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The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties

MAKAU WA MUTUA*

I. INTRODUCTION

The African Charter on Human and Peoples' Rights (the African Charter),[1] the basis of Africa's continental human rights system, entered into force on October 21, 1986, upon ratification by a simple majority of member states of the Organization of African Unity (OAU).[2] The African Charter has attracted criticism because it departs from the narrow formulations of other regional and international human rights instruments.[3] In particular, it codi-

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1. The African Charter on Human and Peoples' Rights, June 27, 1981, OAU Doc. CAB/LEG/67/3/Rev.5 (1981), reprinted in 21 I.L.M. 59 (1982) [hereinafter African Charter].

2. The African Charter, also referred to as the Banjul Charter, was adopted in 1981 by the 18th Assembly of Heads of State and Government of the Organization of African Unity (OAU), the official body of African states. It is known as the Banjul Charter because the final draft was produced in Banjul, the capital of the Gambia. The Charter's sole implementing organ, the African Commission on Human and Peoples' Rights (the African Commission), was established in 1987. The African Commission's eleven members, known as commissioners, are elected by the OAU by secret ballot for a six-year term and serve in their own personal capacities. See African Charter, supra note 1, arts. 31, 33, 36, 45, 21 I.L.M. at 64-65.

3. The major human rights instruments include the trilogy of documents commonly referred to as the International Bill of Rights: (i) the 1948 Universal Declaration of Human Rights, G.A. Res. 217 A(III), U.N. Doc. A/810, at 71 (1948) [hereinafter UDHR]; (ii) the 1966 International Covenant on Civil and Political Rights, G.A. Res. 2200 A(XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966) [hereinafter ICCPR],

fies the three generations of rights, including the controversial concept of peoples' rights, and imposes duties on individual members of African societies.[4] While a number of scholars have focused attention on apparent tensions between human and peoples' rights, there has been little discussion of the notion of individual duties in the context of the African Charter.[5] Yet a thorough understanding of the meaning of human rights, and the complicated processes through which they are protected and realized, would seem to link inextricably the concepts of human rights, peoples' rights, and duties of individuals. Individual rights cannot make sense in a social and political vacuum, devoid of the duties assumed by indi-

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what many call the Bible of the human rights movement; and (iii) the 1966 International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 A(XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966) [hereinafter ICESCR]. The last two instruments entered into force in 1976.

Apart from the African Charter, the other major regional human rights instruments include (i) the American Convention on Human Rights, Nov. 22, 1969, 36 O.A.S.T.S. No. 36, at 1, O.A.S. Off. Rec. OEA/Ser. L/V/II.23 Rev.2, reprinted in 9 I.L.M. 673 (1970), the document that anchors the inter-American human rights system; (ii) the [European] Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 (1955); and (iii) the European Social Charter, Oct. 18, 1961, 529 U.N.T.S. 89 (1965), which forms the basis for the European human rights system. See generally Thomas Buergenthal, International Human Rights (1988); Guide to International Human Rights Practice (Hurst Hannum ed., 1992) [hereinafter Human Rights Practice Guide]; United Nations, 1 Human Rights: A Compilation of International Instruments, U.N. Doc. ST/HR/1/Rev.4 (1993).

4. Civil and political rights, the staple of the human rights movement, have been commonly referred to as "first generation" rights, while economic, cultural, and social rights, are called "second generation" rights. In addition to these, the African Charter provides for "peoples' rights," known also as collective or group rights, which include the right of peoples to self-determination, political sovereignty over their natural resources, and the right to development. Buergenthal, supra note 3, at 176-77. One group right, the right to self-determination, is widely recognized and enshrined in article 1 common to both the ICCPR and the ICESCR. ICCPR, supra note 3, art. 1, para. 1; ICESCR, supra note 3, art. 1, para. 1. Chapter II of the African Charter, which imposes various duties on individuals, is that document's most radical contribution to human rights law. See African Charter, supra note 1, arts. 27-29, 21 I.L.M. at 63.

5. For detailed discussions and analyses of the relationships between peoples and human rights in the African Charter, see generally Richard Gittleman, The African Charter on Human and Peoples' Rights: A Legal Analysis, 22 Va. J. Int'l L. 667 (1982); U. Oji Umozurike, The African Charter on Human and Peoples' Rights, 77 Am. J. Int'l L. 902 (1983); Theo van Boven, The Relations Between Peoples' Rights and Human Rights in the African Charter, 7 Hum. Rts. L.J. 183 (1986); Jean-Bernard Marie, Relations Between Peoples' Rights and Human Rights: Semantic and Methodological Distinctions, 7 Hum. Rts. L.J. 195 (1986); Burns H. Weston et al., Regional Human Rights Regimes: A Comparison and Appraisal, 20 Vand. J. Transnat'l L. 585 (1987); Richard Kiwanuka, The Meaning of 'People' in the African Charter on Human and Peoples' Rights, 82 Am. J. Int'l L. 80 (1988).

viduals.[6] This appears to be more true of Africa than any other place. The individualist, narrow formulation of human rights is not sufficient to pull the African continent back from the abyss.[7]

The argument by current reformers that Africa merely needs a liberal democratic, rule-of-law state to be freed from despotism is mistaken. The transplantation of the narrow formulation of Western liberalism cannot adequately respond to the historical reality and the political and social needs of Africa. The sacralization of the individual and the supremacy of the jurisprudence of individual rights in organized political and social society is not a natural, "transhistorical," or universal phenomenon, applicable to all societies, without regard to time and place. The ascendancy of the lan-

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6. There seems little doubt that private duties, implied and direct, are contemplated by most human rights instruments. Examples abound. Article 5 of the ICCPR provides, in part, that nothing contained therein can imply "for any state, group or person" any right to limit the rights of others. ICCPR, supra note 3, art. 5. Moreover, individuals can be punished for violations of human rights, as was the case in Nuremburg, given that the Geneva Conventions impose duties on private individuals. See generally Jordan Paust, The Other Side of Right: Private Duties Under Human Rights Law, 5 Harv. Hum. Rts. J. 51-63 (1992).

7. The human rights movement is based on the Western liberal tradition which conceives of the individual as atomistic and alienated from society and the state. Although Jack Donnelly makes a case for other trajectories within the liberal tradition, he concedes that "[t]he 'Western' or 'liberal' conception of human rights is conventionally characterized as resting on a social vision of largely isolated individuals holding (only) property rights and 'negative' civil and political liberties." Jack Donnelly, Human Rights and Western Liberalism [hereinafter Donnelly, Human Rights and Western Liberalism], in Human Rights in Africa: Cross-Cultural Perspectives 31, 31 (Abdullahi A. An-Na'im & Francis M. Deng eds., 1990) [hereinafter Cross-Cultural Perspectives]. This formulation, which this author terms Eurocentric because it grows out of European history and philosophy, sees the human rights corpus merely as an instrument for individual claims against the state. Donnelly argues that this "conventional, or minimalist, conception of liberalism.... is only one strand of the liberal tradition of political theory and practice." Id. at 32. In fact, Donnelly posits that there is an "alternative strand that rests on a broader, more subtle—and . . . more coherent and defensible—social vision." Id. In this more radical liberal tradition, Donnelly argues, "individualism is moderated by social values, private property rights are limited rather than absolute, and civil and political rights are coupled with economic and social rights." Id. at 33. It is this strand of liberalism that is the source of the social democratic regimes and the welfare states of the Western industrial democracies.

Notwithstanding Donnelly's alternative insight, it is primarily the conventional strand of liberalism that has dominated the theory and practice of the human rights movement. Scholars and activists in the West, the main authors of the discourse, have articulated a vision that places civil and political rights above other categories of rights. In effect, the human rights movement has become an anti-catastrophe crusade, under the captive leadership of Amnesty International and Human Rights Watch, to contain and control state action against the individual. The practice of human rights by inter-governmental organizations (IGOs), non-governmental organizations (NGOs), and national human rights institutions has been primarily focused on civil and political rights. Economic, social, and cultural rights, while part of the rhetoric of rights, remain severely underdeveloped.

guage of individual rights has a specific historical context in the Western world. The rise of the modern nation state in Europe and its monopoly of violence and instruments of coercion gave birth to a culture of rights to counterbalance the invasive and abusive state.[8] John Locke reduced this thinking to a philosophy in his *Two Treatises of Government*.[9] He argued that each individual, together with his compatriots, contractually transfers to a public authority his individual right to implement the law of nature.[10] But this power is conditional and limited to the state's duty to "protect individual rights and freedoms from invasion and to secure their more effective guarantee."[11] According to Locke, a government that systematically breaches these duties becomes illegitimate. While Locke's conception is the floor—the modern state is more intrusive and pervasive than he imagined—it remains the basic justification for the existence of the state in the West.

The development of the state in Africa is so radically different from its European equivalent that the traditional liberal conception of the relationship between the state and the individual is of limited utility in imagining a viable regime of human rights. The modern African state was imposed on ethno-political communities by European imperialists and did not result from the natural progression or evolution of those societies.[12] Only a handful of modern African states bear any territorial resemblance to the political formations which existed prior to penetration and subjugation by European states.[13] The majority of states were contrived overnight, often dismantling existing ethno-political communities and

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8. See generally Robert M. Cover, Obligation: A Jewish Jurisprudence of the Social Order, 5 J. L. & Religion 65 (1987). Cover argues that the myth, the jurisprudence of rights, is essential to counterbalance the omnipotent state. This myth "a) establishes the State as legitimate only in so far as it can be derived from the autonomous creatures who trade in their rights for security—i.e., one must tell a story about the States's utility or service to us, and b) potentially justifies individual and communal resistance to the Behemoth." Id. at 69. It is not surprising that Western individuals and movements employ the language of rights in their claims against society or the state. Examples range from civil rights groups to women's organizations and gay and lesbian individuals and groups.

9. John Locke, Two Treatises of Government (Peter Laslett ed., 1988).

10. Id.

11. Donnelly, Human Rights and Western Liberalism, supra note 7, at 34.

12. In 1885 at the Berlin Conference, European powers carved up the map of Africa and created dozens of entirely new countries without regard to existing political entities, ethnic boundaries, economic considerations, historical alliances, or geographic and demographic variables. See Crawford Young, The Heritage of Colonialism, in Africa in World Politics 19, 19 (John W. Harbeson & Donald Rothchild eds., 1991).

13. Only Morocco, Tunisia, Ethiopia, Burundi, Rwanda, Madagascar, Swaziland, Lesotho, and Botswana have any meaningful pre-colonial territorial identities. Id.

their organizational structures. Communities that lived independently of each other were coerced to live together under the newly-created colonial state. Most of these new citizens lacked any instinctual or nationalistic bond to the colonial state. The failure of the successor post-colonial state points to the continued inability of the "unnatural" and forced state to inspire loyalty and distinct national identities.[14] This disconnection, between the people and the modern African state, is not merely a function of the loss of independence or self-governance over pre-colonial political and social structures and the radical imposition of new territorial bounds with unfamiliar citizenry. It is above all a crisis of cultural and philosophical identity: the delegitimation of values, notions, and philosophies about the individual, society, politics, and nature developed over centuries. Severe as these problems are, the crisis of the African state is not insoluble. The purpose of this Article is to imagine and reconfigure a rights regime that could achieve legitimacy in Africa, especially among the majority rural populace, and become the basis for social and political reconstruction. The reconstruction proposed here is not merely that of human rights norms. In order for the proposal to make sense, a reconfiguration of the African state must also be simultaneously attempted. The imposed colonial state, and its successor, the post-colonial state, stand as moral and legal nullities, entities whose salvation partially lies in new map-making in the context of self-determination for Africa's many nationalities, democratization, and, most importantly, historical reconnection with certain pre-colonial ideals. However, the purpose of this Article is not to explore the creation of a new polit-

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14. This author has argued elsewhere that "[s]ince citizens lack an instinctual and nationalistic bond to the state, those who become rulers pillage it." Makau wa Mutua, Redrawing the Map along African Lines, Boston Globe, Sept. 22, 1994, at 17 [hereinafter Redrawing the Map]. Furthermore,

> [f]ew Africans owe their allegiance to the emergent state; many identify with an ethnic group—a loyalty that predates colonialism—or the pan-Africanist idea of Africa as home. The colonial state and its successor have been so alienated from the people that the development of national consciousness was not possible.

