MUJIB JIMOH*

The Status of "New Rights" Before the African Human Rights Commission and Court

* Mujib Jimoh, LL.B. (First Class); B.L., LL.M. (Duke University School of Law); Judy Horowitz Scholar and Salzburg Cutler Fellow in International Law. I thank Professors Laurence L. Helfer, Jayne Huckerby, Aya Fujimura-Fanselow, and Monica Iyer for critical discussions. However, the views expressed here are solely mine.

ABSTRACT

In 1986, the United Nations General Assembly (UNGA) adopted Resolution 41/120, which provides quality control for introducing new rights under international law. Under the Resolution, five criteria must be fulfilled: the new rights must (1) be consistent with existing international human rights; (2) be of fundamental character; (3) be sufficiently precise; (4) provide realistic and effective implementation; and (5) attract broad international support. Despite this heightened standard, the effort to introduce new rights has continued in the 21st century, with more than fifty new rights in queue. These new rights are either derivative from existing rights or freestanding. For its part, the UNGA seems to have been abiding by the UNGA resolution's quality control practice. Over the last twelve years, it has recognized only two new rights through its resolutions—the right to a clean, healthy, and sustainable environment in 2022 and the right to water and sanitation in 2010.

This method of recognizing new rights through UNGA resolutions raises an issue. On the one hand, UNGA resolutions are generally not binding under international law. On the other hand, the meticulousness and the time taken by the UNGA before recognizing these new rights could lead to the view that those rights have become customary international human rights norms. Yet, any attempt to argue that all new rights recognized by the UNGA through its resolutions have become customary international law is likely to be controversial.

Notwithstanding any controversy on the status of new rights recognized through UNGA resolutions, this Article argues that the African Commission and Court on Human and Peoples' Rights, as quasi-judicial and judicial bodies respectively, may give effect to the new rights as contained in UNGA resolutions. Because human rights quasi-judicial and judicial bodies must be reliable and must apply clear principles of international law to ensure compliance from States, this Article delves into the existing jurisprudence of the African Commission and Court to find the basis for giving effect to those new rights contained in UNGA resolutions. The Article finds two ways in which the African Commission and Court may recognize new rights: Article 60 of the African Charter or by using a derivative method.

INTRODUCTION

The idea of "new rights" stems from the view that to address contemporary issues, human rights should be constantly updated to keep up with changing circumstances. Over the years, the United Nations General Assembly (UNGA) has advanced new rights through its resolutions, while academics have proposed similar rights through legal scholarship. For instance, during the seventy-sixth session of the UNGA in July 2022, the UNGA adopted a resolution recognizing a new right—the "right to a clean, healthy and sustainable environment."[1] The resolution was approved by 161 Member States with no votes against it.[2] Prior to this, the United Nations Human Rights Council (UNHRC) had adopted a resolution recognizing the right during its forty-eighth session in 2021.[3] The UNHRC resolution, too, was widely supported by "more than 1,300 civil society organizations . . . 15 UN agencies . . . and the Global Alliance of National Human Rights Institutions."[4] The Preamble to the UNGA resolution notes that the right had already been recognized by a vast majority of States and that the right is contained in national constitutions, legislation, international agreements, laws, and policies.[5] But the resolution does not state with specificity which treaties or constitutions recognized the right, nor does it expressly declare the right as part of the customary international law of human rights. The silence of the resolution on these points has implications under international law with respect to how States, treaty bodies, and regional human rights commissions and courts will recognize the right.

This Article aims to address the international law implications of new rights declared by UNGA resolutions. Specifically, when a new right is recognized under international human rights law through a UNGA resolution, what is its status before the African human rights

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1 *See* G.A. Res. 76/300, The Human Right to a Clean, Healthy and Sustainable Environment (July 28, 2022).

2 However, eight States abstained. *UNGA Recognizes Human Right to Clean, Healthy, and Sustainable Environment*, IISD (Aug. 3, 2022), https://sdg.iisd.org/news/unga-recognizes-human-right-to-clean-healthy-and-sustainable-environment [https://perma.cc/U43B-V599].

3 *See* Human Rights Council Res. 48/13, The Human Right to a Clean, Healthy and Sustainable Environment (Oct. 8, 2021).

4 *UN Body Adopts Universal Right to Healthy Environment*, IISD (Nov. 4, 2021), https://sdg.iisd.org/news/un-body-adopts-universal-right-to-healthy-environment [https://perma.cc/FJ86-PW69].

5 G.A. Res. 76/L.75, para. 19 (July 26, 2022).

commission[6] and court?[7] At the domestic level, the answer to this question might be inconsistent: If the new right is not part of customary international law,[8] a rule of *jus cogens*,[9] or contained in any treaty in force,[10] the domestic court may choose not to enforce the new right.[11] Or, the court may choose to enforce it.[12] For international human rights commissions and courts, the reliability of their practice is germane to ensure compliance with their decisions.[13] As such, they might want to

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6 The African Commission on Human and Peoples' Rights (the African Commission) was established by the African Charter on Human and Peoples' Rights. African Charter on Human and Peoples' Rights, art. 30, June 27, 1981, 1520 U.N.T.S. 217 [hereinafter African Charter].

7 The African Court on Human and Peoples' Rights (hereinafter the African Court) was established by the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights. Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, art. 1, June 10, 1998, https://au.int/sites/default/files/treaties/36393-treaty-0019_-_protocol_to_the_african_charter_on_human_and_peoplesrights_on_the_establishment_of_an_african_court_on_human_and_peoples_rights_e.pdf [https://perma.cc/JAV5-XB4Y] [hereinafter Protocol].

8 *See* Richard B. Lillich, *The Growing Importance of Customary International Human Rights Law*, 25 GA. J. INT'L & COMPAR. L. 1, 1 (1996). *See generally* Thomas Buergenthal, *The Evolving International Human Rights System*, 100 AM. J. INT'L L. 783 (2006).

9 A *jus cogens* norm is a peremptory rule of international law that means the international law shall prevail over any conflicting rule or agreement. Such a norm permits no derogation and may "be modified only by a subsequent norm . . . [of] the same character." *See* Mujib Jimoh, *U.N. Resolutions as "Hard-Law" in Armed Conflict*, 51 S. U. L. REV. (forthcoming 2024); Magdalena Matusiak-Fracczak, *Jus Cogens Revisited*, 26 REV. COMPAR. L. 55, 56 (2016); Anthony J. Colangelo, *Procedural* Jus Cogens, 60 COLUM. J. TRANSNAT'L L. 377, 379 (2022).

10 *See* MALCOLM N. SHAW, INTERNATIONAL LAW 95 (6th ed. 2008) ("[P]arties that do not sign and ratify the particular treaty in question are not bound by its terms."). *See generally* Arthur M. Weisburd, *The Effect of Treaties and Other Formal International Acts on the Customary Law of Human Rights*, 25 GA. J. INT'L & COMPAR. L. 99 (1996).

11 *See* Legal Resources Foundation v. Zambia, Communication 211/98, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶ 60 (Apr. 23, 2001), https://achpr.au.int/en/decisions-communications/legal-resources-foundation-zambia-21198 [https://perma.cc/N3T5-54MC] ("[I]nternational treaties which . . . are not part of domestic law and *which may not be directly enforceable in the national courts* . . . .") (emphasis added).

12 Domestic courts may give effect to some rights contained in U.N. resolutions. *See* Gregory J. Kerwin, *The Role of United Nations General Assembly Resolutions in Determining Principles of International Law in United States Courts*, 32 DUKE L.J. 876, 884 (1983) ("United States Court of Appeals for the Second Circuit, in *Filartiga v. Pena-Irala*, also accorded significant weight to UN General Assembly Resolutions."). *See also* Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens and General Principles*, 12 AUSTL. Y.B. INT'L. L. 82, 86 (1988).

13 *See* Joseph Raz, *Human Rights in the Emerging World Order*, 1 TRANSNAT'L L. THEORY 31, 43 (2010); LI-ANN THIO, THE HERITAGE FOUND., EQUALITY AND NON-DISCRIMINATION IN INTERNATIONAL HUMAN RIGHTS LAW 23 (2020).

steer clear of the inconsistent domestic approach by reliably giving effect to the new rights. To do otherwise may be bad for human rights advocacy because it could truncate efforts to address contemporary problems with the new rights. But if human rights commissions and courts are to recognize and uphold the new rights passed through a UNGA resolution, they must do so within the established principles of international law, and not capriciously.[14]

Additionally, if the new rights contained in the UNGA resolutions arise without becoming part of customary international law,[15] the available literature on the binding nature of UNGA resolutions posits that they are, generally, not binding in international law.[16]

This Article aims to find ways by which new rights adopted in UNGA resolutions may be recognized within the African human rights system. Article 60 of the African Charter provides that both the African

14 It is important for human rights commissions and courts to ground their decisions on clearly known principles. *See* Christof Heyns, *The African Regional Human Rights System: In Need of Reform?*, 2 AFR. HUM. RTS. L.J. 155, 158 (2001) ("[T]he rule of law demands that law is predictable, and as a result words used in legal texts should be given their ordinary meaning as far as is possible. To retain its integrity, the [African] Charter should in this sense be understood to say what it means, and to mean what it says. Where there are deviations, these need to be rectified, even if that means that the Charter has to be amended.").

