
Human Rights in Africa — A New Perspective on Linking the Past to the Present

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The discussion of human rights in Africa must be grounded in its political and ideological history and, more importantly, in the continent's history of nationalism and anti-colonialism. A rights discourse was an important tool of independence movements. As a result, several post-colonial constitutions embodied a bill of rights. Commitment to human rights remained rhetorical, however, often sacrificed in the name of ideology, tradition, or institutions.

After independence had been achieved in many countries, African socialism offered an ideological justification for divorcing human rights from nationalism and domestic constitutions. This influenced the institutional accommodation of human rights in Africa in the Organisation of African Unity. Traditional arguments were also offered to justify the move away from constitutional protection of human rights. These arguments were based on a romantic view of traditional African society that portrayed it as purely communalistic, homogenous, and cooperative.

This traditional view is also at the root of much of the scholarship on human rights in Africa. That scholarship has two schools: one emphasizing that human rights in Africa are communitarian, the other denying their very existence. The authors propose that the African perspective on human rights is neither entirely individualistic nor purely communal. Further, the *African Charter on Human and Peoples' Rights* is far from a realistic reflection of human rights in Africa.

The authors conclude that human rights are central to Africa's development. The nation-state in Africa has ignored the ethnic composition of the continent, leading to its present crisis. The right to self-determination should, therefore, occupy a central position in the human-rights debate in Africa. Properly interpreted, it can be used as an effective tool for resolving ethnic and political disputes. To this end, the African Commission on Human and Peoples' Rights will have to play a greater role in guaranteeing the right to self-determination.

Le débat des droits de la personne en Afrique doit se fonder sur l'histoire politique et idéologique, et de manière plus importante, sur l'histoire nationaliste et anticolonialiste du continent africain. Le discours des droits de la personne constituait un outil important des mouvements d'indépendance. Conséquemment, plusieurs constitutions post-coloniales comprennent une charte des droits de la personne. Toutefois, l'engagement au respect des droits de la personne demeure une simple rhétorique, souvent sacrifiée au nom des idéologies, traditions ou institutions locales.

Suite à l'accession de plusieurs pays à l'indépendance, le socialisme africain proposa une justification idéologique pour exclure les droits de la personne des constitutions nationales et internes. Cette idéologie a influencé l'implantation institutionnelle des droits de la personne en Afrique au sein de l'Organisation de l'unité africaine. Des arguments traditionnels ont également été avancés afin de justifier l'éloignement des protections constitutionnelles des droits de la personne. Ces arguments étaient fondés sur une vision romantique de la société africaine traditionnelle, la définissant comme purement communaliste, homogène et coopérative.

Cette vision traditionnelle est également à la source de la doctrine africaine sur les droits de la personne. Cette doctrine compte deux écoles : une soutenant que les droits de la personne en Afrique sont communautaires ; l'autre niant l'existence même de ces droits. Selon les auteurs, la perspective africaine des droits de la personne n'est ni complètement individualiste, ni purement communale. De plus, la *Charte africaine des droits de la personne et des peuples* ne reflète pas de façon réaliste les droits de la personne en Afrique.

Les auteurs concluent que les droits de la personne sont primordiaux au développement de l'Afrique. L'État-nation en Afrique a ignoré la composition ethnique du continent, ce qui a mené à la crise actuelle. Le droit à l'autodétermination devrait donc occuper une place primordiale dans le débat sur les droits de la personne en Afrique. Interprété correctement, il pourrait être utilisé comme outil efficace pour la résolution des conflits ethniques et politiques. Afin d'atteindre ces objectifs, la Commission africaine des droits de la personne aura un plus grand rôle à jouer afin de garantir ce droit à l'autodétermination.

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[I]t is a commonplace to say that culture is not a mere assemblage of works and norms which can function automatically in every climate and at all periods. These works and these norms must have a subject which fires them with its [culture's] passions, its aspirations and its genius. The most universal philosophical doctrine or literary work is only valid by virtue of the men [and women] who live by it. It is only the people who give it authority and dynamic force.

...

[E]very effort towards the personification and enrichment of national culture, and every effort to implant Negro men [and women] of culture in their civilization, constitute in fact, progress towards universalization and are a contribution towards the civilization of [hu]mankind.¹

Second Congress of Negro Writers and Artists, 1959.

Introduction

The human-rights debate in Africa is a reflection of the continent's political and legal history. Therefore, any discussion of human rights in Africa must be grounded in the political and ideological history of the continent, covering four broad periods: pre-colonial, colonial, post-colonial (the struggle for independence) and contemporary. The history of nationalism and anti-colonialism is particularly important.

Africa's pre-colonial history (up to the early 1800s) witnessed the prevalence of traditional ethnic communities living under various socio-political arrangements (called traditional African political systems). These arrangements, ranging from the simple to the complex, embodied elements of traditional forms of democracy and human rights embedded in the religion and culture of these communities. Pre-colonial history came to an end with European contact. These contacts, initially commercial relations mostly with respect to raw materials, led to the slave-trade and, when the demands of European imperialism and capitalism grew, developed into colonisation of the continent. Although a number of treaties and agreements were concluded between African kings and chiefs and the Europeans, most of these kingdoms were denied any legal standing when the continent was declared *terra nullius* at the Vienna Congress of 1815,² which signalled the formal beginning of colonialism.

¹ Second Congress of Negro Writers and Artists, (1959) 24 *Présence Africaine* 321 at 321.

² This treatment of Africa is in itself, in our view, a denial of international law. First, Africa was declared *terra nullius* in spite of the existing agreements between African Kings and Europeans. J. Westlake reported the blunt disregard of early international law: "[A newly discovered] region was scarcely distinguished from a *res nullius*" (L. Oppenheim, ed., *The Collected Papers of John Westlake on Public International Law* (Cambridge: Cambridge University Press, 1914) at 139). Second, Africa and Africans were denied legal personality on the basis that they were "backward", "uncivilised" and

The period of European colonialism (from the late 1800s to the mid 1900s) saw the most contradictions and transformations in Africa. Colonialism imposed far-reaching changes on the socio-political and economic context of Africa: new boundaries, European legal systems, languages and religions. The new boundaries and ethnic divisions permanently altered the geopolitical make-up of the continent, leaving a legacy of haphazard and irresponsibly-drawn cleavages. The imposed religions, languages and legal-education systems demonized and exorcized the African equivalents. Acknowledging these changes is a *sine qua non* for any successful conceptualisation of human rights in Africa.

Post-colonial African history (from the mid 1900s to the late 1980s) could be described as a period of great disillusionment. Although initially a period of hopeful transition from European control and institutions to national independence, post-colonialism was marked by repression and corruption, leading to a concentration of wealth in the ruling élite. During this period, the African ruling élite ran the gamut of ideologies: socialism, one-partyism, pro-Americanism, pan-Arabism and pan-Africanism.

Contemporary Africa is also characterized by contradictions and confusions, at the centre of which lies the question of human rights and democracy. There are some positive developments, such as a decline in foreign manipulation of the ruling élite, following the end of the cold war, and popular revolts for a more participatory form of government. There are also setbacks. The continent is experiencing an increase in inter-ethnic atrocities and religious intolerance and a return to the support of Africa's "Big Men" by the West. All of this has led to more shameless repression by regimes in countries such as Nigeria, Sudan, Zaire, Morocco (against the people of Western Sahara) and Kenya.

hence unfit for membership in the "Family of Nations." Oppenheim stated: "[I]t is irrelevant whether or not some agreement is made with the natives by which they submit themselves to the sway of the occupying State. Any such agreement is usually neither understood nor appreciated by them ..." (L. Oppenheim, *International Law: A Treatise*, vol. 1 (London: Longman, 1905) at 277 [hereinafter *International Law*]). He went further to say:

Outside Europe there are numerous States under the protectorate of European States, but all of them are non-Christian States of such a civilisation as would not admit them as full members of the Family of Nations ... And it may therefore be questioned whether they have any real position within the Family of Nations at all (*International Law, ibid.* at 139).

I. A History of Human Rights in Africa

A. Human Rights and Independence

The starting point for analyzing human rights and democracy in contemporary Africa is African nationalism and pan-Africanism.³ Early on, these movements were engaged in the fight against rights abuses in Africa and the plundering of Africa's resources by colonial authorities.⁴ African nationalists appealed to colonial authorities and the international community regarding the need to respect the rights of colonized people.⁵ Just as important, they made Africans aware of their rights. At the 1945 pan-African Congress, for instance, part of the Declaration read:

We are determined to be free. We want education. We want the right to earn a decent living; the right to express our thoughts and emotions, to adopt and create forms of beauty. We will fight in every way we can for freedom, democracy, and social betterment.⁶

Human rights were, therefore, an important basis of the struggle for independence. S.K.B. Asante has outlined three international documents that contributed to a favourable environment for human rights: the *Charter of the United Nations*,⁷ which consigns six articles to "encouraging" or "promoting" respect for human rights;⁸ the *Universal Declaration of Human Rights*,⁹ which he describes as providing "a powerful source of inspiration for the founding pattern of African nations";¹⁰ and the European *Convention for the Protection of Human Rights and Fundamental*

³ African nationalism is identified with the political revolt against colonialism; Pan-Africanism with the aspiration for continental solidarity and equality (see M. Roberts, "A Socialist Looks at African Socialism" in W.H. Friedland & C.G. Rosberg, eds., *African Socialism* (Stanford: Stanford University Press, 1964) 80 at 82ff). For a detailed analysis, see: N. Sithole, *African Nationalism*, 2d ed. (London: Oxford University Press, 1968); J.K. Nyerere, *Freedom and Socialism/Uhuru na Ujamaa* (London: Oxford University Press, 1968); D. Nelkin, "Socialist Sources of Pan-African Ideology" in Friedland & Rosberg, eds., *ibid.*, 63; N. Azikiwe, "The Future of Pan-Africanism" (1962) 12 *Présence Africaine* 7; K.A. Busia, *The Challenge of Africa* (New York: Praeger, 1962) Part 4 [hereinafter *The Challenge*].

⁴ See e.g.: W. Rodney, *How Europe Underdeveloped Africa* (Washington: Howard University Press, 1974); R.E. Howard, *Human Rights in Commonwealth Africa* (Totowa, N.J.: Rowman & Littlefield, 1986) [hereinafter *Human Rights*]; S. Kiwanuka, *From Colonialism to Independence: A Reappraisal of Colonial Policies and African Reactions, 1870-1960* (Nairobi: East African Literature Bureau, 1973) c. 1.

⁵ Sithole, *supra* note 3, outlines various strategies adopted by African nationalists in their fight against colonial rule.

⁶ Cited in G.B.N. Ayittey, *Africa Betrayed* (New York: St. Martin's Press, 1992) at 99 [footnotes omitted].

⁷ 26 June 1945, Can. T.S. 1945 No. 7, 145 U.K.T.S. 805 [hereinafter *U.N. Charter*].

⁸ See *ibid.* at arts. 1, 13, 55, 62, 73, 76.

⁹ 10 December 1948, GA Res. 217 (III), UN GAOR, 3rd Sess., Supp. No. 13, UN Doc. A/810 (1948) 71 [hereinafter *Universal Declaration*].

¹⁰ S.K.B. Asante, "Nation Building and Human Rights in Emergent African Nations" (1969) 2 *Cornell Int'l L.J.* 72 at 72.

Freedoms,¹¹ which played a role in shaping the human-rights provisions in the constitutions of various African states, such as Nigeria and Sierra Leone.¹² Yet African nationalists used an important tool which was missing from the *Universal Declaration*, that is, the right to self-determination, which entitles all "peoples" to freely determine their political status and freely pursue their economic, social and cultural development.¹³ It is no surprise, then, that this right was brought to the forefront by the struggle of Africans to free themselves from European colonialism.¹⁴

African leaders of newly-independent states translated their human-rights rhetoric into internal constitutional provisions,¹⁵ which were negotiated with the departing colonial authorities.¹⁶ The human-rights platform in nationalist and pan-Africanist campaigns, coupled with the promise of improvement in general welfare under indigenous rule, created in the African populace an expectation of firm human-rights guarantees with the arrival of nationhood. This hope was re-inforced by continued promises of respect for rights at the dawn of independence. Yet, in spite of this rhetoric, rights-abuses soon became common as African leaders began to divorce human rights from their respective constitutions and, eventually, even from the speeches and writings that gave birth to African socialism.¹⁷

B. African Socialism

African socialism represented a new trend in the political philosophy of African leaders in the post-independence period. Devoted to establishing a new social order founded on the best traditions of pre-colonial African society,¹⁸ African socialism

¹¹ 4 November 1950, 213 U.N.T.S. 221, Eur. T.S. 5.

