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**The American University in Cairo**

**School of Global Affairs and Public Policy**

**ARTICLE 24 OF THE AFRICAN CHARTER ON HUMAN AND  
PEOPLES' RIGHTS: AN INDIVIDUAL OR PEOPLES' RIGHT TO A  
SATISFACTORY ENVIRONMENT?**

**A Thesis Submitted to the  
Department of Law**

**in partial fulfillment of the requirements for the degree of  
Master of Arts in International Human Rights Law**

**By**

**Evan Griffin Longo**

**May 2011**

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The American University in Cairo  
School of Global Affairs and Public Policy  
Department of Law

ARTICLE 24 OF THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS:  
AN INDIVIDUAL OR PEOPLES' RIGHT TO A SATISFACTORY ENVIRONMENT?

Evan Griffin Longo

Supervised by Professor Alejandro Lorite

ABSTRACT

Article 24 of the African Charter on Human and Peoples' Right has been viewed similarly to the individual right to a satisfactory environment within international law. The African Charter however differs from the broader conception of the right to a satisfactory environment by expressing the right as a *peoples'* and not an individual right. Unlike previous authors, I argue that the fact that article 24 of the charter characterizes the right, as a peoples' right is significant and cannot be ignored. The *SERAC v. Nigeria* communication in the African commission is the only time in which the right to a satisfactory environment has been significantly dealt with in the African Commission. The case articulated the substantive aspects of article 24 but was also important for its understanding of the concept of peoples'. This paper seeks to clarify the similarities and differences in the conception of a right to a satisfactory environment in the universal and African systems of human rights. It will explore the question of why article 24 is structured as a peoples' right and not an individual right, and how this articulation of the right may be useful or problematic in the African context. I argue that because of the collective nature of article 24, the peoples' right to a satisfactory environment in the African Charter has deep connections with modern forms of foreign oppression, and other collective rights, particularly the right to self-determination. In order to demonstrate this I will describe the right to a satisfactory environment as it is conceived generally in international law and more specifically within Africa. Next, I will examine the concept of peoples' and its connection with the right to self-determination, as it is understood generally in international law and particularly in Africa. I will then explain the functions of article 24 and its place in the African Charter as a peoples' right. Finally, I will examine the strengths and weaknesses of conceiving the right to a satisfactory environment as a collective right and what conclusions may be drawn for current and future articulations of the right.

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## I. Introduction

The right to a satisfactory environment also known as the right to a clean and healthy environment has been an emerging human right since the 1970's. Its status as a third generation right has led to much controversy over its nature and desirability. However, regardless of its contentiousness the right is recognized in several forms internationally and most prominently within the African human rights system. Although much attention has been given to the contents and justiciability of a right to a satisfactory environment, less attention has been given to its categorization as a collective right within article 24 of the African Charter on Human and Peoples' Rights.<sup>1</sup>

In contrast to the common view that the right to a satisfactory environment must be an individual human right the African Charter provides an interesting example of the right conceived as a collective or peoples' right. The inclusion of the word peoples' differs significantly from other articulations and suggests a collective dimension not found in other articulations. The *SERAC v. Nigeria* communication in the African Commission is the only time in which the right to a satisfactory environment has been significantly dealt with in the African human rights system.<sup>2</sup> Furthermore, the case was significant for its understanding of the concept of peoples, collective rights, and socio-economic rights.

The SERAC case along with several others in the African Commission have been crucial to providing a better understanding of what exactly constitutes peoples'. Defining what constitutes a people has important implications for the justiciability of collective rights generally, and more specifically within the framework of the African Charter. This

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<sup>1</sup> African (Banjul) Charter on Human and Peoples' Rights art 24, Jun. 1981, O.A.U. Doc. CAB/LEG/67/3 rev.5,21 I.L.M. 58 (1982).

<sup>2</sup> The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria, Comm. 155/96, The African Commission on Human and Peoples' Rights, 30<sup>th</sup> Ordinary Session,(2001).

leads to the question regarding a right to a satisfactory environment; does the right to a satisfactory environment necessarily need to be a peoples' right? The wording of article 24 and the SERAC communication suggests an interpretation of the right as a 'peoples' right and not an individual right as in other contexts.

Such an understanding of article 24 could be viewed as problematic especially in light of several environmental problems, which have important implications for human rights generally, and specifically on the African continent. In these instances, a violation of the right to a satisfactory environment may not only affect *peoples'*, but also individuals and groups that may not fall under the African Commission's definition of peoples'. Although understanding the African Commission's interpretation of peoples' has been difficult, SERAC and other cases have illuminated the concept in recent years.

*A. A Summary of the SERAC Case*

The SERAC case involved the destruction of the Ogoni people's homeland in Nigeria leading to widespread environmental devastation, persecution, and health problems.<sup>3</sup> In the communication the Nigerian government was found to have violated the rights of the Ogoni community in conjunction with state and foreign oil companies. The oil companies were responsible for numerous oil spillages and flaring which devastated the environment and Ogoni community as a whole. Moreover, the exploitation of the oil reserves were done without regard or input from the Ogoni community. The environmental damage destroyed the rivers, soil, and air of the area, which made "living in Ogoniland a nightmare."<sup>4</sup>

Consequently, the Ogoni began to resist the oil companies and Nigerian government, which worked with the oil companies in order to maintain the production of

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<sup>3</sup> *Id.*

<sup>4</sup> *Id* para 67.



oil.<sup>5</sup> The government argued that it had a responsibility to protect oil production since it was a major source of income and development for the country.<sup>6</sup> The resistance, which was peaceful at first, was met with military and paramilitary operations attacking villages and assassinating important leaders.<sup>7</sup> The Nigerian government effectively placed the legal and military powers of the state at the disposal of the oil companies and refrained from monitoring or requiring safety standards of these companies.<sup>8</sup> The Ogoni community was denied access to information regarding the dangers of the oil company operations. The communication brought before the commission therefore alleged the violation of the rights to health, the right to control over natural resources, and the right to a satisfactory environment among others.

In the merits of the case, the Commission emphasized that all human rights contain four major obligations, namely that states respect, protect, promote, and fulfill a right.<sup>9</sup> These obligations both positive and negative were then transferred to the particular right, which was found to have been violated. The Commission commented on the relationship between the right to health and the right to a satisfactory environment in that an environment degraded by pollution is contrary to satisfactory living conditions and development and is harmful to both physical and moral health.<sup>10</sup>

Concerning the right to a satisfactory environment the commission clearly articulated the minimum core obligations of the right, and how it had been violated by the Nigerian government. Among the requirements, the commission articulated were that states; take reasonable measures to prevent pollution and ecological degradation, promote conservation, and secure ecologically sustainable development and use of natural

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<sup>5</sup> *Id* para 5-7.

<sup>6</sup> *Id* para 54.

<sup>7</sup> *Id* para 7.

<sup>8</sup> *Id* para 50.

<sup>9</sup> *Id* para 44.

<sup>10</sup> *Id* para 51.

resources.<sup>11</sup> Article 24 also requires that states at least permit independent scientific monitoring of threatened environments and provide access to information to affected communities.<sup>12</sup>

The commission traced the origin of the right to freely dispose of natural resources in the African charter to colonialism.<sup>13</sup> The commission did not provide sources to understand how it came to this conclusion. However, since the concept of colonialism and its effects on Africa are found throughout the African Charter, Organization of African Unity, and the African Union, it is likely that a connection exists between colonialism and the inclusion of a peoples' right to a satisfactory environment within the Charter. Articles 19-24, and the corresponding concept of peoples' can all be viewed as originating from the context of colonialism and it is probable that origin of article 24 can also be explained in this way.

Ultimately, among all of the rights found to have been violated by Nigeria, the right to life can be seen as the most fundamental. The commission directly linked the violation of the right to life with the destruction of the environment saying "The pollution and environmental degradation to a level humanly unacceptable has made living in the Ogoni land a nightmare."<sup>14</sup> The commission concluded that the very survival of the Ogoni people depended on this land, which was devastated by the oil companies and government. This effectively did not only threaten and persecute individuals but the Ogoni community as a whole.<sup>15</sup> Furthermore, the commission emphasized that multinational corporations while potentially positive for economic development must be

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<sup>11</sup> *Id* para 52-54.

<sup>12</sup> *Id* para 52-53.

<sup>13</sup> *Id* para 56.

<sup>14</sup> *Id* para 67.

<sup>15</sup> *Id*.

monitored and if necessary face intervention by the state in order to protect the rights of individuals and communities affected by them.<sup>16</sup>

### *B. The Significance of SERAC*

The SERAC case is considered a landmark case for several reasons. Firstly, the case disproved the notion that economic, social, and cultural rights are vague unjusticiable human rights. Secondly, it helped develop the jurisprudence of collective and peoples' rights found in the charter. Moreover, the case was significant for clearly articulating the right to a satisfactory environment in the African human rights system. If the right to a satisfactory environment is ever to be accepted internationally, the implications of such a right should be investigated. The African Charter provides the strongest example of the right currently in international law. It is hoped that by examining the SERAC case something can be learned about the nature of the right to a satisfactory environment, which may be conducive to current and future articulations of the right.

Although the SERAC case is significant in many ways, the concept of peoples' used by the commission when compared to previous and subsequent cases has traditionally been unclear. The alternative definition of peoples' provided in the SERAC case while seemingly inconsistent with previous rulings in the African Commission effectively widened the possible definition of peoples'. This does not prevent the commission in future rulings from using other definitions of peoples', but strengthens the possibility that a peoples' right to a satisfactory environment and other peoples' rights will be invoked in the African Commission. The interpretation of the concept of peoples' used in the SERAC case can be viewed as that of an indigenous group. While this is one category of peoples' in the African Charter, there are other possible interpretations of the

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<sup>16</sup> *Id* para 69.

concept.<sup>17</sup> It can be argued that the reason for the structure of article 24 as a peoples' right and not an individual right is because of the historical realities particularly colonialism, foreign oppression, and struggles for self-determination that African states have faced.

### *C. Literature Review*

The literature regarding article 24 of the African Charter and the right to a satisfactory environment suffers from a bias of conceiving the right as an individual right. Several authors have overlooked the fact that in the African Charter the right is a peoples' right and therefore different from other conceptions of the right in international law.<sup>18</sup> Some scholars have even gone so far as to misquote article 24 and mistakenly argue that people meaning individuals and not peoples' meaning groups have the right to a satisfactory environment in the African Charter.<sup>19</sup> This conforms with the traditional bias in human rights discourse of conceiving human rights as individual rights, with economic, social, cultural and collective rights sometimes viewed as inferior to more firmly established civil and political rights.<sup>20</sup> However, these arguments for a hierarchy within the human rights framework are contrary to numerous sources in international law that have emphasized the lack of hierarchy and declared all human rights as interrelated and interdependent.<sup>21</sup>

Another problematic aspect of past interpretations of Article 24 has been a lack of focus on the African Charter's construction and general confusion regarding the concept

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<sup>17</sup> Solomon A Dersso, The jurisprudence of the African Commission on Human and Peoples' Rights with respect to peoples' rights, 6 Afr. Hum. Rts. L. J. 358, 373 (2006) (discussing the idea of categories of peoples').

<sup>18</sup> M. Van der Linde and L. Louw, Considering the Implementation of Article 24 of the African Charter on Human and Peoples' Rights in light of the SERAC Communication, 3 Afr. Hum. Rts. L. J. 167, 171 (2003).

<sup>19</sup> *Id* 169.

<sup>20</sup> Elsa Stamatopoulou, CULTURAL RIGHTS IN INTERNATIONAL LAW: ARTICLE 27 OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS AND BEYOND,5(Hurst Hannum ed., Martinus Nijhoff Publishers 2007) (2007)

<sup>21</sup> See World Conference on Human Rights, June 14-25, 1993, *Vienna Declaration and Programme of Action*, U.N. Doc. A/Conf.157/23 (July 12, 1993).

of peoples'.<sup>22</sup> Countless articles have been written discussing the substantive aspect of the right to a satisfactory environment yet few examine the peoples' aspect of the right extensively.<sup>23</sup> Generally, these articles come to similar conclusions, arguing that the right is not fully entrenched in international law and depending on the author should be enforced through existing rights or proclaimed as a new universal human right.<sup>24</sup> The articles written on the subject also tend to use similar sources from the European, Inter-American, and Universal human rights systems.<sup>25</sup> While some articles do mention the SERAC case, few go into detail investigating other African interpretations of the right to a satisfactory environment or explore the concept of peoples' extensively.

Interestingly, even though an extensive list of international sources supporting the existence of the right to a satisfactory environment exists, many authors argue that the right is not fully recognized internationally.<sup>26</sup> Opponents of explicit declarations of the right to a satisfactory environment in the form of an internationally recognized treaty have argued that the right is problematic in several ways. Among these arguments are that the right is indeterminate, not justiciable, conflicts with existing rights, overly anthropocentric or not anthropocentric enough.<sup>27</sup>

Another major controversy found in the literature is how the right should be protected either arguing that it can be enforced through established human rights or that a

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<sup>22</sup> Justice C. Nwobike, *The African Commission on Human and Peoples' Rights and the Demystification of Second and Third Generation Rights under the African Charter: Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights (CESR) v. Nigeria*, 1 Afr. J. Legal Stud. 129, 135 (2005).

<sup>23</sup> See Dinah Shelton, *Human Rights And The Environment: What Specific Environmental Rights Have Been Recognized?* 35 Denv. J. Int'l L. & Pol'y 129, (2006-2007).

<sup>24</sup> See Melissa Fung, *The Right to a Healthy Environment: Core Obligations Under the International Covenant of Economic, Social and Cultural Rights*, 14 Willamette J. Int'l L. & Dis. Res. 97, (2006) (for the enforcement through existing rights argument and Shelton 2006 for the creation of an explicit right argument.).

<sup>25</sup> *Supra* 23.

<sup>26</sup> Luis E. Rodriguez-Rivera, *The Human Right to Environment and The Peaceful Use of Nuclear Energy*, 35 Denv. J. Int'l L. & Pol'y 173 (2006-2007) (discussing the traditionalist and modernist view of international law and its implications for the right.).

