

# WHAT EVER HAPPENED TO THE AFRICA IN AFRICAN HUMAN RIGHTS?

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## ABSTRACT

*In the late 1970s, the Organization of African Unity (“OAU”) committed to drafting and adopting a human rights instrument that would uphold African values and traditions—those aspects of African culture that were unique and praiseworthy and, in the opinion of many African leaders, superior to those of Europe. The resulting document, the African Charter on Human and Peoples’ Rights (“the African Charter” or “the Charter”), included numerous provisions intended to do just that. However, in the decades following the African Charter’s adoption, African lawyers, judges, and tribunals produced little jurisprudence applying and further defining those uniquely African values and traditions. This article offers a historical and legal analysis of what the African Charter’s drafters intended and where things went wrong. It argues that certain uniquely African human rights problems – including the alarming loss of African ancestral land resulting from Western-inspired land titling schemes—should be addressed by applying the sort of African human rights the Charter’s drafters thought they had created.*

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## INTRODUCTION

In the late 1970s, the Organization of African Unity (“OAU”) committed to drafting and adopting a human rights instrument that would uphold African values and traditions—those aspects of African culture<sup>1</sup> that were unique and praiseworthy and, in the opinion of at least some Africans, superior to those of Europe.<sup>2</sup> The resulting document, The African Charter on Human and Peoples’ Rights (“the African Charter” or “the Charter”) included numerous provisions intended to do just that.<sup>3</sup> However, in the four decades following the African Charter’s adoption, African lawyers, judges, and tribunals have produced little jurisprudence applying and further defining those uniquely African values and traditions.<sup>4</sup> This article will offer a historical and legal analysis of what the African Charter’s drafters intended, what happened, and what should happen starting now. It argues that a uniquely African contemporary human rights crisis—ancestral land loss—should be addressed by applying the sort of African human rights that the Charter’s drafters thought they had created.<sup>5</sup>

*A. African Culture: Community and Family Interdependence, Respect for Age, Reverence for Ancestors*

In the mid-1980s, I spent two years as a Peace Corps volunteer in a remote village in the West African Republic of Niger. I visited Niger regularly in the decades after my Peace Corps service, and as of this writing

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<sup>1</sup> I am fully aware of the perils of making reductive statements about “African culture” when the continent includes a multiplicity of ethnicities, languages, and beliefs. However, this article asserts, and most commentators agree, that there are certain cultural practices and beliefs that are common to most Africans. See KEBBA MBAYE, *LES DROITS DE L’HOMME EN AFRIQUE* 33 (2d ed. 2002) (arguing most commentators agree that traditional African societies “bear a family resemblance that permits one to talk about African human rights”); see also Dan Kuwali, *Decoding Afrocentrism: Decolonizing Legal Theory*, in *DECODING AFROCENTRISM: DECOLONIZING LEGAL THEORY* 71, 80 (Oche Onazi ed., 2014) (arguing “in the midst of the diversity of African cultures, there is striking cultural uniformity which allows us to talk of ‘African culture’”) (internal quotations omitted).

<sup>2</sup> IRVING LEONARD MARKOVITZ, *LEOPOLD SEDAR SENGHOR AND THE POLITICS OF NEGRITUDE* 40, 42 (1969); see *infra* INTRODUCTION, Part A.

<sup>3</sup> See *infra* Part II.B.2.

<sup>4</sup> See *infra* Part II.C.3 (arguing that the African Commission and related institutions have done little to flesh out the African values and traditions referred to in the African Charter).

<sup>5</sup> See *infra* Part III.

have spent about four years of my adult life living there. During that time, I observed many cultural practices that are starkly different from those of my home country, the United States, and, I would argue, in certain respects superior.

Some of those laudable cultural traits involve individuals' relationships to their communities. For instance, a few months after arriving in the village, at a time when I was still learning the local language, Zarma, I encountered the word *bogu* and the cultural practice it describes.<sup>6</sup> I had noticed one morning a large group of women gathering in the village center cooking what appeared to be a huge feast. When I inquired, I learned that a man in the village was seriously ill and unable to cultivate his family's millet fields. In a community where everyone's sustenance depends at least partly on subsistence agriculture,<sup>7</sup> a failed harvest can be catastrophic. Therefore, the community came together for a *bogu*, which meant that everyone in the village spent the day helping the vulnerable family. Following their prescribed gender roles,<sup>8</sup> the women prepared a huge meal and the men spent the day tending the sick man's fields. In American English there is no equivalent word or concept that I am aware of. We help one another out at times, but our language and, I would assert, our culture does not include the idea of an obligatory communal action. The closest we come is "barn raising," which of course applies only in a limited context.<sup>9</sup> Over the following years I would often see and sometimes participate in *bogus*.

Other African values and traditions surround the concept of family. Not long after the *bogu* mentioned above, I stumbled over a child who was lying

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<sup>6</sup> Zarma is an unwritten language, so it must be rendered phonetically. This can lead to confusion and inconsistency because various Global North groups have developed phonemic systems based on their own languages. In academic literature, even the word Zarma is spelled a multiplicity of ways: Zarma, Djerma, Zerma, etc. The word *bogu* is sometimes written *boogu*, to emphasize that the "o" is slightly elongated. If one pronounces the same word with a short, crisp "o," it means blue (or green, since Zarmas do not distinguish between those colors). Even after speaking the language for decades, I cannot easily hear the difference.

<sup>7</sup> Thomas A. Kelley, *The Death of Custom: Winners and Losers in the Legal Transformation of Peri-Urban Land in Niger*, 47 SYRACUSE J. INT'L L. & COM. 57, 61-62 (2020).

<sup>8</sup> See *infra* Part III.A.1 (arguing Zarma society is patriarchal).

<sup>9</sup> Barn raising addressed the need by enlisting members of the community, unpaid, to assist in the building of their neighbors' barns. Because each member could ask others for help, reciprocation could reasonably be presumed for each participant if the need were to arise. *Barn Raising*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Barn\\_raising](https://en.wikipedia.org/wiki/Barn_raising) (Oct. 28, 2022).

unconscious in the dirt outside the grass hut where I lived. It was the rainy season, when malaria is rife, and the boy had a high fever. I went to look for help, and the first person I encountered was my next-door neighbor, a middle-aged man named Garba. I explained the situation and asked where the boy's parents were. I wanted to seek their permission to take him to the nearest rural medical dispensary in a town 20 kilometers away. Garba responded that he was the boy's father and that I was welcome to take him. With Garba's help, I lashed the child to my back and carried him on my motorcycle to the distant town. Sometime later, after the boy had recovered and we were back in the village, I learned that Garba in fact was his uncle, not his father. The boy's parents were dead, and he lived amidst his extended family in the village chief's compound. I was not angry with Garba, but I wanted to explain to him that in my culture it is important to have a parent's permission before taking a child away for a medical procedure. Garba, who was sitting in under the village tree surrounded by older men when I approached him, responded that he was indeed the boy's father, and that he did have the authority to grant such permission. Gesturing to the others sitting under the tree, he said "all of us are his fathers." They all murmured *chimay no*, "it's the truth," and seemed surprised and disappointed I did not know it.

Still other African traditions involve respect and even reverence for age and ancestry.<sup>10</sup> One day I was seated on a grass mat in the village center amidst a throng of wedding guests. Villagers of all ages were chatting energetically when suddenly silence fell. The oldest living man in the village was arriving by foot, and the villagers stopped talking as a show of respect. The person sitting next to me explained that the man was well past 100 years-old and was particularly respected because as a young man he had spent eleven years walking to Mecca and back to perform Islam's holy pilgrimage. I later learned that villagers accorded this respect and reverence

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<sup>10</sup> See Thomas Kelley, *Squeezing Parakeets into Pigeon Holes: The Effects of Globalization and State Legal Reform in Niger on Indigenous Zarma Law*, 34 N.Y.U. J. INT'L L. & POL. 635, 667 (2002) (arguing respect for age among the Zarma people of Niger is an important tenet of village life); Simphiwe Sesanti, *Ancestor-Reverence as a Basis for Pan-Africanism and the African Renaissance's Quest to Re-Humanise the World: An African Philosophical Engagement*, 5 INT'L J. SOC. SCI. STUD. 63, 66 (2017) (arguing ancestor reverence exists everywhere on the African continent).

not only to the aged who are still living but to those who have passed into the spirit realm.

These African traits that I found so admirable—communal interdependence, a broad and encompassing concept of family, and a reverence for age and ancestry—are aspects of what some commentators refer to as “African humanism.”<sup>11</sup> As later sections of this article will discuss, the drafters of the African Charter were determined to include—and did include—African humanism in the document’s text. However, the most important of those provisions have lain dormant. This article poses the question why and explains what should happen next.

### *B. The Roadmap*

In pursuit of answers to those questions, Part I of the article will establish necessary context by exploring the African humanist philosophy that African leaders had in mind when they set about drafting the African Charter. It will summarize several interrelated African intellectual movements that provided inspiration and guidance for the Charter’s drafters. Part II will provide a historical analysis of the African Charter’s adoption as well as a close reading of the uniquely African provisions that were included in its text. It will also briefly discuss the fact that African tribunals, particularly the African Commission on Human and Peoples’ Rights, have largely failed to include African values and traditions in their

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<sup>11</sup> Benjamin Elias Winks, *A Covenant of Compassion: African Humanism and the Rights of Solidarity in the African Charter on Human and Peoples’ Rights*, 11 AFR. HUM. RTS. L.J. 447, 456 (2011) (arguing pre-colonial African societies were governed by a “philosophy of compassion, community and solidarity” that can be referred to as African humanism); Leopold Sedar Senghor, President of the Republic of Senegal, Speech (1974) (referring to a complex of African beliefs as humanism); J.L. HYMANS, LEOPOLD SEDAR SENGHOR: AN INTELLECTUAL BIOGRAPHY 23 (1971) (using the term humanism to describe Senghor’s Negritude philosophy); Sesanti, *supra* note 10 (describing various related African cultural beliefs, including *ubuntu*, as a form of African humanism); Anneth Amin, *The Potential of African Philosophy in Interpreting Socio-Economic Rights in the African Charter on Human and Peoples’ Rights*, 5 AFR. HUM. RTS. Y.B. 23, 29 (2021) (arguing Africans’ communal orientation goes by various names including African humanism).

human rights jurisprudence, looking instead to the Global North for inspiration and precedent. Part III will offer a specific example, drawn from my own field study in the West African Republic of Niger, where a truly African conception of human rights could act as an effective tool to combat ancestral land loss caused by Western-inspired land reform. The article will conclude by speculating on the reasons why African lawyer and judges have ignored African values and traditions and will call for a change.

## I. AFRICAN PHILOSOPHY UNDERLYING THE AFRICAN CHARTER

When we in the United States debate the meaning of our Constitution, one side or the other inevitably invokes the liberal European philosophical traditions that were in the air as our founders sat down at the drafting table.<sup>12</sup> The great European liberal political philosophers of the 18<sup>th</sup> century—Hobbes, Locke, and Rousseau—claimed that natural law vested boundless rights in individual human beings.<sup>13</sup> However, if all humans exercised their individual rights to the maximum extent, it would, to borrow Hobbes’ oft-repeated locutions, lead to a “War, where every man is Enemy of every man” and lives that were “nasty, brutish and short.”<sup>14</sup> Therefore, humans made the rational decision to sacrifice some of their inherent individual rights in exchange for a reasonable degree of order and security.<sup>15</sup> In the liberal formulation, that is why we have centralized authorities including governments.<sup>16</sup> It also explains why the governments’—or the

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<sup>12</sup> See Donald L. Doernberg, *“We the People”: John Locke, Collective Constitutional Rights, and Standing to Challenge Government Action*, 73 CAL. L. REV. 52, 57 (1985) (arguing John Locke, a leading liberal political theorist, heavily influenced the American Revolution and those who created the government that followed it).

<sup>13</sup> See Richard N. Kiwanuka, *The Meaning of “People” in the African Charter of Human and Peoples’ Rights*, 82 AM. J. INT’L L. 80, 82 (1988) (arguing liberal political philosophy has an “atomistic” view of “individuals locked in constant struggle against society for the redemption of their rights”).

<sup>14</sup> THOMAS HOBBS, *LEVIATHAN: OR, THE MATTER, FORME AND POWER OF A COMMONWEALTH ECCLESIASTICAL AND CIVIL* 130 (1651).

<sup>15</sup> William Michael Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 699 (1985) (“[T]he sacrifice of individual interests to the greater good of the whole formed the essence of republicanism.”).

<sup>16</sup> Michael R. Antinori, *Does Lochner Live in Luxembourg?: An Analysis of the Property Rights Jurisprudence of the European Court of Justice*, 18 FORDHAM INT’L L.J. 1778, 1815 (1994).

collectives’—control over individuals is limited: it was the individuals who held the rights in the first place, and they only ceded some of them to centralized authorities.<sup>17</sup>

When the drafters of the African Charter first put pen to paper, they were inspired and guided by altogether different philosophical traditions. Most had been educated in Europe, or at least in European schools located on the African continent, so they must have been aware of Hobbes, Locke, Rousseau, and European liberal thought.<sup>18</sup> However, many leading intellectual lights in Africa had at least partly rejected those liberal philosophies and were guided by African intellectual traditions that viewed the world, particularly the relationship between individuals and collectives, very differently.<sup>19</sup> The remainder of this section provides brief descriptions of the African philosophical traditions that were in the air as the African Charter took shape.

### A. *Pan-Africanism*

There is no simple definition of Pan-Africanism.<sup>20</sup> Its various strains have waxed and waned since the early 1900s depending on the epoch and the geographical setting,<sup>21</sup> and there have been numerous offshoots, including Leopold Senghor’s Negritude,<sup>22</sup> discussed below. Furthermore, it

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<sup>17</sup> *Id.*

<sup>18</sup> See Charles J. Ogletree, Jr., *Addressing the Racial Divide: Reparations*, 21 HARV. BLACKLETTER L.J. 1, 281 (2005) (arguing many African leaders were educated in Europe and the United States); see also Thomas Kelley, *Apples to Oranges: Epistemological Dissonance in the Human Rights Case Hadijatou Mani v. Niger*, QUINNIPIAC L. REV. 311, 348, n. 268 (2014) (arguing many African judges and lawyers were educated in Europe).

<sup>19</sup> See Jeanne M. Woods, *Rights as Slogans: A Theory of Human Rights Based on African Humanism*, 17 NAT’L BLACK L.J. 52, 54 (2003) (describing African humanism as “a vision of rights based on collective sharing, rather than individual acquisition and greed; a concept of autonomy rooted in community rather than individual license; a concept of duty to the community, and a responsibility to give something back”).

<sup>20</sup> Olayiwola Abegunrin, *Origins of Pan-Africanism*, in PAN-AFRICANISM IN MODERN TIMES: CHALLENGES, CONCERNS, AND CONSTRAINTS 1 (Olayiwola Abegunrin & Sabella Ogbobode Abidde eds., 2016); Sabella Ogbobode Abidde, *Pan-Africanism, the State and Status of a Movement*, in PAN-AFRICANISM IN MODERN TIMES: CHALLENGES, CONCERNS, AND CONSTRAINTS 222 (Olayiwola Abegunrin & Sabella Ogbobode Abidde eds., 2016).