15 There is a possibility that this will occur. To Swanson, new rights are developed at the international level, possibly by a Treaty Body. *See* Julia Swanson, *The Emergence of New Rights in the African Charter*, 12 N.Y. L. SCH. J. INT'L. & COMPAR. L. 307, 315 (1991) ("The new rights, on the other hand, are conceived directly in international fora, where they are presented for endorsement as rights, before they have received the benefit of careful prior scrutiny.").

16 *See, e.g.*, Stephen M. Schwebel, *The Effect of Resolutions of the U.N. General Assembly on Customary International Law*, 73 AM. SOC'Y. INT'L. L. PROC. 301 (1979).

Commission[17] and the African Court[18] may "draw inspiration from . . . instruments adopted by the United Nations"[19] in performing their mandates.[20] Does this "inspiration" extend to recognizing a new right, as set out in a UNGA resolution, within the African human rights system? To answer this question, this Article will draw upon the existing principles of international law applicable to the African Commission and Court.

This Article is divided into three parts. After this introduction, Part I will discuss the concept of "new rights." This Part will be divided into two sections. Its first section will be an overview of new rights, whereas the second section will consider the criticisms leveled against the introduction of new rights. Part II examines the status of new rights contained in UNGA resolutions before the African Commission and Court. This Part will be broadly divided into two sections. Section A provides a brief overview of and discusses the principles, approaches, and arguments for and against the recognition of new rights. Section B focuses on the African Court. It provides a brief overview of the Court and examines its jurisdiction under the Protocol establishing it and its

17 Article 60 of the African Charter expressly refers to the "Commission." African Charter, *supra* note 6, art. 60. This is because the African Court was not included in the African Charter but came later via the Protocol. *Compare* Swanson, *supra* note 15, at 330 ("Lastly, the African Charter does not provide a court system for the settlement of disputes. . . . The authors of the Charter insisted that this feature, like much of the Charter, is more suited to traditional methods of settling disputes through friendly arbitration than to the adversarial approach of the West."), *with* Gina Bekker, *The African Court on Human and Peoples' Rights: Safeguarding the Interests of African States*, 51 J. AFR. L. 151, 171 (2007) ("[African States] were more concerned with sovereignty and the maintenance of the *status quo* than with the protection of the individuals and groups within the state. This is evidenced by the manner in which the African Charter is framed, providing for a weak enforcement mechanism (the African Commission) that is lacking in funding and independence, largely subservient to the political machinery of the OAU/AU, and unable to provide meaningful redress to victims of human rights abuses."). Swanson's view seems to have more support. *See generally* Rachel Murray & Debra Long, *Monitoring the Implementation of Its Own Decisions: What Role for the African Commission on Human and Peoples' Rights?*, 21 AFR. HUM. RTS. L.J. 836, 837 (2021).

18 *See* Protocol, *supra* note 7, art. 3. Although Article 60 of the African Charter expressly mentions the "Commission," it is equally applicable to the African Court; African Charter, *supra* note 6, art. 60. *See also* Laurence Burgorgue-Larsen, *"Decompartmentalization": The Key Technique for Interpreting Regional Human Rights Treaties*, 16 INT'L. J. CONST. L. 187, 191 (2018) ("This interpretation function naturally expanded to the African Court following the adoption of the Protocol on its establishment.").

19 For discussion on such instruments, see *infra* Section II.A.1.

20 The African Commission has four mandates. African Charter, *supra* note 6, art. 45. For discussion on the mandate, see Mujib Jimoh, *A Critique of the Seizure Criteria of the African Commission*, 22 AFR. HUM. RTS. L.J. 362, 365–66 (2022). The African Court has only the protective mandate. *See* Protocol, *supra* note 7, art. 2.

Rules of Procedure. It also considers the African Court's basis for recognizing new rights contained in any UNGA resolutions and related concerns regarding such recognition. I will then conclude that the African Commission and Court may utilize two methods to recognize the new rights. They may use Article 60 of the African Charter or adopt a derivative approach, whereby the new rights are derived from the existing rights in the African Charter.

I
OVERVIEW OF NEW RIGHTS

The concept of "new rights" implies the introduction of novel, contemporary human rights to existing human rights. International law, however, requires some conditions that must be fulfilled for new rights to emerge. The new rights must be consistent with existing international human rights; be of fundamental character; be sufficiently precise; provide realistic and effective implementation; and attract broad international support.[21]

Aside from these criteria, there are two views on how these new rights may originate under international law. One view is that new rights germinate from the domestic system. According to Julia Swanson, a right must undergo a "maturation process" from the domestic system, which may take many years to complete—either through litigation, refinement, or revision—before introduction to the international order.[22] Swanson's view presupposes that, prior to being introduced and recognized by the international community, legitimate new rights should have already become popular at the domestic level.[23] If we agree with this view, it would make little difference that these new rights are contained in a UNGA resolution, as the notoriety of the new rights domestically may invite the view that the new rights have become a norm of customary international human rights, with the UNGA resolution serving as evidence. Yet, it is controversial to claim that once a new right is recognized by the UNGA through a resolution,

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21 G.A. Res. 41/120, Setting International Standards in the Field of Human Rights, para. 4 (Dec. 4, 1986). *See also* Barbara Stark, *Conceptions of International Peace and Environmental Rights: "The Remains of the Day*,*"* 59 TENN. L. REV. 651, 672 (1992).

22 Swanson, *supra* note 15, at 315.

23 *See, e.g.*, G.A. Res. 76/L.75, *supra* note 5, para. 19. *See also UNGA Recognizes Human Right to Clean, Healthy, and Sustainable Environment*, *supra* note 2 (noting that the right to a clean, healthy, and sustainable environment is said to have been "five decades in the making").

that right has become part of customary international human rights norms.[24] The second view is a flexible approach to originating new rights. Under this approach, new rights may either originate from the domestic system or from international bodies.[25]

The following Section provides a background on the concept of new rights. It discusses issues such as the approaches for new rights, the U.N. requirements for the recognition of new rights, and the new rights in queue awaiting recognition. The Section concludes by examining the criticisms leveled against the concept of new rights.

A. The Concept of New Rights

New rights are said to be new in the sense that they are nonexistent "when first conceived."[26] Swanson credits the idea of "new rights" to Karel Vasak[27]—which Vasak termed the "third generation of human rights."[28] To Vasak, these rights,

> are new in that they may both be *invoked against* the State and *demanded* of it; but above all (and herein lies their essential characteristic) they can be realized only through the *concerted efforts of all the actors* on the social scene: the individual, the State, public and private bodies and the international community.[29]

The need for new rights is rooted in the notion that law changes, and that human rights law should not be an exception[30]—moreover, the

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24 There are debates on whether there are such things as customary human rights norms. *See* Hugh Thirlway, *Human Rights in Customary Law: An Attempt to Define Some of the Issues*, 28 LEIDEN J. INT'L. L. 495 (2015). *See also* WILLIAM A. SCHABAS, THE CUSTOMARY INTERNATIONAL LAW OF HUMAN RIGHTS (2021); Brandon L. Garrett et al., *Closing International Law's Innocence Gap*, 95 S. CAL. L. REV. 311, 350–51 (2021). Although scholars do not express the view that new rights must be recognized as customary international law before giving them recognition, they express the view that the new rights should enjoy "acceptance by 'states and international bodies.'" *Id.*

25 Kerstin von der Decken & Nikolaus Koch, *Recognition of New Human Rights: Phases, Techniques and the Approach of 'Differentiated Traditionalism,' in* THE CAMBRIDGE HANDBOOK OF NEW HUMAN RIGHTS: RECOGNITION, NOVELTY, RHETORIC 7, 8 (Andreas von Arnauld et al. eds., 2020).

26 *Id.*

27 Swanson, *supra* note 15, at 310–12. *See* Stephen P. Marks, *Emerging Human Rights: A New Generation for the 1980s?*, 33 RUTGERS L. REV. 435, 441 (1981). *See also* Carolina Pereira Saez, *New Rights: The End of an Era?*, 76 PERSONA & DERECHO 93 (2017) (calling new rights "fourth generation").

28 Marks, *supra* note 27, at 441.

29 *Id.* (third emphasis added).

30 Luisa Netto, *Criteria to Scrutinize New Rights: Protecting Rights Against Artificial Proliferation*, 8 REVISTA DE INVESTIGACOES CONSTITUCIONAIS 11, 11 (2021) ("[T]he recognition of implicit and new rights appears unavoidable and desirable as history and its evolving circumstances permanently present new challenges to human dignity.").

Universal Declaration of Human Rights (UDHR), the International Convention on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR) are not perfect as they do not capture human rights needed to address all contemporary problems.[31]

Von der Decken and Koch posit that new rights emerge in three phases—the idea, the emergence, and full recognition—noting, however, that these phases are not rigid.[32] If new rights can emerge without fulfilling all three phases,[33] Swanson's "maturation process" will seem to conflict with these flexible phases, as there is nothing preventing international organizations or a treaty body from originating nonexistent new rights directly.[34] But this may be replete with challenges at the domestic level, which may require the new rights to be codified in the nation's constitution before recognition.[35] At the regional human rights level, however, waiting for such codification before recognition will be unhelpful; States already have recognized doctrines—clawback clauses in Africa,[36] Margin of Appreciation in Europe[37]—which could be used to confine even existing human rights.[38]

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31 Hurst Hannum, *Reinvigorating Human Rights for the Twenty-First Century*, 16 HUM. RTS. L. REV. 409, 431 (2016).