<sup>27</sup> *Supra* 23 at 170.

new right should be created.<sup>28</sup> Explicit articulations of the right have only been made in the Inter-American human rights system as an individual right and in the African human rights system as a collective right. In the European context the right to a satisfactory environment has been recognized through existing human rights and in the United Nations a hybrid of both methods of recognition has been used. Significantly, in the United Nations the right to a satisfactory environment has not been explicitly recognized in a treaty, but only through soft law declarations.<sup>29</sup>

International bodies such as the International Court of Justice and the European Court of Human Rights<sup>30</sup>, as well as the United Nations Human Rights Council have recognized the right and this has done much to weaken traditional arguments against recognizing the right in some form. While these issues are understandably important, sufficient time has passed since the right to a satisfactory environment's initial emergence in international law. The fact that full fledged acceptance of the right has occurred in some regional systems cannot be denied. Therefore, the realities of the right such as who is entitled to it and its significance and substance in certain regions need to be dealt with in order for present and future articulations of the right to benefit.

While not demeaning the important work which has been done on the topic this paper strives to overcome both the regional and ideological bias which discussions of a right to a satisfactory environment have suffered. My paper emphasizes the collective dimension of article 24, as well as other African interpretations of the right. By delving into the important question of peoples' in the African system and looking at this aspect of article 24 more extensively, I hope to provide a different perspective for present and

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<sup>28</sup> See Shelton 2006 for an extensive look at the theory of this as well as the legal realities

<sup>29</sup> Declaration of the United Nations Conference on the Human Environment, Stockholm, Sweden, June 5-16, 1972, *Final Declaration*.

<sup>30</sup> Lopez Ostra v. Spain, App.16798/90, Eur. Ct. H.R. (ser. A)(1994).

future articulations of the right. This perspective it is hoped will provide a better understanding of the right's potential and substantive realities in Africa.

#### *D. Thesis and Road Map*

Regardless of *if* a right to a satisfactory environment should be considered a human right factually in the African context it *is* a peoples' right according to the African Charter. The African regional system of human rights provides an excellent opportunity to test some of the traditional claims against a right to a satisfactory environment and collective rights in general. By investigating, the strongest version of the right in international law through the African system conclusions can hopefully be made that will be useful in Africa and other contexts.

Understanding who peoples' are is essential to understanding not only who gets what rights in the African Charter but the entire concept of collective rights found in the document. To further complicate the situation other communications before the commission have operated under different assumptions of what constitutes a people. Until recently with the SERAC and other cases, the African Commission had not fully clarified the concept of peoples' rights and their relationship to the other human rights found in the Charter. However, through a critical understanding of the SERAC and other recent cases the concept has been made clearer by the Commission.

This paper seeks to clarify the similarities and differences in the conception of the right to a satisfactory environment internationally and the African human rights system. It will explore the question of why article 24 is structured as a peoples' right and not an individual right, and how this articulation of the right may be useful or problematic in the African context. I argue that the African conception of the right to a satisfactory environment as a peoples' right radically alters the nature of the right when compared to other versions found throughout international law. Ultimately this can strengthen the interpretation of the right while simultaneously not limiting more traditional

interpretations of who is entitled to the right, and will provide a better understanding of the nature of the right to a satisfactory environment.

In order to accomplish this I will examine both the substantive nature of the right to a satisfactory environment, as well as some of the more specific qualities that it has taken within the African human rights system. I will use a variety of sources to explore the nature of the right including international and African interpretations. Next I will examine the concept of peoples', collective rights, and self determination which are particularly important in the African context. Finally, using the SERAC case I will explain what can be gained from the African Commission's interpretation of the right both internationally and regionally.



## II. The Right to a Satisfactory Environment

### A. Descriptions of the Right to a Satisfactory Environment

The right to a satisfactory environment has been articulated in a variety of sources in international law. The terminology used to describe the right has differed considerably with the most common descriptive terms used being the right to a clean and healthy environment, the right to a satisfactory environment, the right to environment, environmental rights, and environmental human rights. Generally, all of these terms mean the same thing and currently there is no consensus on the best adjective to describe the right. Another aspect of defining the right is the division between procedural rights and more hortatory language used to encapsulate the right. However, a trend has emerged over time with the hortatory language gaining a wider acceptance with the implicit understanding that the procedural aspects will be included in these articulations.

Examples of the right to a satisfactory environment are found in a variety of national constitutions, the San Salvador Protocol to the Inter-American Charter on Human Rights<sup>31</sup>, and the African Charter. A substantial body of soft law regarding the right also exists in the form of UN declarations and customary law.<sup>32</sup> Among these sources, the three most important are the Stockholm Declaration, the 1994 Draft Declaration of Principles on Human Rights and The Environment, and the SERAC case. These sources have provided a general framework for the content of the right. Although a substantial amount of other sources exist regarding the right, these three sources have gained the widest recognition internationally and are typically mentioned in discussions regarding the right to a satisfactory environment.

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<sup>31</sup> American Convention on Human Rights, ADDITIONAL PROTOCOL TO THE AMERICAN CONVENTION ON HUMAN RIGHTS IN THE AREA OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS "PROTOCOL OF SAN SALVADOR", Article 11,( Available at <http://www.oas.org/juridico/english/treaties/a-52.html>).

<sup>32</sup> The 1994 Draft Declaration of Principles on Human Rights and the Environment, Geneva, Switz., May 16, 1994, *Draft Declaration*.

Experts have heavily debated how the right should be constructed and recognized. The main controversy revolves around explicitly constructing a new independent right or recognizing the right through existing human rights law. However, generally most scholars that are in favor of recognizing the right in some form agree on the substantive aspects of the right.

*B. The Need for a Human Right to a Satisfactory Environment*

Although there is not a consensus on if the right should be explicit or implicit, the significance of protecting the environment and that a relationship between the environment and human rights exists has generally been accepted.<sup>33</sup> Increasingly, over recent decades environmental problems have gained publicity and become a major concern of the international community. Modern international environmental law with few exceptions has mostly taken the form of soft law relying much more heavily on national law for positive change.<sup>34</sup> To some proponents of environmental protection this has made it desirable to incorporate the language of human rights into the project of environmental protection. Human rights law itself also contains a considerable amount of soft law; however, it has also been more successful in creating binding treaties and at least in theory universal norms. The effects of environmental problems have taken on an international dimension with issues such as climate change expected to have disastrous consequences in the future. Among these possible consequences are the loss of agricultural land, desertification, and in some cases possible loss of territory of entire states.<sup>35</sup> Thus, global solutions are necessary in order to effectively deal with these problems including the recognition of a human right to a satisfactory environment.

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<sup>33</sup> *Id.*

<sup>34</sup> Patricia Birnie Alan Boyle and Catherine Redgwell, *INTERNATIONAL LAW & THE ENVIRONMENT*, 36, (Oxford University Press 2009 (2002)).

<sup>35</sup> Christopher C. Joyner, *INTERNATIONAL LAW IN THE 21<sup>ST</sup> CENTURY: RULES FOR GLOBAL GOVERNANCE*, 220, (Rowman & Littlefield Publishers Inc. 2005) (2005).

One of the strongest arguments for the recognition of a right to a satisfactory environment is that human rights and arguably everything is dependent on the condition of the environment. Without a satisfactory environment, the very existence of humans let alone human rights would be impossible to sustain. The awareness that the resources of the planet and the ability to sustain life are not unlimited or unaffected by human action has created a need to protect the environment. A multi-faceted approach to the problem with recognition of the human toll environmental devastation has is likely to be one important approach to the problem. Additionally, both human rights and environmental law while considered separate, ultimately have similar if not the same goals. While the general importance on particular issues may differ the desire to improve the lives of human beings and protect future generations from potential harm is similar.<sup>36</sup>

There are also practical reasons why environmental protection and human rights are viewed as interconnected. Many specific rights have a direct relationship with environmental concerns. One example is that environmental concerns are paramount when considering issues of control over land, indigenous rights, and the right to self-determination.<sup>37</sup> Additionally, economic rights and sustainable development have at times received the attention of the international community. Moreover, environmental rights are directly connected with the rights to food, water, health, and life.<sup>38</sup> As argued by General Comment 14 the quality of the environment has a direct effect on the right to health.<sup>39</sup> This is because pollution and environmental damage can have a detrimental

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<sup>36</sup> Dinah Shelton, *Human Rights, Environmental Rights, and the Right to Environment*, 28 *Stan. J. Int'l. L.* 103, 109-111 (1992) (Discussing the common objectives of environmental and human rights law).

<sup>37</sup> Michelle Leighton Schwartz, *International Legal Protection for Victims of Environmental Abuse*, 18 *Yale J. Int'l. L.* 355, 364-367 (1993).

<sup>38</sup> Neil Popovic, *Pursuing Environmental Justice with International Human Rights and State Constitutions*, 15 *Stan. Envtl. L. J.* 338, 351-352 (1996).

<sup>39</sup> Office of the High Commissioner for Human Rights, CESCR General Comment 14: The Right to the Highest Attainable Standard of Health (Art. 12), Para. 4 (2000).

effect on the health of individuals. Finally, an issue that has emerged recently and has the potential to cause international conflict has been the issue of water rights.<sup>40</sup>

The relationship between the environment and human beings is essential to most if not all cultures. It provides a context for which a society functions and its historical narrative. For many indigenous groups and peoples' the environment plays an even greater role as it is fundamental to many aspects of daily life and their view of the world. In certain cases this because of a spiritual attachment to the land and understanding of the world.<sup>41</sup> As the SERAC case demonstrated, an attack on the environment of these collectives can be a way of attacking the group destroying their culture, livelihood, as well as the ability to survive.

### *C. Ecocentric Critiques of the Right to a Satisfactory Environment*

Environmental issues are viewed from several different perspectives. One of the strongest criticisms of the right to a satisfactory environment has been from ecocentric philosophy. Deep ecology or ecocentrism as opposed to anthropocentrism is the view that the environment should be valued intrinsically as a thing in itself.<sup>42</sup> Supporters of this philosophy of the environment have criticized the idea of the right to a satisfactory environment because in their view such a right would perpetuate the common view of the environment as something to be exploited by humans.<sup>43</sup> In this view any human right to a satisfactory environment would be too anthropocentric and would only protect the

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<sup>40</sup> Voice of America News, *Ethiopia-Egypt Talks Yield 'New Environment' in Nile Dispute*, May 13, 2011 (Available at <http://www.voanews.com/english/news/africa/north/Ethiopia-Egypt-Talks-Yield-New-Environment-in-Nile-Dispute-121810374.html>).

<sup>41</sup> *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on Behalf of Endorois Welfare Council v Kenya*, Comm. 276/2003, Para. 16, The African Commission on Human and Peoples' Rights, 41st Ordinary Session (2006).

<sup>42</sup> Roda Mushkat, *Contextualizing Environmental Human Rights: A Relativist Perspective*, 26 *Pace Envtl. L. Rev.* 119, 122 (2009).

<sup>43</sup> Linda Hajjar Leib, *HUMAN RIGHTS AND THE ENVIRONMENT: PHILOSOPHICAL, THEORETICAL AND LEGAL PERSPECTIVES*, 28-34, (Malgosia Fitzmaurice, Panos Merkouris and Phoebe Okowa ed. Martinus Nijhoff Publishers 2011) (2011).

environment because of its relationship to human beings. Proponents of this view argue that the ecosphere is more important than human beings and criticize anthropocentric attitudes that have been deeply engrained in Western culture. Deep ecologists would argue that the traditional environmentalist idea of human stewardship of the environment inherently constructs human beings as superior to nonhuman entities.<sup>44</sup>

Any human right will inherently have an anthropocentric aspect to it. However, this does not mean that an anthropocentric way of dealing with environmental issues necessarily needs to be antithetical to environmental protection. The ecocentric view is radical and while not without its merits, a pragmatic approach to environmental protection would be more useful. A more anthropocentric view of environmental solutions would essentially be a human rights approach to the problem. By using the language, institutions, and general international acceptance of human rights ideology a more effective method of environmental protection may be possible.<sup>45</sup> A more moderate approach could also stress less the superiority by human beings or the planet and strike more of a balance while also be more effective given current cultural, social, legal, and economic conditions internationally. Finally, the ecocentrist view of the environment fails to take into account other cultural traditions and states of development. Deep ecologists fail to seriously acknowledge the heavy burdens human beings would need to suffer in order to fulfill the radical demands of a substantial decrease in world population, decrease in economic activity, loss of technology and innovation which would follow from an implementation of their principles. While the goals that they set may be worthy ones, implementation of their principles would have enormous human consequences, and would be better served by serious but gradual changes over time.

Despite ecocentric critiques of the idea of a human right to a satisfactory environment, the idea has gained currency within human rights discourse. The right has

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<sup>44</sup> *Id* 32-33.

<sup>45</sup> *Id* 157-162.

increasingly been recognized and debated. Significantly, the idea of the right to a satisfactory environment has in fact become a human right in some parts of the world. Therefore, even if ecocentric critiques of the right have been put forward legally it has become a human right and the consequences of this must be investigated.

*D. International Articulations of The Right to a Satisfactory Environment*

A traditional criticism of the right to a satisfactory environment within human rights discourse has been the general vagueness of such a right. It is argued that such a right is closer to a general social value than a legal principle.<sup>46</sup> While this critique may have been plausible throughout the 1980's and early 1990's, since the 1994 Draft Declaration an abundance of soft law and academic work has occurred which outlines the specifics of the right. Contrary to allegations that the right is utopian<sup>47</sup> there are realistic obligations which can be used to realize the right to a satisfactory environment. The obligations of governments in regards to human rights in general and including the right to a satisfactory environment as articulated in the SERAC communication are that states have both positive and negative obligations of rights which are to promote, respect, protect, and fulfill such rights.<sup>48</sup> The specifics of what it means to respect, protect, promote, and fulfill the right to a satisfactory environment can be ascertained from the three sources described, as well as other sources.

The 1972 Stockholm Declaration was the first major international document that dealt with the relationship between human rights and the environment.<sup>49</sup> The declaration as a whole covers a variety of rights in 26 principles. The declaration in many ways is practical by recognizing economic differences internationally, particularly the situation of

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<sup>46</sup> Noralee Gibson, *The Right to a Clean Environment*, 54 Sask. L. Rev. 5, 9 (1990).

<sup>47</sup> *Id.*

<sup>48</sup> *Supra* 2 at para 44.