<sup>21</sup> Abidde, *supra* note 20, at 222; see FRANS VILJOEN, INTERNATIONAL HUMAN RIGHTS LAW IN AFRICA 151 (2d ed. 2012) (arguing Pan-Africanism “grew in different strains”).

<sup>22</sup> See Ernest Tooche Aniche, *Pan-Africanism and Regionalism in Africa: The Journey So Far*, in PAN AFRICANISM, REGIONAL INTEGRATION AND DEVELOPMENT IN AFRICA 1, 17-19



has never been clear whether Pan-Africanism is a philosophy, an ideology, or a political movement.<sup>23</sup> What is clear is that Pan-Africanism includes certain fundamental tenets, many political and economic, others historical and cultural, and some even spiritual.<sup>24</sup>

Although some scholars trace Pan-Africanism to pre-colonial times when great empires ruled much of the continent, or to African resistance against trans-Atlantic and Arabic slave trading,<sup>25</sup> most pick up the story with W.E.B. Du Bois in 19<sup>th</sup> century America. Du Bois was “a charismatic intellectual who emphasized the restoration of the dignity of the black man” and championed solidarity as a means to confront the many injustices visited upon Black people around the world.<sup>26</sup> He was a major animator of the first Pan-African Conference in London in 1900, and many of his ideas were picked up by Europe-based African intellectuals who later became major actors in the Pan-African movement.<sup>27</sup> Kwame Nkrumah, the first post-independence president of Ghana, who emerged as a central leader of Pan-Africanism, referred to Du Bois as the “Father of modern Pan-Africanism.”<sup>28</sup>

The movement was fundamentally about claiming dignity and a “rightful place in the world” for Africans and people of African descent, but it also

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(Samuel Ojo Oloruntoba ed., 2020) (discussing Negritude as a sub-category of Pan-Africanism).

<sup>23</sup> See Sharon Adetutu Omotoso, *Mediatizing and Gendering Pan-Africanism for ‘Glocal’ Impacts*, in PAN AFRICANISM, REGIONAL INTEGRATION AND DEVELOPMENT IN AFRICA 149 (Samuel Ojo Oloruntoba, ed., 2020) (arguing Pan-Africanism is variously referred to as an ideology and a movement).

<sup>24</sup> Abidde, *supra* note 20, at 222; see Nathaniel Rubner, *A Historical Investigation of the Origins of the African Charter on Human and Peoples’ Rights* (2008) (Masters’ thesis, University of Cambridge), [https://archives.au.int/bitstream/handle/123456789/2566/An%20historical%20investigation%20of%20the%20origins%20of%20the%20African%20Charter%20on%20Human%20and%20people%20Rights\\_E.pdf?sequence=1&isAllowed=y](https://archives.au.int/bitstream/handle/123456789/2566/An%20historical%20investigation%20of%20the%20origins%20of%20the%20African%20Charter%20on%20Human%20and%20people%20Rights_E.pdf?sequence=1&isAllowed=y) (arguing Pan-Africanists rejected European domination of church practices and begin to Africanize Christianity).

<sup>25</sup> See Aniche, *supra* note 22 (tracing Pan-Africanism to the 10<sup>th</sup> century when Islam began spreading around the continent under “Arab colonialism”).

<sup>26</sup> Tola Odubajo and Tunde Babawale, *The African Union and the International Criminal Court: An Analysis of Al-Bachir’s International Arrest Warrant*, in PAN AFRICANISM, REGIONAL INTEGRATION AND DEVELOPMENT IN AFRICA 61 (Samuel Ojo Oloruntoba, ed., 2020).

<sup>27</sup> Odubajo and Babawale, *supra* note 26, at 61.

<sup>28</sup> *Id.*

articulated and promoted concrete political aims.<sup>29</sup> One was the end of European colonialism on the African continent.<sup>30</sup> Another, closely linked, was political independence, full sovereignty, and a voice in world affairs for African states.<sup>31</sup> In 1963, this Pan-African spirit led to the creation of the Organization of African Unity (OAU),<sup>32</sup> whose founding principles included the struggle against colonialism and apartheid as well as the struggle for Pan-African economic and social development.<sup>33</sup>

Pan-Africanism, however, did not focus entirely on political and economic goals and structures. It aimed to “rehabilitate the value of aspects of African culture,”<sup>34</sup> to glorify the African past, and to promote African history, tradition, and values.<sup>35</sup> Pan-Africanists believed that there was a unique “African personality,”<sup>36</sup> and that in addition to expelling European colonists from the continent, African people had to decolonize their own minds by embracing their own culture and traditions.<sup>37</sup> The particulars of

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<sup>29</sup> Omotoso, *supra* note 23, at 151.

<sup>30</sup> See Abegunrin, *supra* note 20, at 1 (arguing the aim of Pan-Africanism was to organize Black Peoples all over the world and work as a team against racism, discrimination, oppression and exploitation by Europeans).

<sup>31</sup> Rubner, *supra* note 24, at 90.

<sup>32</sup> Sesanti, *supra* note 10, at 64 (arguing Pan-Africanism was the force that inspired the creation of the OAU).

<sup>33</sup> Org. of African Unity [OAU] Charter art. II, May 25, 1963.

In the early years of independence, most African political and intellectual leaders agreed on the importance of Pan-Africanism, but they disagreed on what political structure should result. Reindorf Gyamena, *Pan-Africanism: Strengthening the Unity of Africa and its Diaspora*, in PAN-AFRICANISM, AFRICAN NATIONALISM: STRENGTHENING THE UNITY OF AFRICA AND ITS DIASPORA 333 (B.F. Bankie & K. Mchombu eds., 2008). Some, including Nkrumah, envisioned a United States of Africa that would be tightly unified. Odubajo and Babawale, *supra* note 26, at 61. Others, including a group of states referred to as the Monrovia Bloc, envisaged close political, economic, and socio-cultural cooperation (largely through the offices of the OAU) but full sovereignty for the states they had inherited when the European colonialists departed. Odubajo and Babawale, *supra* note 26, at 59-61. In the event, the OAU opted for the lighter version of political Pan-Africanism and wrote into its Constitutive Act strong sovereignty for individual states. See Rubner, *supra* note 24, at 10-11 (arguing expansive Pan-Africanism spooked some smaller countries with in the OAU who wanted to protect their post-independence boundaries, and a strong presumption of non-interference in states’ internal affairs).

<sup>34</sup> Abegunrin, *supra* note 20.

<sup>35</sup> *Id.* at 2-3.

<sup>36</sup> Omotoso, *supra* note 23, at 149; Rubner, *supra* note 24, at 85, 89 (quoting Nkrumah as referring to the African personality).

<sup>37</sup> Vera Ogorumua, *Indigenous Languages and Names: Transforming Thoughts, Actions and Character Through African Ways of Knowing*, in HISTORICAL AND CONTEMPORARY PAN-AFRICANISM AND THE QUEST FOR AFRICAN RENAISSANCE 76 (Njoki Wane and Francis

those traditions were never perfectly clear, but they were fleshed out by Senghor's Negritude philosophy and various other related African intellectual movements discussed below.

### *B. Negritude*

Leopold Senghor served as president of Senegal from independence in 1960 until 1980.<sup>38</sup> He was not merely a statesman but also a poet, a renowned public intellectual, and a leading voice of Negritude, a philosophy that celebrated the historical, cultural, and spiritual achievements of African peoples.<sup>39</sup> The Negritude movement arose in the ferment of post-World War I Paris, where a group of African and diaspora intellectuals were questioning their own and their peoples' identities in a world where European colonizers subjugated and controlled their homelands.<sup>40</sup> The French, who believed (and in my view, still believe) that their language and culture represented the apex of global civilization, maintained that all people, including their colonial subjects, could aspire to be French and would be welcomed as such as soon as they sufficiently civilized themselves.<sup>41</sup> Negritude was, at least according to some, an attempt by Senghor and his intellectual set to demonstrate that African civilization had

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Adyanga Akena eds., 2019) (quoting Jerry Rawlings, former president of Ghana, as saying "When Europeans came to Africa, we were so strong that they needed chains to enslave us, but today, there's no need for chains because we have our minds trapped and we are struggling to be free"); Rubner, *supra* note 24 (arguing that along with rising political nationalism, there was a "cultural nationalism aimed to restore to Africans their confidence in their own culture.")

<sup>38</sup> *The Presidency: Léopold Sédar Senghor*, PRESIDENCY OF SENEGAL, <https://www.presidence.sn/en/presidency/leopold-sedar-senghor>.

<sup>39</sup> See REILAND RABAKA, *THE NEGRIUDE MOVEMENT: W.E.B DUBOIS, LEON DAMAS, AIME CESAIRE, LEOPOLD SENGHOR, FRANZ FANON, AND THE EVOLUTION OF AN INSURGENT IDEA 207* (2015) (referring to Senghor as a poet, a statesman, and one of the creators of Negritude).

Although Senghor was Negritude's leading voice, the term was coined by his friend, the French West Indian poet Aime Césaire, in the early 1930s. HYMANS, *supra* note 11, at 23. Like Pan-Africanism, Negritude had intellectual roots in the teachings of the American W.E.B. De Bois and the Harlem Renaissance. *Id.* at 53 (arguing Negritude emerged from "a twentieth century triangular trade in ideas between black America, Europe, and Africa"). Although it had competing strains propounded by various diaspora intellectuals, by the 1940s Senghor had emerged as its central figure and primary definer and spokesperson. *Id.*

<sup>40</sup> HYMANS, *supra* note 11, at 11; MARKOVITZ, *supra* note 2, at 40.

<sup>41</sup> MARKOVITZ, *supra* note 2, at 42.

been flowering when the slave traders and then colonists began despoiling the continent and was in many respects superior to European civilization.<sup>42</sup> At its start, therefore, Negritude was an effort to demonstrate “the singularity of the black’s contribution to civilization.”<sup>43</sup>

As was true of Pan-Africanism, there is no precise definition of Negritude.<sup>44</sup> Its ambiguity was sometimes exacerbated by Senghor’s tendency to express himself in poetic vagaries.<sup>45</sup> Also, its central tenets – as articulated by Senghor—evolved over time.<sup>46</sup> At first, Negritude seemed a jumble of mystical pronouncements about the contours of the “black soul.”<sup>47</sup> Senghor’s best known definition of Negritude was *l’ensemble de valeurs de civilisation du monde noir*, or “the totality of civilization and its values within the black world.”<sup>48</sup> Another slightly more descriptive definition was “the permanent values of our civilization, the communal spirit, the spirit of enterprise, the respect of cultural values, the spiritual values, the sense of the concrete, the sense of the facts.”<sup>49</sup> But by the post-independence era in the 1960s and beyond, Negritude had morphed into a more pragmatic movement that aimed to spur economic, social and political development along paths blazed by Africans, for Africans.<sup>50</sup>

For Senghor, the strengthening and celebration of the unique aspects of African civilization was a precondition to independence and development.<sup>51</sup> When referring to these unique aspects of African civilization, he sometimes used the term *Africanite* (“Africanness”) as a synonym for negritude.<sup>52</sup> To

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> Peter S. Thompson, *Negritude and a New Africa: An Update*, 33 RSCH. AFR. LITERATURES 143 (2002).

<sup>45</sup> See MARKOVITZ, *supra* note 2, at 35 (arguing Senghor’s “erudition” created barriers to understanding him); Thompson, *supra* note 44, at 148.

<sup>46</sup> Sam Hurwitz, *The Duality of Négritude: An Examination of Assimilation, Colonization, and Black Glorification*, 4 (2017) (Senior Honors Thesis, University of Wisconsin) (on file with the University of Wisconsin) (arguing definitions of Negritude have changed and adapted over time).

<sup>47</sup> See RABAKA, *supra* note 39, at 207.

<sup>48</sup> Thompson, *supra* note 44, at 144.

<sup>49</sup> MARKOVITZ, *supra* note 2, at 74 (citations omitted).

<sup>50</sup> *Id.* at 68; Angela M. Lloyd, *The Southern Sudan: A Compelling Case for Secession*, 32 COLUM. J. TRANSNAT’L L. 419, 445 (1994).

<sup>51</sup> Thompson, *supra* note 44, at 144.

<sup>52</sup> See *id.* (arguing that in the 1960s and 1970s Senghor used the word Negritude less and *Africanite* more, partly because American blacks did not like the term Negritude and partly to emphasize black Africans’ solidarity with north Africans).

define it, he looked mostly to the continent's pre-colonial history, culture and traditions<sup>53</sup> where he found the characteristics of emotion, intuition, and artistic creativity.<sup>54</sup> He lauded a civilization that emphasized the mythical over the conscious and rational, art and religion over science and technology, and, vital to arguments in the following sections of this article, the celebration of the group over the individual.<sup>55</sup>

Regarding the relationship between groups and individuals, in Senghor's telling pre-colonial African society was governed by community consensus, a "speaking democracy" in which all community members had the right to participate and where even the dead were consulted.<sup>56</sup> Once the community achieved consensus, the minority naturally followed the majority and the community's opinion was applied without deviation.<sup>57</sup> This collective and collaborative spirit was possible because Africans viewed their personhood in ways fundamentally different from the West.<sup>58</sup> For Senghor, and as we will see below, for many other African thinkers, the individual achieved "his true spiritual essence, and his only fulfillment, from participating in the community."<sup>59</sup> Senghor believed Europeans were mistaken to focus all energies on the individual, "with his needs, passions, tastes, and fantasies," in contrast to Africans, who believed the individual could only realize himself as a member of the group.<sup>60</sup>

Reverence for age and ancestry were also important tenets of Negritude. In Africa, old age was considered a source of respect and veneration in contrast to the cold and calculating West where old people were cast aside when they were no longer economically productive.<sup>61</sup> Africans' reverence for age continued even after elders had died and passed into the spirit realm.<sup>62</sup>

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<sup>53</sup> *Id.*; see HYMANS, *supra* note 11, at 57 (arguing Senghor wrote about Africa as a distant, abstract, highly idealized continent).

<sup>54</sup> RABAKA, *supra* note 39, at 207.

<sup>55</sup> *Id.*

<sup>56</sup> MARKOVITZ, *supra* note 2, at 195.

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

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

<sup>59</sup> *Id.* at 196.

<sup>60</sup> *Id.* at 195.

<sup>61</sup> Mumba Malila, *Individuals' Duties in the African Human Rights Protection System: Challenges and Prospects*, in BETWEEN RIGHTS AND RESPONSIBILITIES: A FUNDAMENTAL DEBATE 187, 205 (Stephan Parmentier et al. eds., 2016).

<sup>62</sup> Sesanti, *supra* note 10, at 67; see also Kelley, *supra* note 10 at 647 (arguing Zarma people communicate with their ancestors in the spirit realm).