32 von der Decken & Koch, *supra* note 25, at 8 ("The lines between the phases will remain blurred and, hence, so will any claim at 'localising' a right subject to dispute.").

33 *Id.* ("Furthermore, not all human rights go through all phases: some may be brought to full recognition directly (e.g., by a groundbreaking judgment and thus, more or less, skipping the 'phase of emergence', [sic] as seen with the right to be forgotten as developed by the European Court of Human Rights (ECtHR)).").

34 Mart Susi, *Novelty in New Human Rights: The Decrease in Universality and Abstractness Thesis*, *in* THE CAMBRIDGE HANDBOOK OF NEW HUMAN RIGHTS: RECOGNITION, NOVELTY, RHETORIC 21, 23 (Andreas von Arnauld et al. eds., 2020).

35 Netto, *supra* note 30, at 42 ("They are not born as constitutional norms; if they carry substantial fundamentality, they ought to be constitutionalized.").

36 For discussion, see Mujib Jimoh, *Investigating the Responses of the African Commission on Human and Peoples' Rights to the Criticisms of the African Charter*, 4 RUTGERS INT. L. & HUM. RTS J. (forthcoming 2024). *See also* Gino J. Naldi, *Limitation of Rights Under the African Charter on Human and Peoples' Rights: The Contribution of the African Commission on Human and Peoples' Rights*, 17 S. AFR. J. HUM. RTS. 109, 109 (2001).

37 *See generally* Andreas Follesdal & Nino Tsereteli, *The Margin of Appreciation in Europe and Beyond*, 20 INT'L. J. HUM. RTS. 1055 (2016).

38 Richard Gittleman, *The African Charter on Human and Peoples' Rights: A Legal Analysis*, 22 VA. J. INT'L L. 667, 692 (1982).

Proponents of new rights argue that their introduction presupposes the "inadequacy of protection thesis"[39]: either (1) that there is a *lacuna* in the implementation of the "established human rights" because it does not cover a certain group of people[40] or (2) that the existing human rights are insufficient to address certain social goals.[41] Thus, new rights are thought to be important to address contemporary problems that the existing rights cannot address. Scholars have explored different methods and approaches to ground the basis for recognizing new rights. For instance, von der Decken and Koch discuss the "Treaty Approach," the "Customary International Law Approach," and the "Derivation Approach";[42] while Susi discusses the "Epistemic Aspect" and the "Ontic Aspect"[43]—it seems that both the "Derivative" and "Freestanding" approaches have incorporated all these approaches.[44]

Under the Derivation Approach, the new rights will be extracted from existing rights,[45] showing some form of "intersection" between the new rights and the existing ones.[46] For example, the African Commission extracted the right to food[47] and the right to water and

39 Susi, *supra* note 34, at 22.

40 *Id.* at 33. *See* Corina Heri, *Justifying New Rights: Affectedness, Vulnerability, and the Rights of Peasants*, 21 GERMAN L.J. 702 (2020) (discussing the basis for the clamor for the rights of peasants).

41 *Id. See also* Garrett et al., *supra* note 24, at 332–34.

42 von der Decken & Koch, *supra* note 25, at 11.

43 Susi, *supra* note 34, at 21.

44 For discussion, *see* Garrett et al., *supra* note 24, at 332. The Freestanding Approach is also called the Stand-Alone Approach. For usage of both concepts, see *id.* at 334.

45 For discussion on the various methods of extraction, see *id.* at 333 ("The process deriving a 'new' right involves 'identifying previously unarticulated aspects of old human rights' or articulating 'newly recognized aspects of existing rights.' . . . There are different means by which such derivative processes occur. Evolutive interpretation that recognizes human rights treaties as 'living instruments' is one of the most common methods.").

46 *See* Lea Shaver, *The Right to Read*, 54 COLUM. J. TRANSNAT'L L. 1, 49 (2015) ("It is possible, however, to locate the right to water at the intersection of previously recognized rights to life, health, food, and an adequate standard of living.").

47 Soc. & Econ. Rts. Action Ctr. (SERAC) v. Nigeria, Communication 155/96, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶¶ 64–65 (May 27, 2002), https://achpr.au.int/en/decisions-communications/social-and-economic-rights-action-center-serac-and-center-economic-15596 [https://perma.cc/A7Q6-SERS].

sanitation[48] from the existing human rights in the African Charter.[49] As for the Freestanding Approach, new rights that are "stand-alone" are developed independent of existing human rights,[50] perhaps because, even with evolutive and liberal implementation and interpretation of the existing human rights,[51] certain social goals cannot be derived.[52] No attempt has been made by the African Commission or Court to adopt the Freestanding Approach to recognize a new right within the African human rights system.

In the 1980s and 1990s, there were numerous new rights in the queue. For instance, Professor Philip Alston provided a list of twenty new rights proposed by Galtung and Wirak[53] and the International Association of Democratic Lawyers.[54] However, only seven of them

48 *See* Free Legal Assistance Group v. Democratic Republic of Congo, Communication 25/89, 47/90, 56/91, 100/93, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶ 47 (Apr. 4, 1996), https://achpr.au.int/index.php/en/decisions-communications/free-legal-assistance-group-lawyers-committee-human-rights-union-interafr [https://perma.cc/FJY2-R48S].

49 The right to food is derived from arts. 4, 16, and 22. The right to water and sanitation was derived from arts. 4, 5, 15, 16, 22, and 24. African Charter, *supra* note 6. *See* African Commission on Human and Peoples' Rights (ACHPR), *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights*, at 48, 51 [hereinafter *Principles and Guidelines*], https://archives.au.int/bitstream/handle/123456789/2063/Nairobi%20Reporting%20Guidelines%20on%20ECOSOC_E.pdf?sequence=1&isAllowed=y [https://perma.cc/RVY3-QX7H].

50 Susi, *supra* note 34, at 32.

51 Garrett et al., *supra* note 24, at 333.

52 *Id.* at 334.

53 Philip Alston, *Conjuring Up New Human Rights: A Proposal for Quality Control*, 78 AM. J. INT'L L. 607, 610 (1984) ("[T]he right to sleep; the right not to be killed in a war; the right not to be exposed to excessively and unnecessary heavy, degrading, dirty and boring work; the right to identity with one's own work product, individually or collectively (as opposed to anonymity); the right to access to challenging work requiring creativity; the right to control the surplus resulting from the work product; the right to self-education and education with others (as opposed to schooling); the right to social transparency; the right to co-existence with nature; the right to be a member of *some* secondary group (not necessarily the family); the right to be a member of *some* secondary group (not necessarily the nation); the right to be free to seek impressions from others (not only from media); and the right to be free to experiment with alternative ways of life.").

54 *Id.* at 611 ("[T]he right of every individual and people to permanent peace; the right of every individual to enjoy the highest attainable standard of physical and mental health, and in particular, the right to freedom from genetic mutation or damage; the right of all individuals and peoples to an environment of such quality as to enable them to live with dignity and enjoy a state of well-being; the right of all individuals and peoples to live in a peaceful region which is to become neither the theater of an armed conflict nor the subject of that conflict; the right of every individual and all peoples to live in freedom from threats; the right of all individuals and peoples to disarmament; and the right of all individuals and peoples to progress and development.").

were thought to be "serious candidates."[55] Alston, Stephen Marks, and Swanson were part of the earliest scholars to discuss the concept of new rights under international human rights law. The effort to introduce more new rights by scholars[56] and the UNGA[57] has continued in the twenty-first century and is unrelenting.[58] In recent years, due to the advent of modern technology, other rights joined the queue. Now, there are recurring arguments to include new rights for some vulnerable peoples, like the LGBTQIA community, people with HIV/AIDS, children born of wartime rape, Indian Dalits, etc.[59]

In a recent work, twenty broad new rights are discussed by various human rights scholars.[60] Other new rights contained in recent scholarship include the right to have descendants,[61] the right to a green

55 *See* Swanson, *supra* note 15, at 313 ("[T]he right to development, the right to the environment, the right to peace, the right to communicate, to right to share in the common heritage of mankind, the right to be different, and the right to receive humanitarian assistance.").

56 Andreas von Arnauld & Jens T. Theilen, *Rhetoric of Rights: A Topical Perspective on the Functions of Claiming a 'Human Right to…,' in* THE CAMBRIDGE HANDBOOK OF NEW HUMAN RIGHTS: RECOGNITION, NOVELTY, RHETORIC 34 (Andreas von Arnauld et al. eds., 2020).

57 The UNGA recognized two new rights in the last twelve years—the right to a clean, healthy, and sustainable environment and the right to water and sanitation. The right to water and sanitation was recognized by G.A. Res. 646/292, The Human Right to Water and Sanitation (Aug. 3, 2010).

58 von Arnauld & Theilen, *supra* note 56, at 34 (discussing the various new rights proposed).

