

(Excerpt from)
**The Banjul Charter and the African Cultural Fingerprint:
An Evaluation of the Language of Duties**

By

Makau wa Mutua

35 Va. J. Int'l L. 339

Winter, 1995

(Notes omitted)

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. 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. Both extremes only serve to detain the development of a universal jurisprudence of human rights.

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. In one culture, 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. 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 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. ⁿ²⁰ 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.

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.

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. This view holds that the "African 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." 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.

(Ronald Cohen, *Endless Teardrops: Prolegomena to the Study of Human Rights in Africa*, in *Human Rights and Governance*)

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. Both endowed the person with individual rights as well 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. 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."

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 the Akamba resented any social organization with a central authority, the council's services included the legislation of public norms and customs. 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. 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. 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 human being could be punished without trial." The Akans, like the Akamba, also recognized a wide range of individual rights: murder, assault, and theft were punished as violations of the person.

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." 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." 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." 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 Americas, some writers have labelled the cultural and social patterns distinctive to the continent as the "African personality." Leopold Sedar Senghor, for one, called it *negritude* or "the manner of self-expression of the black character, the black world, black civilization," while Aime Cesaire 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." Julius Nyerere named it *ujamaa*, the Kiswahili term for African socialism. 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. As aptly put by Cohen,

many 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.

...

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." This African worldview, he writes, "is for all intents and purposes as valid as the European theories of individualism and the social contract." 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 "everyone has the duties to the community in which alone the free and full development of his personality is possible." 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." 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 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. 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." 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.

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. The colonialists were concerned with the exploitation of 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.

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)

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. 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, n98 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 become conscious of; the nation had to be created concurrently with a consciousness."

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. 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.

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 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. 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. They represent a rejection of the individual "who is utterly free and utterly irresponsible and opposed to society". 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." 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 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 "the rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest." 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. 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. The family guilty of such an omission 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. 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;" not to "compromise the security of the State;" to serve the "national community by placing his physical and intellectual abilities at its service;" to "pay taxes imposed by law in the interest of the society;" 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."

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. The duties represent an extension of the principle of self-determination, used 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. 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.

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" and the "custodian of morals and traditional values." 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. The reference is to those 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. 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. Such confusion is unfortunate. In socialist ideology, states - not individuals - are subjects of international law. Thus the state assumes obligations under international law, through the International Covenant on Civil and Political Rights (ICCPR) for example, to provide human rights. 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. Human rights, therefore, are conditioned on the interest of the state and the goals of communist development. There is an organic unity between rights and duties to the state. In this collectivist 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. In effect, the primacy attached to the family in the Charter places the family above the state, which is not the case under communism. 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.

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." 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. The fear is frequently expressed that emphasis on duties may lead to the "trumping" of individual rights if the two are in opposition. 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 state policies rationalized as social and economic improvement.

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. Similarly, Mobutu Sese Seko of Zaire has run the country into the ground because he cannot contemplate relinquishing power. 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. The use of the state to implement particular state 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." Valid criticism would question the "precise boundaries, content, and conditions of compliance" contemplated by the Charter. 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. 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, for example, could utilize traditional notions in addressing famine, public works, and community self-help projects. The care of parents and the needy 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."

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. 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.

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. 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 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.

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." 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. 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 society 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. 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 political 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*, 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. 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 "mankind is one and indivisible and the basic needs of man are similar everywhere." 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. "Their recognition, their mode of exercise and their means of protection" is a collective process requiring the intervention of other individuals, groups, and communities. 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.