In Western thought, a person's existence begins at birth and ends with death.<sup>63</sup> In African tradition these bounds are more fluid and ancestors are treated as respected members of the community who in many cases have the capacity to furnish advice and guidance to the those remaining in the temporal world.<sup>64</sup>

Senghor and Negritude not only identified these differences, but believed Africa could help Europe to overcome its cold rationality and rampant individualism.<sup>65</sup> Western people had become rootless, isolated, fallen from community,<sup>66</sup> and Africans could assist them “to discover the richest element of her own traditions: the sense of community, the sense of hierarchy, the feeling of the divine—in any case the spiritual—the feeling of art which plunges its roots in life and which is produced by the soul as much as and more than by the mind.”<sup>67</sup> For Senghor, and for the Negritude movement, the challenge was to revive these African characteristics and principles in a modern form.<sup>68</sup>

Although Negritude helped inspire and shape the struggle for independence in Africa—and although it helped spawn other philosophies that guided the continent's post-independence development (to be discussed briefly in Part I.C, below)—it was not universally loved. Some, especially in its early days in the Paris of the 1930s, critiqued it for being a narrow conversation among intellectual elites.<sup>69</sup> Others lampooned Senghor's romanticization of pre-colonial Africa<sup>70</sup> and pointed out that he and the other leading lights of Negritude were highly educated, urban elites with no firsthand knowledge of the idyllic setting and tribal communities

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<sup>63</sup> Malila, *supra* note 61, at 205.

<sup>64</sup> Sesanti, *supra* note 10, at 67.

<sup>65</sup> HYMANS, *supra* note 11, at 103; see RABAKA, *supra* note 39, at 207 (arguing Senghor contrasted the African spirit, or “black soul,” to the Western, or “Hellenic,” hyper-rational world view).

<sup>66</sup> MARKOVITZ, *supra* note 2, at 46.

<sup>67</sup> HYMANS, *supra* note 11, at 102 (quoting Leopold Senghor).

<sup>68</sup> MARKOVITZ, *supra* note 2, at 89 (arguing Senghor wished to create “a new foundation for African modernity . . . one which, above all, will emphasize valuable continuities with our pre-colonial culture”).

<sup>69</sup> Rubner, *supra* note 24, at 96; see MARKOVITZ, *supra* note 2, at 28 (arguing that by the 1960s Senghor was “addressing himself to the mass of peasants and not just the intellectual elite”).

<sup>70</sup> HYMANS, *supra* note 11, at 57.

they invoked.<sup>71</sup> Still others found Senghor and his pronouncements to be insufficiently confrontational toward the European powers that still controlled and exploited the continent.<sup>72</sup> He believed that Africans should embrace that which was essentially and historically African, but that modern Africa should be open to borrowing what was good from France and other Western societies.<sup>73</sup> For this, and for the fact that he wrote in and spoke in the colonizer's language,<sup>74</sup> he was sometimes branded an assimilationist.<sup>75</sup> By the 1970s, emerging African intellectuals were in no mood for Senghor's accommodating approach toward Europe and America.<sup>76</sup> They saw themselves being trapped and exploited, not so much by colonialism (though it still existed on the continent), but by neo-colonialism enforced by the "industrialized world's system of banking, trade, and commodities markets."<sup>77</sup> Some began to view Negritude, with its somewhat nostalgic pronouncements, as irrelevant.<sup>78</sup>

### C. *Related African Political and Philosophical Traditions*

Part I began with the aim of briefly describing the political philosophies that were in the air in the 1970s when African legal experts began drafting the African Declaration on Human and Peoples' Rights. There is no doubt that the intertwined movements of Pan-Africanism and Negritude were predominant.<sup>79</sup> However, there were other, sometimes overlapping African philosophical traditions, some of which arose to address issues in specific places and times, others that have endured and spread as Negritude has faded.

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<sup>71</sup> Thompson, *supra* note 44, at 147.

<sup>72</sup> *Id.* at 148; see MARKOVITZ, *supra* note 2, at 40 (arguing critics believed Negritude was a collaboration between colonial and African elites and "a bridge to the colonial establishment."); see HYMANS, *supra* note 11, at 135 (arguing that for some, Negritude and Senghor became "symbols of conciliation" with colonial powers).

<sup>73</sup> Thompson, *supra* note 44, at 145.

<sup>74</sup> *Id.* at 147.

<sup>75</sup> See *id.* at 148; MARKOVITZ, *supra* note 2, at 63.

<sup>76</sup> *Id.* at 150.

<sup>77</sup> *Id.* at 149.

<sup>78</sup> *Id.*

<sup>79</sup> See Daniel C. Turack, *The African Charter on Human and Peoples' Rights: Some Preliminary Thoughts*, 17 AKRON L. REV. 365, 378 (1984) (arguing the African Charter, especially the preamble, were heavily influenced by Pan-Africanism and Negritude).

### 1. *Black Consciousness*

To offer one example, Black Consciousness was an African political philosophy that arose in the 1960s and 1970s out of the struggle against apartheid in South Africa.<sup>80</sup> Steve Biko, the movement's leading voice, rejected the tenets of European liberalism and instead followed the teachings of liberation philosophers such as Fanon, Freire, Malcolm X, and Senghor.<sup>81</sup> He believed that Black South Africans would succeed in liberating themselves from apartheid only after they liberated themselves from feelings of racial inferiority.<sup>82</sup> He preached that "black is beautiful," and insisted that the struggle against apartheid should be led by Black and Brown people,<sup>83</sup> not white liberals who exhibited paternalistic attitudes and who unwittingly replicated the structures of apartheid when their advantages in wealth and education inevitably propelled them to positions of leadership and control.<sup>84</sup>

Echoing some of the cultural tenets of Pan-Africanism and Negritude, Biko believed that Blacks had to rediscover and take pride in their own traditions. One way of accomplishing this was to engage in community projects because they helped psychologically transform Black

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<sup>80</sup> Hal Abramson, *Nelson Mandela as Negotiator: What Can We Learn from Him?*, 31 OHIO STATE J. ON DISP. RESOL. 19, 29 (2016).

<sup>81</sup> Kevin D. Brown, *African-Americans Within the Context of International Oppression*, 17 TEMP. INT'L & COMPAR. L.J. 1, 24 (2003).

<sup>82</sup> *Id.* at 23.

<sup>83</sup> Based on many months of living and working in South Africa, it, like the United States, has a complicated nomenclature of racial categories. Under apartheid, the white majority government used the term "black" to refer primarily to Bantu speaking ethnic groups such as the Zulu and Xosa. People with lighter brown skin, some of whom descended from the region's indigenous hunter-gatherer peoples, others who descended from enslaved Asian people brought by European occupiers, and still others a mishmash of various races, were deemed "coloured." Yet another category was "Indian," descendants of South Asian people who had emigrated to South Africa, mostly as laborers. During white ruled apartheid, "blacks" were at the bottom of the social order, whites at the top, and "coloured" and Indians somewhere in the middle. However, when Biko used the term "black," he was referring to all non-white South Africans.

<sup>84</sup> Steve Biko, *We Blacks*, FRANK TALK 1(4) (Sept./Oct. 1984), <https://disa.ukzn.ac.za/ftsep8416837118001004sep198415>.



communities.<sup>85</sup> By the mid-1970s, at around the time that African leaders were getting serious about fleshing out the concept of African human rights, Black Consciousness had grown into a powerful liberation movement whose influence had spread beyond South Africa.<sup>86</sup> As Biko's ideas on Black Consciousness collected adherents in South Africa and across the African continent, he became a threat to the apartheid regime, which arranged for his custodial murder in 1977.<sup>87</sup>

## 2. *Ubuntu*

*Ubuntu* is a related African philosophical tradition that long pre-dated Pan-Africanism, Negritude, and Black Consciousness but that came to the outside world's attention only in the 1990s when Archbishop Desmond Tutu popularized the concept as the Chair of South Africa's post-apartheid Truth and Reconciliation Commission.<sup>88</sup> As with other African philosophies discussed in this article, and perhaps true of all philosophies everywhere, *ubuntu* lacks a precise definition.<sup>89</sup> Archbishop Tutu himself was quoted as saying, "*ubuntu* is very hard to render into Western languages."<sup>90</sup> There is no doubt, however, that the word *ubuntu* has its origins in the Bantu languages of Southern Africa,<sup>91</sup> and that many African languages and cultures include similar words and concepts.<sup>92</sup> Its meaning is reflected a

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<sup>85</sup> Kevin Hopkins, *Assessing the World's Response to Apartheid: A Historical Account of International Law and Its Part in the South African Transformation*, 10 UNIV. MIA. INT'L & COMPAR. L. REV. 241 (2001).

<sup>86</sup> Femi Ojo-Ade, *Stephen Biko: Black Consciousness, Black Struggle, Black Survival*, 19 J. MOD. AFR. STUDS. 539, 546 (1981).

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

<sup>88</sup> Kuwali, *supra* note 1; Rosalind English, *Ubuntu: The Quest for an Indigenous Jurisprudence*, 12 S. AFR. J. ON HUM. RTS. 641, 645 (1996).

<sup>89</sup> See Drucilla Cornell & Karin van Marle, *Exploring uBuntu: Tentative Reflections*, AFR. HUM. RTS. L.J. 195, 196 (2005) (arguing *ubuntu* is a "bloated concept that can mean anything to anybody").

<sup>90</sup> Thino Bekker, *The Reemergence of uBuntu: A Critical Analysis*, in UBUNTU AND THE LAW: AFRICAN IDEALS AND POSTAPARTHEID JURISPRUDENCE 377, 378 (Drucilla Cornell and Nyoko Muvangua eds., 2012).

<sup>91</sup> Kuwali, *supra* note 1.

<sup>92</sup> Cornell & van Marle, *supra* note 89, at 196; see Kuwali, *supra* note 1 (arguing *ubuntu* is widely believed to be a classical African philosophy or worldview).

Americans who have visited Kenya may have encountered *harambe*, a similar term and concept in Swahili that describes and encourages communitarian spirit and communal action.

Zulu proverb: *umuntu ngumuntu ngabantu*, which says “that a person cannot exist as a human being in isolation” and that the essence of humanity is interconnectedness and interdependence.<sup>93</sup> When South Africans are trying to explain *ubuntu* to outsiders, they often resort to the English expression “I am because we are.”<sup>94</sup>

The importance of community is a central tenet of *ubuntu*, but its communalism is more subtle and complicated than simply advocating the rights of the community over those of the individual.<sup>95</sup> The notion—generally antithetical to Western liberal political philosophy<sup>96</sup>—is that an individual has the potential to become a person only within the context of the community,<sup>97</sup> and that community includes ancestors who have passed in to the spirit realm.<sup>98</sup> Stated otherwise, it is the community that endows the individual with personhood; it is not a Leviathan that stands against individuals.<sup>99</sup> It follows that the individual, who owes his or her personhood to the community, has responsibilities toward it.<sup>100</sup> After all, if personhood depends on the viability of the collective, then the person must do everything possible to support it and contribute to its cohesion.<sup>101</sup>

In context of *ubuntu*, freedom looks different than in liberal philosophical thought. In the worldview of Western liberalism, individual rights are constrained by one’s community,<sup>102</sup> but only because individuals must exercise their rights in ways that do not interfere with others’ individual rights.<sup>103</sup> Aside from that minor inconvenience of according

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<sup>93</sup> Kuwali, *supra* note 1.

<sup>94</sup> *See id.* (referring to that expression and offering an alternative wording: “people are people through other people”).

My characterization of Africans’ summarizing *ubuntu* for outsiders is based on my personal experience of having *ubuntu* explained to me by South African friends and colleagues.

<sup>95</sup> Cornell & van Marle, *supra* note 89, at 207.

<sup>96</sup> Kuwali, *supra* note 1 (arguing the concept of *ubuntu* runs counter to the creed of individualism of Western societies).

<sup>97</sup> Cornell & van Marle, *supra* note 89, at 207.

<sup>98</sup> *See supra* INTRODUCTION, Part A (arguing Zarma people believe their ancestors’ spirits live among them); *see also* Dani W. Nabudere, *Ubuntu Philosophy: Memory and Reconciliation*, UNIV. OF TEX. REPOSITORIES (2005) (arguing African philosophy believes spirits can intercede in the temporal world).

<sup>99</sup> Cornell & van Marle, *supra* note 89, at 206.

<sup>100</sup> *Id.* at 207.

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

<sup>102</sup> *See* Bekker, *supra* note 90, at 378.

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

mutual respect, individuals—who, after all, owned all the rights in the first place<sup>104</sup>—are at liberty to act in any way they wish.<sup>105</sup>

#### *D. Summary*

Numerous non-Western, non-liberal, African political philosophies were percolating across Africa in the 1960s and 1970s. Pan-Africanism and Negritude were the most prominent, but Black Consciousness, *ubuntu*, and a host of other regional variations were also in the air. They had much in common. They insisted that Africa should chart its own course; that it should be unconstrained by European liberalism; that African politics and thought should respect and reflect African culture and tradition, including reverence for age and ancestors; that communities, not merely individuals, have rights; and perhaps most important, that individuals are duty bound to support and strengthen their communities because those communities are the source of individuals' identity and humanness. To tie this discussion of African philosophies back to my observations of village life in Niger,<sup>106</sup> Pan-Africanism, Negritude, *ubuntu* and the like celebrated the same traits I found so admirable when I lived in a rural village in the 1980s. As the following sections will illustrate, these were the ideas—and the traits—that the drafters of the African Charter on Human and Peoples' Rights had in their heads when they began their work in the late 1970s.

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<sup>104</sup> See Kiwanuka, *supra* note 13 and accompanying text.

<sup>105</sup> See Ralph Beddard, *Duties of Individuals Under International and Regional Human Rights Instruments*, 3 INT'L J. HUM. RTS. 30, 33 (2007) (arguing in Western human rights conventions, individuals' primary duty toward others is merely to respect their individual rights).

<sup>106</sup> See *supra* INTRODUCTION, Part A.

## II. AFRICAN HUMANISM IN THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS

### A. *The Adoption Process*

#### 1. *Leopold Senghor's Dakar Speech*

On November 28, 1979, President Senghor delivered a speech to a meeting of African legal experts<sup>107</sup> who had gathered in Dakar under the aegis of the OAU to draft a human rights charter for the continent.<sup>108</sup> Senghor was an inspiration for and leader of that effort, and although his Dakar speech was typically Sengorian—suggestive, elliptical, metaphorical, and requiring the interpretive powers of other scholars and intellectuals to divine its meaning<sup>109</sup>—he was clear about urging upon the experts certain concrete guiding principles.

First, Senghor told them to avoid simply duplicating the Universal Declaration of Human Rights and other leading European and American human rights instruments.<sup>110</sup> He adjured them to take inspiration “from [Africa’s] beautiful and positive traditions . . . [a]nd keep constantly in mind our values of civilization and the real needs of Africa.”<sup>111</sup> He instructed them to avoid the Western practice of separating civil and political rights from

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<sup>107</sup> Germain Baricako, *Introductory Preface: The African Charter and African Commission on Human and Peoples' Rights*, in *THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: THE SYSTEM IN PRACTICE 1986–2006* 6 (Malcolm Evans & Rachel Murray eds., 2d ed. 2008) (noting the meeting included twenty experts from six African countries). See Frans Viljoen, *The African Charter on Human and Peoples' Rights: The Travaux Préparatoires in Light of Subsequent Practice*, 25 *HUM. RTS. L.J.* 313 (2004) (referring to them as *legal experts*).

<sup>108</sup> See Address Delivered by Leopold Sedar Senghor, President of the Republic of Senegal, in *The Regional Protection of Human Rights in Africa*, 4 *HUM. RTS. L. AFR.* 35 (1999).