59 *See* MARTA CARTABIA, THE AGE OF "NEW RIGHTS" 9 (2010); Clifford Bob, *Introduction: Fighting for New Rights*, *in* THE INTERNATIONAL STRUGGLE FOR NEW HUMAN RIGHTS 13 (Clifford Bob ed., 2009).

60 These are right to water; right to housing and land; right to health; right to a clean environment and rights of the environment; rights of older persons; rights to gender identity; rights of indigenous people; animal rights; right to internet access; the right to be forgotten; reproductive rights; genetic rights; right to bodily integrity; right to mental integrity; rights relating to enforced disappearance; right to democracy; right to diplomatic and consular protection; right to good administration; the right to freedom from corruption; and the right of access to law. *See* THE CAMBRIDGE HANDBOOK OF NEW HUMAN RIGHTS: RECOGNITION, NOVELTY, RHETORIC v–ix (Andreas von Arnauld et al. eds., 2020) [hereinafter THE CAMBRIDGE HANDBOOK].

61 Miguel Ángel Presno Linera, *Derechos fundamentals, derecho europeo y derecho de familia: Nuevas familias, nuevos derechos* [*Fundamental Rights, European Law, and Family Law: New Families, New Rights*], 6 DIREITOS FUNDAMENTAIS & JUSTICA 33 (2009) (Braz.).

future,[62] the right to be able to live,[63] a right *not* to be left alone,[64] and even a "right to be loved."[65] Netto recently developed a list of eight criteria to test whether a new right is fundamental.[66] Chief among them is the notion that new rights must aim to complement and have some form of relationship with the right to human dignity.[67] However, whether all new rights must be tied to the right to human dignity is not within the scope of this Article.[68]

B. Criticisms of New Rights

The idea of new rights is not without controversy and division among scholars and commentators.[69] Yet, proponents have constantly maintained that there is no clear basis for the controversy, citing the introduction of new rights to the African Charter as proof of their success.[70] Criticisms against new rights have been really harsh.[71] But sometimes, the criticisms have been mild.[72]

Perhaps the most prominent of the criticisms is the notion that new rights will cause human rights inflation[73] due to their proliferation.[74]

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62 *See generally* RICHARD HISKES, THE HUMAN RIGHTS TO A GREEN FUTURE: ENVIRONMENTAL RIGHTS AND INTERGENERATIONAL JUSTICE (2009).

63 V. Ramaswamy, *A New Human Rights Consciousness*, 9 NETH. Q. HUM. RTS. 50 (1991).

64 Lisa Grans, *A Right Not to Be Left Alone – Utilising the Right to Private Life to Prevent Honour-Related Violence*, 85 NORDIC J. INT'L. L. 169, 169 (2016).

65 *See* S. MATTHEW LIAO, THE RIGHT TO BE LOVED (2015). *See also* von Arnauld & Theilen, *supra* note 56 (discussing other rights).

66 Netto, *supra* note 30, at 45 (noting that "fundamentality" is a requirement under U.N. GA Resolution 41/120). *See* Garrett et al., *supra* note 24, at 349–50.

67 Netto, *supra* note 30, at 45 ("[I]n the testing process, the argumentation burden ought to be adequately fulfilled showing that the new right is required by or enhances the protection and the promotion of human dignity.").

68 For instance, it seems that Unger's new right of immunity contains some elements not related to dignity. *See* Andrew Halpin, *New Rights for Old*, 53 CAMBRIDGE L.J. 573, 575 (1994).

69 *See* Swanson, *supra* note 15, at 312 n.41.

70 *Id.* at 315.

71 *Id.* at 312 n.41.

72 Hannum, *supra* note 31, at 412 ("[W]e should welcome this process, although proclaiming too many new norms without ensuring that meaningful consensus exists within all regions of the world can be problematic, as discussed further in the section on new rights.").

73 von Arnauld & Theilen, *supra* note 56.

74 *See* Bridget Lewis, *Quality Control for New Rights in International Human Rights Law: A Case Study of the Right to a Good Environment*, 33. AUSTL. Y.B. INT'L L. 55, 57–58 (2015).

Human rights inflation is the condition of devaluing human rights as a result of producing "too much bad human rights currency."[75] When the proliferation is left unchecked, new rights can potentially weaken the "legal and political worth" of human rights.[76]

Another popular criticism is that new rights share a close relationship with economic, social, and cultural rights (ESCRs), which are themselves controversial.[77] Though ESCRs have been recognized under international law,[78] they still continue to generate many concerns.[79] Prominent amongst these concerns are that they are undemocratic;[80] that they are dependent on the availability of resources;[81] and that they are still valued less than negative rights (civil and political rights),[82] so, they are "at best, programmatic ideals realisable at the discretion of governments."[83] Notwithstanding these concerns, it has been advocated that these should generally not deter the formulation of new rights, as these are generic concerns for ESCRs,[84] with proof that civil and political rights also face similar concerns.[85]

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75 James Nickel, *Human Rights*, *in* SANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2021).

76 Netto, *supra* note 30, at 63.

77 Ramaswamy, *supra* note 63.

78 Danwood M. Chirwa, *Access to Water as a New Right in International, Regional and Comparative Constitutional Law*, *in* THE CAMBRIDGE HANDBOOK OF NEW HUMAN RIGHTS: RECOGNITION, NOVELTY, RHETORIC 55, 58 (Andreas von Arnauld et al. eds., 2020).

79 *See generally* Paul O'Connell, *The Death of Socio-Economic Rights*, 74 MOD. L. REV. 532 (2011). For philosophical consideration, see generally Malcolm Langford, *Socio-Economic Rights: Between Essentialism and Egalitarianism*, *in* MORAL AND POLITICAL CONCEPTIONS OF HUMAN RIGHTS: IMPLICATIONS FOR THEORY AND PRACTICE 258 (Reidar Maliks & Johan Karlsson Schaffer eds., 2017).

80 Aryeh Neier, *Social and Economic Rights: A Critique*, 13 HUM. RTS. BRIEF 1, 2 (2006).

81 Antonio Carlos Pereira-Menaut, *Against Positive Rights*, 22 VALPARAISO U. L. REV. 359, 369 (1988); SAMUEL MOYN, NOT ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD 101 (2018).

82 Philip Alston, *Dialogue on Human Rights in the Populist Era*, 9 J. HUM. RTS. PRAC. 1, 9 (2017).

83 Chirwa, *supra* note 78, at 61. Chirwa states other concerns that ESCRs are "vague . . . making it difficult to define their content and the obligations they entail, to implement them immediately or to enforce them judicially." *Id.* at 57 (footnotes omitted).

84 *See* Alston, *supra* note 82, at 99. *See also* Chirwa, *supra* note 78, at 57 ("Much of the controversy about the existence of the right of access to water has more to do with concerns about socio-economic rights in general than with concerns about the right to water itself.").

85 Chirwa, *supra* note 78, at 57.

Other criticisms include the fact that new rights are seen as "vague and exaggerated."[86] Another criticism is the view that new rights can disrupt[87] and restrict existing rights. Ironically, on one hand, it is claimed that new rights are susceptible to neglect by States.[88] On the other hand, it is said that States might entangle too much with new rights, mixing them with politics—for instance, by using new rights to create obligations—to the extent that the new rights will lose their main purpose.[89] Another criticism is that because new rights sometimes cater to the vulnerable by filling a gap in the existing rights with new rights, they are "anti-establishment"[90] and lead to controversies.[91] Hannum collects other criticisms from scholars and sums them up:

> Both critics and some supporters of the human rights movement have expressed concern over what Eric Posner terms the 'hypertrophy' of rights: 'The more human rights there are, and thus the greater variety of human interests that are protected, the more that the human rights system collapses from an undifferentiated welfareism in which all interests must be taken seriously for the sake of the public good.' Michael Ignatieff argues that 'rights inflation—the tendency to define anything desirable as a right—ends up eroding the legitimacy of a defensible core of rights'. [sic] Allen Buchanan similarly observes that 'unbridled proliferation damages the very idea of international human rights by abandoning the notion of extraordinarily high priority norms in favour of an ever-expanding list of protected interests.'[92]

To work around these criticisms, some scholars insist on the development of only extremely important and feasible new rights.[93] Despite this, numerous rights are being recommended.[94] It seems,

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86 Swanson, *supra* note 15, at 314.

87 *Id.*

88 *Id.*

89 Saez, *supra* note 27.

90 von Arnauld & Theilen, *supra* note 56, at 41.

91 Issa G. Shivji, *Constructing a New Rights Regime: Promises, Problems and Prospects*, 8 SOC. & LEGAL STUD. 253, 254 (1999).

92 Hannum, *supra* note 31, at 431 (footnotes omitted) (quoting ERIC POSNER, THE TWILIGHT OF INTERNATIONAL HUMAN RIGHTS 85 (2015)) (quoting Michael Ignatieff, *Human Rights as Idolatry*, *in* HUMAN RIGHTS AS POLITICS AND IDOLATRY 90 (Amy Gutmann ed., 2014)) (quoting ALLEN BUCHANAN, THE HEART OF HUMAN RIGHTS 286 (2013)).

93 *See generally* MAURICE CRANSTON, WHAT ARE HUMAN RIGHTS? (1973); Pablo Gilabert, *The Feasibility of Basic Socioeconomic Rights: A Conceptual Exploration*, 59 PHIL. Q. 6, 659 (2009).