Id. Other writers have characterized the transformation of the African political and cultural landscape in more modest terms. According to Crawford Young, "the depth and intensity of alien penetration of subordinated societies continues to cast its shadow." Young, supra note 12, at 19-20. He notes further that the

> cultural and linguistic impact [of colonialism] was pervasive, especially in sub-Saharan Africa. Embedded in the institutions of the new states was the deep imprint of the mentalities and routines of their colonial predecessors. Overall, colonial legacy cast its shadow over the emergent African state system to a degree unique among the major world regions.

Id. at 19-20.

ical map, but to reconstruct the human rights corpus. This choice does not imply a hierarchy or ranking. In practice, both paradigms must be simultaneously addressed for the formulation to bear fruit.

For the present purposes, the current human rights movement must be understood as only a piece of the whole. Its roots in the Western liberal tradition necessarily deny it completeness, though not the universality of many of its ideals and norms. To paraphrase the famous metaphor, the gourd is only partially filled by the Western tradition: it falls on other traditions to fill it. On this premise, this Article makes several interrelated arguments. Part II stresses the African notions of human rights which existed prior to colonization and how those notions differed from the contemporary Eurocentric articulation of human rights. In particular, these notions saw the individual social being as the bearer of both rights and duties. Accordingly, Part III asserts that the pre-colonial concept of duty remains a valid means of conceptualizing human rights and, thus, should be the basis for the construction of a regime of unitary, integrated rights regime capable of achieving legitimacy in Africa. Finally, Part IV of this Article presents a vision that strikes a balance between duties and rights. Not only does this vision restrain the runaway individualism of the West, but its also has strong roots in the continent and indeed may be Africa's last hope for reversing societal collapse. The present attempt is not meant to deny the validity of the Western liberal tradition to the human rights corpus, but only to inform it with an African contribution that entwines duties and rights in a society consumed by the socialization of the individual, a concept articulated by the African Charter.

The purpose of this Article is not to find parallel rights in African conceptions of human rights in order to show the equality of African cultures to European ones. Although that is one incidental by-product, this Article did not set out to clothe these parallel rights in the language of rights. In fact, the vindication of rights in Africa had a very different dimension. In the West, the language of rights primarily developed along the trajectory of claims against the state; entitlements which imply the right to seek an individual remedy for a wrong. The African language of duty, however, offers a different meaning for individual/state-society relations: while people had rights, they also bore duties. The resolution of a claim was not necessarily directed at satisfying or remedying an individual wrong. It was an opportunity for society to contemplate the complex web of individual and community duties and rights to seek

a balance between the competing claims of the individual and society.

This view is not relativist. It does not advance or advocate the concept of apartheid in human rights or the notion that each cultural tradition has generated its own distinctive and irreconcilable concept of human rights.[15] It proceeds from the position that, although cultural relativism in human rights as an anti-imperial device is admirable, it is a misunderstanding inspired by cultural nationalism. What its proponents see as radically distinctive, irreconcilable traditions also possess ideals which are universal. Most critiques of cultural relativism, on the other hand, are ethnocentric and symptomatic of the moral imperialism of the West.[16] Both extremes only serve to detain the development of a universal jurisprudence of human rights.[17]

In reality, the construction and definition of human rights norms are dynamic and continuous processes. Human rights are not the monopoly or the sole prerogative of any one culture or people, although claims to that end are not in short supply.[18] In one cul-

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15. For more detailed views of the concept of cultural relativism in human rights, see generally Jack Donnelly, Universal Human Rights in Theory and Practice (1989) [hereinafter Donnelly, Universal Human Rights]; Raimundo Panikkar, Is the Notion of Human Rights a Western Concept? 120 Diogenes 75 (1982); Adamantia Pollis & Peter Schwab, Human Rights: A Western Construct with Limited Applicability, in Human Rights: Cultural and Ideological Perspectives, (Adamantia Pollis & Peter Schwab eds., 1979) [hereinafter Human Rights Perspectives].

16. Rhoda Howard, a well known Canadian Africanist, refuses to acknowledge that precolonial African societies knew human rights as a concept. She emphasizes that "traditional Africa protected a system of obligations and privileges based on ascribed statuses, not a system of human rights to which one was entitled merely by virtue of being human." Rhoda Howard, Group Versus Individual Identity in the African Debate on Human Rights [hereinafter Howard, Group Versus Individual], in Cross-Cultural Perspectives, supra note 7, at 159, 167. Howard is so fixated with the Western notion of rights attaching only to the atomized individual that she summarily dismisses arguments by African scholars, some of whom could be classified as cultural relativists, that individual rights were held in a social, collective context.

17. Francis Deng disagrees with the view "widely held in the West and accepted or exploited in developing countries, that the concept of human rights is peculiarly Western." Francis M. Deng, A Cultural Approach to Human Rights Among the Dinka, in Cross-Cultural Perspectives, supra note 7, at 261, 261. "[T]o arrogate the concept," writes Deng, "to only certain groups, cultures, or civilizations is to aggravate divisiveness on the issue, to encourage defensiveness or unwarranted self-justification on the part of the excluded, and to impede progress toward a universal consensus on human rights." Id.

18. Donnelly, for example, dismisses cultural relativists and then declares, rather hastily, that "human rights are foreign to such communities [African, Native American, traditional Islamic social systems], which employed other mechanisms to protect and realize human dignity." Donnelly, Universal Human Rights, supra note 15, at 118. Unless the contrary is established, this author assumes that all cultures have evolved moral and ethical standards

ture, the individual may be venerated as the primary bearer of rights; while, in another, individual rights may be more harmonized with the corporate body. Rather than assert the primacy of one over the other, or argue that only one cultural expression and historical experience constitutes human rights, this author views each experience as a contributor to the whole. The process of the construction of universal human rights is analogous to the proverbial description of the elephant by blind men: each, based on his sense of feeling, offers a differing account. However, all the accounts paint a complete picture when put together. As a dynamic process, the creation of a valid conception of human rights must be universal. That is, the cultures and traditions of the world must, in effect, compare notes, negotiate positions, and come to agreement over what constitutes human rights. Even after agreement, the doors must remain open for further inquiry, reformulation, or revision.

II. HUMAN RIGHTS IN PRE-COLONIAL AFRICA: CONTENT AND CONTEXT

This segment of the Article will explore the validity of both the argument made often by Africans, and the controversy it engenders, that the concept of human rights was not alien to pre-colonial societies and that such notions were the foundation of social and political society. Recent debates, which are primarily interpretive, have focused attention on this divisive theme. They agree on basic behavioral, political, and social characteristics but disagree as to their meaning.[19] There are no easy answers for a number of reasons. In particular, methodological pitfalls exist for any analysis that attempts to address the length and width of sub-Saharan Africa. The sheer size of the continent, and the diversity of African peoples and their societies, defy easy categorization or generalization. Secondly, with regard to human rights, there are very few extant sources of pre-colonial societies. The oral tradition common

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as well as norms and processes that protect the dignity and worth of human beings in both their individual and collective personalities. It is these norms and processes—which manifest themselves in all cultures of the world—that germinate the concept of human rights.

19. Timothy Fernyhough, Human Rights and Precolonial Africa, in Human Rights and Governance in Africa 39, 39 (Ronald Cohen et al. eds., 1993) [hereinafter Human Rights and Governance]. Fernyhough notes that this division is ironic because "both groups take as their starting point a precolonial Africa that they agree was precapitalist and predominantly agrarian, relatively decentralized politically, and characterized by communal social relations." Id.

to most of Africa had its own imprecision even before its interruption by the forces of colonialism.

Nevertheless, several broad themes are discernable from the past. It is now generally accepted that the African pre-colonial past was neither idyllic nor free of the abuses of power and authority common to all human societies. However, the despotic and far-reaching control of the individual by the omnipotent state, first perfected in Europe, was unknown.[20] Instead, pre-colonial Africa consisted of two categories of societies: those with centralized authority, administrative machinery, and standing judicial institutions, such as the Zulu and the Ashanti, and those with more communal and less intrusive governmental paraphernalia, such as the Akamba and Kikuyu of Kenya.[21] But a feature common to almost all pre-colonial African societies was their ethnic, cultural, and linguistic homogeneity—a trait that gave them fundamental cohesion.[22]

Had these political societies developed the concept of human rights? Proponents of the concept of human rights in pre-colonial African societies are accused by their opponents of confusing human dignity with human rights.[23] This view holds that the "Afri-

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20. Although the majority of pre-colonial authorities in Africa were not rigidly stratified, a number of highly centralized states such Buganda and the Nigerian emirates divided society into the repressive categories of nobles, freemen, and slaves. See Rhoda Howard, Evaluating Human Rights in Africa: Some Problems of Implicit Comparisons, 6 Hum. Rts. Q. 160, 175-76 (1984) [hereinafter Howard, Evaluating Human Rights]. Howard errs, however, when she asserts that the "picture of precolonial African social relations on which the communal model is based is inaccurate even regarding the past." Id. at 175. She deliberately fails to admit that highly centralized societies were the exception, not the norm; most were governed by ideals of communitarianism.

21. An examination of pre-colonial societies yields two basic models. A majority of societies, many of which were agricultural, pastoralist or both, were relatively free of rigid social stratification, although age and gender played significant roles in determining both social and political status. A number of others had developed coercive state structures. See generally Eric O. Ayisi, An Introduction to the Study of African Culture (1979); Myer Fortes & Edward Evans-Pritchard, African Political Systems (1940).

22. A basic contradiction between the European nation-state and pre-colonial Africa societies lies in the constitution of political society. In distinguishing what he calls "African cultural-nations" from the modern state, Mojekwu argues that

> [w]hile the European impersonal governments were able to accommodate and control peoples from several ethnic, racial, and cultural origins within the nation-state, African cultural-nations controlled kinship groups within their cultural boundaries. A cultural-nation governed through familial chiefs and elders who shared authority with the community at large.

Chris Mojekwu, International Human Rights: An African Perspective, in International Human Rights: Contemporary Issues 85, 87 (Jack L. Nelson & Vera M. Green eds., 1980). Few pre-colonial African societies were multi-ethnic.

23. Howard, Group Versus Individual, supra note 16, at 165.

can concept of justice," unlike human rights, "is rooted not in individual claims against the state, but in the physical and psychic security of group membership."[24] While it is probably correct to argue that African societies did not emphasize individual rights in the same way that European societies did, it is not a correct presumption to claim that they did not know the conception of individual rights at all.

According to Ronald Cohen, a right is an entitlement:

> At its most basic level, a human right is a safeguarded prerogative granted because a person is alive. This means that any human being granted personhood has rights by virtue of species membership. And a right is a claim to something (by the right-holder) that can be exercised and enforced under a set of grounds or justifications without interference from others. The subject of the right can be an individual or a group and the object is that which is being laid claim to as a right.[25]

Moreover, a brief examination of the norms governing legal, political, and social structures in pre-colonial societies demonstrates that the concept of rights, like that articulated by Cohen, informed the notion of justice and supported a measure of individualism. Two societies which are representative of the two basic organizational paradigms prevalent in pre-colonial Africa illustrate the point. The Akamba of east Africa were symptomatic of the less rigidly organized societies, whereas the Akans of west Africa were characteristic of the more centralized state systems. In Akan thought, the individual had both descriptive and normative characteristics.[26] Both endowed the person with individual rights as well

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24. Id. at 166. Howard sees no middle ground between individual and group consciousness. She writes, incredibly, that for Africans to "assert their human rights as individuals would be unthinkable and would undercut their dignity as group members." Id.

