but only the continued endorsement of them as norms will eventually lead to their realization.²²⁰

Although there are universal components to human rights,²²¹ the way in which they are conceptualized in a non-Western culture is fundamentally different from Western, and United Nations', presentations of the same rights.²²² Failure to recognize the importance of cultural differences has been suggested as the reason for the Universal Declaration's inability to achieve its objective of arriving at a consensus on human rights.²²³ If human rights in Africa, or anywhere else in the world, are to be assured of protection in the future, cultural differences must be taken into account. The African Charter performs this important function.

Resultantly, regional instruments that are drafted in the future are likely to look to the African Charter as a model human rights instrument that conveys the needs of nations and peoples in terms of their cultural values.²²⁴ The Charter has succeeded in taking norms well-known to Westerners from their incorporation in the Universal Declaration and other international instruments and adapting them to identified local traditions. At the same time, it has given fresh impetus

219. See Lopatka, *supra* note 69, at 363.

220. See Alston, *supra* note 112, at 126.

221. All societies manifest some notion of human rights, and certain provisions such as the right to life and the right against torture see to be universally accepted. See Motala, *supra* note 151, at 379.

222. *Id.*

223. *Id.* at 377.

224. African Charter, *supra* note 1, preamble, cl. 4.

to new rights and has legitimized them by relating them meaningfully and contextually to the circumstantial underpinnings of the document.²²⁵

It is too early to determine just how effective the Charter will be in achieving protection of the human rights of the African people, but the use of African values in their conceptualization has met with enthusiastic approval.²²⁶ The African Charter is both a regional response to human rights concerns and a reflection of the realities of Africa. Thus it is indeed a positive achievement.²²⁷

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225. See van Boven, *supra* note 2, at 184.

226. See, e.g., Bondzie-Simpson, *supra* note 25, at 664; Motala, *supra* note 151, at 409; Cobbah, *supra* note 12, at 331.

227. See Motala, *supra* note 151, at 409.