¹² See Asante, *supra* note 10 at 72.

¹³ See: *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47 at art. 1(1) [hereinafter I.C.C.P.R.]; *International Covenant on Economic, Social and Cultural Rights*, 19 December 1966, 993 U.N.T.S. 3, Can. T.S. 1976 No. 46 at art. 1(1) [hereinafter *Covenant on Economic, Social and Cultural Rights*].

¹⁴ For a historical and jurisprudential analysis of this right, see Part IV.C, below.

¹⁵ Asante identifies three types of post-independence constitutions in Africa: the Nigerian type, with an elaborate bill of rights spelled out in "precise legal language"; the Chad type, in which the Preamble proclaims "in general terms" a commitment to the principles set forth in the French *Declaration of the Rights of Man and of the Citizen* of 1789, and in the *Universal Declaration*, *supra* note 9; and the Ghana type, without a bill of rights or any other institution to protect the rights of the ordinary citizen (see Asante, *supra* note 10 at 74-75).

¹⁶ The goal was largely to protect the property interests of the settler minorities and foreign companies against nationalisation (see Asante, *ibid.* at 73-74). See also I.G. Shivji, *The Concept of Human Rights in Africa* (London: CODESRIA, 1989) at 19.

¹⁷ For an analysis of the contemporary human-rights situation in Africa, see e.g. B.P. Ambrose, *Democratization and the Protection of Human Rights in Africa: Problems and Prospects* (Westport, Conn.: Praeger, 1995).

¹⁸ For an account of traditional socio-political life in the African society, written from a local, ethnic perspective, see: K.A. Busia, *The Position of the Chief in the Modern Political System of Ashanti* (London: Oxford University Press, 1951) [hereinafter *The Position of the Chief*]; K.A. Busia, *Africa in Search of Democracy* (New York: Praeger, 1967) c. 1, 2; *The Challenge*, *supra* note 3 at Part 1; J. Kenyatta, *Facing Mount Kenya: The Traditional Life of the Gikuyu* (London: Heinemann, 1979).

was defined as “democratic socialism as conceived by Africans in Africa, evolving from the African way of life and formulated in particular terms as the result of a continuing examination of African society”.¹⁹ African socialism argued for an African concept of democracy distinct from Western notions. For instance, J. Nyerere writes:

[T]he African’s mental conception of “government” was personal — not institutional. When the word government was mentioned, the African thought of the chief; he did not, as does the Briton, think of a grand building in which a debate was taking place.²⁰

Thus, one element of this distinct tradition was the existence of a leader in whom all authority was vested.²¹ This idea merged with the contention that traditional African politics was socialistic in extraction, with the people united under the chief or king and acting according to his will. Another element of the tradition was that decisions were taken by consensus.²²

African leaders saw in a mass party united under one leader the gateway to rapid economic development. For example:

Ghana has chosen the socialist form of society as the objective of her social and economic development. This choice is based on the belief that only a socialist form of society can assure Ghana a rapid rate of economic progress without destroying that social justice, that freedom and equality, which are a central feature of our traditional way of life.²³

A unified front was needed to avert a derailment of development by centrifugal forces which African socialists identified as including tribalism²⁴ and a privileged upper class. The single party was, therefore, to act as the conscience of the state under the direction of the executive leader.²⁵

¹⁹ This definition is from a conference on “Democratic African Socialism and its Challenges” organized by the East African Institute of Social and Cultural Affairs in Nairobi, 1-6 February 1964.

²⁰ J. Nyerere, “The African and Democracy” in J. Duffy & R.A. Manners, eds., *Africa Speaks* (Princeton, N.J.: Van Nostrand, 1961) 28 at 33. Antonio Cassese argues that this view typifies the social structure of many African and Asian communities, with leaders more or less exercising unfettered powers as benevolent dictators (see A. Cassese, *International Law in a Divided World* (Oxford: Clarendon Press, 1986) at para. 69).

²¹ See text accompanying notes 141-142.

²² See Nyerere, *supra* note 20 at 30ff.

²³ Ghana, *First Seven Year Development Plan* (Accra: Office of the Planning Commission, 1962) at 1, cited in Friedland & Rosberg, eds., *supra* note 3 at 267.

²⁴ For a counter-view on tribalism by Nnamdi Azikiwe, first President of Nigeria, see N. Azikiwe, “Tribalism: A Pragmatic Instrument For National Unity” in J.A. Langley, ed., *Ideologies of Liberation in Black Africa: 1856-1970* (London: Rex Collings, 1979) 458.

²⁵ See C.F. Andrain, “Guinea and Senegal: Contrasting Types of African Socialism” in Friedland & Rosberg, eds., *supra* note 3, 160 at 173.

C. *The Organization of African Unity*

African socialism found a home in the Organization of African Unity ("O.A.U.")²⁶ Though not all African states subscribed to African socialism — at least not by name — its core ideas were clearly incorporated into the O.A.U.'s Purposes²⁷ and Principles.²⁸ The idea for the formation of the O.A.U. was mooted through the activities of socialist-oriented African-Americans like Henry Sylvester, W.E.B. Dubois, George Padmore and others.²⁹ Pan-Africanism thrived on three key principles — African unity, black nationalism and socialism³⁰ — and called for "the government of Africans by Africans for Africans":³¹

Economically and socially, Pan-Africanism, [*sic*] subscribes to the fundamental objectives of Democratic Socialism, with state control of the basic means of production and distribution. It stands for the liberty of the subject within the law and endorses the Fundamental Declaration of Human Rights, with emphasis upon the Four Freedoms. ... Pan-Africanism sets out to fulfil the socio-economic mission of Communism under a libertarian political system. Finally, for Pan-Africanism, the self-determination of the dependent territories is the prerequisite to the federation of self-governing states on a regional basis, leading ultimately to the creation of a United States of Africa.³²

An overview of the *O.A.U. Charter* indicates that it did not give human rights prominence among its concerns. For example, while article 20 recommended the establishment of five specialized commissions, none of them was devoted to the is-

²⁶ The O.A.U. was founded in Addis Ababa, Ethiopia, in 1963. For detailed analysis of the history of the O.A.U., see e.g.: C.O.C. Amate, *Inside the OAU: Pan-Africanism in Practice* (London: Macmillan, 1986); A. Sesay, O. Ojo & O. Fasehun, *The OAU After Twenty Years* (Boulder: Westview Press, 1984).

²⁷ The Purposes of the *Charter of the Organisation of African Unity*, 13 September 1963, 479 U.N.T.S. 39, 2 I.L.M. 766 [hereinafter *O.A.U. Charter*], refer to a comprehensive list of the objectives to be achieved by African states under the auspices of the O.A.U., and the areas of cooperation to be covered while working towards the achievement of these objectives. The objectives include the promotion of unity and solidarity, achievement of a better life for the peoples of Africa, defence of their sovereignty, territorial integrity and independence, eradication of all forms of colonialism from Africa and the promotion of international cooperation. The areas of cooperation cover political and diplomatic, economic and social, educational and cultural, health, sanitation and nutritional, scientific and technical, and defence and security (see *O.A.U. Charter, ibid.* at art. 2). These fit in with the three elements of African socialism described in detail above (see text accompanying notes 18-25, above).

²⁸ The Principles of the O.A.U. detail the basis for the cooperation of African states and cover respect for sovereign equality, non-interference, respect for sovereign and territorial integrity of each state, and peaceful settlement of disputes through negotiation, mediation, reconciliation or arbitration, etc. (see *O.A.U. Charter, ibid.* at art. 3).

²⁹ According to Amate, Sylvester, who was the first to organize a pan-African congress until Dubois took over after his death, was also the first to use the term "pan-Africanism" (see Amate, *supra* note 26 at c. 1).

³⁰ See Nelkin, *supra* note 3 at 63.

³¹ G. Padmore, *Pan-Africanism or Communism?* (London: Dennis Dobson, 1956) at 21.

³² *Ibid.* at 21-22.

sue of human rights.³³ The O.A.U. was pre-occupied with “more pressing” issues, such as unity, non-interference and liberation.³⁴ For instance, the first, second and third paragraphs of the Preamble recognize, respectively: “the inalienable right of *all people* to control their own destiny”; that “freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the *African peoples*”; and the “responsibility [of Member States] to harness the natural and human resources” of the continent “for the total advancement of *our peoples* in spheres of human endeavour”.³⁵ Keba M’baye, the father of the *African Charter on Human and Peoples’ Rights*,³⁶ wrote:

Thus, the African governments appear clearly to have sacrificed rights and freedoms for the sake of development and political stability. This situation can be explained and even justified. In mobilizing the masses in order to secure economic and social development, everyone’s attention is directed exclusively towards the prospect of improved standards of living. Inaction or idleness thus came to be regarded as an infraction and the exercise of certain freedoms, even in the absence of any abuse, an attack on public order.³⁷

Human rights in Africa were to be peoples’ rights; freedom, for example, was seen as *national* freedom, not *individual* freedom. The class struggle was to be between the “developed” and “developing” nations; the widening gap between the emerging political élite and the *nouveaux riches*, on the one hand, and ordinary citizens, on the other, was overlooked. The O.A.U.’s commitment to human rights was, therefore, vague and weak. This situation influenced the human-rights provisions of the subsequent *African Charter*.

³³ The Commissions were: Economic and Social; Educational and Cultural; Health, Sanitation and Nutrition; Defence; Scientific, Technical and Research. Two more Commissions, Transport and Communications, and the Commission of Jurists, were added at the first ordinary session of the O.A.U. in 1964. One might expect that the Commission of Jurists would promote and protect human rights, but this Commission was only established as an instrument for legal research (see K. M’baye & B. Ndiaye, “The Organisation of African Unity” in K. Vasak, ed., *The International Dimensions of Human Rights*, vol. 2 (Westport, Conn.: Greenwood Press, 1982) 583 at 593). In any case, the Commission was disbanded after only one year, while others were merged, reducing the number of commissions from seven to three.

³⁴ This was spelled out by Haile Selassie, then Head-of-State of Ethiopia, at the Conference of Addis Ababa on May 22, 1963 (see M’baye & Ndiaye, *ibid.* at 592) and confirmed in the *O.A.U. Charter*, *supra* note 27 at “Preamble”, and specifically articles 2(1)(c) and 3, which talk about guaranteeing the national sovereignty and territorial integrity of the member states, and art. 3(6), which stipulates an “absolute dedication to the total emancipation” of African territories not yet independent.

³⁵ *O.A.U. Charter*, *ibid.*, “Preamble” at para. 4 [emphasis added].

³⁶ 26 June 1981, OAU Doc. CAB/LEG/67/3, 21 I.L.M. 59 (in force 21 October 1986) [hereinafter *African Charter*].

³⁷ M’baye & Ndiaye, *supra* note 33 at 599.