25. Ronald Cohen, Endless Teardrops: Prolegomena to the Study of Human Rights in Africa, in Human Rights and Governance, supra note 19, at 3, 4. Wiredu defines a right as a "claim that people are entitled to make on others or on society at large by virtue of their status." Kwasi Wiredu, An Akan Perspective on Human Rights, in Cross-Cultural Perspectives, supra note 7, at 243, 243.

26. Wiredu, supra note 25, at 243. Akans believed that each individual had intrinsic value and was entitled to a measure of basic respect. But individuals were also members of matrilineal kinship lineages which generated duties and obligations. A person could enhance his or her "individuality" or "personhood" by executing duties such as participating in public works and sustaining a prosperous household. Conversely, if one failed to make these contributions, their personhood diminished. This "normative layer" in the conception of an individual bears obligations, but it is also "matched by a whole

as obligations. Similarly, the Akamba believed that "all members were born equal and were supposed to be treated as such beyond sex and age."[27] The belief prevailed in both societies that, as an inherently valuable being, the individual was naturally endowed with certain basic rights.

Akan political society was organized according to the principle of kinships. A lineage of those who were descended from the same ancestress formed the basic political unit. Adults in each lineage elected an elder. All lineage heads, in turn, formed the town council which was chaired by a chief who, though chosen according to descent, was in part elected.[28] The chief, however, could not rule by fiat, because decisions of the council were taken by consensus. Moreover, council decisions could be criticized publicly by constituents who found them unacceptable. As Wiredu explains, there was no "doubt about the right of the people, including the elders, to dismiss a chief who tried to be oppressive."[29]

Among the Akamba, individuals joined the elders council, the most senior rank in Akamba society, after demonstrating commitment to the community and responsibility in personal matters. Maintaining a stable household, which included a spouse or spouses and children, was a necessary precondition. The council was a public forum which made decisions by consensus. Although

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series of rights that accrue to the individual simply because he lives in a society in which everyone has those obligations." Id. at 247.

27. Joseph Muthiani, Akamba From Within 84 (1973). While all "people were considered equal in status as human beings" everyone was expected to show strangers "special generosity." Id. at 18. The age-gradation on which the Akamba were organized was a functional structure based on the level of physical maturity. Equality and democracy were required within each age grade. Women had their own comparable but separate prestige structure which, however, was rarely consulted by the council of elders in matters of public concern. Id. at 80-82.

28. Wiredu, supra note 25, at 248-49. On occasion, an election was necessary to determine who in the royal lineage was the rightful heir. The town was the basic unit of government among the Akans. Several Akan towns could group together to form larger governmental units.

29. Id. at 251 ("The stool was the symbol of chiefly status, and so the installation of a chief was called enstoolment and his dismissal destoolment."). The "destooling" of a chief was governed by certain processes and rules. Charges would be filed and investigations conducted before a decision could be reached. Id. On rules governing a chieftainship, see Ayisi, supra note 21, at 48. Further evidence of democratic governance in traditional African society is offered by Kobia's description of the political organization among the Meru of Kenya. Members of the *njuri ncheke*, the supreme council of elders, were "very carefully elected and had to be individuals of unquestionable integrity and in good standing with the society." Samuel Kobia, The Quest for Democracy in Africa 12 (1993). The chair of the *njuri ncheke*, which held legislative and judicial powers, "rotated among the *agwe*," leaders of the six sub-groups of the Meru nation. Id.

the Akamba resented any social organization with a central authority, the council's services included the legislation of public norms and customs.[30] These two examples demonstrate that individuals in pre-colonial society had a right to political participation in determining by whom and through what policies to be ruled.

Much of the discussion about whether pre-colonial societies knew of and enforced individual human rights has taken place in the absence of considered studies of, and reference to, judicial processes in those societies. A preliminary examination of both the Akan and Akamba societies strongly indicates individual-conscious systems of justice. With respect to the Akamba, a party to a complaint appeared before the council of elders in the company of his jury, a selection of individuals who enjoyed the party's confidence. Unlike Western-style jurors, the Akamba did not hand down a verdict, but advised the party on how to plead and what arguments to put forth to win the case. They had to be steeped in Kamba law, customs, and traditions. The threat of the administration of *kithitu*, the Kamba oath, which was believed to bring harm to those who lied, encouraged truthfulness.[31] After presentations by parties, the elders would render judgement or give counsel on the appropriate settlement. Each offense carried a punishment: murder was compensated by the payment of over ten head of cattle; rapists were charged goats; assaults, depending on their seriousness, could cost over ten head of cattle; adultery was punishable by the payment of at least a goat and bull; and an arsonist was required to build his victim a new house or replace the lost property. Individual rights to cultivated land were also recognized and protected.[32] These elaborate punishments present just one indication of the seriousness with which Kamba society took individual rights to personal security, property, marriage, and the dignity and integrity of the family.

In Akan society, the principle of innocent-until-proven-guilty was deeply embedded in social consciousness. According to Wiredu, "it was an absolute principle of Akan justice that no

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30. Muthiani, supra note 27, at 83.

31. Id. at 85; see also Charles W. Hobley, Ethnology of the A-Kamba and Other East African Tribes 78 (1971).

32. Hobley, supra note 31, at 78-79. Cattle were highly valued as a measurement of wealth. Among the Maasai, another east African people, the murder of a man was compensated by the fixed fine of forty-nine head of cattle. It is interesting to note that no fine was set for the murder of women because the Maasai almost never murdered women, due to the belief that ill-luck would strike the murderer. See S.S. Ole Sankan, The Maasai 14 (1971).

human being could be punished without trial."[33] The Akans, like the Akamba, also recognized a wide range of individual rights: murder, assault, and theft were punished as violations of the person.[34]

For those who deny the recognition of human rights in pre-colonial societies, it must come as a strange irony that the human rights corpus shares with pre-colonial Africa the importance of personal security rights. The right to life, for example, was so valued that the power over life and death was reserved for a few elders and was exercised "only after elaborate judicial procedure, with appeals from one court to another, and often only in cases of murder and manslaughter."[35] This respect for human life was not an aberration. Fernyhough notes that much of Africa is characterized by a "preoccupation with law, customary and written, and with legal procedure."[36] He adds that the Amhara of Ethiopia, for example, have historically relished litigation and the lengthy cross-examination of witnesses. Whether a society was highly centralized or not, "there existed elaborate rules of procedure intended to protect the accused and provide fair trials."[37] The protection of individual rights was of preeminent importance to pre-colonial societies.

Many of the Akamba and Akan socio-political norms and structures were common to other pre-colonial ethno-political entities or cultural-nations. This Article refers to these shared basic values as the index of the African cultural fingerprint, that is, a set of institutional and normative values governing the relationship between individuals, the society, and nature. To be sure, the fingerprint belongs to Africa although it is also human and, thus, aspects of it reveal universal characteristics. In the search for the definition of the continent, for what sets it apart from Asia and Europe or the

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33. Wiredu, supra note 25, at 252 (emphasis added). He notes, further, that neither at the "lineage level nor at any other level of Akan society could a citizen be subjected to any sort of sanctions without proof of wrongdoing." Id. Even dead bodies were tried posthumously before a symbolic sentence could be imposed.

34. See generally Ayisi, supra note 21, at 64-70.

35. Fernyhough, supra note 19, at 56.

36. Id. at 61. See generally Ideas and Procedures in African Customary Law (Max Gluckman ed., 1969).

37. Fernyhough, supra note 19, at 62. For example, in the Tio kingdom in present-day Brazzaville, the Congo, "as elsewhere in Africa, a strong tradition of jurisprudence existed, with specific rulings for penalties cited as precedents, such as levels of fines for adultery". Id. Among the Akamba, for instance, the offense of assault carried numerous fines, which varied depending on the degree of assault and whether it resulted in the loss of a limb or limbs. See Hobley, supra note 31, at 79.

Americas, some writers have labelled the cultural and social patterns distinctive to the continent as the "African personality."[38] Léopold Sédar Senghor, for one, called it negritude or "the manner of self-expression of the black character, the black world, black civilization," while Aimé Césaire described it simply as "recognition of the fact of being black, and the acceptance of that fact, of our destiny of black, of our history and our culture."[39] Julius Nyerere named it *ujamaa*, the Kiswahili term for African socialism.[40] The principles and ideals common to all these conceptions are, according to the author's own observations of various African societies, *respect* for, and *protection* of, the individual and individuality within the family and the greater socio-political unit; *deference* to age because a long life is generally wise and knowledgeable; *commitment* and *responsibility* to other individuals, family, and community; *solidarity* with fellow human beings, especially in times of need; *tolerance* for difference in political views and personal ability; *reciprocity* in labor issues and for *generosity*; and *consultation* in matters of governance.[41] As aptly put by Cohen,

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38. See generally Joseph Ki-Zerbo, African Personality and the New African Society, in Independent Black Africa: the Politics of Freedom 46-59 (William J. Hanna ed., 1964).

39. Léopold S. Senghor, *Problématique de la négritude*, in *Liberté 3: Négritude et civilisation de l'universel* 269-70 (1977), quoted in Janet G. Vaillant, Black, French, and African: A Life of Léopold Sédar Senghor 244 (1990). The concept of "negritude" was initially coined by Aimé Césaire and Léopold Sédar Senghor as a reaction to white racism of the French variety. Under the philosophy of negritude, "collective organizations enfold the individual in Africa. Yet he is not crushed. What the African knows, Senghor points out, is that the realization of the human personality lies less in the search for singularity than in the development of his potential through participation in a community." Id. at 257. It emphasizes the importance of the family, nuclear and extended, the role of democratic, consensual decision-making with the community through the council of elders, and respect for nature.

40. The concept of *ujamaa*, the Kiswahili concept for kinship, was based on three prongs: (i) respect, where each family member recognized the place and rights of others within the family; (ii) common ownership of property, that all must have the same basic necessities; and (iii) obligation to work, that every family member has the right to eat and to shelter but also the obligation to work. See Goran Hyden, Beyond Ujamaa in Tanzania: Underdevelopment and an Uncaptured Peasantry 98 (1980).

41. Ki-Zerbo, supra note 38. In her work on family structures, Sudarkasa groups the cultural factors that account for the cohesion of the African family into four principles: respect, restraint, responsibility, and reciprocity. These principles create a complex balance of rights and duties within the family structure. See Niara Sudarkasa, African and Afro-American Family Structure: A Comparison, 11 Black Scholar 37, 50 (Nov./Dec. 1980); see also Josiah Cobbah, African Values and the Human Rights Debate: An African Perspective, 9 Hum. Rts. Q. 309-31 (1987). Special mention must be made of the importance of generosity in traditional society. As noted by Kobia, there was a "mutual caring for one another, especially strangers and travellers." Kobia, supra note 29, at 13. It was, for example, a "cardinal custom" in every household to prepare enough food for the

> [m]any African cultures value the group—one should never die alone, live alone, remain outside social networks unless one is a pariah, insane, or the carrier of a feared contagious disease. Corporate kinship in which individuals are responsible for the behavior of their group members is a widespread tradition. *But in addition, the individual person and his or her dignity and autonomy are carefully protected in African traditions, as are individual rights to land, individual competition for public office, and personal success.*[42]

Both Nyerere and Wai have argued, separately, that pre-colonial societies supported individual welfare and dignity and did not allow gross inequalities between members.[43] To buttress his claim that African societies "supported and practiced human rights," Wai argues that the rulers were bound by traditional checks and balances to limit their power and guarantee a "modicum of social justice and values concerned with individual and collective rights."[44] Legesse emphasizes the importance of distributive justice in "formally egalitarian," as well as hierarchical, societies to ensure that "individuals do not deviate so far from the norm that they overwhelm society".[45] Wiredu likewise tabulates a list of rights and responsibilities borne by the Akans in the pre-colonial era. These included rights to political participation, land, and religion, as well as the duty to defend the nation.[46] Fernyhough though not sub-

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unexpected stranger. Id. Even in today's economic difficulties, Africans—rural and urban—generally offer food to strangers and visitors.