94 *See* THE CAMBRIDGE HANDBOOK, *supra* note 60.

however, that the UNGA has been able to apply "quality control"[95] to these new rights. For instance, over the past twelve years, the UNGA has recognized only two new rights—the right to water and sanitation in 2010, and the right to a clean, healthy, and sustainable environment in 2022. This makes it enticing to think that the meticulousness and the duration usually taken[96] by the UNGA in recognizing new rights denote that new rights are announced after developing into customary human rights norms.

II
THE STATUS OF NEW RIGHTS CONTAINED IN UNGA RESOLUTIONS BEFORE THE AFRICAN HUMAN RIGHTS COMMISSION AND COURT

UNGA resolutions are, as a general rule, not binding in international law,[97] except when they are accepted by States as binding.[98] There are three ways States may accept a UNGA resolution as binding. First, States may accept the resolution as binding through "a special agreement" to treat it as such. Second, it may be accepted as binding where States treat UNGA resolutions as binding under customary international law. Third, a resolution may be accepted when the UNGA expresses the intention to treat that resolution as binding.[99] "Nevertheless, it is generally accepted that such resolutions in certain specified circumstances may be regarded as evidence of customary international law or can contribute—among other factors—to the creation of such law."[100] Overall, most scholars agree that UNGA

95 For discussion on quality control for new rights, see generally Alston, *supra* note 53.

96 Swanson, *supra* note 15, at 316 ("[U]nless and until [rights] attain the status of customary international law, the occurrence of which is a function of time and general acceptance by the world community . . . .").

97 There are numerous works on this. *See* Schwebel, *supra* note 16; Kerwin, *supra* note 12, at 876; Christopher C. Joyner, *U.N. General Assembly Resolutions and International Law: Rethinking the Contemporary Dynamics of Norm-Creation*, 11 CAL. W. INT'L. L.J. 445, 452 (1981); F. Blaine Sloan, *Binding Force of a Recommendation of the General Assembly of the United Nations*, 25, BRIT. Y.B. INT'L L. 1, 1 (1948); Gabriella R. Lande, *The Changing Effectiveness of General Assembly Resolutions*, 58 AM. SOC'Y INT'L L. PROC. 162, 169 (1964).

98 *See* JEFFREY DUNOFF ET AL., INTERNATIONAL LAW: NORMS, ACTORS, PROCESS 77 (5th ed. 2020) (citing *Texaco Overseas Petroleum Company/California Asiatic Oil Company and the Government of the Libyan Arab Republic*, 17 I.L.M. 1 (1977)).

99 Jimoh, *supra* note 9, at 24 (citing Sloan, *supra* note 97).

100 DUNOFF ET AL., *supra* note 98, at 79 (quoting *SEDCO, Inc. v. Nat'l Iranian Oil Co. and the Islamic Republic of Iran*, 10 Iran-U.S. Cl. Trib. Rep. 180 (1986)).

resolutions are not binding.[101] For this reason, and in the absence of an express pointer that States have accepted a UNGA resolution as binding, how can new rights contained in a UNGA resolution be recognized by the African Commission and the Court?

In Africa, both the African Commission and the African Court are the main regional, quasi-judicial[102] and judicial bodies for claims about violations of human rights.[103] While the African Commission is established by the African Charter,[104] the African Court is established by the Protocol.[105] Each body has its own rules of procedure and practice.[106] This Part examines the rules, decisions, and practices of both the African Commission and the African Court to determine the status of new rights contained in UNGA resolutions.

A. The African Commission

As part of its protectional role,[107] the African Commission uses the communication procedure to hear complaints alleging any violations of rights in the African Charter.[108] Communications may be submitted either by a State that is party to the Charter against another State[109] or by nonstate actors, either nongovernmental organizations or individuals, against a State. The African Commission will not proceed

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101 *See* Jimoh, *supra* note 9.

102 The African Commission is quasi-judicial. *See* Manisuli Ssenyonjo, *Analysing the Economic, Social and Cultural Rights Jurisprudence of the African Commission: 30 Years Since the Adoption of the African Charter*, 29 NETH. Q. HUM. RTS. 358, 358 (2011). The African Court is a judicial body. *See* FRANS VILJOEN, INTERNATIONAL HUMAN RIGHTS LAW IN AFRICA 410 (2d ed. 2012).

103 Jimoh, *supra* note 20, at 365.

104 African Charter, *supra* note 6, art. 30.

105 Protocol, *supra* note 7, art. 1. For discussion on the reasons, see Bekker, *supra* note 17, at 152.

106 The African Commission's current rules were made in 2020. *See African Commission on Human and Peoples Rights Rules of Procedure*, https://www.achpr.org/rulesofprocedure. The African Court's current rules were made in 2020 too. *See Rules of Court: African Court on Human and Peoples' Rights*, https://www.african-court.org/en/images/Basic%20Documents/Rules_of_Court_-__-_25_September_2020.pdf.

107 African Charter, *supra* note 6, art. 45, § 1.

108 Jimoh, *supra* note 20, at 366.

109 This has rarely been used. *See id.* at 364 ("[O]nly three communications have been received by the African Commission with respect to communications between state parties.").

with a communication if the alleged breach is brought against a State that has not ratified the African Charter.[110]

The African Charter contains numerous rights—including both individual[111] and collective rights[112]—from which a complainant may allege a violation.[113] Where, however, a right is not contained in the African Charter, and that same right is contained in a UNGA resolution, would that new right be recognized by the African Commission?

1. Principles for the Recognition of New Rights by the African Commission

There are conflicting principles that may be gleaned from the jurisprudence of the African Commission in determining whether it will recognize new rights contained in UNGA resolutions.[114] The first inferred principle (*Principle 1*) could be that the African Commission will require a communication to specify which right in the Charter is violated before considering such communication. Under this view, if a communication cannot point to a right existing in the African Charter, the African Commission will refuse seizure,[115] and decline to proceed with admissibility of the communication.[116] If this principle is correct, then by implication, the African Commission may not recognize new rights from any other source, including UNGA resolutions, except those expressly contained in the African Charter. Support for this view

110 African Freedom of Expression Exchange & 15 Others (Represented by FOI Attorneys) v. Algeria & 27 Others, Communication 742/20, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶ 40 (Apr. 26, 2021), https://achpr.au.int/en/decisions-communications/african-freedom-expression-exchange-foi-attorneys-algeria-74220 [https://perma.cc/V8LM-X3UQ] (declining jurisdiction against Somaliland and Morocco since they had not ratified the African Charter). This is a rule of international law. *See* SHAW, *supra* note 10, at 95 ("[P]arties that do not sign and ratify the particular treaty in question are not bound by its terms. This is a general rule and was illustrated in the *North Sea Continental Shelf* cases where West Germany had not ratified the relevant Convention and was therefore under no obligation to heed its terms.").

111 African Charter, *supra* note 6, arts. 1–18.

112 *Id.* arts. 19–26.

113 For discussion on individual and collective rights in the Charter, see Mujib Jimoh, *The Place of Digital Surveillance under the African Charter on Human and Peoples' Rights and the African Human Rights System in the Era of Technology*, 1 AFR. J. LEGAL ISSUES TECH. & INNOVATION 113, 116–20 (2023).

114 I define jurisprudence here to mean the African Commission's application and interpretation of the African Charter, its communication decisions, and its rules of procedure.

115 For discussion on seizure, see generally Jimoh, *supra* note 20.

116 For discussion on admissibility, see generally Sabelo Gumedze, *Bringing Communications Before the African Commission on Human and Peoples' Rights*, 3 AFR. HUM. RTS. L.J. 118 (2003).

may be found in the work of Gumedze,[117] and the decision of the African Commission in *Jawara v. The Gambia*.[118] Gumedze opines, though, on another subject,[119] that,

> Communications before the Commission must be limited to violations of international human rights standards. The Charter is the yardstick for testing whether or not there has been a violation of an international standard within the African human rights system.[120]
>
> . . . .
>
> In submitting a communication before the Commission, the rights allegedly violated should be contained in the Charter.[121]

Likewise, in *Jawara*, while deciding the compatibility of the military regime's acts with the provisions of the Charter, the African Commission held that "[t]he position of the Commission has always been that a communication must establish a *prima facie* evidence of violation. *It must specify the provisions of the Charter alleged to have been violated.*"[122]

The pronouncement seemingly suggests that rights claimed before the African Commission must be present in the African Charter, though the communication in *Jawara* did not refer to new rights and the African Commission's justification for their reasoning is unclear from the pronouncement. If this principle were strictly applied, the African Commission would not give effect to new rights contained in any other document. Furthermore, it also suggests that a right which originates as customary international law will not be considered by the African Commission, since it is not contained in the African Charter. This would be contrary to another provision in the African Charter, embodied by the second principle.[123]

The second principle (*Principle 2*) is that new rights could be claimed at the African Commission. This principle may be extracted from the African Charter and the practice of the African Commission

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117 *Id.* at 123.

118 *See* Jawara v. Gambia, Communication 147/95-149/96, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶ 41 (May 11, 2000), https://achpr.au.int/en/decisions-communications/sir-dawda-k-jawara-gambia-14795-14996 [https://perma.cc/7G6Z-VSUR].