II. A Critique of African Socialism

In our view, African socialism misinterpreted democracy and the place of human rights in the traditional African political system. It failed to draw the necessary link between traditional human rights and the traditional democratic system. Rather, it presented the myth of an idealized, conflict-free traditional society — *Merrie Africa*³⁸ — and blamed the colonizers for disrupting this paradise. In this regard, we agree with J.E. Wiredu that the emphasis on African authenticity was often “merely a political slogan”.³⁹ However, we disagree with his view that the return to authenticity might signify the confirmation of black Africans’ inferiority complex. To agree with that is equivalent to believing that African culture is inherently inferior, and that the solution is to shed it and adopt a new culture altogether. It is our firm belief that one cannot forget the past in trying to chart the future, but it must be recalled truthfully, fairly and critically. This is what African socialism failed to accomplish. African leaders of that period failed to analyze the political forms⁴⁰ of traditional African societies and the concept of rights that went with each and, then, to use the product of that analysis as the foundation for African socialism. They missed “the great structural variety of African forms [that reflect] certain basic assumptions that [previous generations of] Africans made about the nature of human collectivities, the nature of societal interaction, and the desired relationship between power and authority.”⁴¹

Merrie Africa is also wishful thinking: in reality, there were despotic rulers who abused the rights of citizens and strangers alike. For example: there was slavery;⁴² capital punishment was practised;⁴³ and abuse of women and handicapped persons was prevalent in some communities. It is in response to such abuses that Africans of old rejected certain political systems and developed new ones,⁴⁴ and it is within

³⁸ This is borrowed from T. Fernyhough, who in turn picked it from A.G. Hopkins, *An Economic History of West Africa* (London: Longman, 1973) at 10. It connotes “a morally immaculate image” of Africa (T. Fernyhough, “Human Rights and Precolonial Africa” in R. Cohen, G. Hyden & W.P. Nagan, eds., *Human Rights and Governance in Africa* (Gainesville: University Press of Florida, 1993) 39 at 40). Yet, we add to it the image of a homogenous, conflict-free, cooperative and communalistic society, as African socialists portray it.

³⁹ J.E. Wiredu, “How Not to Compare African Thought with Western Thought” in R.A. Wright, ed., *African Philosophy: An Introduction*, 2d ed. (Washington, D.C.: University Press of America, 1979) 133 at 135.

⁴⁰ C.P. Potholm writes that “[these] forms can be regarded as indicators of the basic societal values that underpinned the political system and permeated the political value systems of the group” (C.P. Potholm, *The Theory and Practice of African Politics*, 2d. ed. (Lanham, MD: University Press of America, 1988) at 4).

⁴¹ *Ibid.* African socialists, therefore, are subject to the same criticism levelled by Potholm against Western anthropologists (see *ibid.* at 9-10).

⁴² See O.C. Eze, *Human Rights in Africa: Some Selected Problems* (Lagos: Nigerian Institute of International Affairs, 1984) at 13. He also notes: “In Africa, it could be said that the predominant socio-economic formations before colonial penetration were primitive communalism, slave-owning society, and feudalism” (*ibid.* at 9-10).

⁴³ In the Ashanti kingdom, for instance, there were paid executioners in the service of the king.

⁴⁴ See Eze, *supra* note 42 at 11.

this context that we posit the role of human rights in the shaping of the traditional political society. For it is in the face of abuse that individuals come together to protect themselves and their property, enhance their claim-making capacities and find ways to chart their own path to freedom and development.

Many of the different political systems in traditional Africa emerged through the reaction of oppressed peoples to tyrannical leadership who severed existing allegiances and established their own political communities. In the Ashanti political system, for instance, the claim against tyrannical rule is reflected in the following pre-installation oath for newly elected chiefs:

We do not want you to abuse us. We do not want you to be miserly; we do not want one who disregards advice; we do not want you to regard us as fools; we do not want autocratic ways; we do not want bullying; we do not like beating. Take the Stool. We bless the Stool and give it to you. The Elders say they give the Stool to you.⁴⁵

On the face of it, one would assume that the address, being couched in a negative tone and imposing limitations on the chief, is a reflection of typical civil and political rights, which, in the Western liberal context, are referred to as "negative" rights. However, in the traditional political system, the role of the chief and his elders and the rights of the subjects were not seen in this negative sense. Rights were, and still are, seen as "giving one the way" or "empowering someone" to go about one's normal duties with the goal of promoting and preserving the community's well-being.

III. Scholarship on Human Rights in Africa

A. *The Community School*

Human-rights scholarship in Africa, distinct from African socialist thought and practice, has presented a dichotomy between the communal basis of African societies and the notion of individual rights predominant in Western liberal thought. Some Western anthropologists concluded that traditional African political systems did not possess a notion of rights.⁴⁶ Most African scholars, however, defend a no-

⁴⁵ The Committee of Experts that drew up a proposal for a draft constitution for Ghana's Fourth Republic, 1992, referred to this quotation in its report. In its view, the address was a demonstration of hatred of oppression, demand for popular participation in the decision-making process, mutual respect between the ruler and the ruled and an insistence that government must be for and in the interest of the governed.

⁴⁶ The initial view of Western anthropologists was that traditional African societies did not know democracy. No effort was made to examine whether they had any notion of rights. We attribute this to the Western liberal idea of linking rights to democracy, a constitution, a bill of rights, individualism and cosmopolitanism, all of which were absent from such societies (see e.g. J. Donnelly, *The Concept of Human Rights* (London: Croom Helm, 1985)).

tion of rights in Africa. For example, one school⁴⁷ argues that the traditional African concept of rights is the direct opposite of the Western model, emphasizing community rights over individual rights and freedoms:

The pursuit of human dignity is not concerned with vindicating the right of any individual against the world. The African notion of family seeks a vindication of the communal well-being. The starting point is not the individual but the whole group including both the living and the dead.⁴⁸

The writings of these scholars echo those of African socialists with regard to the *Merrie Africa* idea. What distinguishes them is that they look beyond governmental institutions and the socio-economic setting and address the key issue of human rights. Thus, for example, relying on the socio-political setting of the traditional African society, Mojekwu asserts:

[The communitarian] concept of human rights in Africa was fundamentally based on ascribed status ... One who has lost his membership in a social unit or one who did not belong — an outcast or a stranger — lived outside the range of human rights protection by the social unit.⁴⁹

B. *Reaction to the Community School*

Jack Donnelly and Rhoda Howard argue that traditional African societies did not have a concept of rights, since fundamental human rights, which they believe are universal in scope and application, are inherent in one's humanity, not community. At best, these communities had notions of human dignity but not of human rights.⁵⁰

This argument suffers from two major shortcomings. First, Donnelly bases his conclusions principally on Mojekwu's faulty analysis. In traditional African socie-

⁴⁷ See e.g.: C.C. Mojekwu, "International Human Rights: The African Perspective" in J.L. Nelson & V.M. Green, eds., *International Human Rights: Contemporary Issues* (Stanfordville, N.Y.: Human Rights Publishing Group, 1980) 85; L. Marasinghe, "Traditional Conceptions of Human Rights in Africa" in C.E. Welch, Jr. & R.I. Meltzer, eds., *Human Rights and Development in Africa* (Albany, N.Y.: State University of New York Press, 1984) 32; A. Legesse, "Human Rights in African Political Culture" in K.W. Thompson, ed., *The Moral Imperatives of Human Rights: A World Survey* (Washington, D.C.: University Press of America, 1980) 123; D.M. Wai, "Human Rights in Sub-Saharan Africa" in A. Pollis & P. Schwab, eds., *Human Rights: Cultural and Ideological Perspectives* (New York: Praeger, 1979) 115.

⁴⁸ J.A.M. Cobbah, "African Values and the Human Rights Debate: An African Perspective" (1987) 9 Hum. Rts. Q. 309 at 321.

⁴⁹ Mojekwu, *supra* note 47 at 86 [footnotes omitted].

⁵⁰ See: J. Donnelly, "Cultural Relativism and Universal Human Rights" (1984) 6 Hum. Rts. Q. 400; R. Howard, "The Full-Belly Thesis: Should Economic Rights Take Priority Over Civil and Political Rights? Evidence from Sub-Saharan Africa" (1983) 5 Hum. Rts. Q. 467 [hereinafter "The Full-Belly Thesis"]; R.E. Howard, "Is there an African Concept of Human Rights?" in R.J. Vincent, ed., *Foreign Policy and Human Rights: Issues and Responses* (Cambridge: Cambridge University Press, 1986) 11; *Human Rights, supra* note 4.

ties, not all rights were denied to strangers, as Mojekwu claims. In some cases, strangers and slaves — especially the former — could rise to the status of ordinary citizen and even hold public office.⁵¹ Thus, in traditional Africa, the situation was analogous to today's distinction between citizens and non-citizens with each country granting to its citizens particular rights that are not enjoyed by non-citizens.⁵²

Second, even if one accepts Mojekwu's analysis, rights were never universally enjoyed at the time and place where they are said to have developed, that is, Western Europe during the Enlightenment.⁵³ In fact, the concept of natural rights was largely only a means for middle-class men to argue for the right to own property. In support of this view, Kathleen Lahey writes:

The notion of equality was originally devised by men in order to promote wider distribution of political and economic power among male members of the state. ... In Locke's view, women had to be enslaved within the family if property relations were to be legitimated and maintained.⁵⁴

However, Lahey's criticism is incomplete because Locke's conception of equality not only excluded women, but also slaves and serfs (both male and female). Thus Locke's conception of liberty and equality was shared only by "free" persons.⁵⁵ Rights were also denied to colonized peoples during the Enlightenment. Eide notes:

[G]enocidal actions ... were carried out by self-proclaimed freedom-lovers emigrating from Europe at a time when human rights jargon was blossoming

⁵¹ Busia notes that among the Ashanti of Ghana, strangers could rise to the position of leader of the "Opposition party", whose ranks are filled by the youth of the community. Slaves could own property. Indeed, in order to protect the interests of slaves, the pre-installation pledge for elected chiefs included a commitment not to disclose the origin of the people falling under his jurisdiction (see *The Position of the Chief*, *supra* note 18 at 9-12). The same approach is present among the Tswanas of southern Africa.

⁵² For example, the right to work is not automatically enjoyed by non-citizens of a country, and even in the *Convention on Economic, Social and Cultural Rights*, *supra* note 13, less industrialized states ("L.I.S.") are given the right to "economically discriminate" against foreigners (*ibid.* at art. 2(3)).

⁵³ See J. Berting, "Technological Impacts on Human Rights: Models of Development, Science and Technology, and Human Rights" in C.G. Weeramantry, ed., *The Impact of Technology on Human Rights: Global Case-Studies* (Tokyo: UN University Press, 1993) 13 at 20 (Sales No. E92.III.A.7).

⁵⁴ K.A. Lahey, "The Charter and Pornography: Towards a Restricted Theory of Constitutionally Protected Expression" in J.M. Weiler & R.M. Elliot, eds., *Litigating the Values of a Nation: The Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1986) 265 at 267. See also M.E. Turpel, "Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences" (1989-90) 6 Can. Hum. Rts. Y.B. 3 at 15.

⁵⁵ See: J. Locke, *Two Treatises of Government*, ed. by M. Goldie (London: J.M. Dent, 1993); R.W. Grant, *John Locke's Liberalism* (Chicago: University of Chicago Press, 1987). Indeed, C.B. MacPherson extends the set of those denied their rights to include the poor. He remarks that the classical liberal theory was dedicated to "the individual right to unlimited acquisition of property, to the capitalist market economy, and hence to inequality, and it was feared that these might be endangered by given votes to the poor" (C.B. MacPherson, "Politics: Post-Liberal-Democracy?" in R. Blackburn, ed., *Ideology in Social Science* (Glasgow: Fontana, 1972) 17 at 19).

there and was warmly endorsed by the emigres — in so far as their own emigre society was concerned, but not embracing the peoples they met.⁵⁶

Were the Western concept of human rights truly based on universal humanity, and not on “ascribed status”, then “others” — women, slaves, serfs, the poor and colonized peoples — would not have been denied their rights.

In traditional Africa, community leaders enjoyed some “special” rights or privileges to facilitate the performance of their duties, just as in modern societies, heads-of-state, parliamentarians and diplomats are given certain immunities and privileges to enable them to perform their public duties more effectively.⁵⁷ Thus, the motivation in many — but, admittedly, not all — situations of traditional leadership was efficiency and reward, not discrimination. We conclude, therefore, that both Western and African notions of rights are concerned with personal, human rights.⁵⁸

Furthermore, the exercise and enjoyment of rights is essential to the performance of one’s duty to attain human development and dignity. Thus, contrary to the view of Howard and Donnelly, all societies, irrespective of the stage of their development, exercise and enjoy rights, in the absence of which there would be no development.⁵⁹ We contend that individual rights have existed in African communities, and that their exercise helped to strengthen those societies. This is not to deny, however, that the African notion of rights is also communitarian.

Others have supported the idea that

[t]he African social order is, strictly speaking, neither purely communalistic nor purely individualistic. But the concept of communalism in African social thought is often misunderstood, as is the place of the individual in the communal social order.⁶⁰

⁵⁶ A. Eide, “Linking Human Rights and Development: Aspects of the Norwegian Debate” in I. Brecher, ed., *Human Rights, Development and Foreign Policy: Canadian Perspectives* (Halifax: Institute for Research on Public Policy, 1989) 5 at 8.