42. Cohen, supra note 25, at 14 (emphasis added). For pre-colonial human rights conceptions in Africa, see also Tunji Abayomi, Continuities and Changes in the Development of Civil Liberties Litigation in Nigeria, 22 U. Tol. L. Rev. 1035, 1037-41 (1991); Fasil Nahum, African Contribution to Human Rights, Paper presented at the Seminar on Law and Human Rights in Development, Gaborone, Botswana, May 24-28, 1982 (on file with author); Nana Kusi Appea Busia, Jr., The Status of Human Rights in Pre-colonial Africa: Implications for Contemporary Practices, in Africa, Human Rights, and the Global System: The Political Economy of Human Rights in a Changing World 225-50 (Eileen McCarthy-Arnolds et al., 1994) [hereinafter Political Economy].

43. See generally Dunstan M. Wai, Human Rights in Sub-Saharan Africa, in Human Rights Perspectives, supra note 15, at 115-44; Julius Nyerere, Essays on Socialism (1968).

44. Wai, supra note 43, at 116. He notes, further, that channels for political participation existed in which "[d]iscussion was open and those who dissented from the majority opinion were not punished . . . . There was a clear conception of freedom of expression and association." Id. at 117.

45. Asmaron Legesse, Human Rights in African Political Culture, in The Moral Imperatives of Human Rights: A World Survey 123, 125 (Kenneth W. Thompson ed., 1980).

46. See generally Wiredu, supra note 25.

scribing to a unique African concept of human rights, has outlined many of the rights protected in pre-colonial societies, including the rights to life, personal freedom, welfare, limited government, free speech, conscience, and association.[47] Many of these rights were protected in complex processes of interaction between the individual and the community.

Thus far, this Article has identified and elaborated human rights ideals which existed in pre-colonial societies. However, as in other cultures, notions or practices that contradict concepts of human dignity and human rights also existed, some particularly severe. Among the Akamba, for example, a suspect in a serious crime could be tried by a fire or water ordeal if he did not admit guilt.[48] When a chief died in Akan society, a common citizen's life would be taken so that he could "accompany" the chief and "attend" to him on his "journey to the land of the dead."[49] This practice of human sacrifice was a clear abrogation of the right to life, even by Akan norms which attached an intrinsic value to every individual. Speech and dissent rights of non-adults or minors were also severely restricted.[50] The discriminatory treatment of women—by exclusion from decision-making processes and the imposition of certain forms of labor based on gender—in the home and outside of it flew in the face of the concept of gender equality.[51] However, these practices which were inimical to human rights are not peculiar to Africa; all cultures suffer from this duality of the good and the bad.

A number of Western academics have attacked the index of the African cultural fingerprint and the concept it represents—the African contribution to the human rights corpus—as false and erroneous. In an impassioned critique of scholars she regards as African cultural relativists, Howard notes that although "relatively homogeneous, undifferentiated simple societies of pre-colonial Africa" had "effective means for guaranteeing what is now known

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47. See generally Fernyhough, supra note 19; Lakshman Marasinghe, Traditional Conceptions of Human Rights in Africa, in Human Rights and Development in Africa 32 (Claude Welch & Ronald Meltzer eds., 1984).

48. In the fire ordeal, the suspect would be asked to lick a red hot sword to prove his innocence. Hobley, supra note 31, at 81.

49. Wiredu, supra note 25, at 258.

50. Id. at 259.

51. In pre-colonial Africa, women were primarily responsible for housework including child care. Men generally handled "public" affairs such as security and governance of the community.

as human rights,"[52] there was nothing specifically African about them. Such a model, which she calls the communitarian ideal, "represents typical agrarian, precapitalist social relations in non-state societies."[53] Elsewhere, Howard argues that industrialization has dismantled what she refers to as the peasant worldview, or communitarian ideal, and replaced it with "values of secularism, personal privacy, and individualism."[54]

Donnelly, in many respects Howard's ideological counterpart, concedes that while societies based on the communitarian ideal existed at one point in Africa, they are now the exception. He dismisses the notion that pre-colonial societies knew the concept of human rights; an argument he thinks moot because the communitarian ideal has been destroyed and corrupted by the "teeming slums" of non-Western states, the money economy, and "Western" values, products, and practices.[55] In effect, both Donnelly and Howard believe that human rights are only possible in a post-feudal state, and that the concept was alien to specific pre-capitalist traditions and ideals such as Buddhism, Islam, or pre-colonial African societies. In other words, these traditions can make no normative contribution to the human rights corpus. But the other implausible suggestion derived from these positions is that societies—governed under a centralized modern state—necessarily Westernize through industrialization and urbanization. Moreover,

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52. Howard, Evaluating Human Rights, supra note 20, at 176.

53. Id. at 176. Howard attempts to explain away the index or the African notions of rights and duties by analogizing the simplicity of feudal Europe to pre-colonial Africa. In "closed-village societies of premodern Europe, we would also discover that people thought of themselves more as members of their own local groups than as individuals, finding a sense of identity by fulfilling their assigned roles rather than by fulfilling 'themselves.' " Id. To her, what some writers "view as essentially different African and Western social structures and ways of thinking are actually differences between relatively simple and relatively complex societies." Id. In other words, Howard believes that pre-industrial African societies could not generate the complex concept of human rights.

54. Howard, Group Versus Individual, supra note 16, at 170. Howard believes that the "African" worldview, which is "peasant" and "traditional," must give way to the "Western" worldview, which is "urban" and "modern" and anchored around the individual. She cites Kenya and Nigeria, the "more developed economies of contemporary Africa" as examples of societies where the "traditional concept of solidarity is giving way to individualism." Id.

55. Donnelly, Universal Human Rights, supra note 15, at 119. He writes, further, that "[i]n the Third World today we see most often not the persistence of traditional culture in the face of modern intrusions, or even the development of syncretic cultures and values, but rather a disruptive 'Westernization', cultural confusion, or the enthusiastic embrace of 'modern' practices and values." Id.

such societies become fertile ground for the germination of human rights.

Donnelly and Howard dismiss with too much haste the argument that many Africans are still influenced by pre-colonial norms and notions. They assume, apparently without adequate research, that the old ways have been eroded by modernization. The examples that Howard gives, those of Kenya and Nigeria, two of the "more developed" economies on the continent, in fact point in the opposite direction: that in spite of the ubiquity of the centralized modernizing state, kinship ties and group-centered forms of consciousness still influence growing urban populations. Matters concerning marriage, birth, and death are still supported by extensive family and kinship networks. This is evident even among the peoples of South Africa and Zambia, Africa's most urbanized countries. Fernyhough, correctly finds "Howard's assessment of the new culture of modernity, like her new 'modern' African, strangely unsophisticated and lacking in sensitivity."[56] It is difficult, if not impossible, he adds, to "measure individuation or judge changing worldviews by counting radios and cinemas."[57] Without a doubt, pre-colonial values have been undermined and deeply affected by the forces of change. But it is difficult to believe that this process will completely invalidate them, just as it is unlikely that the modernization of Japan, China, and Saudi Arabia will completely destroy the cultural norms and forms of consciousness evolved through Buddhism and Islam.

Donnelly and Howard face other problems as well. The first difficulty, and perhaps the most troublesome, is the implication in their works that only European liberalism—a philosophy they seem to think inevitable under modernization—can be the foundation for the concept of human rights. Although Donnelly and Howard would deny it, this argument in effect destroys any claim of universality because it places the concept of human rights exclusively within a specific culture. Unless they believe that the ideals of liberalism are inherently universal, it is impossible to reconcile their assertion that the concept of human rights is universal, while at the same time assigning to it uniqueness and cultural specificity.

The second difficulty, which is an extension of the first, is the implied duty on Westerners to impose the concept of human rights on non-European cultures and societies because it is a universal

56. Fernyhough, supra note 19, at 49.
57. Id.

concept that all societies must accept for their own good. Seen from other cultural perspectives, such a view barely masks the historical pattern by the West—first realized through colonialism—to dominate the world by remaking it for the benefit and in the image of Europe.

This conflict between Howard and Donnelly, on the one hand, and their opponents, on the other, is summed up beautifully by Fernyhough who illustrates how politicized the debate about the origin of the concept and content of human rights has become:

> From one perspective the human rights tradition was quite foreign to Africa until Western, "modernizing" intrusions dislocated community and denied newly isolated individuals access to customary ways of protecting their lives and human dignity. Human rights were alien to Africa precisely because it was precapitalist, preindustrial, decentralized, and characterized by communal forms of social organization. From the opposing viewpoint there is a fundamental rejection of this as a new, if rather subtle, imperialism, an explicit denial that human rights evolved only in Western political theory and practice, especially during the American and French revolutions, and not in Africa.[58]

Fernyhough adds, and this author agrees, that the protest of those who reject the chauvinistic view of the West articulate the "very plausible claim that human rights are not founded in Western values alone but may also have emerged from very different and distinctive African cultural milieus."[59] It is impossible to sustain the argument made by Donnelly and Howard because of its internal inconsistency and ethnocentric, moral arrogance. Conversely, African writers who claim a distinctively African concept of human rights exaggerate its uniqueness. By implication they make the point that such a concept could not have any universal application, a position which fails to recognize that concepts of human dignity—the basis of a concept of human rights—are inherent in all *human* societies. As Fernyhough notes:

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58. Id. at 40 (citations omitted).

59. Id. at 40-41. To argue, as Donnelly and Howard do, that the individual in precolonial African societies was not entitled, in certain circumstances, to be left alone—for that is what the concept of human rights is partially about—betrays gross and surprising ignorance about African societies.

> Thus Donnelly and Howard contend that in pre-colonial Africa, as in most non-Western and preindustrial societies, forms of social and political organization rendered the means to attain human dignity primarily through duties and obligations, often expressed in a communally oriented social idiom and realized within a redistributive economy. Yet both reject with unwarranted emphasis the notion that in the search for guarantees to uphold human life and dignity precolonial Africans formulated or correlated such claims to protection in terms of human rights.[60]

It is indeed the notion, common to all societies, that human beings are special and worthy of protection that distinguishes humans from animals. The dogged insistence, even in the face of evidence to the contrary, on the exclusive or distinctive "possession" of human rights has no real place in serious scholarship; the only purpose of such a claim could only lie either in the desire to assert cultural superiority or to deny it. It would be more fruitful to vigorously study other cultures and seek to understand how they protect—and also abuse—human rights.

Above all else, the view of the ethnocentric universalist is at best counterproductive. It serves only to alienate state authorities who would purposefully manipulate concepts in order to continue their repressive practices. How are human rights to be realized universally if cultural chauvinists insist that only their version is valid? Through coercion of other societies or modern civilizing crusades? The only hope for those who care about the adherence by all communities to human rights is the painstaking study of each culture to identify norms and ideals that are in consonance with universal standards. Only by locating the basis for the cultural legitimacy of certain human rights and mobilizing social forces on that score can respect for universal standards be forged. It would be ridiculous, for example, for an African state to claim that, on the basis of African culture, it could detain its own citizens without trial. As An-Na'im succinctly explains:

> Enhancing the cultural legitimacy for a given human right should mobilize political forces within a community, inducing those in power to accept accountability for the implementation or enforcement of that right. With internal cultural legitimacy, those in power could no longer

60. Id. at 39.

argue that national sovereignty is demeaned through compliance with standards set for the particular human right as an external value. Compliance with human rights standards would be seen as a legitimate exercise of national sovereignty and not as an external limitation.[61]

III. NO RIGHTS WITHOUT DUTIES: AN AFRICAN DIALECTIC

Except for the African Charter's clawback clauses[62] and provisions concerning peoples' rights, much of the criticism of the Charter has been directed at its inclusion of duties on individuals.[63] This criticism, which this author shared at one point, appears to be driven primarily by the gross and persistent violations of human rights in post-colonial African states and the fear that vesting more power in the states can only result in more abuses.[64] This fear aside, this Article will examine the concept of duty in pre-colonial African societies and demonstrate its validity in conceptualizing a unitary, integrated conception of human rights in which the extreme individualism of current human rights norms is tempered by the individual's obligation to the society.