The cited volume that collects Senghor's speech along with other African human rights documents does not specify whether the speech was delivered in French, Senegal's colonial language. Presumably so since Senghor's command of the intricate details of the French language was legendary. Assuming that is the case, it is unclear who translated the transcript of the speech into English.

<sup>109</sup> See MARKOVITZ, *supra* note 2, at 34 (arguing Senghor's erudition and the complexity of his “philosophical exegeses and the abundance of quotations from learned sources” made Senghor “inaccessible to the masses”); see also Viljoen, *supra* note 107, at 313 (arguing Senghor's Dakar speech was “painting with a broad philosopher's brush”).

<sup>110</sup> Address Delivered by Leopold Sedar Senghor, *supra* note 108, at 79.

<sup>111</sup> *Id.*

economic, social, and cultural rights,<sup>112</sup> a division that, at least in that era, tended to diminish the salience of the latter.<sup>113</sup> Although he was not a socialist in the Soviet or Chinese mold,<sup>114</sup> he believed that protecting the entire bundle of human rights was more in keeping with Africa's communitarian spirit.<sup>115</sup> He admonished the experts to include the right to development, which he said could only be achieved if civil and political as well as economic, social, and cultural human rights were protected.<sup>116</sup> Crucially, he challenged the experts to draft a document that would feature African humanism: the idea, expressed in Pan-Africanism, Negritude, and related philosophies, that in African societies the individual is sometimes subordinated to the collective; that while individual humans have rights, they also have duties toward groups, particularly their families and the broader community.<sup>117</sup> In Senghor's words:

In Europe, human rights are considered as a body of principles and rules placed in the hands of the individual, as a weapon, thus enabling him to defend himself against the group or entity representing it. In Africa, the individual and his rights are wrapped in the protection the family and other communities ensure to everyone.<sup>118</sup>

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<sup>112</sup> *Id.*

<sup>113</sup> During the Cold War, the Western and Eastern Blocs disagreed about what constituted enforceable human rights. Chidi Anselm Odinkalu, *Implementing Economic, Social and Cultural Rights Under the African Charter on Human and Peoples' Rights*, in *THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: THE SYSTEM IN PRACTICE* 178, 181-82 (Malcolm Evans & Rachel Murray eds., 2002). The West, most particularly the United States, claimed enforceable human rights were limited to civil and political rights. *See* Rubner, *supra* note 24, at 81 (arguing that during the Carter Administration the U.S. considered the "integrity of the person" to be the true core of human rights, and social and cultural rights to be merely aspirational). The East, most particularly the Soviet Union, believed that economic, social and cultural rights were of at least equal importance. *Id.*

<sup>114</sup> *See* Rubner, *supra* note 24, at 90 (arguing Senghor was not an adherent of European socialism but believed that Africa had invented its own form of socialism before the Europeans had arrived); MARKOVITZ, *supra* note 2, at 86 (similar). *See also* John N. Hazard, *Negritude, Socialism and the Law*, 65 *COLUM. L. REV.* 778 (1965) (arguing Senghor felt revulsion at excesses of Stalinism).

<sup>115</sup> Viljoen, *supra* note 107, at 317.

<sup>116</sup> Address Delivered by Leopold Sedar Senghor, *supra* note 108, at 79.

<sup>117</sup> *See supra* notes 54-60 and accompanying text. *See also supra* notes 93-101 and accompanying text.

<sup>118</sup> Address Delivered by Leopold Sedar Senghor, *supra* note 108, at 79-80.

In sum, Senghor urged the experts to create a true African human rights document that would “borrow from modernism only that which does not misrepresent our civilization and deep nature.”<sup>119</sup>

With these exhortations in mind, the Dakar experts produced an influential draft of what later became the African Charter on Human and Peoples’ Rights.<sup>120</sup> Although that may sound like a linear process, and although it is undoubtedly true that Senghor’s speech was a seminal moment in the development of African human rights,<sup>121</sup> the path from Dakar to final OAU adoption in 1981 and entry into force in 1986<sup>122</sup> was anything but smooth.

## 2. *The OAU’s Halting Embrace of Human Rights*

When the OAU was founded in 1963 as a sort of mini-United Nations for the African continent, its constitutive documents emphasized nationalism and sovereignty for newly independent African nations<sup>123</sup> and unity in the struggle against colonialism and apartheid.<sup>124</sup> Its only mention of human rights was the vague admonition that members states should take “due regard” for the human rights articulated in the Universal Declaration.<sup>125</sup>

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<sup>119</sup> *Id.* at 80.

<sup>120</sup> See Rubner, *supra* note 24, at 55, 83 (arguing Senghor was a key figure and inspiration and helped “set the tone” for the African Charter); see also Viljoen, *supra* note 107, at 160 (arguing Senghor was instrumental in pushing the OAU to begin adopting an African human rights instrument).

<sup>121</sup> See Viljoen, *supra* note 107, at 319 (arguing Senghor’s Dakar speech inspired the group of legal experts to include African tradition, group rights, and individuals’ responsibilities toward communities in their draft); see also Rubner, *supra* note 24, at 55-58, 83; Odinkalu, *supra* note 113, at 187 (arguing Senghor was a “driving force” behind the adoption of the African Charter); MBAYE, *supra* note 1, at 182 (arguing Senghor was the “true initiator” of the African Charter).

<sup>122</sup> Misha Ariana Plagis & Lena Riemer, *From Context to Content of Human Rights: The Drafting History of the African Charter on Human and Peoples’ Rights and the Enigma of Article 7*, J. HIST. INT’L L. 556, 557 (2021).

<sup>123</sup> VILJOEN, *supra* note 21, at 151.

<sup>124</sup> *Id.* at 157; Rubner, *supra* note 24, at 4; see Malila, *supra* note 61, at 188 (arguing a central tenet of the OAU was battling colonialism).

<sup>125</sup> VILJOEN, *supra* note 21, at 156; see Baricako, *supra* note 107, at 2 (arguing in the early decades of independence African presidents were “jealous of their state sovereignty and not ready to accept the limitations of human rights institutions”).

Sovereignty and non-interference were so fundamental to the OAU<sup>126</sup> that in the 1960s and 70s, it developed a reputation as club for dictators.<sup>127</sup>

Although not all commentators agree on the causes of the OAU's gradual embrace of human rights in the 1970s, many point to the embarrassing brutality of President Idi Amin's rule in Uganda, Jean-Bedel Bokassa's in the Central African Republic, and Teodoro Nguema's in Equatorial Guinea.<sup>128</sup> It began to dawn on African leaders that it was hypocritical for the OAU to vociferously condemn colonialism and apartheid while ignoring the outlandish cruelty perpetrated by its own club members.<sup>129</sup> The non-interference principle was further challenged when Tanzania unilaterally and successfully halted Amin's slaughter of his own people by invading Uganda and deposing him.<sup>130</sup>

At the same time, international events were creating tail winds for the development of African human rights.<sup>131</sup> Although the twin international human rights covenants had been adopted in 1966, they did not enter into force until 1976, and the U.N. Human Rights Committee only began functioning in 1977.<sup>132</sup> In connection with this human rights evolution, the U.N. was actively promoting the idea of creating human rights mechanisms in Africa.<sup>133</sup> Around the same time, the Carter administration in the U.S.

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<sup>126</sup> Viljoen, *supra* note 107, at 313; Rubner, *supra* note 24, at 10-11.

<sup>127</sup> See Malila, *supra* note 61, at 189 (referring to African heads of state in the 1970s as a "club of dictators"); see also Rubner, *supra* note 24, at 16 (arguing that by the 1970s it was clear that "non-interference" was being used by African leaders to shield themselves from criticism of their policies).

<sup>128</sup> VILJOEN, *supra* note 21, at 158; B.G. Ramcharan, *The Travaux Preparatoires of the African Commission on Human Rights*, 13 HUM. RTS. L.J. 307 (1992). *But see* Plagis & Riemer, *supra* note 122, at 567 (arguing the growth of African civil society organizations led to the OAU's focus on human rights) (citations omitted).

<sup>129</sup> VILJOEN, *supra* note 21, at 158; see Malila, *supra* note 61, at 189 (arguing that widespread human rights abuses by African regimes caused African leaders to be concerned about Africa's standing in the world community).

<sup>130</sup> VILJOEN, *supra* note 21, at 158.

<sup>131</sup> Malila, *supra* note 61, at 189.

<sup>132</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (stating that the Covenant was adopted on 16 December 1966); see also International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (stating that the Covenant was adopted on 16 December 1966); *What is the Human Rights Committee?*, DAG HAMMARSKJÖLD LIBRARY, <https://ask.un.org/faq/228070> (stating that the first session of the Human Rights Committee was held in 1977).

<sup>133</sup> VILJOEN, *supra* note 21, at 160; see Plagis & Riemer, *supra* note 122, at 565 (arguing the U.N. was promoting human rights in Africa but wanted African institutions to apply "universal" rather than African human rights).

declared that future development aid would be tied to progress on human rights.<sup>134</sup> These factors combined to create momentum for the OAU to take human rights seriously.<sup>135</sup>

Despite these internal and external pressures, the process of articulating and embracing African human rights proved to be slow and complicated. Some African state leaders feared that any human rights document would encroach on their sovereignty while others—particularly socialist governments—viewed the growing emphasis on human rights as an unwelcome lurch toward Western liberalism.<sup>136</sup> Rather than openly declaring their opposition, however, many African leaders engaged in “quiet opposition.”<sup>137</sup> For example, in the wake of the 1979 Dakar meeting of legal experts, a conference of OAU ministers was supposed to convene in Addis Ababa to consider the Dakar draft.<sup>138</sup> However, progress was blocked when numerous states held their ministers back from the meeting and prevented a quorum from assembling.<sup>139</sup> OAU Justice Ministers convened at a follow-up meeting in Banjul in June 1980 to consider the Dakar draft, but there was such heated disagreement and so many delay tactics employed that by the end of the gathering delegates had only discussed the preamble and first eleven articles.<sup>140</sup> A second meeting in Banjul in January 1981, finally produced a complete draft of the Charter,<sup>141</sup> which was approved by the OAU’s governing body – the Conference of Heads of State and Government—during OAU’s June 1981 annual meeting in Nairobi.<sup>142</sup>

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<sup>134</sup> Malila, *supra* note 61, at 189; Rubner, *supra* note 24, at 31-33; *but see* Rubner, *supra* note 24, at 36 (arguing the Carter Administration’s human rights policies had little impact on African leaders and the OAU).

<sup>135</sup> *See* Manisuli Ssenyonjo, *An Introduction to the Development of the African Human Rights System: 30 Years After the Adoption of the African Charter on Human and Peoples’ Rights*, in *THE AFRICAN REGIONAL HUMAN RIGHTS SYSTEM: 30 YEARS AFTER THE AFRICAN CHARTER ON HUMAN AND PEOPLES’ RIGHTS* 3, 6, 12 (Manisuli Ssenyonio ed., 2013) (arguing various factors led African leaders to focus on human rights).

<sup>136</sup> Malila, *supra* note 61, at 190-91; VILJOEN, *supra* note 21, at 160-61; *see* Rubner, *supra* note 24, at 30 (arguing some socialist African countries viewed human rights as “conspiracy imposed by the industrialized West”).

<sup>137</sup> Malila, *supra* note 61, at 190.

<sup>138</sup> Malila, *supra* note 61, at 190; Baricako, *supra* note 107, at 6.

<sup>139</sup> *Id.*; Viljoen, *supra* note 107, at 314.

<sup>140</sup> Malila, *supra* note 61, at 191; Baricako, *supra* note 107, at 7; Viljoen, *supra* note 107, at 314; *see* Rubner, *supra* note 24, at 73 (arguing Libya attempted to delay progress by insisting that Arabic be adopted as an official language of the meeting).

<sup>141</sup> Viljoen, *supra* note 107, at 314.

<sup>142</sup> Malila, *supra* note 61, at 191.



The fact that the African Charter finally received endorsement by the OAU at the Nairobi meeting did not mean that all African states supported enhanced protections for human rights.<sup>143</sup> Employing what appeared to be a tactical strategy, the Charter's promoters avoided open opposition by introducing the adoption resolution late at night on the final day of the Nairobi meeting.<sup>144</sup> It was approved by a voice vote with little discussion or debate.<sup>145</sup> Skeptical African heads of state may have been unconcerned about the vote because they believed that "adoption and implementation were quite separate matters."<sup>146</sup> In other words, they assumed they would be able to snuff out any real change by means of obfuscation and delay.<sup>147</sup> They were comforted by the fact that the Dakar draft and the final version left virtually all implementation decisions to the OAU Council of Heads of State and Government, which, of course, they controlled.<sup>148</sup>

### *B. The Final Version of the African Charter*

The result of this tortuous process was a compromise document that delighted few but bridged enough of Africa's political divisions to garner acquiescence if not enthusiasm.<sup>149</sup> The following sections explain how the Charter included significant elements of the African humanism that Senghor had insisted upon.<sup>150</sup> Before engaging in that discussion, however, the article will describe some of the criticisms lodged against it.

#### *1. Something to Disappoint Everyone*

From the perspective of some human rights champions, the Charter's civil and political rights protections were disappointingly weak.<sup>151</sup> Many

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<sup>143</sup> Rubner, *supra* note 24, at 77.

<sup>144</sup> Viljoen, *supra* note 107, at 315; Rubner, *supra* note 24, at 11.

<sup>145</sup> *Id.*

<sup>146</sup> Rubner, *supra* note 24, at 77.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 65; Plagis & Riemer, *supra* note 122, at 568-69.

<sup>150</sup> *See supra* Part II.A.1.

<sup>151</sup> Ssenyonjo, *supra* note 135, at 3; *see* Plagis & Riemer, *supra* note 122, at 581 (arguing rights in the African Charter were "watered down," but that the "minimalist approach may have been necessary to convince African countries to sign on").

essential civil and political rights were simply omitted, including the right to privacy, the right to vote, the right to form and join trade unions and other civil society organizations, and freedom from forced labor.<sup>152</sup> Other civil and political rights were expressed in vague language.<sup>153</sup> For instance, the rights to liberty and security of the person under Articles 6 and 7 said nothing specific about detention without trial, cruel, inhumane or degrading punishment, or torture.<sup>154</sup> Nor did the language explicitly provide for the right to remain silent, the right to be informed promptly of the reasons for one's arrest, protection against forced confession, or the right to appropriate bail.<sup>155</sup> Some African leaders argued that placing too much emphasis on civil and political rights would fuel political and social strife and hinder Africa's badly needed economic development.<sup>156</sup> However, human rights advocates feared that the Charter's tepid protections would grant permission to the most extreme members of the African dictators' club to retain power by stifling dissent and terrorizing their populations.<sup>157</sup>

Human rights advocates' fear of political abuse by African state leaders was exacerbated by the African Charter's numerous "clawback" provisions.<sup>158</sup> These were not the typical derogation clauses included in human rights instruments, which allow for brief, temporary suspensions of rights in dire, declared emergencies.<sup>159</sup> Instead, the African Charter's clawbacks were written in sweeping language, arguably permitting leaders of African states to limit rights of expression, assembly, freedom of conscience and religion, due process, and political participation whenever they believed it was necessary to maintain law and order.<sup>160</sup>

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<sup>152</sup> Ssenyonjo, *supra* note 135, at 12.