<sup>49</sup> *Supra* 29.

developing countries found in many of the articles.<sup>50</sup> The first proclamation in the Stockholm declaration established a connection between the environment and human rights stating;

“Man is both creature and moulder of his environment, which gives him physical sustenance and affords him the opportunity for intellectual, moral, social and spiritual growth. In the long and tortuous evolution of the human race on this planet a stage has been reached when, through the rapid acceleration of science and technology, man has acquired the power to transform his environment in countless ways and on an unprecedented scale. Both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights the right to life itself.”<sup>51</sup>

This statement therefore emphasized that the environment is essential to the enjoyment of human rights. It directly linked the human right to life with the quality of the environment a linkage that was later made in both the 1994 Draft Declaration and SERAC communication.

The declaration recognized the need for different approaches to environmental protection depending on the level of economic development of countries. However, the declaration urges countries to do as much as possible to refrain from harming the environment.<sup>52</sup> While it can be argued that environmental protection should be universally sought, maintaining a balance with economic growth can be seen as a more pragmatic approach to successfully protecting both humans and the environment which they live in. The declaration by recognizing this approaches the issue in a way that is both realistic, and takes into account the varying circumstances of different parts of the world. Moreover, the declaration stresses the importance of the environment to human rights and how different rights including, economic, life, health, education, and development are affected by environmental protection.

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<sup>50</sup> *Id* principle 10.

<sup>51</sup> *Id* preamble.

<sup>52</sup> *Id* principle 11.

Although the language of the Stockholm Declaration was important in helping to conceive the right to a satisfactory environment, the declaration was legally not binding. This over the decades led to a movement to create a more binding document. These efforts culminated in the 1994 Draft Declaration of Principles on Human Rights and the Environment. Interestingly enough this document was also not binding and never materialized into an international treaty. However, the 1994 Draft Declaration provides one of the clearest articulations of the right to a satisfactory environment in human rights.

The 1994 Draft Declaration of Principles on Human Rights and the Environment was a bold statement on the right of every human being to a clean and healthy environment. It clarified the duties of individuals, governments, international organizations, and multinational corporations concerning the environment and human rights. One major concept of the declaration was that “human rights violations lead to environmental degradation and that environmental degradation leads to human rights violations.”<sup>53</sup> The interdependency of environmental protection and the promotion of human rights found in the document is thus considered essential to a modern understanding of the right to a satisfactory environment.

One area that the declaration mentioned was the idea of environmental racism.<sup>54</sup> Environmental racism it is argued is when certain groups of individuals face the brunt of negative environmental consequences precisely because of their disadvantaged position in society.<sup>55</sup> Corporations, which pollute in areas that are predominantly, populated with racial minorities many times do so aware that these communities will face more challenges using the legal system in order to prevent or challenge environmental damage.<sup>56</sup>

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<sup>53</sup> *Supra* 32 at preamble.

<sup>54</sup> *Id* principle 3.

<sup>55</sup> *Supra* 38 at 354-355.

<sup>56</sup> *Id.*



The draft declaration outlines the rights of individuals to be protected from pollution and preserve the environment in order to ensure human rights obligations.<sup>57</sup> The declaration also includes among others the right to adequate housing and assistance in the event of natural and technological disasters.<sup>58</sup>

Civil and political rights within the document are paramount to the right to a satisfactory environment. These rights are enshrined in the procedural aspects of the right. Some of the rights that are mentioned in Part III include indigenous rights and the right to participate in environmental decisions. Along with sustainable development indigenous rights specifically, the rights of indigenous groups to control their lands and maintain a traditional way of life is outlined.<sup>59</sup> An aspect of the draft declaration that differed from the Stockholm Declaration was an emphasis on the relationship between democratic participation in environmental decisions. While this certainly has a connection with indigenous rights it is considered a universal right for individuals in all states to not only participate in decisions effecting the environment but also to have access to information pertaining to the environment.

Section IV of the Draft Declaration describes the obligations of individuals, governments, corporations, and other international actors.<sup>60</sup> Governments are called upon to adopt administrative, legal, and other institutions in order to monitor and protect the environment.<sup>61</sup> This section not only calls for active environmental protection but also for governments and individuals to do their utmost to reduce waste and refrain from producing negative environmental consequences as much as possible. These ideas were also articulated in the SERAC case.

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<sup>57</sup> *Supra* 32 at principle 5.

<sup>58</sup> *Id* principle 12.

<sup>59</sup> *Id* principle 14.

<sup>60</sup> *Id* part IV.

<sup>61</sup> *Id* principle 22.

The final section of the draft declaration recognizes the need to pay special attention to vulnerable persons and groups such as women.<sup>62</sup> The importance of these vulnerable groups and the environment were further emphasized in the Protocol to the African Charter on Women, and the Convention on the Rights of the Child.<sup>63</sup> The only restrictions according to the declaration that these rights may be subject to are “those which are necessary to protect public order health and fundamental rights and freedoms.”<sup>64</sup> This phrasing solidifies the notion that the right to a satisfactory environment is a human right since it is similar to phrasing found in other human rights documents such as the ICCPR.

Indigenous groups have historically been connected to preservation of the environment. The 2007 United Nations Declaration on the Rights of Indigenous Peoples while not specifically intended to deal with human environmental issues did recognize the special relationship between these groups and a satisfactory environment. Indigenous people generally are recognized as having a special attachment with a territory not only for the purpose of physical sustenance but also for cultural and spiritual reasons.<sup>65</sup> Article 29 of the declaration proclaimed that these groups have the right to protection and conservation of the environment.<sup>66</sup> The article also recognizes the problem of storage of hazardous waste on Indigenous territory and allows states only to do so if these communities have given explicit permission.<sup>67</sup> Furthermore, the article states that governments must take effective measures in cases of hazardous waste storage on

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<sup>62</sup> *Id* principle 25.

<sup>63</sup> African Commission on Human and People’s Rights, Protocol to the African Charter on Human and Peoples’ Rights of Women in Africa, Article 18, (Available at [http://www.achpr.org/english/\\_info/women\\_en.html](http://www.achpr.org/english/_info/women_en.html)).

<sup>64</sup> *Supra* 32 at principle 26.

<sup>65</sup> United Nations Declaration on the Rights of Indigenous Peoples, art. 25, G.A. Res. 61/295., September 13, 2007.

<sup>66</sup> *Id* art. 29.

<sup>67</sup> *Id* art. 29.2.

indigenous territory, which should be implemented by monitoring maintaining and restoring the health of these communities.<sup>68</sup>

The SERAC case has provided the latest clarification of the right to a satisfactory environment. The case included many of the ideas presented in the Stockholm and 1994 Draft Declarations and went further outlining specific minimum core obligations of states. The case brought together many of the core ideas including, development, indigenous peoples, and the right to life and is important for being one of the first cases to deal with an explicit articulation of the right in international law and not through existing human rights.

*E. Explicit and Implicit Articulations of the Right to a Satisfactory Environment*

One of the major controversies found in discussions of the right to a satisfactory environment has been how the right should be recognized in international law. Some authors such as Melissa Fung have argued that the right can be recognized through existing human rights such as the right to health.<sup>69</sup> Other experts such as Dinah Shelton have demonstrated how existing civil and political rights such as the right to privacy are used to protect the right to a satisfactory environment.<sup>70</sup> Generally, proponents of using existing human rights to recognize a right to a satisfactory environment have looked to the European, Inter-American, and United Nations human rights systems to support their arguments.<sup>71</sup> Among these examples, several important cases have occurred demonstrating the possibility of implicit recognition such as the right to health in the Lopez case<sup>72</sup> or the Gabčíkovo-Nagymaros dam dispute<sup>73</sup> before the International Court of Justice, which has recognized the importance of the environment in protecting human

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<sup>68</sup> *Id* art. 29.3.

<sup>69</sup> *Supra* 24.

<sup>70</sup> *Supra* 23 at 132-163.

<sup>71</sup> *Id.*

<sup>72</sup> *Id* 157.

<sup>73</sup> *Id* 131.

rights.<sup>74</sup> These arguments have demonstrated that the right can and has been protected using existing human rights law within these systems.<sup>75</sup> However, this has not been the case in every regional system, such as the African Charter and the SERAC case.

In contrast to ecocentric critiques, which argue that, a human right to a satisfactory environment is overly anthropocentric. Critiques of the right from human rights experts such as Dinah Shelton have argued that such a right would not be anthropocentric enough.<sup>76</sup> This could explain the reluctance of some human rights systems to explicitly proclaim the right to a satisfactory environment. However implicitly recognizing the right to a satisfactory environment through existing human rights law has proved problematic in some situations such as European courts where states enjoy a margin of appreciation and have been more willing to rule in favor of existing civil, political, or economic human rights.<sup>77</sup>

Melissa Fung has explored the implicit recognition of the right to a satisfactory environment using General Comment 14 of the International Covenant on Economic, Social and Cultural Rights.<sup>78</sup> Fung argues that if General Comment 14 on the right to health is used the right to a satisfactory environment can be included in the right to health. The right to a satisfactory environment as an inferred right is not the first example of such an implicit understanding of human rights. Other examples of new rights that can be inferred as part of existing rights in the ICESCR include the rights to food, water, and housing.<sup>79</sup> Fung argues that every human right including ones inferred through general comments have three primary obligations, which are to respect, protect, and fulfill such

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<sup>74</sup> International Court of Justice, Reports of Judgments Advisory Opinions and Orders: Case Concerning the *Gabčíkovo - Nagymaros Project*, September 25, 1997, (Available at <http://www.icj-cij.org/docket/files/92/7375.pdf>).

<sup>75</sup> *Supra* 23 at 143.

<sup>76</sup> *Id* 170.

<sup>77</sup> *Id* 154.

<sup>78</sup> *Supra* 24.

<sup>79</sup> *Id* 98-99.

rights.<sup>80</sup> She argues that since the right to a satisfactory environment is not explicitly articulated it is possible that state obligations regarding the right in the ICESCR will only be to respect and protect but not fulfill such a right.<sup>81</sup>

Fung also emphasizes that Article 24 of the African charter is considerably stronger than a right that is inferred from the ICESCR. The right in the context of the ICESCR should however still have minimum core obligations.<sup>82</sup> She has emphasized that minimum core obligations of rights ideally are cost and resource limited in order for states to be able to meet these obligations.<sup>83</sup>

#### *F. Counter Arguments to the Creation of a Right to a Satisfactory Environment*

Some experts have argued that one potential problem with an explicit recognition of the right to a satisfactory environment would be a conflict over rights. Dinah Shelton has argued that there exist numerous possibilities of conflicting rights such as the right to development and family rights.<sup>84</sup> One example given is the right of families to decide on the number and spacing of children. Since population pressures put stress on environmental quality these two rights could potentially conflict with one another.<sup>85</sup> A counter argument to this is that many classic human rights can be viewed as conflicting with one another and in reality, this has not proved problematic. Additionally, the right to a satisfactory environment is more moderate and can be argued to have been created to

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<sup>80</sup> *Id* 102.

<sup>81</sup> *Id* 118.

<sup>82</sup> *Id* 120.

<sup>83</sup> *Id* 118.

<sup>84</sup> *Supra* 23 at 170.

<sup>85</sup> *Id*.

protect individuals and groups from extremely harmful environmental disasters and not every single potential problem that could occur.

Another argument which is made against the creation of a right to a satisfactory environment has been its indeterminacy. Dinah Shelton has argued that the right would be dynamic since scientific evidence of measurement of the environment is constantly in flux. Acceptable water and air quality standards have and will change over time depending on the scientific consensus and data available and it is therefore difficult to have a static understanding of the right.<sup>86</sup> This can be viewed as a positive or a negative development, but in reality many human rights have dynamic qualities to them because of changing cultural, social and economic realities.

*G. An Individual or Collective Right to a Satisfactory Environment?*

One aspect of the right to a satisfactory environment that has only been discussed briefly if at all has been if the right should be conceived as an individual or collective right. The majority of human rights systems which recognize the right explicitly or implicitly have done so as an individual right. The African human rights system has been unique in its conception of the right to a satisfactory environment as a collective right.

Significantly, discussions of group or third generation rights that revolve around the idea of solidarity or collective rights often mention the right to a satisfactory environment as among these type of rights. Richard Hiskes has mentioned this aspect of the right and has argued that one reason a right to a satisfactory environment could be considered as a collective right is because of some of its unique qualities when compared to other human rights.<sup>87</sup> One such aspect is the perceived non anthropocentric nature of the right because of its concern regarding plants and animals.<sup>88</sup> Another reason given for its possible categorization as a collective right is because of the implicit considerations

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<sup>86</sup> *Id* 164.

<sup>87</sup> Richard P. Hiskes, *The Right to a Green Future: Human Rights, Environmentalism and Intergenerational Justice*, 27 *Hum. Rts. Q.* 1346 (2005).

<sup>88</sup> *Id* 1351.

the right would have for the rights of future generations.<sup>89</sup> Hiskes argues that while the level of abstraction required for any concern for future generations may seem problematic if looked at from the perspective of national concern it would be easier to accept this notion.<sup>90</sup>

Another reason which can be given for the right to a satisfactory environment's possible collective dimension could be that the environment is collectively owned by everyone. Therefore the future of the environment along with human beings in general is bound up in collective relationships. Hiskes argues that the environment is affected not only by individual decisions and actions but also collective relationships and decision making.<sup>91</sup> Human rights have generally been attached to the idea of inherent dignity of human beings. Environmental rights can also be viewed as connected to the concept of dignity since these rights are concerned with the welfare and interests of present and future generations.<sup>92</sup>

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<sup>89</sup> *Id.*

<sup>90</sup> *Id.* 1363.

<sup>91</sup> *Id.* 1352.

<sup>92</sup> *Id.* 1356.

### III. Collective and Peoples' Rights

The right to a satisfactory environment has been categorized as a third generation right.<sup>93</sup> This usually has occurred because of its status as a so-called emerging right but also because of a possible collective dimension which the right is sometimes given. Although the validity of the metaphor has been contentious, it is often used within human rights discourse.<sup>94</sup> Significantly, of all the major human rights systems the African human rights system is notable for having all three generations of rights.

A further division exists between civil and political rights on the one hand and economic social and cultural rights on the other. One obvious reason for this is the division of both types of rights in the first two major human rights treaties the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights. In contrast to this, the African Charter does not have a division between civil and political rights and economic social and cultural rights but between human and peoples' rights. Most scholars have understood this dichotomy in the African Charter as between individual human rights and collective peoples' rights. Because of this some have criticized the notion of collective rights found in the Charter arguing that they are detrimental to the traditional individual human rights and could potentially lead to human rights abuses. The African Commission however, particularly in the SERAC case demonstrated that these rights were important and had a place in the African human rights system.