Capturing the view of many Africans, Okere has written that the "African conception of man is not that of an isolated and abstract individual, but an integral member of a group animated by a spirit

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61. Abdullahi A. An-Na'im, Problems of Universal Cultural Legitimacy for Human Rights, in Cross-Cultural Perspectives, supra note 7, 331, 332.

62. Clawback clauses qualify rights and permit a state to restrict them to the extent permitted by domestic law. Their purpose, apparently, is to place vague constraints on government action against the individual. For an example, article 6 of the African Charter provides, in part, that "[e]very individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom *except for reasons and conditions previously laid down by law*." African Charter, supra note 1, art. 6, 21 I.L.M. at 60 (emphasis added). The Charter has also been criticized for the weaknesses inherent in its enforcement mechanisms. See Cees Flinterman & Evelyn Ankumah, The African Charter on Human and Peoples' Rights, in Human Rights Practice Guide, supra note 3, at 159, 167-69. See generally N.R.L. Haysom, The African Charter: Inspirational Document or False Start, paper presented at the Bill of Rights Conference, Victoria Falls, Zimbabwe, Dec. 10-14, 1994; Olosula Ojo & Amadu Sessay, The OAU and Human Rights: Prospects for the 1980s and Beyond, 8 Human Rights Quarterly, 89 (No. 1 1994).

63. See, e.g., Flinterman & Ankumah, supra note 62, at 166-67; Makau wa Mutua, The African Human Rights System in a Comparative Perspective: The Need for Urgent Reformulation, 5 Legal F. 31, 33 (1993) [hereinafter African Human Rights System]; Amnesty International, Amnesty International's Observations on Possible Reform of the African Charter on Human and Peoples' Rights (1993).

64. Mutua, African Human Rights System, supra note 63, at 32. For duties imposed on individuals, see African Charter, supra note 1, arts. 27-29, 21 I.L.M. at 63.

of solidarity."[65] Keba Mbaye, the renown African jurist, has stated that in Africa "laws and duties are regarded as being two facets of the same reality: two inseparable realities."[66] This philosophy has been summed up by Mbiti as well: "I am because we are, and because we are therefore I am."[67] According to this view, individuals are not atomistic units "locked in a constant struggle against society for the redemption of their rights."[68] The Dinka concept of *cieng*, for example, "places emphasis on such human values as dignity, integrity, honor, and respect for self and others, loyalty and piety, compassion and generosity, and unity and harmony."[69] But *cieng* not only attunes "individual interests to the interests of others; it requires positive assistance to one's fellow human beings."[70] Among the Bantu peoples of east and southern Africa, the concept of a person, *mundu* in Kikamba or *mtu* in Kiswahili, is not merely descriptive; it is also normative and refers to an individual who lives in peace and is helpful to his community.[71] Léopold Senghor, then president of Senegal, captured this view at a meeting of African legal experts in 1979:

> Room should be made for this African tradition in our Charter on Human and Peoples' Rights, while bathing in our philosophy, which consists in not alienating the subordination of the individual to the community, in co-existence, in giving everyone a certain number of rights and duties.[72]

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65. B. Obinna Okere, The Protection of Human Rights in Africa and the African Charter on Human Rights and Peoples' Rights: A Comparative Analysis with the European and American Systems, 6 Hum. Rts. Q. 141, 148 (1984).

66. International Commission of Jurists, Human and Peoples' Rights in Africa and the African Charter 27 (1986).

67. The individual's needs, rights, joys, and sorrows are woven into a social tapestry that denies singular individuality. John Mbiti, African Religions and Philosophy 141 (1970).

68. Kiwanuka, supra note 5, at 82.

69. Deng, supra note 17, at 266.

70. Id.

71. The word Bantu consists of *ntu*, a root, which means *human-ness*. Quite often, speakers of Kikamba or Kiswahili will rhetorically ask of an abusive person if he is or has become an animal. An individual is not a *mundu* or a *mtu*, and loses his human-ness if he abuses or mistreats fellow community members.

72. Address of President Léopold Sédar Senghor of Senegal to the Meeting of Experts for the Preparation of the Draft African Charter on Human and Peoples' Rights, Dakar, Senegal (Nov. 28-Dec. 8, 1979), OAU Doc. CAB/LEG/67/3/Rev.1, at 6; also reprinted in Philip Kunig et al., Regional Protection of Human Rights by International Law: The Emerging African System 123 (1985) [hereinafter Emerging African System].

In practical terms, this philosophy of the group-centered individual evolves through a series of carefully taught rights and responsibilities. At the root were structures of social and political organization, informed by gender and age, which served to enhance solidarity and ensure the existence of the community into perpetuity. The Kikuyu of Kenya, for example, achieved a two-tiered form of community organization: at the base was the family group composed of blood relatives, namely a man and his wife or wives, their children, and grand-children, and often great grand-children; the second tier consisted of the clan, a combination of several family groups bearing the same name and believed to have descended from one ancestor.[73] Social status and prestige were based on the execution of duties within a third tier: the age-group. Marriage conferred eligibility for the elders council, the governing body.[74] Like the Kikuyu, the Akamba were organized in similar lineages and age-groups, culminating in the elders council, the supreme community organ.[75] The Akan organizational chart also was similar.[76]

Relationships, rights, and obligations flowed from these organizational structures, giving the community cohesion and viability. Certain obligations, such as the duty to defend the community and its territory, attached by virtue of birth and group membership. In the age-grading system of the Akamba, for example, each able-bodied male had to join the *anake* grade which defended the community and made war.[77] In return for their services, the warriors were allowed to graduate into a more prestigious bracket, whereby others would defend them and their property thereafter. The expectations were similar among the Akans:

> But if every Akan was thus obligated by birth to contribute to defense in one way or another, there was also the complementary fact that he had a right to the protection of his person, property, and dignity, not only in his own state but also outside it. And states were known to go to war to secure the freedom of their citizens abroad or avenge their mistreatment.[78]

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73. Jomo Kenyatta, Facing Mount Kenya 1-2 (1953); see also H.E. Lambert, Kikuyu Social and Political Institutions (1965).
74. Kenyatta, supra note 73, at 200.
75. Muthiani, supra note 27, at 80-85.
76. See generally Wiredu, supra note 25.
77. Muthiani, supra note 27, at 82.
78. Wiredu, supra note 25, at 249.

Defense of the community, a state-type right exacted on those who came under its protection, was probably the most serious positive public obligation borne by young men. The commission of certain offenses, such as murder, treason, and cowardice, were also regarded as public offenses or crimes against the public dimension of the community or state, imposing negative public duties on the individual. But most individual duties attached at the family and kinship levels and were usually identifiable through naming: an aunt was expected to act like a mother, an uncle like a father.[79] This is the basis of the saying, found in many African cultures, that it takes a whole village to raise a child.[80] As Cobbah correctly explains, the naming of individuals within the kinship structure "defines and institutionalizes" the family member's required social role. These roles, which to the Western outsider may appear to be only of morally persuasive value, are "essentially rights which each kinship member customarily possesses, and duties which each kinship member has toward his kin."[81] Expressed differently, "the right of one kinship member is the duty of the other and the duty of the other kinship member is the right of another.[82] Sudarkasa and Cobbah thematically group the principles tying the kinship system together around respect, restraint, responsibility, and reciprocity.[83] In a very real sense, "entitlements and obligations form the very basis of the kinship system."[84]

The consciousness of rights and correlative duties is ingrained in community members from birth. Through every age-grade, the harmonization of individual interests with those of the grade is instilled unremittingly. As Kenyatta remarked, the age-group is a

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79. In Africa, "the extended family unit, like family units in nearly all societies, assigns each member a social role that permits the family to operate as a reproductive, economic and socialization unit." Cobbah, supra note 41, at 320. But unlike the West, kinship terminologies in Africa relate to actual duties and obligations borne by members. Furthermore, the terminologies are more encompassing: aunts and mothers, for example, have similar roles within the kinship unit, regardless of biological parentage. The same is true of uncles and older cousins. Id.

80. Most pre-colonial African villages were be inhabited by people related through blood or marriage.

81. Cobbah, supra note 41, at 321.

82. Id.

83. This matrix of group solidarity revolves around respect, based on seniority in age; restraint or the balancing of individual rights with the requirements of the group; responsibility, which requires commitment to work with and help others in return for security; and reciprocity through which generous acts are returned. Id. at 322; see also Sudarkasa, supra note 41, at 50.

84. Cobbah, supra note 41, at 322.

"powerful instrument for securing conformity" with the community's values; the "selfish or reckless youth is taught by the opinion of his gang that it does not pay to incur displeasure."[85] Through age-groups and the "strength and numbers of the social ties,"[86] community solidarity is easily transmitted and becomes the basis for cohesion and stability. Furthermore, initiation ceremonies—for both girls and boys—taught gender roles and sexual morality.[87] Among the Kikuyu, a series of ceremonies culminating in clitoridectomy for girls and circumcision for boys, marked passage into adulthood. Clitoridectomy, which was brought under sharp attack first by Christian missionaries and now by Western or Western-inspired human rights advocates, was a critical departure point in socialization.

This conception, that of the individual as a moral being endowed with rights but also bounded by duties, proactively uniting his needs with the needs of others, was the quintessence of the formulation of rights in pre-colonial societies. It radically differs from the liberal conception of the individual as the state's primary antagonist. Moreover, it provides those concerned with the universal conception of human rights with a basis for imagining another dialectic: the harmonization of duties and rights. Many of those who dismiss the relevance of the African conception of man by pejoratively referring to it as a "peasant" and "pre-industrial" notion fail to recognize that all major cultures and traditions—the Chinese, European, African, and the Arab, to mention a few—have a basic character distinctive to them. While it is true that no culture is static, and that normative cultural values are forever evolving, it is naive to think that a worldview can be eroded in a matter of decades, even centuries. Why should the concession be made that the individualist rights perspective is "superior" to more community-oriented notion? As Cobbah has noted, "in the same way that people in other cultures are brought up to assert their independence from their community, the average African's worldview is one that places the individual within his community."[88] This African worldview, he writes, "is for all intents and

85. Kenyatta, supra note 73, at 115. Kenyatta writes that "early and late, by rules of conduct in individual instances, by the sentiment of the group in which he lives, by rewards and punishments and fears of ceremonial uncleanness, the younger generation learns the respect and obedience due to parents. The older generation do likewise." Id.

86. Id. at 116-17.

87. See id. at 130-54.

88. Cobbah, supra note 41, at 323.

purposes as valid as the European theories of individualism and the social contract."[89] Any concept of human rights with pretensions of universality cannot avoid mediating between these two seemingly contradictory notions.

IV. PROSPECTS AND PROBLEMS FOR THE DUTY/RIGHTS CONCEPTION

The idea of combining individual rights and duties in a human rights document is not completely without precedent. No less a document than the Universal Declaration of Human Rights (UDHR) blazed the trail in this regard when it provided, in a rare departure from its individualist focus, that "[e]veryone has the duties to the community in which alone the free and full development of his personality is possible."[90] However, the African Charter is the first human rights document to articulate the concept in any meaningful way. It is assumed, with undue haste, by human rights advocates and scholars that the inclusion of duties in the African Charter is nothing but "an invitation to the imposition of unlimited restrictions on the enjoyment of rights."[91] This view is simplistic because it is not based on a careful assessment of the difficulties experienced by African countries in their miserable attempts to mimic wholesale Western notions of government and the role of the state. Such critics are transfixed by the allure of models of democracy prevalent in the industrial democracies of the West, models which promise an opportunity for the redemption of a troubled continent.

Unfortunately, such a view is shortsighted. Perhaps at no other time in the history of the continent have Africans needed each other more than they do today. Although there is halting progress towards democratization in some African countries, the continent is generally on a fast track to political and economic collapse. Now in the fourth decade of post-colonialism, African states have

89. Id.

90. UDHR, supra note 3, art. 29. The American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, International Conference of American States, 9th Conf. (1948), O.A.S. Doc. OEA/Ser. L/V/1.4 Rev. XX (1965), also proclaimed a list of 27 human rights and ten duties. Buergenthal, supra note 3, at 128. The American Convention on Human Rights, supra note 3, did not follow the same course.