<sup>153</sup> *Id.*

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

<sup>155</sup> *Id.*

<sup>156</sup> KOFI OTENG KUFUOR, *THE AFRICAN HUMAN RIGHTS SYSTEM: ORIGIN AND EVOLUTION* 11 (2010).

<sup>157</sup> See Rose M. D'Sa, *Human and Peoples' Rights: Distinctive Features of the African Charter*, 29 J. AFR. L. 72, 76 (1985) (arguing the African Charter's clawback provisions could give permission to Africa's many military dictatorships and one-party states).

<sup>158</sup> D'Sa, *supra* note 157, at 76; Malila, *supra* note 61, at 201-02.

<sup>159</sup> KUFUOR, *supra* note 156, at 40.

<sup>160</sup> Ssenyonjo, *supra* note 135, at 12; KUFUOR, *supra* note 156, at 40-41; Malila, *supra* note 61, at 201; Makau wa Mutua, *The African Human Rights System: A Critical Evaluation*, PREPARED FOR UNITED NATIONS DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT 2000 (2000) (describing the clawback clauses as the African Charter's as its "most serious flaw.").

The Charter's failure to provide a robust enforcement mechanism further disappointed human rights promoters.<sup>161</sup> Rather than creating a human rights court to interpret and apply the African Charter's language, it formed a Commission, which had softer powers to gather information and issue advisory opinions,<sup>162</sup> and which at first was hamstrung by a lack of resources.<sup>163</sup> The Charter granted real power over human rights to the OAU's Assembly of Heads of State and Government.<sup>164</sup>

Finally, there was at least some disappointment from what might be described as the Senghorians, meaning those who believed the African Charter should articulate a detailed vision of human rights uniquely tailored to Africa's history, tradition, and values.<sup>165</sup> As Part II.B.2 will reveal, several Charter sections alluded to African values; however, Sengorian human rights promoters wished the document had been more explicit in describing them and providing clear guidance on how they should be upheld.<sup>166</sup>

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<sup>161</sup> Ssenyonjo, *supra* note 135, at 10.

<sup>162</sup> Gino J. Naldi, *The African Union and the Regional Human Rights System*, in THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS 36 (Malcolm Evans & Rachel Murray eds., 2d ed. 2008); see Ssenyonjo, *supra* note 135, at 7, 9 (arguing the Commission was a "part-time quasi-judicial body and that some African leaders claimed enforcement by a court was contrary to the African tradition of consensus decision making and conciliation, but in fact African leaders simply were not ready to accept judicial scrutiny").

<sup>163</sup> See Robert W. Eno, *Foreword*, in THE AFRICAN REGIONAL HUMAN RIGHTS SYSTEM: 30 YEARS AFTER THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS (Manisuli Ssenyono ed., 2013) (arguing the African Commission has been undermined by the same political leaders who created it through a lack of cooperation and resources); see also D'sa, *supra* note 157, at 18 (arguing the African Commission initially did not have a permanent secretary and did not begin functioning until two years after its creation); Naldi, *supra* note 162, at 35 (arguing the African Commission initially was granted weak powers of investigation and no compulsory jurisdiction).

<sup>164</sup> See D'Sa, *supra* note 157, at 79-80 (arguing decision making power over African human rights lay not with the African Commission but with the OAU Assembly of Heads of State and Governments, a political body).

<sup>165</sup> Rubner, *supra* note 24, at 92-93 (arguing the draft language that emerged from the Senegal meeting was disappointingly dry and legalistic given Senghor's soaring rhetoric about Negritude and Africanness).

<sup>166</sup> See KUFUOR, *supra* note 156, at 65 (arguing the Charter's language regarding group rights was vague); see also Basil Ugochukwu et al., *Group Rights Under The African Charter On Human And Peoples' Rights: Concept, Praxis And Prospects*, in THE AFRICAN REGIONAL HUMAN RIGHTS SYSTEM: 30 YEARS AFTER THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS 105-07 (Manisuli Ssenyono ed., 2013) (arguing the Charter's drafters left several African human rights concepts vague to avoid getting bogged down); Malila, *supra* note 61, at 215-18 (arguing various African rights articulated in the Charter, including group rights and individuals' responsibilities to collectives, are vaguely worded).

As subsequent history would reveal, many of the Charter's perceived weaknesses, including lack of expansive and detailed civil and political rights and broad clawback clauses, were cured, or at least mitigated, by a politically and jurisprudentially savvy African Commission.<sup>167</sup> However, despite the Commission's surprising success, and despite the OAU's more recent institutional transformation that elevated human rights on the African continent,<sup>168</sup> one of the Charter's essential shortcomings remains unresolved: No one has fleshed out or applied the African humanism that was supposed to make the African Charter uniquely African.

## 2. *African Values Included in the Text*

The African Charter, as adopted, contained several provisions intended to emphasize its Africanness. The preamble included a powerful exhortation committing signatory states and the OAU to interpret human rights in light of African historical traditions and values.<sup>169</sup> It also stated that human and peoples' rights were inextricably linked.<sup>170</sup> Finally, it included an unambiguous declaration that the enjoyment of rights and freedoms "implies the performance of duties on the part of everyone."<sup>171</sup> All told, therefore, the African Charter's preamble had a strongly Sengorian cast to it, but what of the details? Which African traditions and values was the preamble alluding to? Which "peoples" should enjoy human rights protections? Precisely what duties do African individuals owe, and to whom? The body of the Charter was disappointingly vague on these points, but it did include some guidance.

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<sup>167</sup> See *infra* Part II.C.

<sup>168</sup> See *infra* note 218 (describing the institutional evolution of the OAU with regards to human rights).

<sup>169</sup> The African Charter on Human and Peoples' Rights, June 27, 1981, OAU Doc. CAB/LEG/67/3/Rev.5 (1981), pmb. ¶ 4 [hereinafter *African Charter*]. Although the language appears in the Charter's preamble rather than its body, it is a well-settled precept of treaty law that preamble language is substantive and enforceable. See Amin, *supra* note 11, at 26 (arguing the African Charter's preamble, when applied as an interpretive aid, is binding just like any other treaty provision); see also Max H. Hulme, Comment, *Preambles in Treaty Interpretation*, 164 UNIV. PA. L. REV. 1281, 1342 (2016) (arguing that under the Vienna Convention on the Law of Treaties preambles hold just as much weight in treaty interpretation as the rest of the text).

<sup>170</sup> African Charter, *supra* note 169, pmb. ¶ 5 ("the reality and respect of peoples [sic] rights should necessarily guarantee human rights").

<sup>171</sup> *Id.* ¶ 6.

For example, Article 61 required the African Commission, when ruling on human rights questions, to take into consideration “[A]frican practices consistent with international norms on human and peoples’ rights,” as well as “customs generally accepted as law.”<sup>172</sup> Given that most African countries’ formal legal systems recognize, to one degree or another, the validity of customary, non-state law<sup>173</sup>—law that is based on African traditions and values—Article 61 is a powerful indication that the drafters intended African human rights to be defined, at least in part, by African customary law.

Other provisions fleshed out the somewhat vague preamble language about upholding the rights of people.<sup>174</sup> For example, Article 19 provided the right of people to be equal and free of domination by another people.<sup>175</sup> Article 20 grants peoples the right to existence, self-determination, and freedom from colonization and oppression.<sup>176</sup> Article 21 provides peoples the right to freely dispose of their wealth and natural resources.<sup>177</sup> Articles 22 through 24 grant peoples the rights to economic, social, and cultural development “with due regard to their freedom and identity,” to peace and security, and to a general satisfactory environment favorable to their development.<sup>178</sup> Enumerating these various peoples’ rights was an acknowledgment and assertion of the comparative importance of communalism in African history and culture.<sup>179</sup> As a result, the African

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<sup>172</sup> African Charter, *supra* note 169, art. 61.

<sup>173</sup> Cornell & van Marle, *supra* note 89, at 220.

<sup>174</sup> African Charter, *supra* note 169, pmb. ¶ 6 (“the reality and respect of peoples [sic] rights should necessarily guarantee human rights”); Kiwanuka, *supra* note 13, at 83.

It should be emphasized that the idea of peoples’ rights is not uniquely African because other human rights instruments and courts have articulated and enforced similar rights. Kiwanuka, *supra* note 13, at 81.

<sup>175</sup> African Charter, *supra* note 169, art. 19.

<sup>176</sup> *Id.* art. 20.

<sup>177</sup> *Id.* art. 21.

<sup>178</sup> *Id.* arts. 22-24.

<sup>179</sup> Kiwanuka, *supra* note 13, at 82; D’Sa, *supra* note 157, at 74, 77; Ugochukwu, *supra* note 166, at 107; VILJOEN, *supra* note 21, at 219; *but see* Viljoen, *supra* note 107, at 317 (arguing that in addition to acknowledging the importance of communal spirit in Africa, the peoples’ rights provisions in the Charter also acted as a sop to socialist countries that were wary of rampant liberal individualism).

Charter established itself as a trail-blazer in recognizing peoples' collective human rights.<sup>180</sup>

Still another African feature of the African Charter was that, as directed by Senghor,<sup>181</sup> it made no distinction between civil and political rights on one hand and social, economic, and cultural rights on the other.<sup>182</sup> Placing social and cultural rights on the same level as civil and political rights meant that African cultural traditions upholding communitarian values—including the Zarmas' *bogu*<sup>183</sup> and southern Africa's *ubuntu*<sup>184</sup>—could be enforced as human rights.<sup>185</sup> The Charter's unequivocal omission of temporizing language like “progressive realization” emphasized the paramount significance of social, economic, and cultural rights.<sup>186</sup> This meant that states had immediate and fully justiciable obligations to uphold African culture (as well as provide food, health, and the like).<sup>187</sup> An additional indication of the centrality of cultural rights in the Charter is that, unlike civil and political rights, they were not subject to clawback provisions.<sup>188</sup>

These Charter provisions helped flesh out the preamble's general exhortation to emphasize African culture and tradition when defining and applying human rights, but the Charter's truly unique African contribution was its careful articulation of individuals' duties toward their families and

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<sup>180</sup> See Kiwanuka, *supra* note 13, at 84, 86 (arguing the African Charter's intention is to establish collective rights as equal to individual rights). Among the proponents of including peoples' rights in the Charter there was some dismay that its final draft failed to define “people.” Plagis & Riemer, *supra* note 122, at 574. In fact, Keba M'Baye, an intimate of Leopold Senghor's and one of the Charter's lead authors, admitted he left the term vague to avoid a difficult debate. Viljoen, *supra* note 107, at 317; Ugochukwu, *supra* note 166, at 106. Subsequent interpretation of the Charter's language, primarily by the African Commission, has made it plain that at a minimum, “people” includes ethnic minority groups, indigenous populations, and colonized people. See Kiwanuka, *supra* note 13, at 84.

<sup>181</sup> Address Delivered by Leopold Sedar Senghor, *supra* note 108, at 79.

<sup>182</sup> See Viljoen, *supra* note 107, at 320 (arguing early drafts of the Charter indicated that civil and political rights would be immediately justiciable while economic, social and cultural rights would be subject to “progressive realization,” but that distinction was dropped in later drafts and all rights would be immediately justiciable).

<sup>183</sup> See *supra* INTRODUCTION, Part A.

<sup>184</sup> See *supra* Part I.C.2.

<sup>185</sup> Kiwanuka, *supra* note 13, at 82.

<sup>186</sup> Eno, *supra* note 163, at xiii.

<sup>187</sup> *Id.*

<sup>188</sup> KUFUOR, *supra* note 156, at 61.

communities.<sup>189</sup> Other human rights instruments include mention of duties, but usually only in passing<sup>190</sup> and often only to clarify that individuals have a duty to obey the just laws of their societies and avoid interfering with the exercise of others' individual rights.<sup>191</sup> In contrast, the drafters of the African Charter believed that individual rights and duties to the collective were intimately intertwined, and that without duties, no individual rights would have meaning.<sup>192</sup> As discussed in Part I.C, from an African perspective, an individual can only realize him or herself in and through the collective.<sup>193</sup> By emphasizing individuals' duties, the drafters were making a conscious effort to elevate and preserve African communal values: the same ones at the heart of Senghor's Negritude and Tutu's *ubuntu*;<sup>194</sup> the same ones illustrated by Zarma peoples' concept of *bogu*;<sup>195</sup> and the same ones that Europeans—with their laser focus on individual rights—had lost sight of.<sup>196</sup>

Individuals' duties are laid out in three of the Charter's articles. Article 27 establishes the general proposition that "every individual shall have duties towards his family and society, the State, and other legally recognized communities, and the international community."<sup>197</sup> It is not clear what the

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<sup>189</sup> Kofi Quashigah, *Scope of Individual Duties in the African Charter*, in THE AFRICAN REGIONAL HUMAN RIGHTS SYSTEM: 30 YEARS AFTER THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS 119 (Manisuli Ssenyono ed., 2013) (arguing the African Charter is "peculiar in its detail" regarding individuals' duties); Malila, *supra* note 61, at 202 (arguing the enumeration of individual duties are "probably the most distinguishing" feature of the African Charter).

<sup>190</sup> See Quashigah, *supra* note 189, at 127 (arguing the Universal Declaration of Human Rights and regional human rights instruments that followed it made only passing reference to duties while the African Charter devoted an entire chapter to the subject); see also D'Sa, *supra* note 157, at 77 (arguing in most human rights documents it is only the state that has duties toward its citizens); Malila, *supra* note 61, at 203 (arguing the African Charter is unique because it not merely just the general principle that individuals have duties, but it enumerates these duties and elevates them to the rank of "African civil obligations.").

<sup>191</sup> Beddard, *supra* note 105, at 33; see Naldi, *supra* note 162, at 28 (arguing the African Charter differs by defining duties that are not simply the other side of individual rights).

<sup>192</sup> Malila, *supra* note 61, at 206; see Quashigah, *supra* note 189, at 124 (arguing "the complementarity of rights and duties is very much emphasized in African traditional society").

<sup>193</sup> See generally *supra* Part I (describing African philosophies and their collectivist orientations).

<sup>194</sup> *Id.*

<sup>195</sup> See *supra* INTRODUCTION, Part A.

<sup>196</sup> See *supra* notes 65-67 and accompanying text.

<sup>197</sup> African Charter, *supra* note 169, art. 27.

drafters meant by “other legally recognized communities,”<sup>198</sup> though one can fairly speculate that they were referring to communities presided over by traditional authorities such as village and regional chiefs, since most African states’ legal systems recognize, to one degree or another, traditional leaders’ authority.<sup>199</sup> It is similarly unclear what Article 27 means by “family.”<sup>200</sup> Is the Charter referring to immediate family, or extended family?<sup>201</sup> Again, in light of African culture’s emphasis on family lineage and with Africans peoples’ tendency to describe even the most distant relations as brother or sister or father or mother, one can fairly assume the Charter is referring to extended family.<sup>202</sup> Article 28 is a generally worded call for mutual respect and tolerance.<sup>203</sup> Article 29, in contrast, offers specifics about which duties are owed to whom.<sup>204</sup> Some of the specified duties flow primarily from individuals to their States. For example, individuals have a duty: to serve the “national community by placing his physical and intellectual abilities at its disposal” (Art. 29(2)); to not compromise the security of the State (Art. 29(3)); “to preserve and strengthen the national independence and the territorial integrity of his country and to contribute to its defense in accordance with the law” (Art. 29(5)); and to pay taxes “imposed by law in the interest of society” (Art. 29(6)).<sup>205</sup>

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<sup>198</sup> Malila, *supra* note 61, at 208.