The rights of peoples' were first declared in the ICCPR and ICESCR in Article 1 of both covenants through the right to self-determination. The African Charter however

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<sup>93</sup> Carl Wellman, *Solidarity, the Individual and Human Rights*, 22 *Hum. Rts. Q.* 639, 643 (2000).

<sup>94</sup> J. Oloka-Onyango, *Reinforcing Marginalized Rights in an Age of Globalization: International Mechanisms, Non-State Actors, and the Struggle for Peoples' Rights in Africa*, 18 *Am. U. Int'l. L. Rev.* 851, 853 (2002-2003).



expanded on these types of rights containing five articles on peoples' rights. Among the rights included in the Charter are the peoples' right to equality, self-determination, control of natural resources, development, peace, and a satisfactory environment. Although, these rights were included in the African Charter, inconsistent definitions of the subject of these rights, peoples' have been given by the African Commission.<sup>95</sup> This failure to clarify the nature of peoples' rights was a common criticism against the Commission. Over time, however the jurisprudence of the Commission has evolved and in recent cases, it has done much to clarify the meaning of the concept in the Charter.

The rights of peoples' internationally has expanded, particularly in regard to indigenous peoples and in some cases an increasing acceptance internationally of some of the peoples' rights outlined in the African Charter . Despite these developments, the strongest connection between human rights and peoples' has been through the right to self-determination. Because of this and the traditional understanding of self-determination as external meaning secession from another state or colonial power, the right has often been connected with colonialism or foreign oppression. The view that the right to self-determination only has an external aspect has been challenged with both experts and judicial bodies arguing that the right has important internal aspects to it.<sup>96</sup> In order to better understand the relationships between these concepts and the meaning of peoples, I will now briefly examine the evolution of peoples' rights internationally and its gradual clarification within the African human rights system.

#### *A. Collective Rights*

The rights of peoples' found in the African Charter have been labeled as third generation, solidarity, or collective rights. Although these classifications have a degree of

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<sup>95</sup> Frans Viljoen, INTERNATIONAL HUMAN RIGHTS LAW IN AFRICA,243-248 (Oxford University Press 2007) (2007).

<sup>96</sup> David Raic, STATEHOOD AND THE LAW OF SELF DETERMINATION 233-237 (Kluwer Law International 2002) (2002).

validity, since these rights pertain to peoples' and not individuals they must be collective rights as well. Collective rights have been described as placing relatively less emphasis on individuals compared to traditional human rights.<sup>97</sup> Individual human rights can also be juxtaposed to collective rights, since individual rights are commonly viewed as universal in nature, while collective rights pertain to specific groups. Because of this, collective rights have been associated with particular groups such as ethnic minorities, indigenous peoples, or national collectives.

Collective rights can be viewed by definition as group rights, because in most cases these rights would not make sense or as much sense if structured as an individual right. One example of this is the right to self-determination. The right to self-determination would be difficult to conceive of as an individual right and has frequently been invoked in the context of colonialism or foreign oppression. Other factors that makes collective rights distinct from individual rights is that these types of rights are said to require all actors on the social scene, joint obligations of each party, and not reducible to individual members of a group.<sup>98</sup>

Although collective rights have achieved greater acceptance in both the African and United Nations human rights systems, collective rights have also been criticized. While the African and to some degree UN human rights systems recognize such rights the United States and the European human rights system have been more reluctant to accept collective rights. The major exception to this is the peoples' right to self-determination, which has generally been accepted in international law. In place of explicit recognition of collective rights, some systems such as the European and UN have recognized these rights through existing individual human rights. One example of this would be the right to a satisfactory environment through the individual right to health.<sup>99</sup> Moreover, within the UN, soft law regarding indigenous peoples, development, and

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<sup>97</sup> *Supra* 93 at 644.

<sup>98</sup> *Id.*

<sup>99</sup> *Supra* 39.

peace has developed supporting these collective rights. As such, the African Commission has emerged as one of the strongest actors in developing the jurisprudence of collective rights.

Opponents of collective rights generally have argued that collective rights are antithetical to individual human rights.<sup>100</sup> These criticisms often argue that collective rights cannot be human rights because they lack the universality that is supposedly found in all human rights.<sup>101</sup> Furthermore, it is argued that human rights must be individual based since human rights are said to be derived from the inherent dignity of the human person and not membership to a particular group.<sup>102</sup> Because of this, collective rights are often viewed as antagonistic to human rights because it would put the goals of society over the rights of humans.<sup>103</sup>

Proponents of collective human rights have provided several counterarguments in support of the inclusion of collectives into human rights law. One such argument is from the cultural relativist perspective, which has criticized the universality of human rights.<sup>104</sup> Following this line of thought, relativists have contended that not all societies attach the same amount of importance to individuals, and many place equal or greater significance to collectives.<sup>105</sup> Moreover, a deficiency in classical human rights theory is a preoccupation with the individual leaving little room for alternative cultural interpretations. The preoccupation with individuals as the main subject of human rights also ignores the fact that an individual cannot thrive in a society without participation in

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<sup>100</sup> Peter Jones, Human Rights, Group Rights, and Peoples' Rights, 21 Hum. Rts. Q. 80, 80 (1999).

<sup>101</sup> *Id* 107.

<sup>102</sup> Jack Donnelly, Human Rights and Group Rights, 13 Bull. Austl. Soc. Leg. Phil. 6, 8 (1989).

<sup>103</sup> *Id* 9.

<sup>104</sup> Lone Lindholt, QUESTIONING THE UNIVERSALITY OF HUMAN RIGHTS: THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS IN BOTSWANA, MALAWI AND MOZAMBIQUE, 25-29 (Dartmouth Publishing Company Limited 1997) (1997).

<sup>105</sup> Richard N. Niwanuka, The Meaning of "People" in the African Charter on Human and Peoples' Rights, 82 Amer. J. Int. L. 80, 82 (1988).

the life of the community.<sup>106</sup> Such rights could potentially be useful for dealing with problems of a global nature, which require all societal actors in order to solve.

An additional argument is that collective human rights are not something new and have been accepted since the beginning of the human rights movement such as the right to self-determination.<sup>107</sup> Although some have argued that collective, rights have the potential to lead to human rights abuses experts and human rights institutions have stated that this is not the case.<sup>108</sup> This is further supported by a wide array of international documents and resolutions that have declared that all human rights are indivisible and interdependent.<sup>109</sup> To further explore the idea of collective rights and a concept, which in my view is central to it, I will now examine the right to self-determination.

#### B. *The Right to Self Determination*

It has been said that the first and most firmly established collective right found in international law is the right to self-determination.<sup>110</sup> The first articulation of this right is found in article 1 of both the ICCPR and ICESCR which states;

“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>111</sup>

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<sup>106</sup> *Supra* 93 at 642.

<sup>107</sup> International Covenant on Civil and Political Rights art. 1, Dec. 16, 1966.

<sup>108</sup> U.N. Educational Scientific and Cultural Organization[UNESCO], International of Experts on further study of the concept of the rights of peoples, Final Report and Recommendations, 12 Para. 43-44, SHS-89/CONF.602/7 (November 27-30 1989).

<sup>109</sup> *See Supra* 21

*And*

Declaration on the Right to Development, General Assembly Resolution, A/RES/41/128, Dec. 4, 1986.

<sup>110</sup> *Supra* 93.

<sup>111</sup> *Supra* 107.

What is notable about article 1 is that the right is entitled to all peoples and not only colonial or peoples oppressed by foreign powers. Furthermore, the article makes no mention of secession. Antonio Cassese has written about the principle of self-determination describing how it has evolved over time. Initially self-determination was understood externally and that peoples under colonial domination had the right to establish a sovereign state or integration with an independent state.<sup>112</sup> The second understanding of self-determination is internal meaning ethnic groups should not be denied full access to government in a sovereign state.<sup>113</sup> The International Court of Justice has described self-determination in the Western Sahara case as essentially requiring “ a free and genuine expression of the will of the peoples concerned”<sup>114</sup>

Despite this after the Second World War, the right to self-determination was understood as pertaining to the colonial context. Under this interpretation, the right to self-determination was viewed as external or the right of peoples’ to secede from a colonial or foreign power. Many states in the world were not independent at the time of the right’s original articulation in the international covenants and the right was used to support struggles for independence. With the eventual end of decolonization and the majority of former colonies achieving independence, the right was viewed as virtually obsolete. Additionally states feared that further use of the right would lead to conflict. This resulted in the use of the principle of *Uti possidetis* in order to maintain the territorial integrity of states in most cases.<sup>115</sup>

In contrast to this, some courts and experts have proposed a different understanding of the right to self-determination that continues to be relevant even after decolonization. This understanding of the right to self-determination is internal and means that peoples’ within states have the right to take part in decisions effecting their

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<sup>112</sup> Antonio Cassese, INTERNATIONAL LAW 61 (Oxford University Press 2005) (2001).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* 62 (Referring to the Western Sahara Case in the ICJ).

<sup>115</sup> *Supra* 96 at 293-301.

future, or as Jan Klabbers has put it “the right to be taken seriously.”<sup>116</sup> This understanding of the right to internal self-determination has resulted in the right or principle as it is sometimes referred to by courts as becoming a procedural norm. In this way, the right to self-determination can be understood as requiring at the very least that groups entitled to the right be consulted in decisions effecting their future.<sup>117</sup>

Since decolonization, only in cases of grave and massive human rights violations have courts been willing to accept the notion that the right to self-determination equates to a right to secession. Instead, the right has been interpreted so that states are allowed to maintain their territorial integrity as long as the groups entitled to the right are allowed through democratic means to have a say in their political, economic, social, and cultural development.<sup>118</sup> This can be exercised in a variety of ways from local autonomy to federalism but above all these groups must be allowed to partake in the decision making process when it directly effects them.

The right to self-determination as containing an internal aspect is perhaps the most useful understanding of the right. In this way, the right is less threatening to the territorial integrity of states. Simultaneously it provides procedural guarantees, which protect against distinct forms of discrimination and marginalization that these groups face. Moreover, this view of self-determination as the right of groups to have a say in the decision-making process can be connected with other collective rights. Without the right to self-determination, other collective or peoples’ rights would be difficult to achieve. More directly many collective rights such as the right to a satisfactory environment and development share substantive aspects with the right to self-determination since consultation with the groups concerned has been understood as being central to these rights.

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<sup>116</sup> Jan Klabbers, *The Right to be Taken Seriously: Self-Determination in International Law*, 28 Hum. Rts.Q. 186, 203 (2006).

<sup>117</sup> *Id.*

<sup>118</sup> *Supra* 96 at 237.

The right to internal self-determination usually pertains to distinct groups within a state and not only colonial peoples'.<sup>119</sup> These distinct groups can vary but usually share a common ethnic, indigenous, linguistic, or religious identity. These groups can be very different from one another and in some cases it may have been desirable to include both colonial and non-colonial peoples' in the articulation of rights. Consequently, an umbrella term to describe groups that the right to self-determination applies to has been used resulting in the concept of peoples'.

### *C. The Concept of Peoples' Internationally*

The concept of peoples' is directly connected to the right to self-determination. The right to self-determination was the first use of the concept of peoples' in international human rights law. Therefore, the concept of peoples' as generally articulated in international law and particularly within the context of the African charter can be seen as connected to the right of self-determination. The concept of peoples' may be useful because the majority of states in the world are not homogenous entities and instead consist of various ethnic and religious groups.

An important court case pertaining to the concept of peoples' and self-determination has been the Quebec secession case.<sup>120</sup> The case dealt with the question of the legality of the possible unilateral secession of Quebec from Canada. The court in its decision determined that the right to self-determination was a right of peoples' and that although some elements of a people existed in the people of Quebec that this right does not pertain to all peoples equally. As such, defining peoples' was found to not be crucial, only determining their oppressed or non oppressed status was important.<sup>121</sup> According to

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<sup>119</sup> Vita Gudeleviciute, Does the Principle of Self-Determination Prevail Over the Principle of Territorial Integrity, 2 Int'l. J. Baltic L. 49,54 (2005).

<sup>120</sup> Reference re Secession of Quebec 2 S.C.R. 217, (1998).

<sup>121</sup> *Id* para 125.

the court, a people's right to self-determination in the form of unilateral secession from another state is only applicable in specific circumstances.<sup>122</sup>

The court stressed that generally peoples' within a state are expected to be able to exercise their right to self determination through democratic means.<sup>123</sup> In cases of colonialism, foreign domination or exploitation, the denial of a meaningful exercise of the right to self-determination secession is considered illegitimate under international law. However, states are expected to maintain their territorial integrity when the right to self-determination through democratic means is respected. Since the court found that because the people of Quebec did not meet any of the criteria of an oppressed people the government of Quebec did not enjoy a right to self determination under international law that would allow for a unilateral secession from Canada.<sup>124</sup>

Although, the term peoples' is almost always used when discussing the right to self determination, the term itself has not been clearly defined in international law. However, experts have over time created guidelines and suggestions, which have developed a better understanding of the concept. UNESCO has given one such example of a working definition of the concept in 1989 when it discussed the issue of peoples' rights in international law.<sup>125</sup>

In 1989 the United Nations Educational, Scientific and Cultural Organization held a meeting regarding the concept of peoples' rights. In the final report, the organization discussed the controversies surrounding the rights of peoples' in international law. Experts concluded that peoples' rights are universally accepted and that the concept has a history which is at least as old as individual human rights.<sup>126</sup> The meeting emphasized that peoples' rights are significantly different from the rights of states.

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<sup>122</sup> *Id* para 64.

<sup>123</sup> *Id* para 111-122.

<sup>124</sup> *Id* para 154.

<sup>125</sup> *Supra* 108.

<sup>126</sup> *Id* para 18-19.