91. Buergenthal, supra note 3, at 178. Others, such as Haysom, have made blanket condemnations of the concept of duties. Fearing that the concept of duties could be used to suppress rights guaranteed by the African Charter, Haysom has written that the "interpretation of a duty towards the community as to mean duty towards the state, lends itself to an autocratic style of Government." Haysom, supra note 62, at 6.

largely failed to forge viable, free, and prosperous countries. The persistence of this problem highlights the dismal failures of the post-colonial states on several accounts. The new African states have failed to inspire loyalty in the citizenry; to produce a political class with integrity and a national interest; to inculcate in the military, the police, and the security forces their proper roles in society; to build a nation from different linguistic and cultural groups; and to fashion economically viable policies. These realities are driving a dagger into the heart of the continent. There are many causes of the problem, and, while it is beyond the scope of this Article to address them all, it will discuss one: namely, the human rights dimensions of the relationship between the individual, the community, and the state.

Colonialism profoundly transformed and mangled the political landscape of the continent through the imposition of the modern state.[92] Each pre-colonial African "nation," and there were thousands of them to be sure, had several characteristics: one ethnic community inhabited a "common territory; its members shared a tradition, real or fictitious, of common descent; and they were held together by a common language and a common culture."[93] Few African nations were also states in the modern or European sense, although they were certainly political societies. In contrast, the states created by European imperialists, comprising the overwhelming majority of the continent, ordinarily contained more than one nation:

> Each one of the new states contains more than one nation. In their border areas, many new states contain parts of nations because of the European-inspired borders cut across existing national territories.[94]

The new state contained a population from many cultural groups coerced to live together. It did not reflect a "nation," a people with the consciousness of a common destiny and shared history and culture.[95] The colonialists were concerned with the exploitation of

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92. For a commanding history of the continent, spanning the pre-colonial era to the present, see Basil Davidson, Africa in History (1991); see also Ali A. Mazrui, The Africans: A Triple Heritage (1986).

93. K. A. Busia, Africa in Search of Democracy 31 (1967). Hansen defines a nation as "a group that shares a common history and identity and is aware of that; they are a people, not just a population." Art Hansen, African Refugees: Defining and Defending Their Human Rights, in Human Rights and Governance, supra note 19, at 139, 161.

94. Hansen, supra note 93, at 161.

95. According to Busia, the

Africa's human and natural resources, and not with the maintenance of the integrity of African societies. For purposes of this expediency, grouping many nations in one territory was the only feasible administrative option. To compound the problem, the new rulers employed divide-and-conquer strategies, pitting nations against each other, further polarizing inter-ethnic tensions and creating a climate of mutual fear, suspicion, and hatred. In many cases, the Europeans would openly favor one group or cluster of nations over others, a practice that only served to intensify tensions. For example, in Rwanda, a country rife with some of the worst inter-communal violence since decolonization, the Belgians heightened Hutu-Tutsi rivalry through preferential treatment toward the Tutsi.[96]

Ironically, colonialism, though a divisive factor, created a sense of brotherhood or unity among different African nations within the same colonial state, because they saw themselves as common victims of an alien, racist, and oppressive structure.[97] Nevertheless, as the fissures of the modern African state amply demonstrate, the unity born out of anti-colonialism has not sufficed to create an enduring identity of nationhood in the context of the post-colonial state. Since in the pre-colonial era the primary allegiances were centered on lineage and the community,[98] one of the most difficult challenges facing the post-colonial political class was the creation of new nations. This challenge, referred to as "creating a national consciousness . . . was misleading," as there was "no nation to

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> new African States are composed of many different tribes. A state can claim to be a common territory for all the tribes within it, but common descent, real or fictitious, cannot be maintained among tribes, some of which have a history of different origins and migrations, such as the Buale, Senufo, Guro of the Ivory Coast; the Yoruba, Hausa, Ibo of Nigeria; Ewe, Fanti, Dagomba of Ghana . . . . Instead of the bond of a common culture and language, there are language and cultural differences which tend to divide rather unite.

Busia, supra note 93, at 33; see also Mutua, Redrawing the Map, supra note 14.

96. Although, before the arrival of the Belgians, the Tutsi minority ruled over the Hutu majority and the Twa in a feudal-client relationship, the colonial state "transformed communal relations and sharpened ethnic tensions by ruling through a narrow Tutsi royalty. The access to resources and power that the Tutsi collaborators enjoyed under the colonial state irreversibly polarized Hutu-Tutsi relations." Makau wa Mutua, U.N. Must Make Rwanda a Priority, Oakland Tribune, May 25, 1994, at A13.

97. "One need not go into the history of colonisation of Africa, but that colonisation had one significant result. A sentiment was created on the African continent—a sentiment of oneness." Mazrui, supra note 92, at 108, quoting Julius Nyerere, Africa's Place in the World, Wellesley College Symposium at 149 (1960).

98. Busia, supra note 93, at 30.

become conscious of; the nation had to be created concurrently with a consciousness."[99]

This difficult social and political transformation from self-governing ethno-cultural units to the multi-lingual, multi-cultural modern state—the disconnection between the two Africas: one pre-colonial, the other post-colonial—lies at the root of the current crisis. The post-colonial state has not altered the imposed European forms of social and political organization even though there is mounting evidence that they have failed to work in Africa.[100] Part of the problem lies in the domination of the continent's political and social processes by Eurocentric norms and values. As correctly put by Hansen:

> African leaders have adopted and continued to use political forms and precedents that grew from, and were organically related to, the European experience. Formal declarations of independence from direct European rule do not mean actual independence from European conceptual dominance. African leaders and peoples have gone through tremendous political changes in the past hundred years. These profound changes have included the transformation of African societies and polities. *They are still composed of indigenous African units, such as the lineage, village, tribe, and chieftainship, but they have been transformed around European units, such as the colony, district, political party, and state.*[101]

This serious and uniquely African crisis lacks the benefit of any historical guide or formula for its resolution. While acknowledging that it is impossible to recapture and re-institute pre-colonial forms of social and political organization, this Article nonetheless asserts that Africa must partially look inward, to its pre-colonial past, for possible solutions. Certain ideals in pre-colonial African philosophy, particularly the conception of humanity, and the interface of rights and duties in a communal context as provided for in the African Charter, should form part of that process of reconstruction. The European domination of Africa has wrought social

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99. Hansen, supra note 93, at 161-62.

100. Id. at 161. Hansen notes that the "most obvious and powerful expressions of the continued African conceptual reliance on European political forms are the African states themselves. *The states are direct and uncritical successors of the colonies.*" Id. (emphasis added).

101. Id. (emphasis added).

changes which have disabled old institutions by complicating social and political processes. Pre-colonial and post-colonial societies now differ fundamentally. In particular, there are differences of scale; states now have large and varied populations. Moreover, states possess enormous instruments of control and coercion, and their tasks are now without number. While this is true, Africa cannot move forward by completely abandoning its past.

The duty/rights conception of the African Charter could provide a new basis for individual identification with compatriots, the community, and the state. It could forge and instill a national consciousness and act as the glue to reunite individuals and different nations within the modern state, and at the same time set the proper limits of conduct by state officials. The motivation and purpose behind the concept of duty in pre-colonial societies was to strengthen community ties and social cohesiveness, creating a shared fate and common destiny. This is the consciousness that the impersonal modern state has been unable to foster.[102] It has failed to shift loyalties from the lineage and the community to the modern state, with its mixture of different nations.

The series of explicit duties spelled out in articles 27 through 29 of the African Charter could be read as intended to recreate the bonds of the pre-colonial era among individuals and between individuals and the state.[103] They represent a rejection of the individual "who is utterly free and utterly irresponsible and opposed to society".[104] In a proper reflection of the nuanced nature of societal obligations in the pre-colonial era, the African Charter explicitly provides for two types of duties: direct and indirect. A direct duty is contained, for example, in article 29(4) of the Charter which requires the individual to "preserve and strengthen social and national solidarity, particularly when the latter is threatened."[105] There is nothing inherently sinister about this provision; it merely repeats a duty formerly imposed on members of pre-colonial communities. If anything, there exists a heightened need today, more

102. In his discussion of the absence of the requirements of empirical statehood in post-colonial Africa, Jackson has written that, in these "ramshackle" regimes, "[c]itizenship means little and carries few substantial rights or duties compared with membership in a family, clan, religious sect or ethnic community. Often the 'government' cannot govern itself, and its officials may in fact be freelancers, charging what amounts to a private fee for their services." Robert H. Jackson, Juridical Statehood in Sub-Saharan Africa 46 J. Int'l Aff. 1 (1992).

103. See African Charter, supra note 1, art. 45, 21 I.L.M. at 65.

104. See OAU Doc. CAB/LEG/67/3/Rev.1, supra note 72, at 2.

105. African Charter, supra note 1, art. 29, para. 4, 21 I.L.M. at 63.

than at any other time in recent history, to fortify communal relations and defend national solidarity. The threat of the collapse of the post-colonial state, as has been the case in Liberia, Somalia, and Rwanda, is only too real. Political elites as well as the common citizenry, each in equal measure, bear the primary responsibility for avoiding societal collapse and its devastating consequences.

The African Charter provides an example of an indirect duty in article 27(2), which states that "[t]he rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest."[106] This duty is in fact a limitation on the enjoyment of certain individual rights. It merely recognizes the practical reality that in African societies, as elsewhere in the world, individual rights are not absolute. Individuals are asked to reflect on how the *exercise of their rights in certain circumstances* might adversely affect other individuals or the community. The duty is based on the presumption that the full development of the individual is only possible where individuals care about how their actions would impact on others. By rejecting the egotistical individual whose only concern is fulfilling self, article 27(2) raises the level of care owed to neighbors and the community.

Duties are also grouped according to whether they are owed to individuals or to larger units such as the family, society, or the state. Parents, for example, are owed a duty of respect and maintenance by their children.[107] Crippling economic problems do not allow African states to contemplate some of the programs of the welfare state. The care of the aged and needy falls squarely on family and community members. This requirement—a necessity today—has its roots in the past: it was unthinkable to abandon a parent or relative in need.[108] The family guilty of such an omission

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106. Id. art. 27, para. 2, 21 I.L.M. at 63.

107. Article 29 of the African Charter provides that the individual shall have the duty to "preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need." Id. art. 29, para. 1, 21 I.L.M. at 63. The state, however, does not shirk responsibility for the aged and disabled. The Charter gives them "the right to special measures of protection in keeping with their physical or moral needs." Id. art. 18, para. 4, 21 I.L.M. at 62.

108. In defense of the duty of the individual to parents, the aged, and the needy, Isaac Nguema, the first chair of the African Commission, has rhetorically asked: "[h]ow can society be so ungrateful to people who once helped to build it, on the grounds that they have become a burden, maybe no more than waste?" Isaac Nguema, Universality and Specificity in Human Rights in Africa, The Courier, Nov./Dec. 1989, at 16, 17. He pleads for Africa to "foster the cult and the veneration of the aged." Id.

would be held in disgrace and contempt pending the intervention of lineage or clan members. Such problems explain why the family is considered sacred and why it would be simply impracticable and suicidal for Africans to adopt wholesale the individualist conception of rights. Duty to the family is emphasized elsewhere in the Charter because of its crucial and indispensable economic utility.[109] Economic difficulties and the dislocations created by the transformation of rural life by the cash economy make the homestead a place of refuge.