<sup>199</sup> *Human Rights and Traditional Justice Systems in Africa*, U.N. HUM. RTS. OFF. OF THE HIGH COMM’R 17 (2016), [https://www.ohchr.org/sites/default/files/Documents/Publications/HR\\_PUB\\_16\\_2\\_HR\\_and\\_Traditional\\_Justice\\_Systems\\_in\\_Africa.pdf](https://www.ohchr.org/sites/default/files/Documents/Publications/HR_PUB_16_2_HR_and_Traditional_Justice_Systems_in_Africa.pdf) (describing the state-recognized authority of “traditional justice systems” in dealing with disputes in African states).

<sup>200</sup> Malila, *supra* note 61, at 208.

<sup>201</sup> *Id.*

<sup>202</sup> See *supra* Part INTRODUCTION, Part A (arguing a group of male elders in an African village considered themselves to be an orphan’s father); see also Elleni Tedla, *Indigenous African Education as a Means For Understanding the Fullness of Life*, 23 J. BLACK STUDS. 7 (1992) (arguing African cultures have a broad and flexible definition of family); Monde Makiwane & Chammah J. Kaunda, *Families and Inclusive Societies in Africa*, HUM. SCI. RSCH. COUNCIL (June 26, 2018) (a paper presented at the U.N.’s observation of the 2018 International Day of Families) (arguing the African concept of family is broad and encompassing); Angela Taylor, *Nigerians in New York: A Big Happy Family – Though Loosely Related*, N.Y. TIMES (June 24, 1974), <https://www.nytimes.com/1974/06/24/archives/nigerians-in-new-york-a-big-happy-family-though-loosely-related-no.html> (arguing Nigerians define family very loosely and that the extended family includes not just blood relatives but the town and the tribe itself).

<sup>203</sup> African Charter, *supra* note 169, art. 28.

<sup>204</sup> *Id.* art. 29.

<sup>205</sup> *Id.* arts. 29(2), 29(3), 29(5), 29(6).



However, several of the duties specified by the Charter flow from individuals to their communities and families and are aimed at preserving African tradition and culture. For example, Article 29(1) upholds the African tradition of deference to age and care for elders by requiring individuals “to preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need.”<sup>206</sup> Article 29(7) requires the individual to “preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well-being [sic] of society.”<sup>207</sup> Finally, presumably in a nod to Pan-Africanism, Article 29(8) requires the individual to contribute “at all times and at all levels, to the promotion and achievement of African unity.”<sup>208</sup> In sum, unlike most human rights instruments, the text of the African Charter specifically states that African individuals have legally enforceable duties toward other individuals, toward their State, but also toward their collectives.<sup>209</sup>

### C. *The African Commission’s Expansive Interpretation of the African Charter*

For non-Senghorian African human rights champions, meaning those who wished to promote human rights on the African continent but who did not particularly care whether those rights respected African values, culture, and tradition, the post-adoption story of the African Charter was a happy one. To the surprise of many, the African Commission succeeded in

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<sup>206</sup> See *supra* Part I.B.2, (arguing African cultural tradition includes respect for and deference to age).

<sup>207</sup> Quashigah, *supra* note 189, at 126; see Malila, *supra* note 61, at 208 (arguing the Charter articulates individuals’ duties to the family, society, the state; other legally recognized communities, and the international community).

<sup>208</sup> African Charter, *supra* note 169, art. 29(8).

<sup>209</sup> See Beppard, *supra* note 105, at 30, 32 (arguing the ICCPR and ICESCR only include duties in a brief preamble statement indicating individuals have a responsibility to strive to promote and observe the rights protected by the covenants); Viljoen, *supra* note 107, at 318, n. 18 (arguing the African Charter was the first human rights instrument to “elaborate” on the duties of individuals); Naldi, *supra* note 162, at 29 (arguing the African Charter goes well beyond the European notion that duties are simply “the other side” of human rights).

expanding its authority and breathing life into human rights protections on the continent, at least those human rights that had been endorsed by European tribunals.

### 1. *The Commission Began with Little Formal Power*

The Commission had been the product of political compromise in an era when many African leaders did not want pesky human rights lawyers interfering in their efforts to retain political power.<sup>210</sup> Therefore, the Charter granted most of the decision-making power over human rights to the OAU's Assembly of Heads of State and Government<sup>211</sup> and confined the Commission's powers to "collecting documents and undertaking studies and researches," and "organizing seminars, symposia, and conferences."<sup>212</sup> The Commission was empowered to "give its views" and "make recommendations" to state parties,<sup>213</sup> but those state parties would be free to ignore the Commission's advice.<sup>214</sup> State parties could bring human rights questions to the attention of the Commission, but the Commission could answer them only after ensuring that all local remedies had been exhausted.<sup>215</sup> In sum, the African Charter created a Commission with some power to promote human rights but scant power to enforce.<sup>216</sup>

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<sup>210</sup> Ssenyonjo, *supra* note 135, at 10. *See supra* notes 150-153 (arguing African heads of state purposely created a weak Commission); *see also* Ramcharan, *supra* note 128, at 311 (arguing the drafters of the Charter disagreed on whether it should both promote and protect human rights and they settled on promote with weak powers to protect).

<sup>211</sup> *See supra* notes 151-153 and accompanying text.

<sup>212</sup> African Charter, *supra* note 169, art. 45(1)(a).

<sup>213</sup> *Id.*

<sup>214</sup> *See id.* art. 45(1)(b) (providing African Governments *may* base their "legislations" on the Commission's principles and rules).

<sup>215</sup> *Id.* art. 50.

<sup>216</sup> *See D'Sa, supra* note 157, at 79 (arguing the Commission did not have a "strict legal role" since decision-making power over human rights remained with the OAU Assembly, which is a political body); *see Ssenyonjo, supra* note 135, at 7 (arguing that early in its existence the African Commission was a "part-time quasi-judicial body"); Naldi, *supra* note 162, at 35 (arguing the Commission was granted only a "quasi-judicial function" with weak powers of investigation and no compulsory jurisdiction); Viljoen, *supra* note 107, at 315 (arguing the OAU Assembly was the sole interpreter of the Charter).

Therefore, it was predictable that the Commission would start slowly.<sup>217</sup> African political leaders who spearheaded the effort encountered significant challenges in ensuring the Commission's effectiveness, primarily due to insufficient cooperation, resource constraints, the absence of a robust monitoring mechanism for recommendation follow-up, and suboptimal public awareness campaigns.<sup>218</sup> Over the following decades, however, the Commission hit its stride, influencing the interpretation of the Charter, filling in at least some of its gaps, and establishing among African member states an expectation of compliance with its rulings.<sup>219</sup>

## 2. *How the Commission Seized the Reins*

Explanations vary as to how the Commission was able to expand its authority, but the most plausible explanation is that it was a classic principal-agent dilemma.<sup>220</sup> In brief, the OAU heads of state, who had carefully reserved for themselves decision-making power over African human rights, lacked the time, resources, and legal expertise to exercise effective control.<sup>221</sup> The Commission thus maintained a “near monopoly over human rights information” and used it to increase its power and expand human rights protections on the continent.<sup>222</sup>

As one example, the Commission took a vital step toward steering the development of African human rights by claiming authority over human rights reporting.<sup>223</sup> The African Charter required member states to submit biannual reports on the steps they had taken to give effect to the Charter's protections.<sup>224</sup> It was silent, however, on what questions the member states

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<sup>217</sup> Naldi, *supra* note 162, at 36; *see* Viljoen, *supra* note 107, at 161 (arguing the Commission did not have a permanent secretary until 1989 and did not begin publishing its decisions until 1994).

<sup>218</sup> Eno, *supra* note 163, at xiv.

<sup>219</sup> Naldi, *supra* note 162, at 36; *see* MBAYE, *supra* note 1 (arguing it is impressive how much the Commission has been able to accomplish given how few resources it was provided); *see also* Eno, *supra* note 163, at xv (arguing the Commission, partly by appointing special rapporteurs to investigate human rights topics, has helped create a culture of human rights in Africa).

<sup>220</sup> Rubner, *supra* note 24, at 49.

<sup>221</sup> *Id.*

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

<sup>223</sup> Naldi, *supra* note 162, at 38.

<sup>224</sup> African Charter, *supra* note 169, art. 62.

should answer and who should receive and review the reports.<sup>225</sup> The Commission fought for and won those powers and used them to expand its authority.<sup>226</sup> At the same time, the Commission adopted of its own accord the practice of periodically issuing resolutions that defined and explained specific human rights.<sup>227</sup> Over time, the Commission's non-binding administrative rulings and pronouncements hardened into quasi-law with which African states generally complied, even if grudgingly.<sup>228</sup>

The Commission's activist approach is facilitated by the fact that many of the African Charter's provisions are written in broad language.<sup>229</sup> By seizing opportunities to interpret the vague language in cases brought before it, the Commission was able to fill in the gaps and place its own gloss on African human rights.<sup>230</sup> For the most part, that gloss has been progressive and expansive and very much in line with European human rights principles.<sup>231</sup>

### 3. *What the Commission Accomplished*

The Commission allayed human rights champions' fears that the Charter's various provisions would be abused by African governments intent on retaining political control.<sup>232</sup> On numerous occasions it interpreted those provisions narrowly "in ways that conform[ed] to European interpretations of rights."<sup>233</sup> For example, it now is well settled that the justifications for invoking the clawbacks "must be founded in a legitimate state interest and the evils of limitations of rights must be strictly proportionate with and absolutely necessary for the advantages which are to be obtained."<sup>234</sup>

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<sup>225</sup> Rubner, *supra* note 24, at 37-38.

<sup>226</sup> *Id.* at 37; *see also supra* Part II.B.1 (describing human rights proponents' disappointment at the Charter's vague language).

<sup>227</sup> Naldi, *supra* note 162, at 38.

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

<sup>229</sup> Viljoen, *supra* note 107, at 316.

<sup>230</sup> Rubner, *supra* note 24, at 39; Viljoen, *supra* note 107, at 316.

<sup>231</sup> Viljoen, *supra* note 107, at 323.

<sup>232</sup> *See* Rubner, *supra* note 24, at 42 (arguing the Commission's decisions have "progressively eroded the threat to human rights posed by clawback clauses").

<sup>233</sup> Naldi, *supra* note 162, at 28.

<sup>234</sup> Quashigah, *supra* note 189, at 123; *see* Malila, *supra* note 61, at 209.

The Commission has also handed down expansive decisions protecting all manner of rights. Several rulings established the right to fair trial along with other civil and political rights, even though they were not explicitly included in the Charter's language.<sup>235</sup> In the realm of so-called second- and third-generation human rights, the Commission became not merely a European follower but an international leader.<sup>236</sup> It has declared that social, economic, and cultural rights under the Charter are not merely aspirational but fully justiciable and enforceable, and has issued rulings upholding the right to health, education, housing and food.<sup>237</sup>

Commission rulings have also established that peoples have distinct, collective, justiciable rights under the Charter,<sup>238</sup> ruling in *Ogoni v Nigeria* that "the importance of community and collective identity in African culture is recognized throughout the African Charter,"<sup>239</sup> and, in *Center for Minority Rights Development (on behalf of the Endorois Community) v. Kenya* that a pastoralist community of 60,000 individuals could make valid land claims under the Charter in the name of the collective, not merely the individuals.<sup>240</sup> As a result of such rulings, it is now settled that the term "peoples" as used in the African Charter does not refer merely to citizens of a state, nor does it refer exclusively to colonized or oppressed peoples (an argument some scholars have promoted), but instead, to any group that views itself as distinct such as minority ethnic groups and indigenous people.<sup>241</sup>

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<sup>235</sup> Plagis & Riemer, *supra* note 122, at 559; Eno, *supra* note 163, at xv; Ssenyonjo, *supra* note 135, at 14; VILJOEN, *supra* note 21, at 215.

<sup>236</sup> Naldi, *supra* note 162, at 47.

<sup>237</sup> *Id.* at 31,47; Viljoen, *supra* note 107, at 320; Malila, *supra* note 61, at 130.

<sup>238</sup> Ugochukwu, *supra* note 166, at 108; Naldi, *supra* note 162, at 47; Clive Baldwin & Cynthia Morel, *Group Rights, in THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: THE SYSTEM IN PRACTICE 1986–2006* 245 (Malcolm Evans & Rachel Murray eds., 2d ed. 2008).

<sup>239</sup> Baldwin and Morel, *supra* note 238, at 246; Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria, Communication 155/96, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], 59 (Oct. 27, 2001) (holding that Nigeria was in violation "of local people's rights to . . . health . . . and life [by] breaching its duty to protect the Ogoni people from damaging acts of oil companies.").

<sup>240</sup> Baldwin and Morel, *supra* note 238, at 246; Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya, Communication 276/03, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶ 241 (Nov. 25, 2009).

<sup>241</sup> Baldwin and Morel, *supra* note 238, at 247.

In sum, the African Commission has made more progress than anyone expected in using its soft power to define and promote human rights on the continent. However, a vitally important question remains: Why has the Commission—along with its allied and successor institutions<sup>242</sup>—done little to flesh out the most African aspects of the African Charter?<sup>243</sup> Why has it

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<sup>242</sup> It is beyond the scope of this article to explain in detail the institutional evolution that the OAU experienced in the 1990s and its effect on human rights. In brief, after the fall of the Berlin Wall, African countries began to embrace the tenets of European liberalism, some enthusiastically, others under duress. See Thomas A. Kelley III, *Exporting Western Law to the Developing World: The Troubling Case of Niger*, 7 GLOB. JURIST 1, 6-7 (2008). Among those tenets was the assumption that respect for human rights and rule of law were precursors to economic development, Naldi, *supra* note 162, at 22, and that enforcing those principles might sometimes require intervening inside the boundaries of African states. See Viljoen, *supra* note 107, at 163, 165 (arguing African countries saw the link between peace and security on one hand and economic development on the other, and so began laying the groundwork for African humanitarian intervention to enforce human rights). A bundle of reforms ensued. The OAU adopted progressive human rights instruments including the African Charter on the Rights and Welfare of the Child in 1990, Viljoen, *supra* note 107, at 161 (noting that although this treaty was a step forward for African human rights, states were slow to adopt it and it did not come into force until 1999), and the Charter on the Rights of Women in 2003. Viljoen, *supra* note 107, at 163. Another important step forward was the OAU's adoption in 1998 of the Protocol on the Establishment of an African Human and Peoples' Rights Court (later renamed the African Court of Justice and Human Rights) a move meant to place human rights enforcement at the center of Africa's agenda. Viljoen, *supra* note 107, at 161, 414 (explaining the new court's rulings are final and binding on members states). The seismic institutional shift culminated in 2000 when the OAU adopted the African Union Constitutive Act, which replaced the old OAU with a more dynamic and progressive institution, the African Union. See Naldi, *supra* note 162, at 221 (arguing AU was a more dynamic institution that replaced the "discredited" OAU); Viljoen, *supra* note 107, at 164-65; Eno, *supra* note 163, at xvi. The AU Constitutive Act departed in many respects from its predecessor, but for purposes of this article the most important change was that it placed respect for and enforcement of human rights at its center. Ssenyonjo, *supra* note 135, at 5; Viljoen, *supra* note 107, at 164-65; Naldi, *supra* note 162, at 21; see Eno, *supra* note 163, at xvi (arguing the recent institutional reforms have "changed Africa's human rights landscape dramatically"). It has taken time to get the new machine moving in the right direction, Viljoen, *supra* note 107, at 169, but in recent years the Court has ruled on numerous human rights cases and the AU has become more active in intervening in members states to stop mass human rights abuses. *Id.*

<sup>243</sup> I claim the African Commission and its allied and successor institutions at the AU have made scant progress in defining the African values and traditions included in the Charter, particularly the notion of individuals' responsibilities to their families and communities, but it is difficult to prove a negative. While I have not read every word of the Commission's (and the successor courts') numerous human rights decisions, I have read many. I also rely on Franz Viljoen, a renowned authority on African human rights, who reported in 2012 that the Commission had yet to hand down any ruling applying or interpreting the African Charter's provisions regarding individuals' duties. VILJOEN, *supra* note 21, at 319. I also scoured the African Court Law Reports (<https://www.african-court.org/wpafc/african->

not taken into greater consideration African values and traditions? More specifically, why has it not defined and enforced the communalistic spirit that motivated the Charter's drafters and that the Charter's text explicitly included?