The UNESCO experts dealt with the right to self-determination extensively because it is one of the most widely accepted peoples' right. Although, the right is the most well established peoples' right numerous other peoples' rights have been proclaimed since its inception. At the time of the meeting, it was acknowledged that some peoples' rights were still in a state of development and therefore contained a certain amount of vagueness.<sup>127</sup> However, it was also stressed that many existing individual human rights had suffered the same problem at one time or another. Contrary to arguments by opponents of people's rights, these types of rights could not be used to infringe on existing human rights.<sup>128</sup>

In the final report the committee stressed that a clear definition of peoples' could not be agreed upon but did suggest guidelines that pragmatically can serve as a definition of the concept. The committee stated that the concept of peoples' can be described as;

“A group of individual human beings who enjoy some or all of the following common features:

- (a) a common historical tradition;
- (b) racial or ethnic identity;
- (c) cultural homogeneity;
- (d) linguistic unity;
- (e) religious or ideological affinity;
- (f) territorial connection;
- (g) common economic life;”<sup>129</sup>

Moreover, the committee also stated;

“The group must be of a certain number which need not be large (e.g. the people of a micro state) but which must be more than a mere association of individuals within a state;

the group as a whole must have the will to be identified as a people or the consciousness of being a people-allowing that groups or some members of such groups, through sharing the foregoing characteristics, may not have that will or consciousness; and possibly;

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<sup>127</sup> *Id* para 7.

<sup>128</sup> *Id* para 39.

<sup>129</sup> *Id* para 22.

4. the group must have institutions or other means of expressing its common characteristics and will for identity.”<sup>130</sup>

This description is useful for providing a working definition and understanding of peoples’. A people may have any one or more of the elements listed but not necessarily all. In this way, the term can be construed in a broad manner. In order for a people to be considered to fall within this definition they must be larger than a simple association of individuals, have at least one of the criteria of a people, have the will to be identified as a people, and finally have some sort of organization or institution of expressing this.<sup>131</sup>

The committee further concluded that the main difference between human and peoples’ rights is the development of enforcement procedures with the former being more developed than the later.<sup>132</sup> The work of the committee expressed a notion that peoples’ rights are connected with the right to self determination and it can be inferred that along with the criteria used to describe the concept, that those groups which have the right to self determination also have peoples’ rights.

Since the 1980’s along with the development of peoples’ rights, indigenous groups as a particular category of peoples’ in international law have increasingly been recognized as having particular rights. Indigenous groups differ significantly from other groups that may be considered as peoples’. They face particular types of marginalization, which are a result of the colonial process. As such, these groups have only recently been recognized in international law and within the African human rights system only in the past decade.

#### *D. Indigenous Peoples*

Indigenous groups have been a particular category of peoples’, which have only recently begun to be recognized in international law. Since 1992 a working group on

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<sup>130</sup> *Id* para 22.

<sup>131</sup> *Id* para 22.

<sup>132</sup> *Id* para 40.

indigenous issues was established within the UN which worked toward the goal of creating the Declaration on the Rights of Indigenous Peoples of 2007.<sup>133</sup> Several other working groups have also been established which explored the relationship between human rights and indigenous peoples. One such group described indigenous peoples as;

“Indigenous communities, peoples and nations are those which having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.”<sup>134</sup>

What is notable about this description is that indigenous peoples are seen as having a connection with colonialism and with an ancestral territory. This is in contrast to other types of peoples’, which may or may not have connection to a territory or colonialism. For example a people can be only a linguistic or ethnic group. With indigenous peoples however the connection to a territory is essential. Indigenous groups have faced particular threats to their culture, territory, and social and legal institutions which have differed from other types of peoples.

Because indigenous groups were recognized as being a special category of peoples over the past decade these groups lobbied for greater recognition within the United Nations. Among these goals was to create a Declaration on the Rights of Indigenous Peoples. As was expected these groups faced considerable opposition from member states in the Americas and Oceania. However, one unexpected regional group,

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<sup>133</sup> Office of The High Commissioner for Human Rights, Commission on Human Rights, Report of the Working Group on Indigenous Populations of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, res. 1993/31, March 5, 1993.

<sup>134</sup> *From Study of the problem of discrimination against indigenous populations: vol. v, conclusions proposals and recommendations* (New York: United Nations, 1987) para. 379. U.N. Doc. E/CN.4/Sub.2/1986/7/Add.4. *IN Maivan Clech Lam, AT THE EDGE OF THE STATE: INDIGENOUS PEOPLES AND SELF-DETERMINATION 7* (Richard Falk ed., Transnational Publishers 2000) (2000).

which delayed the process, was African countries.<sup>135</sup> The African opposition was frustrating to many indigenous groups since the declaration was non-binding. However, a legitimate fear may have been the transformation of soft law eventually into customary law.

African organizations have historically claimed that indigenous peoples do not exist within Africa or that all Africans are indigenous.<sup>136</sup> The major concern dealing with these groups has been the right to self-determination. African states have been concerned that recognizing indigenous groups could possibly fracture multi-ethnic states leading to further conflict in the region.<sup>137</sup> Although the Africa group delayed the rights of indigenous peoples declaration eventually after the African Commission had studied the problem decided to accept the declaration with some amendments recognizing that the situation between UN member states and indigenous groups was not uniform in all regions of the world.<sup>138</sup> Additionally, in recent years the AU has begun to recognize these groups as distinct within Africa and a working group was established in 2005 on the issue.

The African Working Group on Indigenous Peoples' released a report on indigenous peoples in Africa studying the particular problems they face in Africa and how their rights can be better protected.<sup>139</sup> In the report a clear cut definition was not given because in the committee's view it was neither necessary or desirable. Instead, the report aimed to identify some of the characteristics of these groups and the particular types of discrimination, which they face.<sup>140</sup> Within Africa the report identified indigenous groups as mainly hunter-gather, and pastoral societies but also small scale farmers. In

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<sup>135</sup> Megan Davis, *Indigenous Struggles in Standard Setting: The United Nations Declaration On The Rights Of Indigenous Peoples*, 9 *Melb. J. Int'l L.* 439, 443 (2008).

<sup>136</sup> Kealeboga N Bojosi and George Mukundi Wachira, *Protecting Indigenous Peoples in Africa: An Analysis of the Approach of the African Commission on Human and Peoples' Rights*, 6 *Afr. Hum. Rts. L. J.* 382, 394 (2006).

<sup>137</sup> *Supra* 135 at 456.

<sup>138</sup> *Supra* 65 at Preamble.

<sup>139</sup> African Union, *Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities* (2005).

<sup>140</sup> *Id* 87.

many cases they are denied basic dignity by being regarded as less developed or backward. Because of their particular way of life the connection with a territory is essential to these groups existence. Furthermore, they also suffer from domination and exploitation from the dominant sectors of society.<sup>141</sup>

Ultimately the report concludes that the term indigenous peoples is useful in the African context for identifying these groups and the particular human rights violations they face.<sup>142</sup> Moreover, the report states that the range of human rights abuses that these groups face “boil down to a threat towards their right to existence and to the social, economic, and cultural development of their own choice.”<sup>143</sup> This can be understood to relate to the right to self-determination since in order to allow these groups to have a say in their development and continued existence the internal right to self-determination must be respected. Another conclusion that was made was that indigenous groups should be considered to fall within the concept of peoples’ in the African Charter and as such are entitled to both the individual and collective rights provided by it.<sup>144</sup>

One use of the term peoples’ in the African Charter is as an indigenous group. Peoples’ and indigenous groups share many of the same characteristics such as distinctness from majority ethnic groups in regards to culture, language, and social structure. African states including supranational African organizations such as the OAU and AU have at first been reluctant to support the term indigenous in the African context. However, in recent years the AU and African Commission have shown a greater concern with these groups. As demonstrated by the jurisprudence of the African Commission indigenous peoples were eventually understood as being a group of peoples’ under the African Charter. These groups like all types of peoples’ have a connection with self-

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<sup>141</sup> *Id* 89.

<sup>142</sup> *Id* 107.

<sup>143</sup> *Id* 107.

<sup>144</sup> *Id* 110.

determination which is very often central to violations which occur against these groups. As was demonstrated in the SERAC and subsequent cases of the African Commission indigenous groups were found to have collective or peoples' rights in the Charter.

#### *E. Peoples' Rights and Colonialism*

Within the African Charter an overarching theme which has affected the entire African continent and is the background for much of the charter has been colonialism.<sup>145</sup> At the time of the drafting of the Banjul charter many states had achieved complete or some degree of independence from former colonial powers. Colonialism however, was not completely eradicated from the continent. Although independence had been achieved in many African states, the effects were at the time still being and continue to be felt in many African societies.<sup>146</sup> It is in this context that the Charter's use of and specific designation of peoples' rights in juxtaposition with individual rights has traditionally been understood.

Several cases have used the concept of peoples' in relation to colonialism. Taken in its traditional meaning this use of the term could be viewed as virtually obsolete since the formal project of colonialism has ended. However if the role of some transnational corporations is viewed through a neocolonial lens recognizing they are often a source of foreign oppression this can be seen as a new form of colonialism or foreign domination.

The boundaries of African states were in many cases drawn arbitrary by colonial powers during the 19<sup>th</sup> century. As a result, African states were not homogenous nation state entities and because of this the recognition of a separate group of peoples' was and continues to be necessary. Additionally this has been reinforced in several cases in the African Commission which have traced the origins of peoples' rights to colonialism and

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<sup>145</sup> *Supra* 1 at Preamble.

<sup>146</sup> See Ibrahim J. Gassama, Africa and the Politics of Destruction: A Critical Re-examination of Neocolonialism and It's Consequences, 10 Or. Rev. Int'l. L. 327(2008) for a look at the effects of colonialism on Africa.

also explained how this aspect of these rights are still relevant in the modern African context.<sup>147</sup>

Several possible definitions of the term peoples' exist, yet one of the strongest used in the *SERAC* case is the definition of peoples' as a homogenous ethnic, religious, cultural minority.<sup>148</sup> This definition has however, not been the only one used by the commission and if a static definition of the concept cannot be found within the work of the African commission it may be possible to use a more pragmatic definition. Therefore, a peoples' right in the African charter can be defined as any right, which a group that enjoys the right to self-determination may exercise.<sup>149</sup> This understanding of peoples' rights has the advantage of not superfluously being a right of everyone within a state and also contains a degree of flexibility, so that it may be interpreted as groups which are not only considered indigenous communities, or colonial peoples. but other types of minorities as well. As will be shown several types of peoples' can fall within the term, but importantly the *SERAC* and later cases confirmed that indigenous groups were peoples' under the African Charter.

#### *F. The Concept of Peoples' in the African Human Rights System*

Although, the African Charter makes extensive use of the concept of peoples' the term has until recently not been clearly defined. However, over the years the commissions use of the concept has evolved with recent cases making significant strides in the matter. The Commission's understanding of the concept has changed frequently depending on the case and rights involved.<sup>150</sup> Generally, the commission has accepted that groups of individuals constitute peoples' under the charter.<sup>151</sup> However several alternative uses of the term have been suggested. As will be demonstrated each

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<sup>147</sup> *Supra* 91 at para 245.

<sup>148</sup> *Supra* 96 at 255-257.

<sup>149</sup> Rachel Murray and Steven Wheatley, *Groups and the African Charter on Human and Peoples' Rights*, 25 *Hum. Rts. Q.* 213, 231-232 (2003).

<sup>150</sup> *Supra* 95 at 246.

<sup>151</sup> *Id* 246.

alternative definition has corresponding cases which can be used to support these definitions. This suggests that peoples' in the Charter does not refer to a single type of group but several different groups. Initially this was met with criticism, but can also be seen in a positive light since it allows for a greater number of groups to be protected. Some of the alternative definitions which have been suggested are;

“A) all persons within the geographical limits of an entity yet to achieve political independence or majority rule;

B) all groups of people with certain common characteristics who live within the geographical limits of an entity referred to in (A), or in an entity that has attained independence or majority rule (i.e., minorities under any political system);

C) the state and the people as synonymous (however this is only an external meaning of “people”); and

D) all persons within a state.”<sup>152</sup>

This confusion regarding peoples' rights is also shown in various African constitutions which have had difficulty in determining the justiciability of peoples' rights.<sup>153</sup> The 1994 Ethiopian Constitution prominently includes the concept of peoples' rights. Several articles are dedicated to the concept and offer specific protection to these groups. Article 39 stipulates these rights in the framework of the right to self determination. The article also includes guarantees for these groups to develop their own institutions and language, and even goes so far as to allow secession if such groups have met various criteria set out in Articles 39 and 47.

Article 39 also defines the peoples of Ethiopia as;

“A "Nation, Nationality or People" for the purpose of this Constitution , is a group of people who have or share large measure of a common culture or similar customs, mutual intelligibility of language, belief in a common or related identities, a common

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<sup>152</sup> *Supra* 105 at 100-101.

<sup>153</sup> *Supra* 95 at 246.



psychological make-up, and who inhabit an identifiable, predominantly contiguous territory.”<sup>154</sup>

While this definition may include indigenous peoples, it is also broad enough to be extended to other groups that may not be considered indigenous. This definition largely follows other articulations of the concept such as the 1989 UNESCO meeting, as well as understandings which the African Commission has used in several communications. Additionally, some confusion is shown in the Ethiopian constitution by using the concept of peoples differently regarding the right to sustainable development. The right to sustainable development in the Ethiopian constitution is “guaranteed to both the peoples of Ethiopia as a whole and to each nation nationality and people in Ethiopia.”<sup>155</sup>

The African Commission has only found violations of peoples’ rights in a handful of cases. Although all of these cases dealt with peoples’ rights the assumptions of each of the rulings were not uniform. In some cases peoples’ was understood to mean everyone within the territory of a state, while in others it was more specific relating to a cultural, linguistic, or ethnic group. One way of understanding this is that not all peoples’ rights are the same within the African human rights system. What constitutes a people may be very different depending on if the commission is referring to the right to self-determination or the right to a satisfactory environment. Another more likely reason is that the term is flexible and not defined specifically so that it can be as inclusive or exclusive as necessary to the particular violation that has occurred.

It is therefore difficult to determine a static meaning for the concept of peoples’ found in the African Charter. The commission has interpreted the term differently depending on the circumstances and the specific rights invoked. However, by examining several communications that went before the African commission it is hoped a general pattern can be discerned in order to come to a better understanding of the concept.

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<sup>154</sup> 1994 Const. Ehtiopia,art.39.

<sup>155</sup> Supra 95 at 243.