Some duties are owed by the individual to the state. These are not distinctive to African states; many of them are standard obligations that any modern state places on its citizens. In the African context, however, these obligations have a basis in the past, and many seem relevant because of the fragility and the domination of Africa by external agents. Such duties are rights that the community or the state, defined as all persons within it, holds against the individual. They include the duties to "preserve and strengthen social and national solidarity;"[110] not to "compromise the security of the State;"[111] to serve the "national community by placing his physical and intellectual abilities at its service;"[112] to "pay taxes imposed by law in the interest of the society;"[113] and to "preserve and strengthen the national independence and the territorial integrity of his country and to contribute to its defence in accordance with the law."[114]

The duties that require the individual to strengthen and defend national independence, security, and the territorial integrity of the state are inspired by the continent's history of domination and occupation by outside powers over the centuries.[115] The duties represent an extension of the principle of self-determination, used

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109. Article 27(1) of the African Charter provides, inter alia, that "[e]very individual shall have duties towards his family." African Charter, supra note 1, art. 27, para. 1, 21 I.L.M. at 63.

110. Id. art. 29, para. 4, 21 I.L.M. at 63.

111. Id. art. 29, para. 3, 21 I.L.M. at 63.

112. Id. art. 29, para. 2, 21 I.L.M. at 63.

113. Id. art. 29, para. 6, 21 I.L.M. at 63.

114. Id. art. 29, para. 5, 21 I.L.M. at 63.

115. It would be surprising if the first Africa-wide human rights document did not show sensitivity to the subjugation of African peoples, a condition that has largely defined what the continent is today. Beginning with the invasion, enslavement, and colonization by Arabs and later the Europeans, Africans have been keenly aware of the traumatic consequences of the loss of sovereignty over their political and social life. As a general rule, they have not exercised domination over others; that ledger is heavily weighted against them.

in the external sense, as a shield against foreign occupation. Even in countries where this history is lacking, the right of the state to be defended by its citizens can trump certain individual rights, such as the draft of younger people for a war effort. Likewise, the duty to place one's intellectual abilities at the service of the state is a legitimate state interest, for the "brain drain" has robbed Africa of massive intellect.[116] In recognition of the need for the strength of diversity, rather than its power to divide, the Charter asks individuals to promote African unity, an especially critical role given arbitrary balkanization by the colonial powers and the ethnic animosities fostered within and between the imposed states.[117]

In addition to the duties placed on the state to secure for the people within its borders economic, social, and cultural rights, the Charter also requires the state to protect the family, which it terms "the natural unit and basis of society"[118] and the "custodian of morals and traditional values."[119] There is an enormous potential for advocates of equality rights to be concerned that these provisions could be used to support the patriarchy and other repressive practices of pre-colonial social ordering. It is now generally accepted that one of the strikes against the pre-colonial regime was its strict separation of gender roles and, in many cases, the limitation on, or exclusion of, women from political participation. The discriminatory treatment of women on the basis of gender in marriage, property ownership, and inheritance, and the disproportionately heavy labor and reproduction burdens were violations of their rights.

However, these are not the practices that the Charter condones when it requires states to assist families as the "custodians of morals and traditional values." Such an interpretation would be a cynical misreading of the Charter.[120] The reference is to those

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116. Although the "brain drain" is partially a result of the abusive state, the cost of education is so high that a state is entitled to ask its educated elites to contribute to national welfare.

117. Every African is required to "contribute to the best of his abilities, at all times and at all levels, to the promotion and achievement of African unity." African Charter, supra note 1, art. 29, para. 8, 21 I.L.M. at 63. "[A]ll levels" here implies, inter alia, unity between different ethnic groups within the same state. This provision reflects a recognition by the Charter of the destructive power of ethnic hatred or tribalism, the term Westerners prefer when referring to ethnic tensions in Africa.

118. African Charter, supra note 1, art. 18, para. 1, 21 I.L.M. at 61.

119. Id. art. 18, para. 2, 21 I.L.M. at 61.

120. The Charter's reference to "traditional values" cannot in good faith be interpreted as a call for the continued oppression of women. The Charter requires the individual to "preserve and strengthen *positive African cultural values in his relations with other*

traditional values which enhanced the dignity of the individual and emphasized the dignity of motherhood and the importance of the female as the central link in the reproductive chain; women were highly valued as equals in the process of the regeneration of life. The Charter guarantees, unambiguously and without equivocation, the equal rights of women in its gender equality provision by requiring states to "eliminate every discrimination against women" and to protect women's rights in international human rights instruments.[121] Read in conjunction with other provisions, the Charter leaves no room for discriminatory treatment against women.

The articulation of the duty conception in the Charter has been subjected to severe criticism. Some of the criticism, however, has confused the African conception of duty with the socialist or Marxist understanding.[122] Such confusion is unfortunate. In socialist ideology, states—not individuals—are subjects of international law.[123] Thus the state assumes obligations under international law, through the International Covenant on Civil and Political Rights (ICCPR) for example, to provide human rights.[124] Under socialism, the state secures economic, cultural, and social benefits for the individual. Hence, the state, as the guardian of public interest, retains primacy in the event of conflict with the individual.[125] Human rights, therefore, are conditioned on the interest of the state and the goals of communist development.[126] There is an organic unity between rights and duties to the state.[127] In this col-

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members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well-being of society." African Charter, supra note 1, art. 29, para. 7, 21 I.L.M. at 63 (emphasis added).

121. "The state shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions." Id. art. 18, para. 3, 21 I.L.M. at 62. Note, however, that the pairing of women and children in this instance is not merely a function of sloppy draftsmanship; it most probably betrays the sexist perception of the drafters.

122. Donnelly, for example, thinks that the Soviet or socialist conception of human rights, reflected in practice and official doctrine, is "strikingly similar" to African and Chinese conceptions. Donnelly, Universal Human Rights, supra note 15, at 55.

123. See Vladimir Kartashkin, The Socialist Countries and Human rights, in The International Dimensions of Human Rights 631, 645 (Karel Vasak & Philip Alston eds., 1982).

124. Id. at 644-45.

125. Roman Wieruszewski, National Implementation of Human Rights, in Human Rights in a Changing East-West Perspective 264, 270 (Allan Rosas et al. eds., 1990).

126. Articles 39, 50, 51, and 59 of the 1977 Constitution of the Union of Soviet Socialist Republics link individual duties to the state with the enjoyment of individual rights. Konst. SSSR, arts. 39, 50, 51, 59 (1977).

127. V. Chkhidvadze, Constitution of True Human Rights and Freedoms, 1980 Int'l Aff. 18, cited in Donnelly, Universal Human Rights, supra note 15, at 55.

lectivist conception, duties are only owed to the state. In contrast, in the pre-colonial era, and in the African Charter, duties are primarily owed to the family—nuclear and extended—and to the community, not to the state.[128] In effect, the primacy attached to the family in the Charter places the family above the state, which is not the case under communism.[129] In pre-colonial Africa, unlike the former Soviet Union or Eastern Europe, duties owed to the family or community were rarely misused or manipulated to derogate from human rights obligations.[130]

The most damaging criticism of the language of duties in Africa sees them as "little more than the formulation, entrenchment, and legitimation of state rights and privileges against individuals and peoples."[131] However, critics who question the value of including duties in the Charter point only to the theoretical danger that states might capitalize on the duty concept to violate other guaranteed rights.[132] The fear is frequently expressed that emphasis on duties may lead to the "trumping" of individual rights if the two are in opposition.[133] It is argued that:

> If the state has a collective right and obligation to develop the society, economy, and polity (Article 29), then as an instrument it can be used to defend coercive state actions against both individuals and constituent groups to achieve

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128. Individual duties owed to intermediate groups—groups falling between the family and the state such as ethnic, professional, and other associational entities—would seem to be implied by article 27 which refers to "society" and "other legally recognized communities." African Charter, supra note 1, art. 27, para. 1, 21 I.L.M. at 63. Such a reading could also be attached to article 10 which refers to the "obligation of solidarity" in associational life. Id. art. 10, para. 2, 21 I.L.M. at 61. "Solidarity" is both "social" and "national." Id. art. 29, 21 I.L.M. at 63.

129. Article 18(1) compels the state to protect the family, the "natural unit" of society. Id. art. 18, para. 1, 21 I.L.M. at 61.

130. According to Benedek, "[t]he human rights approach to be found in traditional African societies is characterized by a permanent dialectical relationship between the individual and the group, which fits neither into the individualistic nor the collectivistic concept of human rights." Wolfgang Benedek, Peoples' Rights and Individuals' Duties as Special Features of the African Charter on Human and Peoples' Rights, in Emerging African System, supra note 72, at 59, 63.

131. H.W.O. Okoth-Ogendo, Human and Peoples' Rights: What Point is Africa Trying to Make?, in Human Rights and Governance, supra note 19, at 74, 78-79; see Okere, supra note 65, at 148-49; Amnesty International, Protecting Human Rights: International Procedures and How to Use Them 15 (1991). See generally Issa J. Shivji, The Concept of Human Rights in Africa (1989).

132. See supra note 62 and accompanying text; Okoth-Ogendo, supra note 131, at 79.

133. See Cohen, supra note 25, at 15.

state policies rationalized as social and economic improvement.[134]

While the human rights records of African states are distressingly appalling, facts do not indicate that the zeal to promote certain economic and political programs is the root cause of human rights abuses. The regime of Daniel arap Moi in Kenya, for example, has not engaged in the widespread suppression of civil and political rights because of adherence to policies it deems in the national interest; instead, abuses have been triggered by an insecure and narrow political class which will stop at nothing, including political murder, to retain power.[135] Similarly, Mobutu Sese Seko of Zaire has run the country into the ground because he cannot contemplate relinquishing power.[136] Alienated and corrupt elites, quite often devoid of a national consciousness, plunder the state and brutalize society to maintain their personal privileges and retain power.[137] The use of the state to implement particular state

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134. Id. Cohen adds that "[m]ore importantly, the dangers of supporting state power as a fundamental 'right' are obvious. Indeed, the African record to date on that score provides serious grounds for concern." Id. Donnelly points to the perversion of the ordinary correlation between duties and rights in the former Soviet Union where a totalitarian, undemocratic state manipulated the concept to abrogate individual rights. Donnelly, Universal Human Rights, supra note 15, at 55-57. However, this author disagrees with Donnelly when he states that rights are completely independent of duties. The link between rights and duties is a social dialectic; one implies the other.

135. For exhaustive catalogues of human rights abuses by the Kenyan government, see Africa Watch, Kenya: Taking Liberties (1991); Robert F. Kennedy Memorial Center for Human Rights, Failing the Democratic Challenge: Freedom of Expression in Multi-Party Kenya (1993); Kenya Human Rights Commission, Independence Without Freedom: The Legitimization of Repressive Laws and Practices in Kenya (1994). For a more conceptual discussion about the difficulties of creating rights-respecting governments, see generally Akwasi Aidoo, Africa: Democracy Without Human Rights 15 Hum. Rts. Q. 703 (1993); Emerging Human Rights: The African Political Economy Context (George W. Shepherd, Jr. & Mark O.C. Anikpo eds., 1990) (presenting theoretical considerations about emerging rights from the standpoint of political economy); Political Economy, supra note 42; Sakah S. Mahmud, The State and Human Rights in Africa in the 1990s: Perspectives and Prospects, 15 Hum. Rts. Q. 485 (1993) (attributing human rights violations in Africa to the African interpretation of human rights and to structural inadequacies).

136. For a comprehensive report on human rights abuses in Zaire, see Lawyers Committee for Human Rights, Zaire: Repression As Policy (1990); Africa Watch, Zaire: Two Years Without Transition (1992).