119 Gumedze's article is not on new rights, but on the communication procedure of the African Commission. *See generally* Gumedze, *supra* note 116.

120 *Id.* at 123 (emphasis added).

121 *Id.* at 124 (emphasis added).

122 Jawara v. Gambia, ¶ 41 (emphasis added).

123 *See* African Charter, *supra* note 6, art. 61.

with respect to its Rules of Procedure. According to Article 60 of the African Charter, the African Commission is required to,

> draw inspiration from international law on human and peoples' rights, particularly from . . . other *instruments* adopted by the United Nations and by African countries in the field of human and peoples' rights as well as from the provisions of various instruments adopted within the Specialised Agencies of the United Nations of which the parties to the present Charter are members.[124]

The African Charter further requires the African Commission to take into consideration customs generally accepted as law.[125] New rights, by their nature, enjoy "broad international support,"[126] and, where coupled with other actions suggesting *opinio juris*,[127] they arguably qualify as custom generally accepted as law.

Furthermore, the practice of the African Commission with respect to its Rules of Procedure, suggests that it has downplayed the importance of communications containing the specific provision(s) of the African Charter alleged to have been violated.[128] For instance, under its 1995 Rules, the African Commission required a communication "to specify in particular, Provision(s) of the Charter allegedly violated."[129] Under the 2010 and 2020 Rules, however, a communication may be seized by the African Commission "even if no specific reference is made to the Article(s) alleged to have been violated."[130] Whether the African Commission's inspiration, drawn from the adopted U.N. instruments, can be used to give effect to an entirely freestanding new right, not contained in the African Charter, is yet to be seen.[131]

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124 African Charter, *supra* note 6, art. 60.

125 *Id.*

126 *See* Stark, *supra* note 21, at 672.

127 *See* Continental Shelf (Libya v. Malta), Judgment, 1984 I.C.J. 3, ¶¶ 13, 29 (Mar. 21) ("[Customary law must be] looked for primarily in the actual practice and *opinio juris* of states."). *See also* Jordan J. Paust, *The Complex Nature, Sources and Evidences of Customary Human Rights*, 25 GA J. INT'L & COMPAR. L. 147, 151 (1995). *See generally* David H. Culmer, *The Cross-Border Insolvency Concordat and Customary International Law: Is It Ripe Yet?*, 14 CONN J. INT'L L. 563 (1999).

128 *See* Gumedze, *supra* note 116, at 124 (emphasizing this provision contained in the 1995 Rules of Procedure of the African Commission).

129 AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS, RULES OF PROCEDURE 104(1)(d) (1995).

130 AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS, RULES OF PROCEDURE 93(2)(g) (2010); AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS, RULES OF PROCEDURE 115(2)(g) (2020).

131 So far, the new rights recognized by the African Commission have been derivative. *See generally Principles and Guidelines*, *supra* note 49.

A third principle (*Principle 3*) that may be gleaned from the jurisprudence of the African Commission is that it could adopt the evolutive[132] and derivate approaches and give recognition to a new right contained in a UNGA resolution, instead of recognizing a new right outright. This approach seemingly has been adopted by the African Commission in *SERAC*.[133] In that communication, the complainants (representing the people of Ogoniland) alleged that the government of Nigeria, then under military rule through its state-owned oil corporation and Shell Petroleum Development Corporation, caused severe environmental degradation leading to the contamination of their land and water.[134] The communication alleged that instead of addressing the concerns of members of Ogoniland, the Nigerian Government deployed military forces who further destroyed their villages.[135]

Principally, the communication alleged that the activities of the Nigerian Government made farming and fishing (the two primary means of livelihood of the Ogoni) impossible; this affected their sustenance and right to food.[136] But, the right to food is not expressly contained in the African Charter. Recognizing the challenge this situation posed, the complainants argued that the right to food is implicit in some provisions of the African Charter.[137] Specifically, complainants claimed that the right to food is implicit in the right to life; the right to health; and the right to economic, social, and cultural development.[138] The complainants submitted that by violating these explicit rights, the Nigerian Government also violated the implicitly guaranteed right to food.[139] Rather than deriving the right to food from the articles submitted by the complainant, the African Commission

132 *See generally* Mujib Jimoh, *The Evolutive Interpretation of the African Charter on Human and Peoples' Rights*, 10 INDON. J. INT'L & COMPAR. L. 43 (2023).

133 Soc. & Econ. Rts. Action Ctr. (SERAC) v. Nigeria, Communication 155/96, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶ 65 (May 27, 2002), https://achpr.au.int/en/decisions-communications/social-and-economic-rights-action-center-serac-and-center-economic-15596 [https://perma.cc/A7Q6-SERS].

134 *Id.* ¶¶ 1–6.

135 *Id.* ¶ 7.

136 *Id.* ¶ 9.

137 *Id.* ¶ 64.

138 *Id.*

139 *Id.*

derived the right from the right to human dignity.[140] This possibly gives some credence to Netto's thesis.[141] The African Commission held that,

> [t]he right to food is inseparably linked to the dignity of human beings and is therefore essential for the enjoyment and fulfilment of such other rights as health, education, work[,] and political participation. The African Charter and international law require and bind Nigeria to protect and improve existing food sources and to ensure access to adequate food for all citizens.[142]

Similarly, in *Free Legal Assistance*,[143] the African Commission derived the right to water and the right to electricity from the right to health.[144] The African Commission held that the "failure of the Government to provide basic services such as safe drinking water and electricity . . . constitutes a violation of Article 16."[145] Under *Principle 3*, the African Commission would be able to recognize a new right if it can justify the right as deriving from existing rights in the African Charter.

2. Approaches for the Recognition of New Rights

There are two approaches that the African Commission may use to recognize new rights contained in UNGA resolutions. First, the African Commission may adopt *Principle 2*.[146] *Principle 2* allows the African Commission to ground its recognition of new rights upon "other instruments adopted by the United Nations."[147] The African Charter does not define "instruments," but resolutions are generally regarded as instruments.[148] The African Commission itself has used

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140 African Charter, *supra* note 6, art. 5.

141 *See* Netto, *supra* note 30, at 45 (arguing that the fundamentality of a new right is determined by its furtherance of human dignity).

142 Soc. & Econ. Rts. Action Ctr. (SERAC) v. Nigeria, Communication 155/96, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶ 65.

143 Free Legal Assistance Group v. Democratic Republic of Congo, Communication 25/89, 47/90, 56/91, 100/93, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶ 1 (Apr. 4, 1996), https://achpr.au.int/index.php/en/decisions-communications/free-legal-assistance-group-lawyers-committee-human-rights-union-interafr [https://perma.cc/FJY2-R48S].

144 African Charter, *supra* note 6, art. 16.

145 Free Legal Assistance Group, Communication 25/89, 47/90, 56/91, 100/93, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶ 47.

146 *See supra* Section II.A.1.

147 African Charter, *supra* note 6, art. 60.

148 *See* Stewart Patrick, *World Order: What, Exactly, Are the Rules?*, 39 WASH. Q., no. 1, 2016, at 7, 13 ("[T]hanks to overwhelming support for major international *instruments* including the Non-Proliferation Treaty (NPT) and its watchdog, the International Atomic Energy Agency (IAEA); the Chemical Weapons Convention (CWC); the Biological

the word "soft law instruments" to describe its General Comments.[149] Rachel Murray, one of the leading scholars on the African human rights system, has also described the terms "resolutions," "recommendations," "observations," and "guidelines" by the African Commission as "instruments."[150] Thus, resolutions of the UNGA will equally qualify as instruments. The African Commission may use *Principle 2* as a means to "draw inspiration" from U.N. instruments to recognize new rights contained in UNGA resolutions. Since the sources of international human rights are not limited to treaties,[151] when this recognition is made, it will be made based not only on the fact that it is contained in a UNGA resolution but also because the new right has enjoyed broad international support and some act evidencing the State's intent to be bound (*opinio juris*). However, as a human rights body, it should take a flexible approach to *opinio juris.*[152]

Second, the African Commission may adopt *Principle 3*, as seen in the *SERAC* and *Free Legal Assistance Group* cases, to recognize new rights in UNGA resolutions. Under this approach, the African Commission should look through the rights contained in the African Charter to derive the new rights. When applying this principle, the African Commission should be brave and consistent.[153] For instance,

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Weapons Convention (BWC); *UNSC Resolution 1540* (obliging U.N. Member States to prevent transfer of WMD and related technology) . . . .") (emphasis added). *See also* U.N. Library & Archives, *Research Guides*, https://libraryresources.unog.ch/c.php?g=462687&p=3163267 [https://perma.cc/5CKB-URHT] (also classifying resolutions as instruments).

149 *See, e.g.*, *Resources*, AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS, https://achpr.au.int/en/category/soft-law [https://perma.cc/4U99-4ND5].

150 DEBRA LONG & RACHEL MURRAY, *The Role and Use of Soft Law Instruments in the African Human Rights System*, *in* TRACING THE ROLES OF SOFT LAW IN HUMAN RIGHTS 88, 91 (Stéphanie Lagoutte et al. eds., 2016).