The Bissangou/Republic of Congo case illustrated that while no explicit definition of the concept of peoples can be found in the African Charter, such a concept is not infinitely broad.<sup>156</sup> In the communication the complainant alleged the violation of article 21(2) of the charter or the peoples' right to freely dispose of their wealth and natural resources. The second section of this article states that disposed people shall have the right to lawful recovery or compensation in cases of spoliation of their wealth and natural resources.<sup>157</sup> The African Commission using the SERAC case argued that the article's origin could be found in the colonial exploitation of Africans, which deprived them of an inalienable right of land.<sup>158</sup> Furthermore, article 21 states that the right "shall only be exercised in the exclusive interest of the people."<sup>159</sup> Since the complainant had acted on his own behalf and not as a group of individuals or a population living in a given territory the commission did not find a violation of article 21.<sup>160</sup>

The commission by denying that a violation of article 21 had occurred in the Bissangou case explained some of the requirements for what a violation of article 21 and other peoples' rights must meet. The commission emphasized that in order for a peoples' right to be violated a group of individuals or a population living in a given territory must exist.<sup>161</sup> Therefore, the commission has supported the argument that peoples' rights are fundamentally different from the civil, political, economic, social, and cultural human rights which we typically think of in human rights discourse.

In Jawara/The Gambia a peoples' right to self determination was brought before the commission. The commission found the Gambian government in violation of article 20 of the charter.<sup>162</sup> The Gambian government violated the right of peoples to freely

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<sup>156</sup> Antoine Bissangou v Republic of Congo, Communication 253/2002, The African Commission on Human and Peoples' Rights, 80-82, 40<sup>th</sup> Ordinary Session,(2006).

<sup>157</sup> *Supra* 1 at art.21.2.

<sup>158</sup> *Supra* 156 at para 81.

<sup>159</sup> *Id* para 82.

<sup>160</sup> *Id* para 82.

<sup>161</sup> Sir Dawda K Jawara v. The Gambia, Case 147/95 and 149/96, The African Commission on Human and Peoples' Rights, 27<sup>th</sup> Ordinary Session, (2000).

<sup>162</sup> *Id* para 73.

determine their political status when the military took over the government in a coup. The commission in this instance considered the definition of peoples' to be broader than in other cases which violations of peoples' rights have occurred. Peoples' in this communication was seen as an entire country while in other instances such as SERAC the term was meant as a homogenous ethnic, social, or religious group of some sort.

In the Katangese communication, the African Commission upheld the principle of *uti possidetis* similarly to the decision in the secession of Quebec from Canada. This decision declared that secession may only occur in extreme situations of mass human rights violations.<sup>163</sup> Since in the case of Zaire and the Katangese peoples no such extreme human rights violations directed specifically at the Katangese could be found the commission determined that the request for independence by these peoples had no merit under the African charter.<sup>164</sup>

While the SERAC case is widely considered an important case for the justiciability of group rights in the African Charter the case did not clearly define the term peoples'. In fact the commission's use of various adjectives to describe the Ogoni people makes the problem more difficult. In regard to peoples', the commission viewed peoples as a cultural-linguistic ethnic group.<sup>165</sup> It is possible that this is not the only way in which it could be viewed but because of the nature of devastating environmental problems and their localized effects it is likely that in future cases dealing with this right in the African system a similar assumption will be used in finding violations of the right. Perhaps an alternative reason why the definition of peoples took the form it did in the SERAC case is because of the intentional persecution of this group by the state with the assistance of the oil companies.

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<sup>163</sup> Katangese Peoples' Congress v. Zaire, Case 75/92, para 6, The African Commission on Human and People's Rights, (1995).

<sup>164</sup> *Id.*

<sup>165</sup> *Supra* 2.

The *Democratic Republic of Congo/Burundi etc.* communication<sup>166</sup> is significant because it deals with the violation of human and peoples' rights within the Democratic Republic of Congo during an armed conflict. In the communication the DRC alleged several violations including several peoples' rights violations during the conflict. The commission found that the African Charter does not absolve state parties during armed conflict and that human and peoples' rights found in the charter are not constrained by emergency situations.<sup>167</sup> Significantly, the communication dealt with most of the peoples' rights found in the charter including the right of peoples to equality, self determination, control of wealth and natural resources, development, and peace.<sup>168</sup> The commission in each violation accepted the notion that peoples constitutes individuals within a state with regard to nationality and not other elements that have been considered crucial in other cases. The respondent states were all found to have violated these peoples' rights against individuals residing in the territory of the Democratic Republic of Congo as well as the other alleged violations that the complainant made.

Recent decisions by the African Commission have done a much better job at attempting to explain the concept of peoples' in a more definite manner. One such case was the *Sudan Human Rights Organization & The Sudan/Centre on Housing Rights and Evictions v Sudan* communications.<sup>169</sup> The decision dealt substantially with the peoples' right to development in Article 22 of the Charter. Unlike previous cases, the Commission explicitly stated the necessity of determining the status of peoples in the merits of the case.<sup>170</sup> Following in the footsteps of SERAC, the Commission interpreted the concept of peoples' as a distinct ethnic group that shared common characteristics.<sup>171</sup>

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<sup>166</sup> D.R. Congo/Burundi, Rwanda and Uganda, Communication 227/99, The African Commission on Human and Peoples' Rights, 33<sup>rd</sup> Ordinary Session (2003).

<sup>167</sup> *Id* para 65.

<sup>168</sup> *Id* para 8.

<sup>169</sup> *Sudan Human Rights Organization & The Sudan/Centre on Housing Rights and Evictions / Sudan*, Comm. 279/03, The African Commission on Human and Peoples' Rights, 45<sup>th</sup> Ordinary Session (2009).

<sup>170</sup> *Id* para 218.

<sup>171</sup> *Id* para 219.

The Commission acknowledged the fluidity and contention surrounding the concept of peoples' rights in the charter. In doing so, it attempted to make clear pronouncements and a positive contribution to the concept.<sup>172</sup> In the Commission's view a people can be seen as an entity which self identifies itself as a people. Additionally, these groups share characteristics which may include "language, religion, culture, the territory they occupy in a state, common history, ethno - anthropological factors"<sup>173</sup> Furthermore, the commission clarified that even though peoples' in this case was understood to be a distinct ethnic group it also supported the possibility that peoples could be interpreted as a majority ethnic group or national collective in other cases.<sup>174</sup>

While acknowledging the traditional colonial and external threats to peoples' existence and rights the Commission stated that this is not the only way the concept can be interpreted. Internal responsibilities and components of peoples' rights are also essential in protecting these groups under the Charter.<sup>175</sup> The Commission explicitly stated that the people of Darfur could be considered to fall within the definition of peoples' under the Charter and emphasized that as such a group they were entitled to peoples' rights as a collective.<sup>176</sup> In addition to this and similar to the SERAC case the Commission acknowledged a connection with the right to self determination through article 19 of the charter. Article 19, which forbids the domination of one group over another, was connected with self-determination. However, no explicit violation of the article 19 was made in the conclusion. Instead the Commission used the implied violation of article 19 as a way of defining peoples' and arguing that Article 22 of the Charter had been violated.<sup>177</sup>

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<sup>172</sup> *Id* para 220.

<sup>173</sup> *Id* para 220.

<sup>174</sup> *Id* para 220.

<sup>175</sup> *Id* para 221-222.

<sup>176</sup> *Id* para 218.

<sup>177</sup> *Id* para 223.

In *The Legal Resources Foundation v Zambia* case the Commission also argued for the articulation of peoples' as a group different than a national collective. In the decision, the Commission found that Zambia had not violated Article 19 of the Charter because the applicant was not considered as an identifiable people.<sup>178</sup> In addition to not being an identifiable distinct group the Zambian government argued that the mere mention of the term peoples' was related to the principle of self determination.<sup>179</sup> This further affirms that the concepts of peoples' and self-determination are connected.

In one of the most recent examples of a communication dealing with peoples' rights *The Centre for Minority Rights Development and Minority Rights Group International v. Kenya*, the concept was clearly and explicitly articulated as that of indigenous group.<sup>180</sup> The commission acknowledged that the Endorois were an indigenous group that had recognition by the Kenyan government. In the decision the special relationship of the Endorois with the land they formerly inhabited was highlighted noting the spiritual and religious role of the land.<sup>181</sup> Article 21 of the Charter was used with the Endorois arguing that the Kenyan government had violated the peoples' right to control over natural resources because they had been forced to leave a Kenyan game reserve.<sup>182</sup> Furthermore, mining concessions were given in the reserve without sharing the resources with the Endorois community.<sup>183</sup>

The communication also dealt with the violation of article 22 of the charter. The Endorois argued that because they were evicted from their traditional land and no longer had access to pasture land and medicinal salt licks resulting in a violation of their right to development. The eviction and lack of access to their traditional land therefore resulted in

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<sup>178</sup> *Legal Resources Foundation v Zambia*, Comm.211/98,73, The African Commission on Human and Peoples' Rights, 29<sup>th</sup> Ordinary Session (2001).

<sup>179</sup> *Id* para 49.

<sup>180</sup> *Supra* 41.

<sup>181</sup> *Id* para 16.

<sup>182</sup> *Id* para 120.

<sup>183</sup> *Id* para 120.

the mass death of their cattle, which was essential to their way of life.<sup>184</sup> The Endorois in this communication suggested that a connection existed with the violations of the peoples' right to control natural resources and self-determination.<sup>185</sup> They argued that this was because their understanding of article 22 was that the communities involved must be allowed to make a choice regarding development and control over natural resources which was not afforded to them in this instance. The commission agreed with these arguments and found that the Kenyan government had violated article 22 of the Charter.<sup>186</sup>

Instead of viewing peoples' in the African Charter as an unjusticiable term the Commission has clearly shown an evolution in its jurisprudence on the matter. While it took considerable time and criticism, the Commission demonstrated that peoples' could not be considered as a single type of group in the African Charter. Many types of peoples exist in Africa and although the Commission was hesitant to provide a static definition the concept was eventually used to protect several types of groups, which have included national collectives, ethnic minorities and recently indigenous groups. The concept of peoples' and collective rights both are related to the right to self determination. Peoples' that can exercise the right to self-determination can exercise the other collective rights found in the Charter. Therefore since article 24 of the charter is a peoples' right several distinct groups can exercise it as a collective or peoples' rights.

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<sup>184</sup> *Id* para 126.

<sup>185</sup> *Id* para 129.

<sup>186</sup> *Id* para 278.

#### IV. The Peoples' Right to a Satisfactory Environment in Africa

Article 24 of the African Charter includes several concepts which other versions of the right to a satisfactory environment do not. Among these are the concepts of peoples', self-determination, colonialism, and collective rights. Article 24 states that; "All peoples shall have the right to a general satisfactory environment favorable to their development."<sup>187</sup> This phrasing recognizes that the right in the African Charter is a peoples' and not an individual right. Unlike other articulations of the right to a satisfactory environment in international law, the concept of peoples' included in article 24 is more dynamic particularly under the jurisprudence of the African Commission. In other words, the substantive aspects of the right to a satisfactory environment as articulated in the SERAC case and other sources are clear. That the right should be "favorable to their development" means that the quality of the environment should be satisfactory enough that these groups are able to survive physically, as well as maintain their distinct ways of life culturally and economically. However, the collective dimension of article 24 means that who is entitled to the right is open to greater interpretation in the African Charter.

The jurisprudence of the African Commission on the concept of peoples' has differed in several cases. It is however, likely that any use of the term peoples' will coincide with the concept of self-determination.<sup>188</sup> Self-determination has several aspects to it namely external and internal, but also which groups are entitled to exercise it.<sup>189</sup> In the SERAC case no explicit allegation or violation of the right to self determination was found. However, throughout the merits of the decision the Commission stated that the environmental destruction was so severe that it threatened the Ogoni community as a whole, therefore implying that the right to self-determination was central to the case.<sup>190</sup>

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<sup>187</sup> *Supra* 1 at art.24.

<sup>188</sup> *Supra* 96 at 171-172.

<sup>189</sup> *Id* 228.

<sup>190</sup> *Supra* 2 at para 67.



According to the African Commission the concept of peoples' can be interpreted as a right of a national collective such as in the Jawara case.<sup>191</sup> However, in the SERAC decision the Commission took a different view of the concept recognizing the violation occurred to a specific ethnic minority group.<sup>192</sup> Although the Ogoni were not described explicitly as an indigenous group later cases and the report by the working group on indigenous peoples in Africa illustrated that in fact they were such a group.<sup>193</sup> As an indigenous group, the Ogoni had a special reliance on the land in order to maintain their way of life and society. Because of this and the devastating environmental damage which occurred the Ogoni's very existence as a distinct community was threatened. Although the SERAC case was the first instance in which article 24 has been used, the possibility remains for alternative interpretations of the people's aspect of the right in future cases.

Potentially, the Commission could use the Jawara case or other definitions of peoples' to include a much wider group, if the problem were severe enough. The right to self determination in the African Charter is a peoples' right and therefore any group of individuals which can exercise the right to self determination can also exercise other peoples' rights such as the right to a satisfactory environment.<sup>194</sup> This is not only because all of the peoples' rights included within the Charter are grouped together, but also because the concept of peoples' as a distinct and collective group is connected with the right to self determination.<sup>195</sup> In the SERAC case the African Commission made a connection with the right to self determination and Article 24 because the destruction of the environment was so severe that it threatened the existence of the Ogoni community.<sup>196</sup> Since this destruction threatened the community as whole and not only individuals it necessarily needed to be invoked as a collective and not an individual right.

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<sup>191</sup> *Supra* 161 at para 73.

<sup>192</sup> *Supra* 2.

<sup>193</sup> *Supra* 139 at 18.

<sup>194</sup> *Supra* 22 at 135.

<sup>195</sup> *Supra* 108 at para 5. AND *Supra* 96 at 273.

<sup>196</sup> *Supra* 2 at para 67.

Article 24, along with the right to self-determination is also connected with the effects of colonialism and other modern forms of foreign oppression. This is because environmental threats have often originated from transnational corporations.<sup>197</sup> Transnational corporations when not monitored properly can be viewed as a type of foreign domination. These corporations are often ill regulated if regulated at all because governments argue that they bring economic development to their countries.<sup>198</sup> Unfortunately, the human and environmental impact on already marginalized groups is deeply connected with this exploitation. The use of transnational corporations in the exploitation of natural resources was recognized in the SERAC case, and is one aspect of article 21 of the Charter which makes clear the dangers posed by these entities.<sup>199</sup> Article 24 is however distinct from article 21 in that it regards a satisfactory environment as a whole as a right which is often effected by the extraction of natural resources.