⁵⁷ See e.g. J.G. Starke, *Introduction to International Law*, 10th ed. (London: Butterworths, 1989) c. 8, 15.

⁵⁸ See Fernyhough on “popular rights”, *supra* note 38 at 53ff, for a similar argument.

⁵⁹ Compare A.J.M. Milne, *Human Rights and Human Diversity: An Essay in the Philosophy of Human Rights* (Albany, N.Y.: State University of New York Press, 1986), who writes:

A community consists of its members in the sense that, unless there are members, there cannot be a community. Since to be a member is *inter alia* to have rights, without rights there can be no community. ...

A community in which all the members had obligations and none any rights is logically impossible and therefore inconceivable. To be a member is necessarily to have rights as well as obligations (Milne, *ibid.* at 115-16).

⁶⁰ K. Gyekye, *An Essay on African Philosophical Thought: The Akan Conceptual Scheme* (Cambridge: Cambridge University Press, 1987) at 154.

Of course, we need to first note that individualism is not necessarily submerged by communalism nor is communalism antithetical to individualism. Gyekye writes:

Communalism may be defined as the doctrine that the group (that is, the society) constitutes the focus of the activities of the individual members of the society. The doctrine places emphasis on the activity and success of the wider society rather than, though not necessarily at the expense of, or to the detriment of, the individual.⁶¹

Gyekye continues by stating that for the Akans, individuals are born into a human society: an individual's capacities are deemed insufficient to meet basic needs.⁶² In other words, communalism does not negate individualism; it simply reflects "the limited character of the possibilities of the individual ...".⁶³ Consider, for example, the following Akan and Sudanese adages: "The left arm washes the right arm and the right arm washes the left arm";⁶⁴ "A single hand cannot clap." In this view, "the success and meaning of the individual's life depend on identifying oneself with the group. This identification is the basis of the reciprocal relationship between the individual and the group."⁶⁵

Identification with the group, however, should not be mistaken for a negation of individuality. Based on the following criteria, African social thought grants a role to individuality as well:

- (1) Since individual capacities are not equal, their contributions to the community are expected to be unequal. In other words, individuals are recognized on the basis of their merits to some extent.⁶⁶
- (2) The individual *qua* individual has a will, identity, aspirations and desires which can be described as peculiar.⁶⁷

The exercise of individual rights in the African community is a reality and not anathema to the community's development. Rather, the exercise of these rights leads to the attainment of human dignity and the proper functioning of the community. The missing link in Donnelly's analysis on human dignity and proper func-

⁶¹ *Ibid.* at 155.

⁶² *See ibid.*

⁶³ *Ibid.* at 156.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ W.E. Abraham has written: "The responsibility of a member of the clan for the welfare of other members is nevertheless not calculated to encourage the lazy and indolent. It has no suggestion of anyone rushing out of step to save the needy but foolish" (W.E. Abraham, *The Mind of Africa* (Chicago: University of Chicago Press, 1962) at 64).

⁶⁷ This is not to deny the individual's obligations that are based on communal spirit. Abraham has explained: "The obligations are still there; what has altered is their visibility. But because these obligations become more narrowly centred now, the individual obtains a sense of liberation, initiative and creativeness" (Abraham, *ibid.* at 66).

tioning of the society in the African community is provided by the very concept of human rights the existence of which he denies in African communities. The issue, therefore, is not a lack of the concept, but the lack of the expression "rights".⁶⁸ In fact, the African notion of rights, described above, is similar to the Western notion of civil and political rights; the difference lies in regard to the entity (or entities) that ensures, and benefits from, the exercise of those rights.⁶⁹ The African conception of rights is, therefore, community-based, resulting from the community's interest in ensuring and benefitting from the exercise of rights; but personal or individual rights are emphasized first.⁷⁰

C. Related Schools

Another view emphasizes the notion of the duties corresponding to rights. For example, M'baye writes:

In Africa, the individual, completely taken over by the archetype of the totem, the common ancestor or the protective genius, merges into the group. ... In traditional Africa, rights are inseparable from the idea of duty. They take the form of a rite which must be obeyed because it commands like a "categorical imperative." In this, they tie in, through their spiritualism, with the philosophy of Kant.⁷¹

A.A. An-Na'im contributes to the discourse on rights in Africa from a religious perspective. His view is that an Islamic concept of human rights can be merged with international human-rights covenants through a progressive reconciliation of the former with the latter, relying on the discretion of the particular religious community.⁷²

⁶⁸ See E. Groffier, "Les aspects juridiques de la tolérance : essai de terminologie" in E. Groffier & M. Paradis, eds., *The Notion of Tolerance and Human Rights* (Ottawa: Carleton University Press, 1991) 67, where she writes: "Certains langues ne possèdent pas les termes appropriés pour exprimer des droits fondamentaux. Ainsi, le chinois classique n'avait pas de mot pour 'moral', 'liberté', 'autonomie', ... 'droit'" (Groffier, *ibid.* at note 13, p. 84)

⁶⁹ Other differences exist. For example, the African formulation of civil and political rights is not only negative, but also positive-oriented, whereas the Western formulation is predominantly negative.

⁷⁰ A.A. Mazrui has noted: "Within the cooperative structure of kinship and common ownership, there was still room for individual effort and for *individual rewards of such effort*" (A.A. Mazrui, "The Monarchical Tendency in African Political Culture" in M.E. Doro & N.M. Stultz, eds., *Governing in Black Africa: Perspectives on New States* (Englewood Cliffs, N.J.: Prentice-Hall, 1970) 18 at 19). In Ashanti, there is a saying: "It is man that counts. I call upon gold it does not answer. I call upon drapery, there is no answer. It is man that counts." The emphasis is on "man" (*onipa*) — the individual — not on the community (*oman*).

⁷¹ M'baye & Ndiaye, *supra* note 33 at 588-89. The community/duty argument is treated in detail in Part IV D, below.

⁷² See e.g.: A.A. An-Na'im, ed., "Toward a Cross-Cultural Approach to Defining International Standards of Human Rights: The Meaning of Cruel, Inhuman and Degrading Treatment or Punishment" in *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus* (Philadelphia: University of Pennsylvania Press, 1992) 19; A.A. An-Na'im, "Religious Minorities under Islamic Law and the Limits of Cultural Relativism" (1987) 9 Hum. Rts. Q. 1.

An-Na'im's view supports our argument that rights stem from a community's culture and religion. Hence, in talking about human rights in the African context, religion cannot be ignored. While the foundation of human rights in Africa is its traditional religion, as well as traditional African political systems,⁷³ Islam and Christianity, now part of African culture, are also important influences. Because these religions, including the traditional religion, profess individual responsibility, individual rights should be respected in Africa. On An-Na'im's assertion regarding the reconciliation of rights under Islam with international rights, our view is that his approach should not be understood as indicating that human rights emanating from non-Western communities are defective. Nor should we imagine that the international system is perfect. Rather, it should be seen that human rights in every community today have been corrupted by human greed and selfishness. The best approach, therefore, is to give and take and, thereby, create a "comprehensive" whole, but only if the contribution of Africa, for instance, is rid of its *Merrie Africa* bias.

D. *The Individualist School*

There are other African writers who argue that the notion of rights in Africa is not solely communalistic, but also individualistic. We include in this group the works of Asante, Eze and Fernyhough.

Asante argues that "[h]uman rights, quite simply, are concerned with asserting and protecting human dignity, and they are ultimately based on a regard for the intrinsic worth of the individual."⁷⁴ He therefore rejects "the notion that human rights concepts are peculiarly or even essentially bourgeois or Western, and without relevance to Africans".⁷⁵ The gist of Eze's position is that the degree to which human rights are recognized is dependent on a particular society's stage of development. He argues that while African societies did have a concept of rights *qua* rights, these rights were abused. In other words, he rejects *Merrie Africa*.⁷⁶ Fernyhough proposes that human rights in African societies were not only derived from a struggle against tyranny and elitism, but also through mutual individual claims in uncentralized and centralized societies.⁷⁷ This is important in one major respect: it goes beyond the recognition of the fight against "ideological dominance of ruling elites" and sup-

⁷³ See *The Challenge*, *supra* note 3 at c. 1, for an example of the link between religion and politics in the traditional African society.

⁷⁴ Asante, *supra* note 10 at 102. This shares the view with the Howard/Donnelly argument on the nature of human rights. Yet, both Asante, on the one hand, and Howard and Donnelly, on the other, use this foundation to come to different conclusions on whether concepts of human rights existed in Africa.

⁷⁵ Asante, *ibid.* at 102. This shows that Asante believes in the recognition of individual rights in the African context while Howard and Donnelly do not.

⁷⁶ See Eze, *supra* note 42 at 12-13.

⁷⁷ In traditional African political systems, leadership in uncentralized societies vested in family heads (power was diffused). In contrast, centralized societies had chiefs or kings at the apex, with devolution of powers to a council of elders and to other political entities.

ports Potholm's finding on the diverse political forms that existed in traditional Africa and how traditional Africans cherished their freedom and dignity.⁷⁸

IV. The African Charter⁷⁹

A. An Outline

The *African Charter* is divided into three sets of conceptual arrangements: peoples' and individual rights; duties of states and individuals (not peoples); and implementation. Its uniqueness derives mainly from its cultural component and the question of African development, as embodied in the guidelines submitted to the Committee of Experts that drafted the Charter: namely, the Charter "should reflect the African conception of human rights, [and] should take as a pattern the African philosophy of law and meet the needs of Africa."⁸⁰

Based on these guidelines, the O.A.U.'s member states took into account "the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples' rights"⁸¹ in drafting the Charter, consequently coming up with such unique features as the assignment of duties to the individual,⁸² the community and the state and the relationship between community and individual rights.⁸³

⁷⁸ See Potholm, *supra* note 40 at c. 1.

⁷⁹ The *African Charter* came into force on October 21, 1986 after its unanimous adoption in June 1981 by O.A.U. heads-of-state and government summit in Nairobi, Kenya. For a general background on the Charter, see e.g.: E. Kannyo, "The Banjul Charter on Human and Peoples' Rights: Genesis and Political Background" in Welch & Meltzer, eds., *supra* note 47, 128; R. Gittleman, "The Banjul Charter on Human and Peoples' Rights: A Legal Analysis" in Welch & Meltzer, eds., *ibid.*, 152.

⁸⁰ Quoted in Amnesty International, *The Organization of African Unity and Human Rights*, AI Index IOR 03/04/87 at 8.

⁸¹ *African Charter*, *supra* note 36, "Preamble" at para. 5.

⁸² See *ibid.* at arts. 27-29. See also the preamble of the *African Charter*, which states, *inter alia*, that "enjoyment of rights and freedoms also implies the performance of duties on the part of everyone" (*ibid.*, "Preamble" at para. 7). However, the *African Charter* is not the first human-rights instrument to incorporate rights and duties. Article 41 of the *Constitution of the Republic of Ghana*, 1992, reproduced in A.P. Blaustein & G.H. Flanz, eds., *Constitutions of the Countries of the World*, vol. 7 (Dobbs Ferry, N.Y.: Oceana, 1996), provides that the exercise and enjoyment of rights and freedoms is inseparable from the performance of duties and obligations. However, this article does not fall under the chapter guaranteeing human rights and fundamental freedoms but, rather, under the chapter on directive principles of state policy. The attachment of duties to rights has led an Amnesty International research paper to the conclusion that African society attaches importance to the community (see Amnesty International, *supra* note 80 at 9).

⁸³ Other unique elements in the Charter include, among other things, the absence of a court system, the incorporation of economic, social and cultural rights as exclusively peoples' rights, and the infamous claw-back clauses.