151 Swanson, *supra* note 15, at 315.

152 *See* Alston, *supra* note 53, at 615 ("[The right should] be eligible for recognition on the grounds that it is an interpretation of UN Charter obligations, a reflection of customary law rules or a formulation that is declaratory of general principles of law."). The proof of intent should be flexible. This may be through national constitutions, legislation, and/or international behavior. *See* SHAW, *supra* note 10, at 87 ("This means taking a more flexible view of the *opinio juris* and tying it more firmly with the overt manifestations of a custom into the context of national and international behaviour.").

153 *See, e.g.*, Zimbabwe Human Rights NGO Forum v. Zimbabwe, Communication 245/02, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.] (May 15, 2006); Zimbabwe Lawyers for Human Rights & Associated New Notes of Zimbabwe v. Zimbabwe, Communication 284/2003, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], (Apr. 3, 2009) (including "sexual orientation" as a prohibited ground for discrimination, despite that the African Charter does not include sexual orientation as a

Abdi Jibril Ali expresses his frustration on what he called a "bifurcated" jurisprudence of the African Commission.[154] Ali notes, using *Nubian Community in Kenya v. The Republic of Kenya*[155] and *Mbiankeu Genevieve v. Cameroon*[156] as examples, that the African Commission failed to find a violation of a separate right to housing in the former but did so in the latter.[157]

3. Arguments for and Against the Approaches

One criticism of these two approaches is that the African Commission could be recognizing new rights to which the States party to the African Charter did not accept to be bound.[158] Surely, uncertainty of rights in the African human rights system might be an implication of this.[159] Robert Wundeh Eno's views will appear contrary to the two approaches identified above. To him, "the African Commission may not interpret or apply any human rights instrument other than the African Charter under its contentious jurisdiction. While the Charter may be interpreted drawing inspiration from other international human rights instruments, all cases must be decided with reference to the African Charter."[160]

As a justification for his view, Eno cites the provision of Article 45 section 2 of the African Charter,[161] which provides that the African Commission shall "ensure the protection of human and peoples' rights under *conditions laid down by the present Charter*."[162]

There are two possible counterarguments against Eno's view. First, the provisions of Articles 60 and 61 of the African Charter are part of

prohibited ground). However, these decisions have been described as *obiter* as the African Commission has not shown the bravery to move further with this interpretation. *See* Afr. Comm'n on Hum. & Peoples' Rts., Ending Violence and Other Human Rights Violations Based on Sexual Orientation and Gender Identity, at 31 (2016).

154 Abdi Jibril Ali, *Interpretation of Economic, Social and Cultural Rights under the African Charter on Human and Peoples' Rights*, 30 J. ETH. L. 1, 17 (2018).

155 Nubian Community in Kenya v. Republic of Kenya, Communication 317/2006, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], (Feb. 28, 2015).

156 Mbiankeu v. Cameroon, Communication 389/10, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R], (Aug. 1, 2015).

157 Ali, *supra* note 154, at 17.

158 Ssenyonjo, *supra* note 102, at 378.

159 *Id.*

160 Robert Wundeh Eno, *The Jurisdiction of the African Court on Human and Peoples' Rights*, 2 AFR. HUM. RTS. L.J. 223, 226 (2002).

161 *Id.*

162 African Charter, *supra* note 6, art. 45, § 2 (emphasis added).

the "conditions laid down by the present Charter."[163] They cannot be excluded.[164] They are contrary to Eno's view because they allow the African Commission to draw inspiration from sources other than the Charter. Second, the new rights to be recognized by the African Commission must have met the five criteria for new rights.[165] This implies that the new rights already enjoy a "broad international support." The African Commission may ground its reasoning on this fact.

4. Limitations to the Approaches

There is a need to qualify the approaches to avoid criticisms from State party to the African Charter. First, a new right that contradicts the express rights contained in the African Charter either in interpretation, application, or by implication, should not be recognized by the African Commission. Since the Charter is the main human rights instrument in Africa, other human rights instruments should complement, rather than contradict, its provisions. Human rights can conflict with each other.[166] Where a new right contradicts an express right in the Charter, it becomes morally impossible for the African Commission to place the new right above the express rights in the Charter. This is because the African Commission itself derives its authority from the Charter.

Secondly, the new rights to be recognized should not be contrary to traditional African values to ensure compliance.[167] The traditional African values requirement was inserted in the African Charter's preamble by its drafters to further their mandate to make an instrument which "reflect[s] an African conception of Human Rights."[168] The

163 *Id.*

164 *See* Vienna Convention on the Law of Treaties art. 31, § 1, May 23, 1969, 1155 U.N.T.S. 331 ("[Treaties] shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms . . . .").

165 Stark, *supra* note 21, at 672.

166 JAMES GRIFFIN, ON HUMAN RIGHTS 58 (2008).

167 For a discussion on the importance of African values in the African Charter, see Ebow Bondzie-Simpson, *A Critique of the African Charter on Human and Peoples' Rights*, 31 HOW. L.J. 643, 648 (1988). *See generally* Ziyad Motala, *Human Rights in Africa: A Cultural, Ideological, and Legal Examination*, 12 HASTINGS INT'L. & COMPAR. L. REV. 373 (1989).

168 *See* N.S. REMBE, THE SYSTEM OF PROTECTION OF HUMAN RIGHTS UNDER THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: PROBLEMS AND PROSPECTS 3 (1991) (citing OAU Doc. CM/112/Part 1, Nairobi, June 1981, at 31).

drafters felt that to make the African Charter truly "African"[169] and unique from the other human rights instruments before it,[170] there was a need to include, in its preamble, a requirement for the rights to reflect the African "historical tradition and the values of African civilization."[171] Although ultimately, the African Charter was primarily influenced by the ICESCR and the American Convention on Human Rights.[172] The inclusion of this traditional African values requirement in the African Charter's preamble, in a bid to assert Africa's independence, has, over the years, proved to have far-reaching implications for human rights in Africa.

This requirement manifests three problems. First, the African Charter does not define what it means by traditional African values and which period should be used to determine what are traditional African values—precolonial values, values at the time of drafting the African Charter, or values at present. While the *travaux préparatoires* of the African Charter could help clarify this,[173] the African Charter is notorious for having few available *travaux préparatoires*.[174] Second, what makes African culture unique is not sameness but diversity[175]—even if it is slight.[176] There is no guidance on which cultural values should be used. Third, the requirement is susceptible to abuse,[177] and

169 For discussion, see Mujib Jimoh, *The Quest for Information Privacy in Africa: A Critique of the Makulilo–Yilma*, 1 AFR. J. PRIV. & DATA PROT. 1, 14 (2023).

170 The Charter is the last main regional human rights instrument after the International Bill of Human Rights; the European Convention on Human Rights; and the American Convention on Human Rights. *See* Jimoh, *supra* note 36.

171 African Charter, *supra* note 6, at cl. 4.

172 Rachel Murray & Frans Viljoen, *Towards Non-Discrimination on the Basis of Sexual Orientation: The Normative Basis and Procedural Possibilities before the African Commission on Human and Peoples' Rights and the African Union*, 29 HUM. RTS. Q. 86, 89 (2007).

173 A. Bolaji Akinyemi, *The African Charter on Human and Peoples' Rights: An Overview*, 46 IND. J. POL. SCI. 207, 223 (1985).

174 Misha Ariana Plagis & Lena Riemer, *From Context to Content of Human Rights: The Drafting History of the African Charter on Human and Peoples' Rights and the Enigma of Article 7*, 23 J. HIST. INT'L L. 556, 563 (2021).

175 Moeketzi Letseka, *In Defence of Ubuntu*, 31 STUD. PHIL. & EDUC. 47, 48 (2011); Albert K. Barume, *Re-Instating Traditional Values and Cultures as Pillar of a People-Centered Development in Africa*, 4 PROLAW STUDENT J. RULE L. FOR DEV. 1, 7–8 (2017).

176 *See* Gabriel E. Idang, *African Culture and Value*, 16 PHRONIMON 97, 100 (2015).

177 Rose M. D'sa, *Human and Peoples' Rights: Distinctive Features of the African Charter*, 29 J. AFR. L. 72, 74 (1985).

African States have used it to justify violations of fundamental rights.[178]

In treaty interpretation literature, two extremes have emerged on the nature of the preamble.[179] If we accept the "substantive extreme,"[180] the inclusion of the requirement in the African Charter's preamble thus conveys that "in the discovery, explication, application and limitation of rights in [the African Charter],"[181] all the rights must be interpreted to reflect traditional African values. Conversely, if we agree with the "ceremonial extreme,"[182] then the African Commission need not make the rights in the African Charter reflect traditional African values—for whatever reason. However, if it does not, the African Commission risks compliance problems from African States.[183] Flowing from the two extremes and peculiarity of the requirement to African human rights jurisprudence, the African Commission has to interpret the provisions of the Charter as reflecting traditional African values—either out of necessity (a consequence of the "substantive extreme") or practicality (to ensure compliance). In effect, rights in the African Charter should not be interpreted in a way that is incompatible with African values.[184] Thus, it may be reasonable to expect the African Commission to give effect to new rights that are compatible with traditional African values.[185] Save for these two caveats, it appears nothing prevents the

178 The traditional African values requirement has been used to violate the rights of the LGBTQIA people in Africa. *See* Paul Johnson, *Homosexuality and the African Charter on Human and Peoples' Rights: What Can Be Learned from the History of the European Convention on Human Rights?*, 40 J.L. & SOC'Y 249, 262 (2013).