Article 24 and the SERAC case brought together several elements in explaining the right to a satisfactory environment in the African Charter. Substantive aspects of the right to a satisfactory environment have been articulated in a variety of ways internationally. However, article 24 and the African perspective of the right is unique and differs from other articulations by envisioning the right as a collective and not an individual right. Moreover, article 24 as a collective right in the Charter is a peoples' right. While the definition and interpretation of peoples' is considered contentious, generally it can be said that the concept of peoples' in the African Charter has a deep connection with self determination and colonialism.<sup>200</sup> Self determination and colonialism are important aspects of the African Human rights perspective which have made the system dynamic and unique.

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<sup>197</sup> Lauren A. Mowery, *Earth Rights, Human Rights: Can International Environmental Human Rights Affect Corporate Accountability?* 13 *Fordham Env'tl. L. J.* 343,358 (2001-2002).

<sup>198</sup> *Supra* 2 at para 56-57.

<sup>199</sup> *Id* para 55-58.

<sup>200</sup> *Supra* 22 at 135.

### *A. The Right to a Satisfactory Environment in African Constitutions*

In contrast to article 24, African Constitutions have inconsistently articulated the right to a satisfactory environment as a peoples' right. The right is found in a variety of African constitutions and generally the more recent the constitution the more likely that the right will be found in it. The right proclaimed in these constitutions varies in complexity from a single sentence such as the Ugandan constitution<sup>201</sup> to several sections in the case of the 2010 Kenyan constitution.<sup>202</sup> Although the African charter explicitly states the right to a satisfactory environment as a peoples' right, the majority of the constitutions that proclaim such a right do so as an individual right. In some instances there is a collective dimension to the right but the explicit articulations of the right is usually as an individual one.

A typical example of the right to a satisfactory environment in African constitutions is the 1992 Angolan constitution. In the section on fundamental rights and duties, article 24 states;

“1. All citizens shall have the right to live in a healthy and unpolluted environment.  
2. The State shall take the requisite measures to protect the environment and national species of flora and fauna throughout the national territory and maintain ecological balance.  
3. Acts that damage or directly or indirectly jeopardize conservation of the environment shall be punishable by law.”<sup>203</sup>

This articulation of the right is relatively uniform in most African constitutions. It declares that individual citizens have the right to live in a satisfactory environment. It obligates the state to adopt measures to protect the environment implying legislation and conservation and finally that damage to the environment should be punishable by law.

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<sup>201</sup> 1995 Ugandan Const. Art. 39.

<sup>202</sup> 2010 Kenyan Const. art. 42,69,70.

<sup>203</sup> 1992 Angolan Const. art. 24.

Article 24 of the 1996 South African Constitution is another example of the right to a satisfactory environment as an individual right. In contrast to other articulations of the right, it also lists some substantive aspects of the right such as;

“(i) prevent pollution and ecological degradation;  
(ii) promote conservation; and  
(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.”<sup>204</sup>

Although African constitutions rarely proclaim the right to a satisfactory environment as a collective right, in some instances a collective dimension still exists. The Kenyan constitution is one example of the right, which contains a collective dimension. Furthermore, it is also one of the most elaborate forms of the right, which proclaims in three separate articles;

“42. Every person has the right to a clean and healthy environment, which includes the right—  
(a) to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and  
(b) to have obligations relating to the environment fulfilled under Article 70.

Part 2—Environment and natural resources

Obligations in respect of the environment

69. (1) The State shall—

- (a) ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits;
- (b) work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya;
- (c) protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities;
- (d) encourage public participation in the management, protection and conservation of the environment;
- (e) protect genetic resources and biological diversity;
- (f) establish systems of environmental impact assessment,

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<sup>204</sup> 1996 South African Const. art 24.

- environmental audit and monitoring of the environment;
- (g) eliminate processes and activities that are likely to endanger the environment; and
  - (h) utilise the environment and natural resources for the benefit of the people of Kenya.
- (2) Every person has a duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.

#### Enforcement of environmental rights

70. (1) If a person alleges that a right to a clean and healthy environment recognised and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter.
- (2) On application under clause (1), the court may make any order, or give any directions, it considers appropriate—
- (a) to prevent, stop or discontinue any act or omission that is harmful to the environment;
  - (b) to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or
  - (c) to provide compensation for any victim of a violation of the right to a clean and healthy environment.
- (3) For the purposes of this Article, an applicant does not have to demonstrate that any person has incurred loss or suffered injury.”<sup>205</sup>

The Kenyan constitution states that individuals have a right to a healthy environment as well as the obligations of the state in this regard. It also sets clear benchmarks such as 10 percent tree coverage. Moreover, a separate article is dedicated to the issue of enforcement of these rights listing the procedural aspects of the right and how violated rights can be remedied under the constitution. In contrast to other forms of the right it recognizes the role of indigenous peoples in protecting the environment including their own unique forms of knowledge.

The 1992 Madagascar constitution proclaims the right to a satisfactory environment as an individual right stating in article 39; “Everyone shall have the duty to

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<sup>205</sup> *Supra* 202 at art. 42, 69, 70.

respect the environment; the State shall assure its protection.”<sup>206</sup> In contrast to this, a separate article devoted to minority rights in the constitution states ;

“1) The Fokonolona may take appropriate measures to prevent destruction of their environment, loss of their land, seizure of herds of cattle, or loss of their ceremonial heritage, unless these measures jeopardize the common interest or public order.  
(2) The coverage and terms of these provisions shall be determined by law.”<sup>207</sup>

This suggests a connection with minority groups, which would be similar to a peoples’ interpretation of the right to a satisfactory environment. Such an explicit statement on the role of minority groups and concern of the environment supports the view that interpreting the right to a satisfactory environment as a peoples’ right is relevant in Africa.

The 1991 constitution of Mali also makes important proclamations regarding the environment. The significance of protecting the environment is mentioned in the preamble, article 15, and article 99.<sup>208</sup> Article 15 similar to other constitutions proclaims the right as an individual one. However, there is also a collective aspect to the right in this constitution since in article 99 one of the objectives of the High Council of Collectives is to make proposals concerning protection of the environment.<sup>209</sup>

With the exception of some states most African constitutions that proclaim a right to a satisfactory environment do so in a similar manner. The majority of articulations of the right in these constitutions do so as individual right. This suggests that the general understanding in most African states of the right to a satisfactory environment is as an individual right and not specifically a peoples’ right. However there is a collective or peoples’ dimension in many instances such as the Kenyan, Madagascar, and Mali constitutions. There are several possible explanations for this such as the fluidity of the concept of peoples’, emerging status of the right at the time of constitutional drafting, and reliance on previous international sources in creating the right. What is clear however is

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<sup>206</sup> 1992 Madagascar Const., art. 39.

<sup>207</sup> *Id* art. 35.

<sup>208</sup> 1991 Mali Const. Preamble, art. 15, 99.

<sup>209</sup> *Id* art. 99.

that the African Charter unlike most African constitutions explicitly proclaims the right as a peoples' and not an individual right.

*B. The Peoples' Right to a Satisfactory Environment in the African Charter; Self Determination, Colonialism, Collective Rights and Peoples'*

Thus far, only in extreme cases of environmental damage such as with the Ogoni in Nigeria where the land and people were completely decimated has a peoples' right to a satisfactory environment been invoked. The SERAC case importantly emphasized the importance of collective and peoples' rights in the African Charter. The decision also strongly highlighted the importance in the African human rights system of the peoples' right to control natural resources and the peoples' right to a satisfactory environment.<sup>210</sup> Moreover, the SERAC case demonstrated that peoples' rights were in fact justiciable under the charter. The SERAC decision articulated an alternative view of the concept of peoples', which differed from previous cases. This articulation of the concept of peoples' was similar to an indigenous or ethnic minority group and used in the Katangese case regarding the right to self-determination.<sup>211</sup> This is in contrast with other articulations of the concept in previous cases before the commission. Other understandings regarding what groups qualify as a people have used the idea of national collectives such as the Jawara<sup>212</sup>, and DRC decisions.<sup>213</sup>

Throughout the SERAC case the Commission emphasized the deep connection the Ogoni had with the quality of the environment and how their way of life was threatened by the actions of the oil consortiums and the Nigerian military junta.<sup>214</sup> The Commission did not use the opportunity to articulate the concept of peoples, however similar to other cases that have dealt with the concept self-determination; the threat to the very existence of the Ogoni was a major aspect of the case.

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<sup>210</sup> *Supra* 2 at para 55-58.

<sup>211</sup> *Supra* 163 at para 3.

<sup>212</sup> *Supra* 161 at para 73.

<sup>213</sup> *Supra* 166 at para 77.

<sup>214</sup> *Supra* 2 at para 67.

Although no allegations or violations of the right to self determination were made in the decision, the Commission’s reasoning strongly supports the argument that the right was central to the case even if it was not made explicit. Such examples are found throughout the case such as;

“The government has destroyed food sources through its security forces and State Oil Company; has allowed private oil companies to destroy food sources; and, through terror, has created significant obstacles to Ogoni communities trying to feed themselves.”<sup>215</sup>

And

“The Security forces were given the green light to decisively deal with the Ogonis, which was illustrated by the wide spread terrorisations and killings. The pollution and environmental degradation to a level humanly unacceptable has made it living in the Ogoni land a nightmare. The survival of the Ogonis depended on their land and farms that were destroyed by the direct involvement of the Government. These and similar brutalities not only persecuted individuals in Ogoniland but also the whole of the Ogoni Community as a whole. They affected the life of the Ogoni Society as a whole.”<sup>216</sup>

Furthermore, the right to self-determination is connected with article 24 for several reasons. If the right to self-determination is understood as groups being consulted in decisions which affect their future, than several substantive aspects of the right to a satisfactory environment can be viewed as part of this. Firstly, the Ogoni were viewed as an indigenous people and because of this, they have the right to self-determination. As such, their very existence depended on the territory they resided in. The devastation of the land was not only an environmental threat but also a threat to their existence.

Another aspect of article 24 that relates to self-determination is the requirement that information regarding the environment is dispersed to the communities affected. Since the Nigerian government refused to allow scientific monitoring of the situation in the delta region this was one way of preventing the Ogoni from having a greater

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<sup>215</sup> *Id* para 66.

<sup>216</sup> *Id* para 67.



awareness of the damage done by the oil companies. The Nigerian government in this way prevented the Ogoni from access to information regarding the impact of the oil companies. Furthermore, because the government instituted a policy of terrorization and assassinations against the Ogoni this can be viewed as one way which the government threatened the ability of the community to express its demands in protecting the environment. Most importantly the Ogoni were never consulted and in fact not allowed to freely express their views on the actions of the oil companies.

The devastation of the environment was so severe that the Ogoni's very existence was under siege. This was further exacerbated by the mass killings the Nigerian government committed in order to prevent the Ogoni from taking action. In this way the Nigerian government both prevented access to environmental information, prevented action by the Ogoni from being taken and failed to consult them on the actions of the oil companies. Furthermore, the revenue generated from the oil extraction while devastating the environment did not benefit the Ogoni community in any way. This threatened the community as whole and not only individuals.

Although the term indigenous was never used in the SERAC case the Ogoni were one such group. The reluctance of the commission to declare they were an indigenous people is explained by the African systems initial reluctance to deal with the term indigenous. As recent cases have shown the SERAC case was used as a basis in other cases for protection of indigenous groups.<sup>217</sup> Although it was not entirely clear at the time recent cases in the African Commission have illuminated the fact that the Ogoni were to be considered an indigenous group.

Article 24 is textually connected with the peoples' right to development. Since most states in Africa are developing or industrializing it is recognized that a reality of this

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<sup>217</sup>*Supra* 41 at para 255.

situation is some environmental damage will occur.<sup>218</sup> Many states such as Nigeria have used this argument to claim that the right to development excuses environmental devastation to no avail.<sup>219</sup> A modern understanding of development as reiterated in international sources such as the Rio Declaration should be one of sustainable development.<sup>220</sup> Development which ignores the fundamental role of a satisfactory environment will not be permanent and thus over time less beneficial.

The Commission also expressed that the origin of Article 21 could be traced to colonialism because of the history of exploitation of natural resources by colonial powers.<sup>221</sup> Furthermore, it also stated the responsibility of national governments to hold multinational corporations responsible and protect against violations of human rights.<sup>222</sup> It is therefore likely that peoples' rights such as the right to self-determination, and control over natural resources are present in the charter to protect against colonial and neocolonial abuses. Often the rights to control natural resources and development are connected since in the case of Nigeria oil revenue was a major concern of the government in economic development.<sup>223</sup> Another connection with colonialism is the authoritarian regimes that have emerged in the post colonial period. These postcolonial regimes can be viewed as a product of the colonial legacy making the colonial origin of article 21 and arguably other peoples' rights in the charter still relevant today.

### *C. The Function(s) of Article 24*

The importance of the environment and collective rights in the SERAC case was proclaimed by the African Commission stating;

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<sup>218</sup> *Supra* 18 at 176.

<sup>219</sup> *Supra* 2 at para 54,69.

<sup>220</sup> United Nations Conference on Environment and Development, June 3-14, 1992, Rio de Janeiro, Brazil, *Rio Declaration on Environment and Development*, princ. 1-9, U.N. Doc.A/CONF.151/26 (Aug. 12, 1992).

<sup>221</sup> *Supra* 2 at para 56.

<sup>222</sup> *Id* para 69.

<sup>223</sup> *Id* para 69.

“The uniqueness of the African situation and the special qualities of the African Charter on Human and Peoples’ Rights imposes upon the African Commission an important task. International law and human rights must be responsive to African circumstances. Clearly, collective rights, environmental rights, and economic and social rights are essential elements of human rights in Africa. The African Commission will apply any of the diverse rights contained in the African Charter. It welcomes this opportunity to make clear that there is no right in the African Charter that cannot be made effective.”<sup>224</sup>

This suggests that one primary function of Article 24 and the African Charter more generally is to be a human rights mechanism which is responsive to the African context. By taking into consideration issues such as peoples,’ self determination, colonialism, collective rights and development the African Charter seeks to constructively deal with human rights problems in the region in a manner which is unique. Article 24 as a peoples’ right in the African Charter necessarily has deep connections with these concepts. The issues of economic development, marginalization of minority groups, and new forms of foreign oppression all came together in the SERAC decision culminating in an alternative understanding of human and peoples’ rights.