B. *The Link between Individual and Collective Rights*

As noted above, it is generally assumed that African notions of human rights are communitarian, while Western notions are individualistic. In the West, it is said that individuals chart their own path to happiness and acquisition of property. They are not to be helped by anyone; the state is not to interfere.⁸⁴

In contrast, the *person* in the African context is given the opportunity to attain his or her full potential by being supplied the wherewithal by the community through the exercise of his or her rights. These rights include the rights to life, to education (largely informal, and including the right to moral education), to love and affection and other purely individual rights. These are the person's rights *to be*. The community then helps the individual to exercise and enjoy rights *to do*: the right to land and to labour; the freedoms of thought, opinion, religion, expression, movement, association and assembly; and the right to marriage. These rights are also individual but are exercised in a communal fashion. The exercise of rights *to do* leads to the acquisition of property and to the third type of rights, rights *to have*, which are embodied in the right to property. When the right to property is enjoyed, the individual is said to have attained full *development* and is in a position to contribute to the development of others.⁸⁵ Rights *to have* are exercised to satisfy the needs of the individual, the family (nuclear and extended) and the community, in that order.⁸⁶

The right to property in the African traditional context had a dual nature. Individual rights in land were recognized, in that individual creativity and enterprise and any wealth accruing therefrom were respected, recognized and protected. These rights were community-based, however: land was seen as a community asset and resource, an ancestral heritage to be preserved for posterity and to which no individual was entitled to lay absolute claim.⁸⁷

⁸⁴ See e.g. Madam Justice Wilson's comment in *Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441 at 488, 18 D.L.R. (4th) 481, that liberty amounts to a "right to pursue one's goals free from governmental restraint".

⁸⁵ One Ashanti maxim which expresses this is translated: "If I have helped you to develop teeth you should in turn nurse me to lose mine." This proverb stresses family duties. Community duties, of a particularly skilled hunter, for example, are expressed in other proverbs, such as: "If all were equal who would serve the other?"

⁸⁶ Some duties, however, are owed directly to the community, such as the duty to defend the community against attack. There are times when the order changes and prominence is given to the family or community. The important point to note is that the individual is given a substantial amount of recognition.

⁸⁷ This position is supported by West African caselaw and by writings on Ghanaian customary laws. In the Nigerian case of *Amodu Tijani v. Secretary (Southern Nigeria)*, [1921] 2 A.C. 399 at 404-405, 90 L.J.P.C. 236 (P.C.), for example, it was held that an individual could not own a substantial interest in land. Yet the law seems to be swaying in favour of individual title due to the individualization of African society (see G. Woodman, "The Allodial Title to Land" (1968) 5 U. Ghana L.J. 79).

C. *The Peoples' Right to Self-Determination*

While we believe that the *African Charter* places undue emphasis on group rights, our view is not that peoples' rights have absolutely no place in that charter. They do — but within the context of self-determination, which deserves a re-interpretation given Africa's peculiar situation. Our conclusion is that rights of the people should not be interpreted as rights of the state which are too often translated into the rights of its leader.

In reality, if all peoples or groups were treated equally and none were oppressed, the reasons and rationale for the following discussion would likely vanish. Present-day Africa unfortunately reveals the need for the discussion: states have not treated nations and the nationalities within them democratically. This has led to civil war, ethnic violence and massive flows of refugees. A reconstructed right to self-determination would be a valuable tool in both the conceptualization and protection of human rights in Africa.

The right to self-determination has special relevance to Africa, since it occupies a central position in its modern political history.⁸⁸ The African struggle for independence has no doubt shaped the contemporary formulation and implementation of the right to self-determination.⁸⁹

1. Formulation and Implementation

The modern right to self-determination evolved out of the principle of "equal rights and self-determination" as provided for in article 1 of the *U.N. Charter* and in the context of the development of friendly relations among states.⁹⁰ This evolution resulted in the 1960 *Declaration on the Granting of Independence to Colonial Territories and Peoples*,⁹¹ the General Assembly's *Resolution on Permanent Sover-*

⁸⁸ Shivji states: "The experience of national and anti-imperialist struggles ... shows that the 'right of peoples and nations to self-determination' remains central in Africa to-day" (I.G. Shivji, ed., "State and Constitutionalism: A New Democratic Perspective" in *State and Constitutionalism: An African Debate on Democracy* (Harare, Zimbabwe: SAPES Books, 1991) 27 at 36).

⁸⁹ Self-determination is said to date back to Greek and Roman civilizations. The terminology was created by early German philosophers, and its application facilitated by the advent of the nation-state in Europe (see e.g.: U.O. Umozurike, *Self-Determination in International Law* (Hamden, Conn.: Shoe String Press, 1972) c. 1; W. Ofuately-Kodjoe, *The Principle of Self-Determination in International Law* (New York: Nellen, 1977) c. 2).

⁹⁰ See *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*, 24 October 1970, GA Res. 2625 (XXV), UN GAOR, 25th Sess., Supp. No. 28, UN Doc. A/8028 (1971) 121 [hereinafter *Declaration on Friendly Relations*].

⁹¹ GA Res. 1541 (XV), UN GAOR, 15th Sess., Supp. No. 16, UN Doc. A/4684 (1961) 66 [hereinafter *Colonial Declaration*], reproduced in *Human Rights: A Compilation of International Instruments* (New York: UN Centre for Human Rights, 1988) at 47ff [hereinafter *International Instruments*].

*eignty over Natural Resources*⁹² and in the inclusion of the right to self-determination in both the I.C.C.P.R. and the *Covenant on Economic, Social and Cultural Rights*.⁹³ The United Nations ("U.N.") General Assembly described this right as a "prerequisite for the full enjoyment of all fundamental human rights" and "one of the pillars of the international human rights order".⁹⁴

The determination of political status guaranteed under this right entails both international political status (external self-determination) and domestic political status (internal self-determination). The external right involves the ability of a "people" to choose their status within the international community.⁹⁵ In Africa, this status has traditionally taken the shape of either an independent or sovereign state — as in the case of Guinea and Ghana — or an association between independent states — as in the case between Tanganyika and Zanzibar. The internal right to self-determination involves the right of the "people" to freely choose the form of association under which they wish to live collectively. This internal aspect to self-determination is contentious and has yet to be clearly developed. We submit that internal self-determination is vital to the present African situation: it is a useful tool for resolution of disputes (civil wars and ethnic clashes) and a pillar of the African conception of human rights. In other words, we argue for the continuing validity of this right in post-colonial Africa.

The limits to self-determination are defined, first, according to who is entitled to exercise the right. Although "peoples" are the designated holders of the right, none of the instruments that guarantee it provide a definition of "people".⁹⁶ Earlier U.N. sources, such as resolutions and declarations, tend to provide a vague and narrow definition of "people" by confining it to the inhabitants of non-self-governing territories.⁹⁷ Despite this lack of a clear definition of the right holders, the right to

⁹² GA Res. 1803 (XVII), UN GAOR, 17th Sess., Supp. No. 17, UN Doc. A/5217 (1962) 17, reproduced in *International Instruments*, *ibid.* at 49ff.

⁹³ See: I.C.C.P.R., *supra* note 13 at art. 1; *Covenant on Economic, Social and Cultural Rights*, *supra* note 13 at art. 1.

⁹⁴ Mr. Martenson, Under-Secretary-General for Human Rights, commenting on the right to self-determination at the Third Committee (see UN GAOR C.3, 3rd Mtg, UN Doc. A/C.3/45/SR.3 (1990) para. 27).

⁹⁵ Dinh Thi Minh Huyen, the delegate of Vietnam to the Third Committee of the U.N., commented on the right to self-determination: in her view, the right is broader than achieving national independence and "should include respect for the sovereign equality of States, independence and territorial integrity and the right of peoples to determine their own future and choose their own system of government" (UN GAOR C.3, 11th Mtg., UN Doc. A/C.3/46/SR.11 (1991) at para. 75).

⁹⁶ Skeptics of the communitarian notion of rights in Africa conclude that "what 'peoples' rights" appears to refer to is the rights of sovereign states." Howard goes further to define "peoples" in the Charter as "class-ruled 'peoples'" as against "concrete *people*" (*Human Rights*, *supra* note 4 at 8). We agree with this characterization but are hopeful for a more democratic interpretation and application of the right.

⁹⁷ The issue arose before the International Law Commission ("I.L.C.") in 1949. The Commission opted to leave the meaning of peoples to be determined in accordance with the international practice (see "Report to the General Assembly Part II: Draft Declaration on Rights and Duties of States" (1949) Y.B.I.L.C. 286 at 289).

self-determination remains, in our opinion, the clearest and best established of the "Peoples' Rights" set out in the *African Charter*.

Who are "peoples"? Avoiding either a minimalist or maximalist definition, there seems to exist a consensus about the common features of groups of human beings who might well be regarded as "peoples" for the purposes of the right to self-determination. The United Nations Educational, Scientific and Cultural Organization's ("U.N.E.S.C.O.") Meeting of Experts on further study of the rights of peoples, held in Paris in 1989, defined peoples for the purposes of peoples' rights in international law, including the right to self-determination:

1. A group of individual human beings who enjoy some or all of the following common features:
 - (a) a common historical tradition;
 - (b) racial or ethnic identity;
 - (c) cultural homogeneity;
 - (d) linguistic unity;
 - (e) religious or ideological affinity;
 - (f) territorial connection;
 - (g) common economic life; ...⁹⁸

This definition also identified other considerations. For example, the group must be of a certain size, not a mere association of individuals within the state, and it must have the will and means to identify itself as a people.⁹⁹ I. Brownlie summarizes the requirements as a "distinct character".¹⁰⁰ In our view, while the U.N.E.S.C.O. definition captures most of the important elements, the criteria of size and territory, which we believe to be of specific (but not necessarily exclusive) concern to Africa, demand qualification.

The numeric size of the group identifying itself as a people might not have the same significance in Africa as it would in other places, including Canada, where questions of minority groups and indigenous people also exist. This is because the relevant size (that is, within borders) of many groups in Africa varies according to

⁹⁸ U.N.E.S.C.O., "New Reflections on the Concept of Peoples' Rights" (1990) 11:3-4 H.R.L.J. 441 at 446.

⁹⁹ See *ibid.* This latter part was also emphasized in the definition offered by Y. Dinstein who, and after noting the importance of the existence of a common history, states: "It is essential to have a present ethos or state of mind. A people is both entitled and required to identify itself as such" (Y. Dinstein, "Collective Human Rights of Peoples and Minorities" (1976) 25 I.C.L.Q. 102 at 104).

¹⁰⁰ He identifies a core of "reasonable certainty" regarding the definition of people. This core, to him, consists of the right of a community to have its distinct character reflected in its political life:

The concept of distinct character depends on a number of criteria which may appear in combination. Race (or nationality) is one of the more important of the relevant criteria, but the concept of race can only be expressed scientifically in terms of more specific features, in which matters of culture, language, religion and group psychology predominate (I. Brownlie, "The Rights of Peoples in Modern International Law" (1985) 9 Bull. A. Soc. Legal Philo. at 108).

the population's cross-border movement.¹⁰¹ Although the nation-state is a reality in Africa, it has not acquired the same status as it has in Western countries; in many (if not most) cases, peoples or groups are not necessarily aware of the existence of state boundaries and jurisdiction.

The emphasis on territory might similarly be qualified with respect to those people who may live within the boundaries of two or more states. According to a U.N. study by Aurelia Cristescu on the right to self-determination, territory, among other factors, sets a "people" apart from an ethnic, religious or linguistic minority.¹⁰² A distinction based on territory, however, lacks validity within the African context.¹⁰³ First, Cristescu's distinction between peoples and minorities is based on the belief that the exercise of self-determination entails secession or separation.¹⁰⁴ We believe that self-determination within the context of the African nation-state should make available a wider range of possibilities, from protection of group rights to, eventually, secession. Second, paying such attention to the territorial integrity and stability of the state¹⁰⁵ perpetuates present political strife in Africa.¹⁰⁶ Stability during

¹⁰¹ A few examples are *Ashante* between Ghana and Côte d'Ivoire; *Afar* between Eritrea and Somalia; *Bija* and *Bani Aamir* between Sudan and Eritrea; and *Masaleet* between Sudan and Chad.

¹⁰² [T]he elements of a definition which have emerged from discussions on this subject in the United Nations cannot and should not be ignored. ...