The following section provides a concrete example where African values and traditions, in particular Africans' duties toward their families and communities, ought to be deployed to defend Africans' human rights.

### III. A CALL TO INCLUDE AFRICAN VALUES IN AFRICAN HUMAN RIGHTS: PREVENTING ANCESTRAL LAND LOSS

Leopold Senghor and the drafters of the African Charter were clear that African human rights should respect and uphold African values and traditions; however, this has not happened.<sup>244</sup> While the African Commission and its allied institutions have made progress in promoting and protecting liberal, individualistic, European human rights on the African continent, those institutions have primarily ignored African values and traditions.<sup>245</sup> Indeed, the African Charter's most non-European provisions—Articles 27 through 29, which describe individuals' duties toward their families and communities—have been dead letter for decades.<sup>246</sup> It is time to breathe life into the African provisions of the African Charter. AU institutions, including the African Commission and the more recently created African Courts,<sup>247</sup> as well as lawyers and judges across the continent, should deploy those Charter provisions as tools to address uniquely African human rights problems such as the African peoples' rapid loss of ancestral lands: an ongoing African human rights catastrophe.

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court-law-reports/ ), which includes every opinion issued by the African Court on Human and Peoples' Rights between 2006 and 2019, and found no mention of the Charter language regarding individuals' duties. Thus, although it is possible that other African courts have opined on duties, I am confident in asserting that no AU/OAU tribunal has done so.

<sup>244</sup> *See id.* and accompanying text.

<sup>245</sup> *Id.*

<sup>246</sup> *See id.*: African Charter, *supra* note 169, at arts. 27-29.

<sup>247</sup> *See supra* note 242.

A. *A Human Rights Catastrophe: Ancestral Land Loss as the Result of Legal Westernization*

There is a slow-moving but inexorable land loss crisis under way in many African countries.<sup>248</sup> Because my on-site investigation of African land loss has taken place in Niger, the discussion focuses there.

Access to land is crucial in African countries such as Niger where large numbers of people depend on subsistence agriculture and where many peoples' communities and identities are defined by the land they inhabit.<sup>249</sup> Despite its importance, a growing number of individuals and communities are being cut off from their ancestral lands.<sup>250</sup> There are many drivers of this rural land loss crisis, but one preventable cause is African states' westernization of their land laws.<sup>251</sup>

Liberal political values swept the African continent in the 1990s after the fall of the Berlin Wall.<sup>252</sup> Whether willingly and eagerly or under pressure from the Global North, African states committed themselves to democratic governance, free and fair elections, term limits for political leaders, and enhanced respect and protection for human rights.<sup>253</sup> Along with those political reforms came a package of liberal economic reforms sometimes referred to as the Washington Consensus.<sup>254</sup> African countries that wanted to remain in the good graces of the Global North and enjoy bilateral and multi-lateral financial support were compelled to adopt "structural adjustment" packages that were supposed to unleash the power of unfettered capitalistic markets.<sup>255</sup> Structural adjustment required divesting from and privatizing state-owned industries, drastically reducing the size of the civil services, paring back the regulation of business, and eliminating

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<sup>248</sup> See generally Kelley, *supra* note 7, at 62.

<sup>249</sup> *Id.* at 58, 106-09.

<sup>250</sup> *Id.* at 64 (arguing urbanization is "gobbling up" large swaths of agricultural land and converting it to suburbs).

<sup>251</sup> See *id.* at 61-63 (arguing climate change, rapid population growth, and urbanization are exacerbating land loss in Niger); See *id.* at 94-95 (arguing the westernization of Niger's land law has permitted wealthy speculators and developers to buy up available agricultural lands).

<sup>252</sup> See Kelley, *supra* note 242, at 1, 6-7.

<sup>253</sup> See *id.*

<sup>254</sup> Kelley, *supra* note 7, at 77.

<sup>255</sup> Thomas A. Kelley III, *Truth or Consequences (The Deadly Kind): Oath Swearing in Nigerien Customary Law*, 47 N.C. J. INT'L L. 331, 340 (2022).



government subsidies for staples such as grain and fuel.<sup>256</sup> Another crucial element of the Consensus reform package was the westernization of land law.<sup>257</sup> Understanding the legal westernization of African land—and the crisis it has helped create—requires a brief tutorial on customary landholding practices.

### 1. Customary Land Holding Practices in Africa

In Niger, and in much of the rest of the African continent, access to rural land flows from membership in a group, not individual ownership rights.<sup>258</sup> Often, the right to control a particular parcel of land is traced to the ancestors who first cleared the bush and began cultivating crops.<sup>259</sup> Those ancestors were said to have formed pacts with the land spirits (in Zarma, *gangi bi*, meaning “black spirits”) that permitted them and their descendants to exploit the land without the spirits’ interference.<sup>260</sup> A young man wishing to claim control and use of a parcel of land had to demonstrate that he descended from one of those founders.<sup>261</sup> Since everyone knows everyone else in rural villages,<sup>262</sup> it was easy to prove ancestry and the young man would be granted a contingent right over the land.<sup>263</sup>

The right was contingent because ultimate decision-making power over the land lay in the hands of the family patriarch, the lineage head.<sup>264</sup> Those patriarchs, who often were the same person as the village chief (in Zarma *kwarakoy*), were in turn guided and influenced by land chiefs (in Zarma *laabukoy*).<sup>265</sup> Despite these layers of authority, the young man granted access rights in a family plot could expect to control the land for the

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<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

<sup>258</sup> Kelley, *supra* note 7; Gershon Feder & Raymond Noronha, *Land Rights Systems and Agricultural Development in Sub-Saharan Africa*, 2 WORLD BANK RSCH. OBSERVER 143, 143 (1987).

<sup>259</sup> Kelley, *supra* note 7, at 65-66.

<sup>260</sup> *Id.* at 66-67.

<sup>261</sup> *Id.*

<sup>262</sup> I base this statement on my own experience living for two years in a rural African village.

<sup>263</sup> Kelley, *supra* note 7, at 66.

<sup>264</sup> *Id.* at 102; Kelley, *supra* note 10, at 68 n. 175; *see id.* at 68 (employing the term “lineage head”).

<sup>265</sup> *Id.* at n. 170.

remainder of his life and could assume he would have the right to divide it among his own sons.<sup>266</sup>

In patriarchal societies such as Niger, men who descend from village founders are the primary rights holders in land; however, others have enforceable, predictable secondary rights in the same land.<sup>267</sup> For instance, female members of the lineage have secondary rights to use the land during the non-growing season to harvest special grass that they dye and weave into mats and then sell to support their households.<sup>268</sup> Women may also enjoy the right to harvest sauce ingredients and medicinal herbs or reserve a small corner of the family lands for vegetable gardens.<sup>269</sup>

Another class of secondary rights holders are the descendants of enslaved people.<sup>270</sup> According to traditional Nigerien slavery practices, recent captives (in Zarma *tam*), were treated more or less like New World chattel slaves.<sup>271</sup> They could be fettered and forced to engage in onerous and sometimes dangerous labor such as well digging.<sup>272</sup> But in subsequent generations, the enslaved people entered a different social category—*horso* in Zarma.<sup>273</sup> *Horso* were allowed to wander freely and live in their own quarters, often a segregated section of the village reserved for them.<sup>274</sup> They devoted some of their labor to the enslaving family, but customary law prevented the enslaving family from beating them, exposing them to dangerous labor, or selling them.<sup>275</sup> Customary law also required the enslaving families to provide their *horso* with access to sufficient agricultural land to feed themselves and their families.<sup>276</sup> As was true of other secondary rights holders, the *horsos'* right of access was predictable,

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<sup>266</sup> Kelley, *supra* note 7, at 71; see Kelley, *supra* note 10, at n. 175 (arguing men assume their sons will inherit their rights to access agricultural lands).

<sup>267</sup> Kelley, *supra* note 7, at 129; see Kelley, *supra* note 10, at 101.

<sup>268</sup> Kelley, *supra* note 7, at 101-02.

<sup>269</sup> *Id.*

<sup>270</sup> See Thomas Kelley, *Unintended Consequences of Legal Westernization in Niger: Harming Contemporary Slaves by Reconceptualizing Property*, 56 AM. J. COMP. L. 999, 1029 (2008).

<sup>271</sup> *Id.* at 1013-14.

<sup>272</sup> *Id.* at 1014.

<sup>273</sup> *Id.*

<sup>274</sup> See *id.* at n. 74 (arguing many enslaved people live in their own quarter of Zarma villages).

<sup>275</sup> *Id.* at 1014.

<sup>276</sup> See *id.* at 1029 (arguing nobles in Niger have a culturally determined obligation to provide their *horso* with sustenance and land).

even inviolable.<sup>277</sup> As *horso* families cultivated the same plots of land year after year and generation after generation, their land rights came to look much like those of the primary rights holders.<sup>278</sup> This became even more true starting in the first half of the 20<sup>th</sup> century when French colonizers progressively outlawed the practice of capturing new slaves and buying and selling them.<sup>279</sup> Over a few generations, the population of newly captured slaves (*tam*) diminished to almost nothing while the population of *horso* stabilized and settled into the lands that had been set aside for them.<sup>280</sup>

## 2. *Legal Westernization of Land*

The Washington Consensus's introduction of Western land law disrupted Niger's delicate balance of overlapping land rights.<sup>281</sup> The Consensus theory on land, which achieved the status of gospel in international development circles in the 1990s and early 2000s,<sup>282</sup> was that promoting individual ownership and registered titling of land would lead to market-driven economic prosperity.<sup>283</sup> Based largely on the writings of the Peruvian social scientist Hernando De Soto, Global North reformers asserted that the lack of freehold land titles was slowing African economic development.<sup>284</sup> Without a secure title, an African farmer's land comprised "dead capital," limited to economically inefficient uses.<sup>285</sup> With a secure title, that farmer could use his land as collateral for a loan that would permit him to intensify his investment.<sup>286</sup> For example, he could purchase a tractor or fertilizer that would increase his yields and perhaps permit him to sell his

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<sup>277</sup> See *id.* at 1022 (arguing customary law provided durable access to land for those secondary rights holders who fulfilled their duties to the lineage).

<sup>278</sup> *Id.* at 1034.

<sup>279</sup> *Id.* at 1010.

<sup>280</sup> *Id.* at 1014.

<sup>281</sup> See *id.* at 1004 (arguing aggressive legal westernization of land is causing "dramatic harm" in Niger).

<sup>282</sup> See *id.* at 1001-02 (arguing law reformers and international development experts "have adopted as a guiding principle the theory that poor countries . . . can grow their way out of poverty if, and only if, they provide citizens . . . rights in private property"); Kelley, *supra* note 7, at 77 (arguing privatization and individual registration of land was a "key tenet" of the Washington Consensus).

<sup>283</sup> Kelley, *supra* note 7, at 77.

<sup>284</sup> *Id.*

<sup>285</sup> *Id.* at 77-78.

<sup>286</sup> *Id.* at 77

excess produce for cash.<sup>287</sup> He might even decide to quit farming, sell his titled land, and, depending on his skills and preferences, invest the proceeds in a more economically efficient activity such as a small business.<sup>288</sup>

That was the theory. What actually happened when African countries and their Global North sponsors instituted these schemes is too complicated to describe in detail, but the summary version is that it failed miserably.<sup>289</sup> One problem was that few rural people jumped at the chance to register their lands and even fewer bothered to record subsequent land transactions, which meant that cadastral land registers were mostly useless.<sup>290</sup> For those who did register lands, the results could be catastrophic.<sup>291</sup> A common scenario, particularly prevalent in peri-urban areas where agricultural land was attractive to speculators and urban housing developers, was that the family patriarch would register the lineage's land in his own name and then sell it for cash.<sup>292</sup> Although some of the land-titling systems devised by Global North development experts permitted the registration of family or communal rights,<sup>293</sup> in practice governments encouraged individual registration, usually in the name of the patriarch,<sup>294</sup> which had the effect of extinguishing all the secondary rights at the stroke of a pen.<sup>295</sup> The patriarch might receive tens of thousands of dollars for the sale, a fortune in a country where most people live off of less than \$2 per day.<sup>296</sup> He might even be fair and distribute some of the proceeds to others who held rights in the land. But it would matter little. The money would quickly disappear<sup>297</sup> and all the primary and secondary rights holders, including women and descendants

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<sup>287</sup> *Id.*

<sup>288</sup> *Id.* at n. 331.

<sup>289</sup> *Id.* at 78; see Kelley, *supra* note 270, at 1002-03 and n. 18 (arguing that few if any the advertised economic benefits materialized as a result of land reform).

<sup>290</sup> Kelley, *supra* note 7, at 79.

<sup>291</sup> See generally *id.* at 103-09 (summarizing the devastating consequences of loss of lineage lands).

<sup>292</sup> *Id.* at 103-05.

<sup>293</sup> See Kelley, *supra* note 10, at 702 (arguing Niger's westernized land law allowed for registration of land in the name of groups).

<sup>294</sup> Kelley, *supra* note 7, at 78-9.

<sup>295</sup> *Id.* at 101.

<sup>296</sup> *Id.* at 104.

<sup>297</sup> See *id.* at 104-105 (arguing a cash windfall disappears quickly due to poor families' pent-up needs).

of enslaved people, would be left with no land and no way to feed themselves.<sup>298</sup>

There is another tragic aspect of the land titling disaster that is not often told. The sudden shift from lineage and community control to individual ownership undercut rural Africans' deep spiritual and cultural ties to their ancestral lands, ties that are essential to families' and villages' identities and social order.<sup>299</sup> Many rural Africans believe their ancestors made pacts with the spirits who control the land and that those spirits, along with the spirits of the villagers' ancestors, continue to watch over the decisions and actions villagers take.<sup>300</sup> The spirits' omnipresence, and their tendency to punish those who harm the family or community,<sup>301</sup> help bolster rural African's communitarianism.<sup>302</sup> To quote from my own recent work on land loss in Niger:

A young man avoids unruly behavior because he has been raised that way, but also because he does not want to be the one to spark the spirits' wrath and thereby diminish the village's *barka* [a Zarma word meaning well-being]. He accepts his father's or uncle's decisions about which plot of land to cultivate, and when he can begin cultivating for his own account rather than his extended family's account, because to object, to rebel, would injure not only his family but would insult the original land spirits and the spirits of his ancestors. That same young man, once his elders have accorded him a portion of family land for cultivation, will avoid waste and certainly avoid sale, because he understands that interest in land is shared not only by his living relations, but those who lived before and those members of the family and community yet unborn.<sup>303</sup>

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<sup>298</sup> See *id.* at 105 (arguing that in Niger rural people forced to migrate to cities cannot find work to support themselves).