179 Max H. Hulme, *Preambles in Treaty Interpretation*, 164 U. PA. L. REV. 1281, 1288 (2016).

180 This elevates the importance of preambles. *See id.* at 1289.

181 Tsega Andualem Gelaye, *The Role of Human Dignity in the Jurisprudence of the African Commission on Human and Peoples' Rights*, 5 AFR. HUM. RTS. Y.B. 116, 126 (2021) (discussing the role of the provision of dignity in the Charter's preamble).

182 Hulme, *supra* note 179, at 1289. *See, e.g.*, B. Obinna Okere, *The Protection of Human Rights in Africa and the African Charter on Human and Peoples' Rights: A Comparative Analysis with the European and American Systems*, 6 HUM. RTS. Q. 141, 142–43 (1984) ("[Preambles are,] at best, . . . expressions of an ideological function, a program of action and a distillation of principles of interpretation; [which] do not import any strict legal obligation.").

183 States are likely to reject such interpretation under the pretext of traditional African values. *See* Jimoh, *supra* note 132, at 66–69.

184 Swanson, *supra* note 15, at 323.

185 Save for human right issues involving groups such as the LGBTQIA, which are controversial in Africa, most new rights proposed by scholars and those recognized by the UNGA resolutions do not appear to be incompatible with the African values. *See generally*

African Commission from recognizing new rights from UNGA resolutions.

B. The African Court

The African Court came into existence in 2006,[186] even though the required number of ratifications of its Protocol was completed in 2004.[187] While this Article does not provide a full analysis of the jurisdiction of the African Court, a brief consideration of the jurisdiction of the African Court is necessary to determine if it may give effect to new rights contained in UNGA resolutions.

1. The Jurisdiction of the African Court

Though the African Court generally complements the African Commission,[188] it enjoys a higher status than the African Commission.[189] For the purposes of this Article, two articles of the Protocol are relevant. First, Article 3 provides that "[t]he jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant human rights instrument ratified by the States concerned."[190] Second, Article 7 provides the sources of law for the African Court. It states that the "Court shall apply the provisions of the Charter and any other relevant human rights instruments ratified by the States concerned."[191] That still leaves the question of whether these provisions may be used to recognize new rights contained in UNGA resolutions, discussed in the section below.

Siri Gloppen & Lise Rakner, *LGBT Rights in Africa*, *in* RESEARCH HANDBOOK ON GENDER, SEXUALITY AND THE LAW 194 (Chris Ashford & Alexander Maine eds., 2020).

186 Tom Gerald Daly & Micha Wiebusch, *The African Court on Human and Peoples' Rights: Mapping Resistance Against a Young Court*, 14 INT'L J.L. CONTEXT 294, 294 (2018). This Article will not discuss the history or the extensive consideration of the provisions of the Protocol in detail. There are many scholarly works on this. *See generally* Eno, *supra* note 160.

187 N. Barney Pityana, *Reflections on the African Court on Human and Peoples' Rights*, 4 AFR. HUM. RTS. L.J. 121, 121 (2004).

188 *Id.* at 126; Protocol, *supra* note 7, art. 2; Bekker, *supra* note 17, at 169.

189 Ibrahim Ali Badawi Elsheikh, *The Future Relationship Between the African Court and the African Commission*, 2 AFR. HUM. RTS. L.J. 252, 257 (2002).

190 Protocol, *supra* note 7, art. 3, § 1.

191 *Id.* art. 7. The rules of procedure of the African Court are similarly worded. *See* AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS, RULES OF COURT 29 (2020).

2. The African Court's Basis for the Recognition of New Rights in UNGA Resolutions

The jurisprudence of the African Court contains little guidance regarding the basis for recognizing new rights in UNGA resolutions. This is because the jurisprudence of the African Court is still developing: it first issued a full merits judgment in 2013.[192] However, a quick formula may be developed to ascertain whether the African Court may recognize new rights contained in UNGA resolutions: if the interpretation of Articles 3 and 7 of the Protocol that relate to the sources of law for the African Court means that its sources of law are more expansive than that of the African Commission, then the African Court may, like the African Commission, be able to recognize new rights using the two approaches discussed above.[193] Here, there will be no need to investigate any further basis grounding the Court's reasoning in recognizing the new rights. But where the African Court's sources of law are more restrictive than that of the African Commission, further inquiry may be required to determine which other basis the African Court may adopt to recognize the new rights. Opinions are divided on this question.

One view is that the African Court's sources of law are more expansive than that of the African Commission.[194] Another view disagrees, stating that the African Court's sources of law are more restrictive than that of the African Commission.[195] I submit that both the African Commission and Court have equal sources, although a visible difference between the sources is that the African Court shall include "any other relevant human rights instrument ratified by the States concerned" as part of its sources.[196] It may be argued that under Articles 60 and 61 of the African Charter, the African Commission may also give effect to "any other relevant Human Rights instrument ratified by the States concerned."[197]

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192 Daly & Wiebusch, *supra* note 186, at 297.

193 *See supra* Section II.A.2.

194 Pierre De Vos, *A New Beginning – The Enforcement of Social, Economic and Cultural Rights Under the African Charter on Human and Peoples' Rights*, 8 L. DEMOCRACY & DEV. 1, 15 (2004).

195 Pityana, *supra* note 187, at 127 ("[T]he jurisdiction of the Court is confined to the interpretation and application of the African Charter and any other international human rights instruments ratified by the states concerned. For me this serves as a limitation.").

196 Protocol, *supra* note 7, art. 7.

197 *Id.* art. 3, § 1.

Since the African Court is empowered to assume jurisdiction on any question concerning the "interpretation and application of the Charter"[198] and the African Charter itself allows[199] the drawing of inspiration from "other instruments adopted by the United Nations,"[200] UNGA resolutions recognizing new rights, insofar as they are within the limitations set above,[201] may be recognized by the African Court.

3. Concern About the Recognition of New Rights in UNGA Resolutions by the African Court

Generally, African States have been heavily criticized with respect to human rights: they are said to be notorious for human rights violations,[202] and they refuse to comply with decisions finding them in breach of human rights.[203] Speaking on the effects of allowing claims contained in other human rights instruments to bind African States, Bekker noted:

> This provision, by allowing for the possibility of complaints being brought not only on the basis of the African Charter, but on the basis of any other human rights instrument ratified by the state, may lead to diluted international standards and consequently a weakened form of human rights protection for Africa.[204]

I note that the recognition of new rights contained in UNGA resolutions may further escalate this concern. But if the African human rights system is to develop, African States should be bound by their practices under international law. Since the African Court will merely be restating the new rights, it is not creating an obligation, but giving effect to it. I submit that the limitations to the approaches discussed

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198 *Id.*

199 I note that the word "Commission" is referred to in Article 60 of the African Charter. But the Protocol supplements the African Charter, which is the main treaty, and will be interpreted to harmonize it. *See* United Nations Forum on Forest, *An Overview of International Law Working Draft*, 5, https://www.un.org/esa/forests/wp-content/uploads/2014/12/background-3.pdf [https://perma.cc/27YZ-XKYK]. Since the African Court came at a later date, and there is nothing in the Protocol excluding the African Court's power to apply any provisions of the African Charter, Article 60 may be said to also apply *mutatis mutandis* to the African Court.

200 African Charter, *supra* note 6, art. 60.

201 *See supra* Section II.A.4.

202 Daly & Wiebusch, *supra* note 186, at 294.

203 Frans Viljoen & Lirette Louw, *State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights, 1993–2004*, 101 AM. J. INT'L L. 1, 33 (2007).

204 Bekker, *supra* note 17, at 169.

above address any concerns that exist about the recognition of new rights contained in UNGA resolutions.[205]

CONCLUSION

New rights are important to address contemporary issues that existing human rights do not or cannot address. Many new rights have originated in human rights literature. Some of these new rights have also emerged from State practice, and the UNGA has subsequently given effect to them. It becomes important to consider the status of these new rights since most of them are not contained in treaties. The two new rights recently recognized by the UNGA are contained in its resolution, although UNGA resolutions are not binding under international law. Yet, the new rights must be given effect and made claimable by individuals before human rights quasi-judicial and judicial bodies can advance human rights. To do this, the human rights bodies need to ground their recognition of these new rights on established international law principles. This Article explores the principles that may be used by the African Commission and Court to recognize these new rights. This Article argues that the African Commission and Court may use two approaches in recognizing new rights contained in UNGA resolutions. The first is that they may use Article 60 of the African Charter as the basis for the recognition. Under this provision, they are allowed to draw inspiration from "UN instruments." UNGA resolutions qualify as "UN instruments." Second, the African Commission and Court may adopt the derivative approach. This approach uses an expansive interpretation of provisions of the African Charter to recognize new rights contained in UNGA resolutions. However, this Article includes two caveats to these approaches. First, this Article notes that the new rights to be recognized should not contradict, either expressly or impliedly, rights expressly contained in the African Charter. Second, the new rights to be recognized should not be contrary to traditional African values. With these caveats in place, the African Commission and Court may advance human rights jurisprudence with these new rights since the new rights are usually introduced to address problems the existing rights cannot address.

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205 *See supra* Section II.A.4.