(a) The term "people" denotes a social entity possessing a clear identity and its own characteristics;

(b) It implies a relationship with a territory, even if the people in question has been wrongfully expelled from it and artificially replaced by another population;

(c) *A people should not be confused with ethnic, religious or linguistic minorities, whose existence and rights are recognized in article 27 of the International Covenant on Civil and Political Rights* (A. Cristescu, *The Right to Self-Determination: Historical and Current Development on the Basis of United Nations Instruments* (New York: UN, 1981) at 41 (UN Doc. E/CN.4/Sub. 2/404/Rev. I) [emphasis added]).

¹⁰³ "[A]n ethnic, religious or linguistic minority are [*sic*] a 'people' entitled to its right to self-determination ..." (A.A. An-Na'im, "The National Question, Secession and Constitutionalism: The Mediation of Competing Claims to Self-Determination" in Shivji, ed., *supra* note 88, 101 at 108). He seems to echo R.N. Kiwanuka, who described Cristescu's exclusion as based on certain assumptions which are no longer tenable (see R.N. Kiwanuka "The Meaning of 'People' in the African Charter on Human and Peoples' Rights" (1988) 82 A.J.I.L. 80 at 88).

¹⁰⁴ See e.g. *Human Rights*, *supra* note 4, where Howard argues: "The right to self-determination clearly cannot be taken to apply to minority ethnic or national groups (peoples): their self-determination would violate the rule of territorial integrity" (*ibid.* at 6).

¹⁰⁵ A recurring provision, which has been echoed in several subsequent resolutions, was first stated in the fourth principle of the *Declaration on Friendly Relations*, *supra* note 90:

Nothing in the foregoing paragraphs [stating the right to self-determination] shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples ...

the colonial period was maintained through imposed language and/or religion, not necessarily through any shared national characteristics. Consequently, stability can only be maintained under the same conditions. Furthermore, the O.A.U. was established upon such cardinal principles as *uti possidetis juris*.¹⁰⁷

The requirements in the U.N.E.S.C.O. definition, especially of territorial connection and common economic life, point to peoples in association with their state. This is further consolidated by the U.N., the O.A.U. and state practice. There is, however, an alternative: "Peoples' could be used in contradistinction to their state."¹⁰⁸ This distinction, based on the spirit of the Algiers *Universal Declaration on the Rights of Peoples*,¹⁰⁹ is vital and indispensable.¹¹⁰

Article 20 of the *African Charter*, which deals with the right of peoples to self-determination, states:

1. All peoples shall have the right to *existence*. They shall have the *unquestionable and inalienable right to self-determination*. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.

¹⁰⁶ We are not arguing in favour of fragmenting and destabilizing Africa. The U.N. Secretary-General expressed the following concerns: "If every ethnic, religious or linguistic group claimed statehood, there would be no limits to fragmentation, and peace, security and economic well-being for all would become ever more difficult to achieve" (UN Doc. A/47/277 (1992) at para 17). The contemporary revival of ethnic politics in Africa is, as it has been in the past, a constant source of destabilization and is responsible for the loss of millions of human lives in post-colonial Africa. P. Ndegwa calls for fewer states in Africa for two reasons: (i) most of the continent's many countries are not, because of their small size, economically viable; and (ii) their large number makes reaching agreement on economic and political cooperation very difficult (see P. Ndegwa, "Africa and the World: Africa on its Own" in O. Obasanjo & F.G.N. Moshia, eds., *Africa: Rise to Challenge* (New York: Africa Leadership Forum, 1992) 13 at 14).

¹⁰⁷ The provision for this principle in the *O.A.U. Charter*, *supra* note 27 at art. 3(3), was not a novelty. It was adopted by the emergent Latin American states in the nineteenth century. Article 3(3) of the *O.A.U. Charter* requires the solemn affirmation and adherence of member states to such principles as "respect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence." This article was further consolidated by a resolution issued by the Assembly of Heads of State and Government in the year following the O.A.U.'s establishment which declared that "the borders of African States, on the day of their independence, constitute a tangible reality", and therefore, the Assembly solemnly declared that "all Member States pledge themselves to respect the borders existing on their achievement of national independence".

¹⁰⁸ Kiwanuka, *supra* note 103 at 83.

¹⁰⁹ 4 July 1976, reproduced in R. Falk, *Human Rights and State Sovereignty* (New York: Holmes & Meier, 1981) at 225. The Declaration identified some of the ways in which imperialism extends "its stranglehold over many peoples" in our present world, including "manipulation of corrupt local politicians, with the assistance of military regimes based on police repression, torture and physical extermination of opponents, through a set of practices that has become known as neo-colonialism ..." (*ibid.* at "Preamble").

¹¹⁰ Richard Falk advocates a "populist and socialist" perspective in breaking away from the present state of international law, which accords legitimacy to states by assuming that governments represent the interests of their peoples. He stipulates, as a first step, the entitlement of people "to insist upon their own legitimacy as a source of rights, even as against the state" (Falk, *ibid.* at 190).

2. Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community. ...¹¹¹

The wording of this article clearly allows for the right to both internal and external self-determination. The first paragraph guarantees this right to all people, not just colonized people (the subject of the second paragraph). Moreover, since the right is consequential to the right to existence, the right to self-determination arises whenever this existence is threatened or endangered. The term "peoples" is, therefore, to be given the widest possible interpretation within the African context.

2. A Tool for Dispute Resolution

Self-determination can help resolve two different types of disputes: those related to external domination of dependent African territories, and those related to internal conflicts. Resolving external domination is consistent with one of the main purposes of the O.A.U., which is to "eradicate all forms of colonialism from Africa"¹¹² through "absolute dedication to the total emancipation of the African territories which are still dependent".¹¹³ The case of the Western Sahara, the last colonized African territory, has been a source of conflict between Morocco and Algeria, on the one hand, and Morocco and the O.A.U., on the other. The legal principles governing the Western Sahara are clear: (1) it existed as an independent territory apart from both Morocco and Mauritania;¹¹⁴ (2) the Moroccan occupation of the territory is in violation of one of the O.A.U.'s cardinal principles, *uti possidetis juris*;¹¹⁵ and (3) the withdrawal of Morocco from the O.A.U., following the O.A.U.'s admission of the Sahrawi Arab Democratic Republic, should not have halted the O.A.U.'s support for the Sahrawi right to self-determination.¹¹⁶

The case of Eritrea is an example of the resolution of an internal conflict. Although the Eritreans fought for over thirty years against the occupying Ethiopian

¹¹¹ *African Charter*, *supra* note 36 at art. 20 [emphasis added].

¹¹² *O.A.U. Charter*, *supra* note 27 at art. 2(1)(d).

¹¹³ *Ibid.* at art. 3(6).

¹¹⁴ See *Western Sahara Case (Spain v. Morocco)*, [1975] I.C.J. Rep. 12 at 68.

¹¹⁵ Enshrined in the *O.A.U. Charter* and affirmed at the Cairo Summit of 1964 (see OAU, General Assembly, *Resolution on Border Disputes Among African States*, OAU OR AHG/Res.16(1) (1964), reproduced in I. Brownlie, *Basic Documents on African Affairs* (Oxford: Clarendon Press, 1971)). The 1975 Madrid *Declaration of Principles on Western Sahara by Spain, Morocco and Mauritania*, 14 November 1975, reproduced at 14 I.L.M. 1512, which handed over the territory over to Mauritania and Morocco, should have been declared void *ab initio* for it constituted a clear denial of the Sahrawi's right to self-determination.

¹¹⁶ President Siaka Stevens of Sierra Leone made the following remark: "Not everything that is legal is expedient, so we shelved it" (L. Dash, "New Skills to Heal Old OAU Bitterness", *The Guardian* (21 July 1980) 21). See also: J. Naldi, "The Organisation of African Unity and the Saharan Arab Democratic Republic" (1982) 26:2 J.A.L. 152; International Commission of Jurists, "Western Sahara" (1984) 32 Int'l Comm. Jur. Rev. 25.

army, the dispute was never brought before the O.A.U.¹¹⁷ Eritreans were able to win their independence in 1991, with no help from either the U.N. or the O.A.U., and despite a diplomatic blockade by Ethiopia. Eritrea highlighted the O.A.U.'s lack of commitment to the right to self-determination.¹¹⁸ The political situation in Africa, as exemplified by the Western Sahara and Eritrea situations, as well as countless others,¹¹⁹ demonstrates that the denial of the right to self-determination and the neglect of "peoples" leads to violence and civil strife.¹²⁰ The topic of self-determination as an important tool for dispute resolution dominated the twenty-ninth O.A.U. Summit.¹²¹ The *Cairo Declaration* mandated the O.A.U. to establish in Africa "a new institutional dynamism, enabling speedy action to prevent or manage and ultimately resolve conflicts when and where they occur". E. Dumbutshena, former Chief Justice of Zimbabwe, doubted that the O.A.U. would be able to sustain intervention, due to financial weakness.¹²² We add another reason: the O.A.U.'s lack of moral credibility. The African Commission is better qualified to play such an important role¹²³ as part of its mandate to promote human and peoples' rights.¹²⁴

¹¹⁷ This was said to be due to the influence of Emperor Haile Selassie who was one of the founders of the O.A.U. and host of its first meetings (see B.H. Selassie, *Eritrea and the United Nations and Other Essays* (Trenton, N.J.: Red Sea, 1989)).

¹¹⁸ Eritrean President Isaias Afewerki noted, at the 29th O.A.U. Summit and on the occasion of admitting Eritrea to the organisation, that the O.A.U. "has failed to deliver on its pronounced objectives and commitments", adding that the O.A.U. "championed the lofty ideas of unity, cooperation, economic development, human rights and other worthy objectives [but] has failed to seriously work for their concrete realisation" ("The Cairo Declaration" *New Africa* (12-18 July 93) 1197).

¹¹⁹ For example, the continuing civil war in the Sudan, and the present tension, arising out of a border dispute between Nigeria and Cameroon. The tension was heightened by Nigeria's deployment of troops and Cameroon's attempt to bring the dispute before the United Nations. The disputed area, which was part of Nigeria during the colonial era, is said to be rich in oil and other mineral resources. This brings the constellation of issues surrounding sovereignty over natural resources into the dispute. In fact, of the 35 internal wars in the world where battle-related deaths exceed 1,000 a year, 16 are in Africa" (see D. Davies, "Conflicts in Africa: a New Initiative" *New Africa* (24-30 January 1994) 114).

¹²⁰ This is more true in post-Cold War Africa. The effect of the Cold War in Africa was summed up by the United Nations Commission on Human Rights: "the proxy wars of the previous decades have proved to have lives of their own after their patrons withdrew, leaving devastating armories behind in the hands of rival factions" (cited in Davies, *ibid.* at 114). "[S]trife between nations is not of itself a consequence of the principle of self-determination but the reflection of a desire to resist it; in other words, if the states involved are prepared to accept a result based on self-determination, then there is no reason to presuppose violence will ensue ..." (D.W. Bowett, "Self-Determination and Political Rights in the Developing Countries" (1966) *Proc. Am. Soc.'y I. L.* 129 at 130).

¹²¹ OAU, General Assembly, 29th Sess., *Declaration of the Assembly of Heads of State and Government on the Establishment within the OAU of a Mechanism for Conflict Prevention, Management and Resolution* (1993), reproduced in (1994) 6 R.A.D.I.C. 158 [hereinafter *Cairo Declaration*].

¹²² See Davies, *supra* note 119.

¹²³ The Commission's qualification stems from the fact that the question of politics with its central issue of democracy has once again dominated the debate in Africa. The adoption of the *African Charter* has placed the Commission in a central position in this debate (see P.A. Nyong'o, ed., *Popular Struggles for Democracy in Africa* (London: Zed Books, 1987)). Unlike the O.A.U. members, the Commission is less likely, in theory, to be influenced by narrow political interests.

¹²⁴ See *African Charter*, *supra* note 36 at art. 30.

The Commission should adopt a position regarding constitution-making in Africa that accounts for the needs and reality of the African (cultural) context.¹²⁵ This entails expanding the scope of the right to self-determination to include the following:

- (a) equality of all peoples and nations;
- (b) right of colonized people to independence and formation of their own sovereign states;
- (c) right of oppressed nations to self-determination up to, and including, the right to secession;
- (d) right of all peoples, nations, nationalities, national groups and minorities to freely pursue and develop their culture, traditions, religion and language;
- (e) freedom of all peoples from alien subjugation, domination and exploitation;
- (f) right of all peoples to determine democratically their own socio-economic and political system of governance and government.¹²⁶

Questions of internal self-determination should not, therefore, be treated as internal state matters, within a state's boundaries and exclusive jurisdiction. Indeed, since the ratification of the *African Charter*, which implies a waiver of sovereign immunity, constitution-making is no longer an exclusively internal jurisdiction.