Although implied and not explicitly stated one major purpose of peoples’ rights including article 24 of the charter is to protect the right to self determination. One method of doing this is through internal self determination. This requires states to allow collectives or peoples’ the ability to participate in the decision making process.<sup>225</sup> Article 24 exhibits several aspects to the right to self determination since a major substantive requirement as articulated in the SERAC case is to allow communities to have a voice in the decision making process regarding actions which will affect the quality of the environment.<sup>226</sup>

A third function of Article 24 is to protect against colonial and neo-colonial abuses. Although formal colonialism has ended in the majority of cases the legacy of

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<sup>224</sup> *Id* para 68.

<sup>225</sup> *Supra* 96 at 237.

<sup>226</sup> *Supra* 2 at para 53.

colonialism and new forms of foreign oppression have arisen which have a need to be dealt with. This is one of the reasons why peoples' rights in the African context are still relevant. In the SERAC case multinational corporations with the assistance of post colonial rulers acted in ways which directly threatened human rights and the existence of the Ogoni community as a whole.<sup>227</sup> Since the current international legal system has faced difficulty in holding non state actors accountable, states must presently exercise due diligence in protecting the infringement of human rights of their citizens. The SERAC case reinforced this notion of states exercising due diligence in holding non state actors accountable.<sup>228</sup>

A final and perhaps the most obvious function of article 24 is to ensure that the quality of the environment is healthy enough in order to allow for collectives and individuals to enjoy human rights and the environment. The SERAC case proved that the right to a satisfactory environment is in fact justiciable and has minimum core obligations.<sup>229</sup> The nature of the right is that it is a right to which individuals, communities and the public at large can be beneficiaries of.<sup>230</sup> The right contains both first and second generation aspects to it; in that governments must refrain from action or inaction that would impair an individual's enjoyment of the right and refrain from practices that might be harmful to the environment.<sup>231</sup> Governments are further under the obligation to progressively realize and fulfill the right to a satisfactory environment this would include conservation the environmentally sound management of the environment as well as an attempt at improving the natural environment<sup>232</sup>

In the SERAC case the African Commission explained the right to a satisfactory environment to include:

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<sup>227</sup>*Id* para 67.

<sup>228</sup> *Id* para 57.

<sup>229</sup>*Supra* 18 at 171.

<sup>230</sup>*Id* 174-175.

<sup>231</sup> *Id* 174-175.

<sup>232</sup>*Id* 174-175.

“Take reasonable measures to prevent pollution and ecological degradation  
Promote conservation and ensure ecological sustainable development and the use of  
natural resources  
Permit independent scientific monitoring of threatened environments  
Undertake environmental and social impact assessments prior to industrial development  
Provide access to information to communities involved”<sup>233</sup>

While the right to a satisfactory environment in the Charter is only described in a single sentence the SERAC case has demonstrated that numerous obligations follow from the right. States through enacting legislation, exercising due diligence, allowing the collection and dissemination of information, and meaningfully including local communities within the decision making process will meet the core obligations of the right. By fulfilling these obligations states not only protect the right to a satisfactory environment but also other fundamental human rights. It is not a right to an ideal or perfect environment although governments are expected to do as much as possible to protect and improve the environmental situation.<sup>234</sup> Instead the main purpose is to protect against human caused environmental disasters which threaten the lives of human beings.

Thus, article 24 of the African Charter can be viewed as having several purposes. One important function of the right is dealing with human rights in a way which is relevant to the region. This is done through the other functions of article 24 which are protecting peoples and the right to self determination, guarding against colonial and neo colonial influences, and maintaining a satisfactory environment. The right is structured as a collective right because of the concept of peoples which is an essential part of the

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<sup>233</sup> *Supra* 2 at para 52-53.

<sup>234</sup> *Supra* 18 at 175.

African human rights system and its historical concern with the issues of colonialism, and self determination.<sup>235</sup>

*D. The Usefulness of the Right to a Satisfactory Environment in Africa*

Ultimately the question arises if the right to a satisfactory environment is useful? Generally, it is clear that the quality of the environment is deeply connected with human rights. This has been demonstrated by the various articulations of the importance of the environment to human rights in international law.<sup>236</sup> Furthermore, within Africa the right is of particular importance because it is a peoples' right and these groups have historically faced marginalization both from colonialism as well as after the decolonization process.

The right to a satisfactory environment for peoples' in Africa may be useful in dealing with massive cases of environmental devastation and its human impact no matter if they are intentionally or unintentionally directed toward a people as a type of cultural genocide. Governments therefore bear the primary responsibility in protecting these groups and their right to a satisfactory environment which can be viewed as related to the right to self determination. Although the right to a satisfactory environment has only been invoked on one occasion its potential to be used more extensively remains. The possibility that future uses of the concept of peoples' in article 24 as a national collective similar to the Jawara decision remains. This could possibly be useful in dealing with massive human environmental problems if they were on a larger scale than in the SERAC case.

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<sup>235</sup> Charter of the Organization of African Unity art. II, May 25 1963, (Available at <http://www.africa-union.org/root/au/documents/treaties/treaties.htm>).

<sup>236</sup> See *Supra* 32,74, and 31.

Several environmental problems have arisen within Africa that has particular relevance to the right to a satisfactory environment. Among these problems are climate change, desertification, toxic waste dumping, and Oil spills and flaring.<sup>237</sup> The reason why these environmental problems are in fact human rights problems is because many times they have been directed toward marginalized groups which usually go hand in hand with the rights of peoples.

The right to a satisfactory environment is necessary for preserving human dignity, survival, and protection of human rights. The right is particularly relevant in Africa because as a developing and historically exploited region the continent has disproportionately suffered in regard to the environment. Modern environmental problems continue with the Ivory Coast as one example of the exportation of pollution and harmful materials to African countries from the rest of the world.<sup>238</sup> Although arguably all individuals are affected by these problems the concept of peoples within the African Charter is sufficiently broad to protect both individuals and peoples’.

The right to a satisfactory environment does not necessarily need to be interpreted as a collective right internationally. However, in the African context the right envisioned as a collective right makes sense because of historical, social, and economic realities. Although the concept of peoples’ has caused confusion and debate if past understandings

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<sup>237</sup> United Nations, Report of the Special Rapporteur on the adverse effects of the movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights, July 15, 2009, A/HRC/12/26.

*Supra* 2 para 52-53.

AND

United Nations, Annual Report of the United Nations High Commissioner For Human Rights and Reports of the Office of the High Commissioner and The Secretary-General on the relationship between Climate Change and Human Rights, January 15, 2009, A/HRC/10/61.

<sup>238</sup> United Nations, Report of the Special Rapporteur on the adverse effects of the movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights, July 15, 2009, A/HRC/12/26.

of the Commission are used it could be broad enough to include all individuals within a state.

A general criticism of the African human rights system is its lack of enforcement. This may be a problem for an improved implementation of Article 24 but also the other human and peoples rights provided for in the charter.<sup>239</sup> One reason for this is the lack of resources that the African Commission has had for various reasons. Another is the structure of the Charter in lacking mechanisms to assure bindingness on state parties.<sup>240</sup> Regardless of these problems one objective of the African charter is to enhance the realization of human rights.<sup>241</sup> A way in which the African system seeks to do this is by adopting an attitude which works with and not against states and at the same time seeks to understand and substantively deal with the realities of the region.<sup>242</sup>

The SERAC case among other reasons was important because it contributed to an expanded understanding of the concept of peoples'. The case demonstrated that indigenous peoples can be considered to fall within the concept of peoples in the African Charter.<sup>243</sup> While the SERAC case effectively offered an alternative understanding of the concept, this does not prevent the Commission in future communications from using other definitions. The concept of peoples' within the African human rights system is deeply connected with the right to self determination and colonialism. The post colonial context of dealing with the legacy of colonialism which has shaped modern Africa as well as other forms of foreign exploitation make the concept of peoples within Africa still relevant today.

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<sup>239</sup> Bahame Tom Nyanduga, Conference Paper: Perspective on the African Commission on Human and Peoples' Rights on the Occasion of the 20<sup>th</sup> Anniversary of the Entry Into Force of the African Charter on Human and Peoples' Rights, 6 Afr.Hum. Rts. L. J. 255, 261-263 (2006).

<sup>240</sup> *Id* 261-262.

<sup>241</sup> *Supra* 1.

<sup>242</sup> *Supra* 2 at para 69.

<sup>243</sup> Alessandro Fodella, International Law and the Diversity of Indigenous Peoples, 30 Vt. L. Rev. 565, 579 (2005-2006).



### *E. The African Contribution to the Right to a Satisfactory Environment*

One way to approach the problem of human environmental harm would be the creation and increased use of environmental law. However, the language, greater bindingness, and already established institutions of human rights also have something to contribute to a solution.<sup>244</sup> Although, the idea is contentious it is obvious that in the African human rights system environmental rights are considered part of human rights. This is evident by the continued support of the general idea of environmental rights by the African Union, existence of a right to a satisfactory environment in numerous African constitutions, and several environmental law documents in the region.<sup>245</sup>

The African perspective is important in recognizing that the environment has a special role in the securing of human and peoples' rights. Although the African regional system is often criticized and certainly has its share of difficulties this should not be used to overlook the vital contribution of the region in realizing human and peoples' rights. Nontraditional views are essential if such things as universal rights are to ever be realized. Article 24 is unique in that it is a right which is responsive to African conditions. The African struggle against historical and modern forms of oppression is useful in a greater realization of human rights. In a globalized world this is important and essential if the human rights of individuals and collectives are to be fulfilled. Articulations of the right to a satisfactory environment similar to article 24 potentially could be useful in other developing regions of the world.

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<sup>244</sup> Erin Eacott, *A Clean and Healthy Environment: the Barriers and Limitations of this Emerging Human Right*, 10 *Dalhousie J. Legal Stud.* 74, 99, (2001).

<sup>245</sup> Bamako Convention On The Ban Of The Import Into Africa And The Control Of Transboundary Movement And Management Of Hazardous Wastes Within Africa, January 30, 1991. And African Convention On The Conservation of Nature and Natural Resources, 2003.

An important aspect to this is that if a non universalist approach is taken to the right some regions of the world may find it more useful in articulating the right as a collective one. Both individuals and collectives are important for the protection of human rights, and the rights themselves are not necessarily different in substance. What differs however is the historical, social and economic context and because of this a non individualist approach may be useful in certain situations

The SERAC case progressively dealt with the issue of the environment and human rights in Africa. It described the minimum core obligations as well as proved that in the African system the right to a satisfactory environment is a peoples' right. While substantial follow up issues occurred after the decision it can also be argued that the outcome of the case had a role in encouraging states to adopt increased measures in protecting the environment. These can be found in newly created constitutions, African Union Declarations, increased legislation, and finally environmental treaties.

The strength of the concept of peoples' in the African Charter can be found in its relative flexibility. The fact that not every problem can be simplified to an individual vs. state dichotomy and that not all societies conceive individuals as equally important demonstrates the need for an alternative view of rights. The inclusion of peoples' rights recognizes the differences of societies internationally and that even in societies which have a strong individualistic mind set, greater forms of social solidarity may be beneficial. Environmental, indigenous, and problems of self determination cannot be dealt with in the form of individual rights because they are all problems which will not be solved by the actions of a single individual.<sup>246</sup>

As a peoples' right, the right to a satisfactory environment in the African Charter requires that if a violation of the right is found to have occurred that it has been done on a massive scale. Furthermore, to certain groups which are considered to be peoples' the

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<sup>246</sup> *Supra* 93 at 644.

environment plays an integral role in their daily life. While this may be said to be the case for all of humanity, certain groups that share culture or aspects of culture may attach even more importance for their survival both physically and spiritually. Because of the nature of environmental damage it is possible that the right to a satisfactory environment should preferably be interpreted as a collective right. One reason for this could be the large economic cost which would ensue if the right was an individual right. Some authors have suggested that an individual right to a satisfactory environment may not be enough in order to justify a violation. However, when a collective of people have the right violated it has been argued that the case is more compelling for taking action in order to deal with the human repercussions of pollution.<sup>247</sup>

The African system of human rights has been notorious for the lack of uniformity in its interpretation of the concept of peoples. Perhaps this was done on purpose in order for the concept to have the maximum amount of flexibility and utility within the system. Contrary to the common view that the lack of clarity of the concept of peoples is a weakness of the system in my view it can be seen as a strength which ultimately provides a greater and wider range of protection and at the same time recognizes human rights in a way which is culturally relevant.

*F. The Significance for Future Articulations of the Right to a Satisfactory Environment*

In recent years the international community has attempted to articulate improved means of holding non state actors accountable, but this has yet to materialize into any binding instruments which may prove useful.<sup>248</sup> It is therefore important that a separate and explicit right to a satisfactory environment exists. An explicit articulation of the right will not be burdened by the degree of indeterminability which the right suffers from in nonexplicit articulations. How problems of the environment are dealt with may be

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<sup>247</sup> *Supra* 100 at 84.

<sup>248</sup> *Supra* 22 at 138-139.

contentious, but the underlying assumption that something must be done has been generally recognized in international law.

Future articulations should take into account the lessons learned from SERAC and the African Charter in that non individualistic interpretations of rights may be useful. The environment does not necessarily need to be conceived as property. It can be viewed as a public good and not owned but shared, by current and future generations. Perhaps the best way of dealing with the problem will be a hybrid articulation of the right to a satisfactory environment. A hybrid articulation of the right has the advantages of both individual and collective rights theory and also recognizes both the historical tradition of individual rights as well as the possibility for an alternative interpretation of rights. In this way both individuals and communities will benefit from the right to a satisfactory environment, something which should be cherished by individuals, societies and the global community.

#### *G. Conclusion*

Article 24 is a dynamic and unique interpretation of the right to a satisfactory environment. The SERAC case was significant for being the first time article 24 was dealt with by the African Commission. In the Commission's decision indigenous and ethnic groups were found to fall under the definition of peoples' in the Charter. Substantive aspects of the right to a satisfactory environment as articulated by the SERAC case were found to be similar to other articulations of the right in international law. The peoples' dimension of Article 24 however, allows for an interpretation of the right as a collective right. Additionally, the way in which the African Commission articulated the obligations of article 24 suggests a deep connection with the right to self determination. Conceiving the right to a satisfactory environment as a peoples' right protects indigenous peoples, minority ethnic groups, and potentially national collectives from environmental human rights abuses. The right as articulated in the African Charter necessarily has deep connections with collective rights, self determination, and

colonialism all of which make Article 24 a unique, ground breaking, and relevant articulation of the right for Africa, and it is hoped future articulations of the right.