137. During its first two decades after achieving independence in 1961, Tanzania, under the leadership of Julius Nyerere and the Tanzania African National Union (TANU) and later Chama Cha Mapinduzi (CCM), the ruling party, appeared to be an exception to the kleptocratic oligarchies then prevalent in Africa. The state seemed genuinely committed to the realization of *ujamaa*, the policy of socialism and self-reliance. See generally Makau wa Mutua, Tanzania's Recent Economic Reform: An Analysis, 1988 Transafrica Forum 69 (discussing Tanzania's progression towards self-reliance and socialism under Nyerere); Hyden, supra note 40 (discussing the implementation of *ujamma* policies and politics in

policies is almost never the reason, although such a rationale is frequently used as the pretext. Okoth-Ogendo persuasively argues that the attack on the duty conception is not meritorious because the "state is the villain against which human rights law is the effective weapon" and towards which "individuals should not be called upon to discharge any duties."[138] Valid criticism would question the "precise boundaries, content, and conditions of compliance" contemplated by the Charter.[139] It should be the duty of the African Commission in its jurisprudence to clarify which, if any, of these duties are moral or legal obligations, and what the scope of their application ought to be.[140] The Commission could lead the way in suggesting how some of the duties—on the individual as well as the state—might be implemented. The concept of national service,[141] for example, could utilize traditional notions in addressing famine, public works, and community self-help projects. The care of parents and the needy[142] could be formalized in family/state burden-sharing. The Commission should also indicate how, and in what forum, the state would respond to the breach of individual duties. It might suggest the establishment of community arbitration centers to work out certain types of disputes. As suggested by Umozurike, a former chairman to the Commission, state responsibility for these duties implies a "minimum obligation to inculcate the underlying principles and ideals in their subjects."[143]

Tanzania from a political economy perspective with particular focus on the role of the peasants).

138. Okoth-Ogendo, supra note 131, at 79. The misappropriation of tradition by some of Africa's despots and political charlatans to justify coercive measures against individuals should not be reason for the emotional denunciation of the duty/rights conception. Hastings Kamuzu Banda, the former president of Malawi, used "traditional courts" to silence his critics, and Mobutu Sese Seko, the long term Zairian ruler, at one point instituted *salongo*, a thinly disguised colonial practice of forced labor. Both practices, which had nothing to do with pre-colonial values, were cynically designed to increase the state's power over the people. See Robert F. Kennedy Memorial Center for Human Rights, Confronting the Past: Accountability for Human Rights Violations in Malawi (1994); Donnelly, Universal Human Rights, supra note 15, at 120.

139. Okoth-Ogendo, supra note 131, at 79.

140. Article 45 of the African Charter outlines the mandate of the African Commission, which includes the interpretation of the Charter and the formulation of principles and rules relating to human rights. African Charter, supra note 1, art. 45, 21 I.L.M. at 65.

141. Id. art. 29, 21 I.L.M. at 63.

142. Id.

143. Umozurike, supra note 5, at 907. The African Charter also imposes similar obligations on states:

> States parties to the present Charter shall have the duty to promote and ensure through teaching, education and publication, the respect of the rights and

The duty/rights formulation is also inextricably tied to the concept, articulated in the African Charter, of peoples' rights. Although a long discussion about the concept itself and the controversy it has attracted will not be made here, this Article will outline its necessity to the duty conception. Like the duty concept, the idea of peoples' rights is embodied in the African philosophy which sees men and women primarily as social beings embraced in the body of the community.[144] It was pointed out during the drafting of the African Charter that individual rights could only be justified in the context of the rights of the community; consequently the drafters made room in the Charter for peoples' rights.[145]

The concept was not new in a human rights document. For example, Common Article 1 of the two basic international human rights covenants makes peoples the subject of rights, a departure from Western notions that human rights only attach to individuals.[146] There is recognition of the fact that individual rights cannot be realized unless groups hold collective rights. As clearly noted by Sohn:

> One of the main characteristics of humanity is that human beings are social creatures. Consequently, most individuals belong to various units, groups, and communities; they are simultaneously members of such units as a family, religious community, social club, trade union, professional association, racial group, people, nation, and state. It is not surprising, therefore, that international law not only recognizes inalienable rights of individuals, but also recognizes certain collective rights that are exercised jointly

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> freedoms contained in the present Charter and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood.

African Charter, supra note 1, art. 25, 21 I.L.M. at 63.

144. Benedek observes further, that in traditional African societies "the human being could not survive apart from his people, the community, who in turn was dependent on the participation of all its constituent parts." Benedek, supra note 130, at 63. This relationship was one of duality, "not one of subordination but of complementary, participation, and dialogue." Id. The "support and allegiance" of these relationships "are still a predominant factor of the life of most Africans." Id.

145. Rapporteur's Report, OAU Doc. CM/1149 (XXXVII), Ann. 1, at 3, para. 10, quoted in Kiwanuka, supra note 5, at 82.

146. Article 1 of both the ICESCR and ICCPR provides: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." ICESCR, supra note 3, art. 1; ICCPR, supra note 3, art. 1 [hereinafter Common Article 1]. During the drafting of the ICESCR and the ICCPR, Western governments stiffly opposed Common Article 1 because it put at risk the continued domination of the colonies.

> by individuals grouped into larger communities, including peoples and nations. *These rights are still human rights; the effective exercise of collective rights is a precondition to the exercise of other rights, political or economic or both. If a community is not free, most of its members are also deprived of many important rights.*[147]

The African Charter distinguishes human rights from peoples' or collective rights, but sees them in cooperation, not competition or conflict. The Charter's preambular paragraph notes this relationship and recognizes "on the one hand, that fundamental human rights stem from the attributes of human beings, which justifies their national and international protection and on the other hand, that the reality and respect for peoples rights should necessarily guarantee human rights."[148] This unambiguous statement, notes van Boven, is conclusive proof of the Charter's view: human rights are inalienable and intrinsic to man individuals and are not in conflict with peoples' rights, which they complement.[149] The exercise of sovereignty rights by a "people" or "peoples" as contemplated by the Charter is a necessary precondition for the enjoyment of individual rights.[150] This dialectic between individual and peoples' rights is one of the bases for the Charter's imposition of duties on individuals. Solidarity between the individual and the greater soci-

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147. Louis B. Sohn, The New International Law: Protection of the Rights of Individuals Rather Than States, 32 Am. U. L. Rev. 1, 48 (1982) (emphasis added). See generally, Kiwanuka, supra note 5.

148. African Charter, supra note 1, pmbl., 21 I.L.M. at 59.

149. van Boven, supra note 5, at 188-89. In its usage of "peoples," the African Charter neither contemplates internal self-determination, the right of a people to overthrow an oppressive, undemocratic, and illegitimate regime, nor the claims of a minority or group within an independent state to its own self-determination or secession. Self-determination in the context of the OAU without a doubt refers to situations of foreign, colonial-type domination (previously the case in Namibia), or to minority-ruled regimes (formerly the case in South Africa). Ethnic groups or communities within an independent state, such as the Luo or Luhyia of Kenya, are not envisaged by the Charter in this regard. The individual rights guaranteed in the Charter, particularly the rights to political participation, speech, association, and assembly, imply the right of citizens to a rule of law, democratic state.

150. Kiwanuka has identified at least four interpretations or usages of a "people" or "peoples" in the Charter. They are: (i) all persons within the territorial limits of a colonial state or minority-ruled regime; (ii) all groups of people with certain common characteristics who live within a colonial territory or a minority-ruled state, or minorities within an independent state (external self-determination would not be permitted under the OAU in this case); (iii) the people and the state as interchangeable; and (iv) all persons within the state. See generally Kiwanuka, supra note 5. These are the bearers of collective rights against the state which it has the duty to realize.

ety safeguards collective rights, without which individual rights would be unattainable.

V. CONCLUSIONS

Today Africa is at a cross-roads. Since colonization, when Europe restructured its political map, Africa has lunged from one crisis to another. Whether it was famine consuming millions, Idi Amin dispatching political opponents and innocents with impunity, senseless coups by soldiers who could barely read, the recent Rwandese carnage or ethnic tensions turned deadly, or corrupt political elites, the list of abominations is simply unbearable. The failure of the post-colonial state is so pervasive that it has become the rule, not the exception. Needless to say, there are numerous causes for this crisis, perhaps the most important of which is the disfiguration of the continent's political identity by the imposition of European forms and values of government and society. Narrow political elites who barely comprehend the Western notions they eagerly mimic—and who have lost the anchor in their past—remain in power, but without a rudder.[151] This crisis of cultural identity is Africa's most serious enemy. But with the end of colonization and the cold war—the two driving reasons for past European and American interest in Africa—Africans should re-examine the assumptions underlying the role and purpose of the state and its organization.

This Article is not intended to dismiss concerns about the potential for the misuse of the duty/rights conception by political elites to achieve narrow, personal ends. However, any notions are subject to abuse by power-hungry elites. There is no basis for concluding that the duty/rights conception is unique in this respect. While it is true that the pre-colonial context in which the conception originally worked was small in scale and relatively uncomplicated, the argument made here is not about magnitudes. Instead, the ideals that can be distilled from the past are the central thrust of this argument. Is it possible to introduce in the modern African state grassroots democracy, deepening it in neighborhood communities and villages in the tradition of the pre-colonial council of elders? Can the family reclaim its status as the basic organizational polit-

151. See Michael Chege, Between Africa's Extremes, 6 J. Democracy 44, 45 (1995). Chege notes the minimum conditions for the institutionalization of free and popular government which include shared democratic principles, an engaged middles class, and democratic leadership in a reasonably viable state. Id.

ical unit in this re-democratization process? Is it possible to create a state of laws—where elected officials are bound by checks and balances—as in the days of the old where chiefs were held accountable, at times through destooling? Can the state and the family devise a "social security" system in which the burden of caring for the aged and the needy can be shared? Is it possible to require individuals to take responsibility for their actions in matters relating to sexuality, community security, and self-help projects in the construction of community schools and health centers, utilizing concepts such as *harambee*,[152] the Kenyan slogan for pulling together? Child care and rearing, including lighter forms of discipline such as a reprimand, for example, have always been community affairs in Africa.[153] Could community-based programs be devised and encouraged to promote the "village-raising" of children? These are the typical questions that the new formulation of human rights must ask in the context of recreating the African state to legitimize human rights on the continent.

This Article represents a preliminary attempt to begin rethinking Africa's pre-colonial articulation of human rights and propose how some of the ideals imbedded in the past could be woven into conceptions of man, society, and the state in a way that would make the human rights corpus more relevant to Africa today. Senghor stressed the need for an Afro-centric document which would "assimilate without being assimilated," but also cautioned against a charter for the "African Man" only: he emphasized that "[m]ankind is one and indivisible and the basic needs of man are

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152. *Harambee* has been used in contemporary Kenya as a philosophy to drive domestic development groups. For an example, *harambee* self-help projects in rural communities account for the construction of 70% of Kenya's secondary schools. David Gillies & Makau wa Mutua, A Long Road to Uhuru: Human Rights and Political Participation in Kenya (Report of the International Centre for Human Rights and Democratic Development, Montreal, Canada), at 2 (1993). *Harambee* projects have been undertaken with little or no state assistance. Conceived originally as "the social glue binding the state to society," it forced the state to be "accountable in the realm of social services" because under Kenyatta, the country's first president, it worked as "an extra-parliamentary bargaining system" for elected politicians to negotiate alliances and attract additional private resources to their constituencies. Id. It acted, in effect, as a redistributive mechanism where the influential politician would assemble prosperous friends to make personal monetary contributions or material to self-help projects. Id. However, as the state became more repressive and the political elites more cynical, *harambee* was turned into a "forced tax and an instrument of patronage" through which senior politicians would extort funds from businesses or frighten away contributors for particular causes or institutions. Id. at 3; see also Jennifer A. Widner, The Rise of a Party State in Kenya: From "Harambee!" to "Nyayo!" (1992).

153. See Cobbah, supra note 41, at 322.

similar everywhere."[154] Part of the reason for the failure of the post-colonial state to respect human rights lies in the seemingly alien character of that corpus. The African Charter's duty/rights conception is an excellent point of departure in the reconstruction of a new ethos and the restoration of confidence in the continent's cultural identity. It reintroduces values that Africa needs most at this time: commitment, solidarity, respect, and responsibility. Moreover, it also represents a recognition of another reality. Individual rights are collective in their dimension. "[T]heir recognition, their mode of exercise and their means of protection" is a collective process requiring the intervention of other individuals, groups, and communities.[155] The past, as the Africans of the old used to say, is part of the living. It ought to be used to construct a better tomorrow.

154. See Kunig, supra note 72, at 122, 124 (quoting Senghor's speech) (emphasis omitted).

155. Marie, supra note 5, at 199. This was the vision of pre-colonial societies.