D. *The Link between Rights and Duties*

The element of duty underlies the concept of rights in the African community. The community helps the individual to exercise his or her rights, and the individual, in turn, ensures a contribution to general community development. Individuals exercise rights to enable them to perform duties owed to four entities in the community: the community's supreme moral being/authority, the individual, the family and the community.¹²⁷

The rights exercised by the individual correspond to duties that the whole community, apart from that particular individual, performs for that individual. The community, in turn, exercises its rights when individual members, jointly and sev-

¹²⁵ Every constitution represents a solution for the particular difficulties its authors perceive (see R. Siedman, "Perspectives on Constitution-making: Independence Constitution for Namibia and South Africa" (1987) Lesotho L.J. 25 at 50).

¹²⁶ Shivji, *supra* note 16 at 80. These were described by Shivji as the principal elements of self-determination, which are complemented by secondary ones that include: the right to seek assistance in the struggle for self-determination, and the principle of state sovereignty and non-interference.

¹²⁷ These entities are mentioned in the *African Charter*, as well as in all major human-rights instruments. For example, the duty owed to a Supreme Being is indirectly provided for in article 8 of the Charter, which guarantees freedom of conscience and religion. The duty the individual owes to herself is inherent in the rights she exercises. As already noted, that exercise leads to the acquisition of property, which the individual uses for herself, thereby attaining self-development. These rights are found in the *African Charter*, *supra* note 36 at arts. 2-17. For duties owed to other individuals, see *ibid.* at art. 28; for duties to the family and the community, see *ibid.* at arts. 27, 28.

erally, perform their duties to it. These duties are determined on the basis of the needs of the particular community. The ability of the community to meet its needs, thus, leads to its general development. In this analysis, it is worth noting the inter-relatedness and inter-dependence of rights, duties and development and the communal context in which rights are exercised in the African community. Unfortunately, African socialism and the *African Charter* have restructured and confused the order of priority, shifting the focus from the individual to the community and from rights to duties.

E. Is the Notion of Economic, Social and Cultural Rights African?

On the face of it, African governments advocate the inter-relatedness and universality of civil and political rights in addition to economic, social and cultural rights.¹²⁸ In practice, however, more importance is attached to these latter rights. The exercise and enjoyment of these rights are made a condition precedent to the exercise of civil and political rights.¹²⁹ Moreover, they are presented as peoples' or communal rights.¹³⁰ It is our contention that such a conception of economic, social and cultural rights is not truly African.

A truly African conception of rights would not identify civil and political rights as distinct from economic, social or cultural rights. In other words, the distinction between first and second generation rights might not be applicable to Africa. Several specific rights support this contention, such as the rights to land, to education and to marriage, which are exercised through a primary emphasis on the individual. One does not, however, find this element of individualism in the economic, social and cultural rights embodied in the *African Charter*.

The concept of economic and social rights under the *African Charter* is an adoption of a blend of the Socialist doctrine of rights and the L.I.S. doctrine of rights;¹³¹ for it is the socialist concept of rights that makes the exercise of economic,

¹²⁸ The *African Charter*, *ibid.*, "Preamble" at para. 8, reads: "Convinced that ... civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality..."

¹²⁹ See, for example, the concluding part of the eighth preambular paragraph to the Charter, *ibid.*: "... and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights."

¹³⁰ See *African Charter*, *ibid.* at arts. 20-22. These articles mirror the *Covenant on Economic, Social and Cultural Rights*, except that they are not couched as individual rights. See, however, T. van Boven, "The Relations between Peoples' Rights and Human Rights in the African Charter" (1986) 7 H.R.L.J. 183.

¹³¹ See Cassese, *supra* note 20 at para. 214. See also Ebu Lihau who asserts that the *African Charter* blends "together Western liberal and socialist conceptions of human rights" (E. Lihau, "Comments on the Banjul Charter" (1986) 11:4 Hum. Rts. Internet R. 13 at 15). Lihau's view is that the Charter blends the Western notion of civil and political rights and the socialist concept of economic, social and cultural rights. This paper agrees with him on the second issue only and argues further that the concept of civil and political rights is un-African, not Western but socialist. However, a full excursion into that assertion is beyond the scope of this paper.

social and cultural rights contingent on the performance of duties and emphasizes people:

Such a conceptualization of the nature of society precludes the existence of individual rights rooted in the state of nature which are prior to the state. Only legal rights exist, rights which are granted by the state and whose exercise is contingent on the fulfilment of obligations to society and to the Soviet state. Furthermore since capitalism is exploitive, and individual rights, inclusive of the right to private property, are bourgeois rights, socialist rights, which satisfy the basic needs of survival and security, constitute the substance of human rights.¹³²

The socialist notion of rights is founded on the social standing or abilities of the individual, not solely on the individual's existence. Protection of rights, therefore, hinges on the performance of duties, which shifts the focus from the individual to the people as the subject of rights. Only after performance of duties will the state provide the wherewithal required for the enjoyment of rights.¹³³

This philosophy, however, misconceives the notion of rights. Rights are inherent to the person, a part of one's nature and being: without them one ceases to be fully human.¹³⁴ They are also instrumental, in the sense that the individual uses them to tap the potentials and talents with which he is endowed. In tapping this potential, the individual is enabled to perform his duties to attain full self-development and, thereby, contribute to community development. However, where a person is made to perform duties before, or as a condition of, the exercise of rights, then that person is being denied the conducive atmosphere that would facilitate the very performance.

The argument that duties precede rights corresponds to emphasizing economic, social and cultural rights at the expense of — or as a condition to — the exercise of civil and political rights. The argument that development will facilitate the exercise of civil and political rights is also a reflection of African Socialism.

V. The Individual in the Context of the Afrocentricity Debate

We have argued both that traditional African communities were an amalgam of communality and individuality and for the need to respect individual rights in a community context. Further recognition of individual rights is mandated by changes in contemporary African societies, in which the advent of Islam and

¹³² Professor A. Pollis, quoted in J.J. Shestack, "The Jurisprudence of Human Rights" in T. Meron, ed., *Human Rights in International Law: Legal and Policy Issues* (Oxford: Clarendon Press, 1984) 69 at 82.

¹³³ The use of "enjoyment" and not "exercise" of rights is important, for we see in it a key idea of the socialist concept of rights: that rights are not to aid the performance of duties but rather a luxury to be lavished on the people as a reward for performing their duties with efficiency.

¹³⁴ See "The Full-Belly Thesis", *supra* note 50, where Howard argues: "That civil and political rights are needed in and of themselves" (*ibid.* at 469).

Christianity has had an important influence.¹³⁵ This introduces into the debate the "Afrocentricity" argument, as put forward by M.K. Asante, a self-declared "American Afrocentric".¹³⁶ The Afrocentric vision of Africa is devoid of Islam (equated with Arabs) and Christianity (equated with whites), a position developed in critical response to Mazrui's vision of an altered Africa. Asante writes:

Mazrui is incorrect ... in granting to Christianity and Islam the same place as the traditional and centering African culture found throughout the continent, perhaps less so in some places because of the density and intensity of the oppression and suppression of the indigenous people. ... [H]e does not transcend his particular vision of Africa because of an ideological entrapment: combining both European and Arab hegemonic positions over the intellectual and cultural resources of Africa.¹³⁷

If we were to accept Asante's statement, we would find ourselves hunting in the forest instead of the river,¹³⁸ because despite the fact that not all Africans are either Christian or Muslim, Islam and Christianity are felt everywhere on the continent. This does not mean that they take primacy over traditions or other aspects of African life, but they are certainly part of the changes in African culture. Contemporary African thought has long recognized these changes and identified them as challenges to be met.¹³⁹

Two of these challenges are particularly relevant.¹⁴⁰ One is the desire to understand Africans better in order to make it easier to accommodate changes induced by Islam, Christianity and colonialism. A romantic vision of Africa is unhelpful, as is the work of non-African scholars (and like-minded African scholars) who tend to emphasize the "irrational" and "illogical" nature of African thought. The other challenge is prompted by the rise of African nationalism and socialism. The struggle for political independence signified the importance of mental liberation, a sense of total detachment from Western (colonial) ways of doing things. The challenge, however, is to balance this liberation with the needs created as a result of the African acquisition of Western ways: languages, legal systems, political organizations.

In Africa, like anywhere else in the world, "traditional" life is no longer an adequate comprehensive model. For example, social arrangements were based on

¹³⁵ Mazrui's vision is known as "the triple heritage" thesis. See generally A.A. Mazrui, *The African Condition: A Political Diagnosis* (London: Cambridge University Press, 1980).

¹³⁶ See M.K. Asante, *Kemet, Afrocentricity and Knowledge* (Trenton, N.J.: Africa World Press, 1990).

¹³⁷ *Ibid.* at 115.

¹³⁸ Contrary to the African proverb: "However poor the crocodile becomes, it hunts in the river, not in the forest" (K.A. Opoku, *Speak to the Winds: Proverbs from Africa* (New York: Lothrop, Lee & Shepard, 1975) at 51).

¹³⁹ See: Gyekye, *supra* note 60; T. Serequeberhan, ed., *African Philosophy: The Essential Readings* (New York: Paragon House, 1991).

¹⁴⁰ See P.O. Bodunrin, "The Question of African Philosophy" in Serequeberhan, ed., *ibid.*, 63 at 66-67.

the principle of unquestionable obedience to elders.¹⁴¹ The slow pace of change in traditional African societies made it possible for knowledge of the history and culture of the community to be accumulated by an individual person within his or her lifetime.¹⁴² "Knowledge became wisdom, and wisdom, power".¹⁴³ In other words, gerontocracy did not necessarily develop to promote authoritarianism; it was a natural development, and, even, a necessity. In light of modern technology and communications, however, the idea of the head of state as the elder and the repository of all wisdom and power cannot be maintained. In contemporary African politics, it becomes authoritarianism.

Instead of promoting a romantic vision of Africa, it is more useful to develop a pragmatic nexus at two levels: external and internal. Externally, the only role for Afrocentricity is supporting continental African élites in resolving the continent's problems and dilemmas. The challenge is to overcome the anti-freedom aspects of traditionalism while, at the same time, respecting its cultural forms. This cannot be helped by advancing an emotive vision of Africa, as Asante is trying to do, which is naive and demoralizing.¹⁴⁴

Internally, Africans should recognize the inherent difficulties with the traditionalist argument and seek support for human rights in Africa's altered cultural

¹⁴¹ A Malawian official was quoted to say that elders, according to African traditions, ought to be respected as long as they live (see B.B.C. World Service, *World Today* Programme, 31 March 1994, 1:15 A.M.). This statement was made in defence of the Malawian dictator Hastings Banda and his decision to censor election campaigns.

¹⁴² See Potholm, *supra* note 40 at 31.

¹⁴³ *Ibid.*

¹⁴⁴ This demoralizing impact is usually felt by those who live in Africa, but is often overseen by others, "Afrocentrists" included. Two examples are illustrative. The first is to be found in the movement known as Rastafarianism, which started in the late 1930s following the crowning of Haile Selassie as Emperor of Ethiopia. The movement, which gained momentum and popularity in the 1950s as part of the return-to-Africa sentiment, is still popular among English-speaking Caribbeans and black communities in Britain and the United States (for a very useful account of the movement, see H. Campbell, *Rasta and Resistance: From Marcus Garvey to Walter Rodney* (Trenton, N.J.: Africa World Press, 1987)). While the movement has positive aspects, the elevation of Haile Selassie (Ras Tafari) to holy status demoralizes the millions of Eritreans and other non-Amharic Ethiopians who lived under his brutal regime.

The second example involves a different form of romanticism, the "fact of black rule." This became predominant among African-American intellectuals following their contacts with African writers in the late 1950s. African states in the 1970s and 1980s "benefitted from Black-American intellectuals' dilemma of lauding *the fact of black rule* while slighting *the quality of black rule*" (M. Kilson, "African Americans and Africa: A Critical Nexus" (1992) 38 *Dissent* 368). While this movement was instrumental in contributing to the anti-apartheid campaign, it had some negative aspects. For example, African-American intellectuals were mute in the face of Idi Amin's regime in Uganda, which lasted between 1972-1979, and which committed over two hundred thousand political murders. Similar attitudes were prevalent among O.A.U. members, who eventually elected Amin as Chairman of the O.A.U.). Some African-American senators opposed the discussion of Amin's regime because of the "concern that a congressional investigation of Uganda might divert public attention from human-rights condition in South Africa" (this view was expressed by Charles Diggs, a black Congressman in 1977, quoted in Kilson, *ibid.* at 368).

context. Culture is not static; therefore, any reference to it entails culture as it has been changed or influenced: "Rain beats a leopard's skin, but it does not wash out the spots."¹⁴⁵ Cultural changes have rendered certain traditional practices unacceptable, even repulsive. Female genital mutilation is one example of a practice that is actively being combatted in Africa and which has received some attention. Recent reports from South Africa provide disturbing examples of male genital mutilation, part of traditional Xhosa initiation ceremonies.¹⁴⁶ Another shocking example comes from Ghana, involving young girls taken to shrines to serve a criminal sentence of slavery to the fetish priest for crimes committed by their families.¹⁴⁷

VI. Human Rights, the Nation-State and Militarism in Africa

Having argued for the issue of self-determination, it becomes pertinent to consider the nature of the nation-state in Africa and its effect on human rights: "A cow gave birth to fire: she wanted to lick it, but it burned; she wanted to leave, but she could not because it was her own child."¹⁴⁸ The fire here, largely, resembles the nature of the post-colonial state in Africa. Most of the crises facing Africa today can be attributed to the nation-state, yet it does not seem possible, or logical, to abandon this form of polity and find a new one:

¹⁴⁵ Ashanti proverb quoted in C. Leslau *et al.*, *African Proverbs* (New York: Peter Pauper Press, 1962) at 7. African culture (the leopard skin) has undergone changes (the rain). Nevertheless, the rain does have an impact on the leopard's skin in the same way as it does on other kinds of leather. In relation to human rights in Africa, the subsequent cultural changes are regarded as an integral part of the leopard's skin.

¹⁴⁶ "Since 1990, more than 20 initiates have died and 200 were attended in hospitals" ("Another Way to Die in South Africa" *New African* (June 1994) 23). During 1993 alone, ten initiates died and more than a hundred were admitted to hospital. "Some young men had been so badly mauled that their penises had been removed altogether, by the drink-sodden witchdoctors" (*ibid.*).

¹⁴⁷ The cases cited by the Ghana Committee on Human and Peoples' Rights include stories of girls, nine and ten years old, being forced to have sex with the priests in their early teens. It is estimated that more than one thousand girls are still suffering from this tradition in the lower Volta Region of Ghana (see "Slavery in Ghana" (1993) 1:4 Ghana Hum. Rts. Q. 1 at 1, 3). This practice reminds us of the levirate custom, which was practised in some parts of Africa. Under this custom, a widow is inherited by the brother of the deceased, or the closest male relative in the absence of a brother (see: J.S. Mbiti, *African Religions and Philosophy* (New York: Praeger, 1969) at 144-45; A.A. Mazrui, *A World Federation of Cultures: An African Perspective* (New York: Free Press, 1976) c. 6, where he compares the practices of Suttee and Levirate). A Ghanaian human-rights activist is quoted to have said:

"When we started setting up this project for the fetish girls, we had not yet realised what we were going into. This slavery practice is deep rooted and the fetish priests and the soothsayers possess enormous powers in society, even a lot of well educated people would still seek advice from the fetish priest, thus it is very difficult to mobilise the people to rise against this inhuman practise [*sic*]" (Rev. Walter Frimpong, Executive Director of International Needs Ghana, quoted in "Slavery in Ghana", *ibid.* at 3).

This practice also in fact contravenes the Ghanaian Constitution, *supra* note 82, which prohibits "all customary practices which dehumanise or are injurious to the physical and mental well being of a person" (*ibid.* at art. 26(2)).

¹⁴⁸ Ethiopian proverb quoted in *African Proverbs*, *supra* note 145 at 26.

It would be great indeed if we could evolve a new political system, a new sociopolitical order which is different from those found elsewhere and based on an autochthonous African philosophy. That indeed is a worthwhile aspiration which one must not give up without trial. But I am disturbed at certain presuppositions of attempts so far made. To begin with, I think that the past the political philosophers seek to recapture cannot be recaptured.¹⁴⁹

The absence of debate on the nature of the post-colonial state has led to a lack of clarity among Africans, which has been compounded by excessive militarism. It is not our intention here to undertake an analysis of the viability of the nation-state in Africa; rather, we suggest that certain precautions against excessive abuses by the state are warranted.

Pre-colonial Africa witnessed the rise and fall of many empires, kingdoms and sultanates.¹⁵⁰ These dynasties were not nation-states; they were not confined within fixed boundaries or frontiers.¹⁵¹ The location of changing frontiers depended mainly on two factors: military strength and cultural interaction. When the colonial nation-states were formed, there were no "nations" within the frontiers but, rather, diverse groups kept together through coercion and manipulation.¹⁵² This ethnic diversity was underestimated by independence leaders, who took the nation-state as a given;¹⁵³ all that was needed, in their view, was to devise the institutions necessary for a democratic government.¹⁵⁴ Naturally, voters voted *along* ethnic lines, not *across* them, as these leaders would have wished. Africa then tried a range of ideologies and political orientations, resulting in widespread disillusionment and loss of confidence in the existing political structures in Africa; the road was paved for the military to assume its dominant role in African politics.

The African state is therefore weak, ineffective and often lacks legitimacy.¹⁵⁵ There is a disconnectedness between state and society, a worsening of political and legal dualism¹⁵⁶ and internal relations between constituent elements of the state ap-

¹⁴⁹ Bodunrin, *supra* note 140 at 69.

¹⁵⁰ See generally: R. Smith, *Kingdoms of the Yoruba* (London: Methuen, 1969); M. Abitbol, *Tombouctou et les Arma* (Paris: Maisonneuve et Larose, 1979); D.T. Niane, *Sundiata: An Epic of Old Mali* (London: Longmans, 1965); W. Rodney, *A History of the Upper Guinea Coast: 1545-1800* (Oxford: Clarendon Press, 1970); D.A. Low, *Buganda in Modern History* (Berkeley: University of California Press, 1971).

¹⁵¹ See generally I. Kopytoff, ed., *The African Frontier: The Reproduction of Traditional African Societies* (Bloomington: Indiana University Press, 1987).

¹⁵² See G. Munda Carew "Development Theory and The Promise of Democracy: The Future of Postcolonial African States" (1993) 4 *Africa Today* 31 at 33.

¹⁵³ See A.A. Mazrui & M. Tidy, *Nationalism and New States in Africa* (Nairobi: Heinemann, 1984).

¹⁵⁴ See Carew, *supra* note 152 at 32.

¹⁵⁵ See *ibid.* at 31. This seems to be a widely accepted view (see: E. Hutchful, "Reconstructing Political Space: Militarism and Constitutionalism in Africa" in Shivji, ed., *supra* note 88, 183; P. Chabal, *Power in Africa: An Essay in Political Interpretation* (New York: St. Martin's Press, 1992)).

¹⁵⁶ See Hutchful, *ibid.* at 188.

paratus remain ambiguous. As a result, militarism has been the means for attaining certain political and economic interests.¹⁵⁷ At the same time, it is an instrument of dominance and oppression, as in the case of Rwanda and Burundi. Militarism should, therefore, be viewed as a negative factor and be carefully dealt with to attain a successful human-rights conceptualization.

There are different forms of militarism that affect human rights in Africa.¹⁵⁸ State terrorism, directed indiscriminately against political dissent or opposition to the ruling élite, has resulted in, what one might call, a continuing African holocaust. For example, "more than 800,000 people perished at the hands of Idi Amin, Milton Obote, and Tito Okello — all former Ugandan heads of state."¹⁵⁹ Militarism based on ethnic conflicts has also played an unfortunate role in African development. These conflicts stem from colonial economic policies that favoured some parts of the colonies over others. Post-colonial governments, therefore, inherited unevenly developed areas and communities, a situation they have very often either ignored or used for their own political survival. These economic injustices added fuel to historical animosities based on ethnic, social, national, racial and religious divisions and are, in the end, responsible for most of the civil wars raging on the continent (notably in Sudan, Somalia, Ethiopia, Kenya, Uganda, Rwanda and Burundi). Militarism stemming from pastoralist and religious conflicts, from the Cold War and from animosity between fellow nationalist fighters from different ethnic groups, has also been prominent in Africa.

Conclusion

This article has sought to argue that, contrary to the view of most Western liberal-rights theorists, human rights did exist in the traditional African context. Moreover, the African notion of rights does not over-emphasize the community, as most African leaders and writers would have us believe but, rather, strikes a balance between individual and communal rights.

The major factors that have shaped the "modern" African concept of human rights have been economics and politics and not culture, as such. The economic argument is premised on the incorporation of African economies into a global economic system that favours the industrialized world and which has weakened their ability to meet the socio-economic needs of their citizens. Therefore, the insistence of the West on democracy and human rights demonstrates its insensitivity to the plight of African states. Unless a new international economic order is established,

¹⁵⁷ Indeed, it is argued by some African leaders that militarism is part of the African tradition. This, however, is another misrepresentation of the relationship that existed between the heads of traditional African governments, who remained civilians, and their military staffs, whose sole purpose was defence. In fact, many political systems had no standing army (see Ayittey, *supra* note 6 at 69-70).

¹⁵⁸ See *ibid.* at c. 7.

¹⁵⁹ *Ibid.* at 120.

which gives less industrialized states more favourable trading terms, there can be no guarantee of the promotion and protection of civil and political rights. It is, therefore, argued that civil and political rights and democracy are a sophistication, a Western imposition and a bane to development; economic development must precede their realization. The underlying notion of this economic argument is, therefore, that development automatically promotes or will lead to the realization of democracy and respect for human rights. Inextricably linked to the economic argument is the political argument for a strong, unified state. The two arguments merged to create the concept of African Socialism, which post-independence African leaders held out as the gateway to economic freedom and prosperity for their countries.

Our work seeks a re-thinking of the human-rights debate in Africa: while a communitarian concept of human rights has existed in African communities,¹⁶⁰ the exercise of rights is primarily based on the individual. Economic, social and cultural rights are best promoted and protected by focusing first on the individual. An organic connection exists between communal and individual rights¹⁶¹ as well as between modern rights and rights in the African traditional society. Based on these positions, we have criticized the *African Charter* for its incorrect portrayal of human rights in Africa.

Closely related to the position of the individual in the traditional African community is the Afrocentricity debate. The potency and relevance of challenging the Afrocentric argument lies in portraying African societies as dynamic: the advent of Islam and Christianity has altered African cultures to include the traditions embodied in the tenets of these world religions. As a result, the obsession with communal or peoples' rights is misplaced.

Peoples' rights as embodied in the right to self-determination, however, have an important and positive role to play in contemporary Africa. The denial of the right to self-determination combined with a narrow definition of "peoples" for the purposes of that right share some of the blame for the civil wars and violence — and consequent violations of other rights — that have plagued Africa.

We conclude that the best way for African governments to promote and protect economic, social and cultural rights is to properly incorporate the traditional African-rights model, which primarily emphasizes individual rights, into the *African Charter* and their local constitutions. Adopting such a stance would mean that African governments would have to pay greater attention to civil and political rights. This would, in turn, imply the adoption of a progressive interpretation of the right

¹⁶⁰ In fact, in all human communities, including pre-capitalist Western Europe (see P.J. Hountondji, "The Master's Voice — Remarks on the Problem of Human Rights in Africa" in *Philosophical Foundations of Human Rights* (Paris: U.N.E.S.C.O., 1986) 319).

¹⁶¹ See C. Scott, "The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights" (1989) 27 *Osgoode Hall L.J.* 769.

to self-determination, since it is a right that encompasses civil and political, as well as economic, social and cultural rights.