<sup>299</sup> *Id.* at 106; see *supra* Part III.A.1; see also Sesanti, *supra* note 10, at 66 (arguing in African societies ancestors teach the living how to live virtuous lives).

<sup>300</sup> Kelley, *supra* note 7, at 107; see Sesanti, *supra* note 10, at 66 (arguing ancestor reverence exists everywhere on the African continent).

<sup>301</sup> See Kelley, *supra* note 7, at 107-108; see also Sesanti, *supra* note 10, at 66 (arguing most Africans agree that ancestors reward those who do good and punish those who commit evil).

<sup>302</sup> Kelley, *supra* note 7, at 107-08.

<sup>303</sup> *Id.* at 107-08 (citations omitted).

When land is titled by an individual and sold to outsiders, this cultural and spiritual belief complex disappears and the family and community begin to fall apart.<sup>304</sup> The members of the lineage and the village are not only left with no means of producing food, they are also transformed into rootless, spiritless, individuals.<sup>305</sup>

### *B. The Solution: African Values Protected by the African Charter*

Nigeriens and other Africans who are being dispossessed of their ancestral lands through the westernization of land laws should be able to prevent that catastrophe by bringing human rights claims under the African Charter. I am not a litigator by training or temperament, so I will not attempt to lay out a procedural roadmap for ensuring that these claims are heard by competent tribunals. That is work for others to pursue. I will, however, outline the African Charter-based argument that dispossessed secondary rights holders could pursue and that tribunals should entertain.

#### *1. The Charter's Preamble*

The argument begins with the Sengorian language included in the Charter's preamble.<sup>306</sup> In defining human rights, the Charter's signatories agreed to take into consideration "the virtues of their historical tradition and the values of African civilization."<sup>307</sup> With this language, the Charter's drafters established the expectation that African human rights would be interpreted in light of African humanism, the belief system that includes the veneration of ancestors and the elevation of the collective above the individual.<sup>308</sup> In the land loss scenario described above, the transition to Western, liberal, capitalist, individual ownership of land undermines those distinctly African values and traditions. The individual patriarch's usurpation of land ownership has left the collective, in the form of the

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<sup>304</sup> *Id.* at 108-09; Sesanti, *supra* note 10, at 69.

<sup>305</sup> *See supra* notes 65-68 and accompanying text (arguing Senghor and the drafters of the African Charter believed they could help Europeans overcome their loss of communitarian spirit).

<sup>306</sup> *See supra* Part II.A.1.

<sup>307</sup> African Charter, *supra* note 169, pmb., ¶ 5.

<sup>308</sup> *See supra* Part I.B & C.

lineage and the village, economically bereft and vulnerable.<sup>309</sup> Moreover, the very identity of the collective, which is defined by the ancestors who originally settled the land, is destroyed at the stroke of a pen.<sup>310</sup> The patriarch has failed to uphold the duties owed to the collective, and the state has failed in its duty to enforce the human rights articulated in the Charter.

## 2. *Individual Duties in Articles 27 to 29 of the Charter*

In addition to the preamble's exhortatory language,<sup>311</sup> the body of the Charter also includes more specific language for African lawyers and judges to rely on. Much of this is contained in the provisions on individuals' duties toward collectives.<sup>312</sup> That language begins with the introductory statement that "every individual shall have duties towards his family and society, the State and other legally recognized communities . . ." <sup>313</sup> Across Africa, the typical definition of "family" is broad and elastic and certainly includes members of the same lineage.<sup>314</sup> But the duties are also owed to larger collectives such as villages.<sup>315</sup> In most African countries, villages are "legally recognized communities." <sup>316</sup> Thus, according to the plain language of the Charter, individuals owe duties to those collectives, too.

Precisely what duties do the individuals owe? Among others, they must "preserve the harmonious development of the family and work for the cohesion and respect of the family . . ." <sup>317</sup> Obviously, a lineage head who sells ancestral land out from under his family violates this command. As a matter of common sense, cutting the lineage off from its primary means of food production shows lack of respect and leads to dispersal, which is the

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<sup>309</sup> See *supra* notes 299-304 and accompanying text.

<sup>310</sup> See *supra* note 295 and accompanying text.

<sup>311</sup> See African Charter, *supra* note 169 (arguing treaty law makes preamble language enforceable).

<sup>312</sup> See *supra* Part II.B.3.

<sup>313</sup> African Charter, *supra* note 169, art. 27.1.

<sup>314</sup> See *supra* Part III.A.2 (arguing individuals in Zarma society feel duties toward their lineages and broader communities).

<sup>315</sup> See *id.*

<sup>316</sup> See Kelley, *supra* note 10, at 654-55 (arguing French colonizers of Niger, as well as the post-independence leaders, made cantons and villages the lowest levels of the country's administrative apparatus).

<sup>317</sup> African Charter, *supra* note 169, art. 29.1.

opposite of cohesion.<sup>318</sup> It also disrespects and splinters the family by eliminating the historical and spiritual identity grounded in their connection to ancestral lands.<sup>319</sup>

The Charter also provides that the individual has a duty toward his family and community “[t]o preserve and strengthen positive African cultural values in his relations with other members of the society. . . .”<sup>320</sup> The patriarch who sells ancestral lands ignores and undermines positive African cultural values, far from preserving or strengthening them. An essential African cultural value is the veneration of and ongoing consultation with ancestors who inhabit ancestral lands.<sup>321</sup> Cutting living members of the family off from those ancestors by alienating the land destroys those values.

Finally, the African Charter provides that individuals have a duty to “contribute to the promotion of the moral well-being [sic] of society.”<sup>322</sup> Alienating ancestral lands accomplishes the opposite. One reason that rural communities in Africa are generally stable and harmonious is the communal interdependence of lineages and villages.<sup>323</sup> Young people in the village participate in *bogus* and other communal actions, they respect the judgment of their elders, and they keep a weather eye on the ancestors, doing so helps ensure their standing in the community<sup>324</sup> and thereby helps ensure access to land that they will need to support themselves and their children.<sup>325</sup> In this way, land is a crucial component of a socio-spiritual complex that encourages people to cooperate, behave themselves, and<sup>326</sup> “promote the moral welfare of society.”<sup>327</sup> When land is removed from that equation, everyone is suddenly free to pursue their selfish interests.<sup>328</sup> The

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<sup>318</sup> See generally notes 299-305 and accompanying text.

<sup>319</sup> See *supra* notes 299-305 and accompanying text.

<sup>320</sup> African Charter, *supra* note 169, art. 29.7.

<sup>321</sup> See *supra* Parts I.B and III.A.2. (arguing the spirits of Africans ancestors watch over the land and living humans consult them about land use).

<sup>322</sup> African Charter, *supra* note 169, art. 29.7.

<sup>323</sup> See Kelley, *supra* note 10, at 704 (arguing life in a rural African village “is harmonious because of the ongoing, tight-knit, multifaceted relationships that exist among members of the community, both living and non-living”).

<sup>324</sup> See *supra* Part III.A.2.

<sup>325</sup> *Id.*

<sup>326</sup> Kelley, *supra* note 7, at 107-08.

<sup>327</sup> *Id.*

<sup>328</sup> *Id.*



moral wellbeing of the community suffers.<sup>329</sup> The lineage and community fall apart.<sup>330</sup>

### 3. *Other Helpful African Charter Provisions*

Several ancillary provisions of the African Charter bolster a legal claim based on individuals' duties to their families and communities. Some involve the state's duty to intervene when individuals' and communities' rights are being violated. For example, Article 17 provides that "the promotion and protection of . . . traditional values recognized by the community shall be the duty of the State."<sup>331</sup> Stated simply, because the sale of ancestral land directly contradicts "traditional values recognized by the community,"<sup>332</sup> the state has a duty to intervene to prevent it.<sup>333</sup>

Article 18 supports the centrality of African traditions, declaring that the family is the "natural unit and basis of society" that also must be protected by the state,<sup>334</sup> and that "the State shall have a duty to assist the family which is the custodian of . . . traditional values recognized by the community."<sup>335</sup> As the foregoing discussion reveals, family lineages are the backbone of village communities and alienating their land violates traditional values<sup>336</sup>; thus, Article 18 requires African states to intervene to protect people from loss of ancestral lands.

Finally, lawyers wishing to rely on the African Charter to protect rural people<sup>337</sup> against loss of ancestral lands should not forget that the African Commission has interpreted the Charter's generally worded social, economic and cultural rights expansively to include, among others, the right

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<sup>329</sup> *Id.*

<sup>330</sup> *Id.*

<sup>331</sup> African Charter, *supra* note 169, art. 17.3.

<sup>332</sup> *Id.*

<sup>333</sup> Kelley, *supra* note 7, at 107-09.

<sup>334</sup> African Charter, *supra* note 169, art. 18.1.

<sup>335</sup> *Id.* art. 18.2.

<sup>336</sup> *See supra* Parts III.A.1 & 2.

<sup>337</sup> I use the term "rural people" rather than "rural land owners," because strictly speaking, no one owns the land in rural communities governed by traditional law. Men and women have durable, predictable rights of access to the land, but not ownership. *See supra* Part III.A.1.

to food and housing.<sup>338</sup> The Commission has also found that the right to food is closely bound with the right to land.<sup>339</sup> Further, the Commission has declared unambiguously that such rights are fully justiciable.<sup>340</sup> If polluting peoples' lands can constitute a deprivation of their social, economic and cultural rights, as the Commission found in *Social and Economic Rights Action Centre (SERAC) v. Nigeria (Ogoni rights case)*,<sup>341</sup> then a patriarch entirely eliminating his lineage's access to land surely would constitute a justiciable violation.

#### 4. *Objections and Responses*

##### a. The Patriarchs' Objections

The patriarch may argue for his right to alienate lineage land based on formal state land law.<sup>342</sup> The secondary rights holders, however, could point to Article 61 of the Charter, which instructs the African Commission to consider not just formal state law but "customs generally accepted as law."<sup>343</sup> From an African human rights perspective, family lineage's control of land is well settled custom recognized by many states' constitutions<sup>344</sup> and thus should counter a patriarch's claim that he had the legal right under formal state law to alienate the family land.

The patriarch also might point to Article 14 of the Charter, which says that property rights "may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the

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<sup>338</sup> Amin, *supra* note 11, at 38; Naldi, *supra* note 162, at 31 (both citing *Social and Economic Rights Centre (SERAC) v. Nigeria (Ogoni Rights case)*); Viljoen, *supra* note 107, at 320.

<sup>339</sup> Baldwin & Morel, *supra* note 238, at 244. Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v. Sudan, Communication 279/03-296/05, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], (May 27, 2009) ("Based on the legal obligations of the Government of Sudan under the African Charter, the African Commission should find violations by the Government of Sudan of its obligation to respect and to ensure the right to adequate food and the right to water as guaranteed under, inter alia, Articles 4, 16, and 22 of the African Charter on Human and Peoples' Rights.").

<sup>340</sup> See *supra* notes 182-88 and accompanying text.

<sup>341</sup> *Social and Economic Rights Action Center & the Center for Economic and Social Rights (SERAC) v. Nigeria*, *supra* note 239.

<sup>342</sup> See *supra* Part III.A.2 (arguing Niger reformed its land law by introducing the notion of individual ownership and titling of land).

<sup>343</sup> African Charter, *supra* note 169, art. 61.

<sup>344</sup> See Kelley, *supra* note 242, at 19 (arguing Niger's Constitution permits the application of customary law in various domains including real property).

provisions of appropriate laws.”<sup>345</sup> He might argue that under formal state law, he is the owner of property, and that the state has no justification for encroaching on that right. The Charter-based human rights response would be twofold. First, protecting the socio-spiritual institution of lineage lands is “in the general interest of the community”<sup>346</sup> for the reasons discussed above.<sup>347</sup> Second, protecting such property would be “in accordance with the provisions of appropriate laws” because when this phrase is read in conjunction with Article 61 (which says human rights questions should be decided in ways that are consistent with African “customs generally accepted as law”), it becomes clear that “appropriate laws” would include well-settled customary land law.<sup>348</sup>

#### b. Other Objections

There will be other objections to this plea to apply African values to African human rights problems such as ancestral land loss. One might be that the Charter’s language on African values and traditions, including individuals’ duties to their families and communities, is too vague to enforce.<sup>349</sup> The simple response is that putting meat on the bones of law is an essential aspect of lawyers’ and judges’ jobs.<sup>350</sup> One need not look further for an example than the African Commission’s jurisprudential expansion of the Charter’s vaguely worded civil and political rights.<sup>351</sup> Why can African lawyers and judges not do the same for African values and traditions?

Another objection may be that individuals are not signatories of the African Charter, so a court cannot compel them to comply with duties that the Charter assigns them.<sup>352</sup> More specifically, a court would lack the

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<sup>345</sup> African Charter, *supra* note 169, art. 14.

<sup>346</sup> *Id.*

<sup>347</sup> See *supra* notes 299-304 and accompanying text.

<sup>348</sup> See *supra* Part III.A.1 (arguing customary land law in Niger is predictable and reliable).

<sup>349</sup> Malila, *supra* note 61, at 212-13.

<sup>350</sup> See Viljoen, *supra* note 107, at 319 (arguing it is a judge’s job to resolve laws’ internal tensions and ambiguities); KUFUOR, *supra* note 156, at 67 (arguing treaties are incomplete and that is why we need judges); see Rubner, *supra* note 24, at 67 (arguing Leopold Senghor fully realized there were ambiguities and internal tensions within the Charter and that they would have to be resolved in the future).

<sup>351</sup> See Malila, *supra* note 61 and accompanying text.

<sup>352</sup> See *id.* at 222 (arguing international law forbids enforcing treaties against non-signatories).

authority to order patriarchs to cease titling ancestral land in their own names and selling those lands out of the family.<sup>353</sup> The response is that Charter signatories have a duty to protect human rights within their borders, and a court hearing a Charter-based human rights challenge to the sale of land would order the state to deploy its own laws to prohibit such sales.<sup>354</sup> Such an objection would also ignore the abundant historical evidence that the drafters intended the Charter's duties to be fully enforceable.<sup>355</sup>

A more persuasive objection is that it may be unwise to rely on African traditions and customs as laudable human rights norms. After all, African customs also include patriarchy,<sup>356</sup> concubinage,<sup>357</sup> early marriage,<sup>358</sup> and female genital mutilation.<sup>359</sup> This objection, however, can be easily overcome. First, there is ample evidence in the history of the Charter's drafting that its creators intended to include only African traditions and customs that were useful and that did not offend universally accepted human rights principles.<sup>360</sup> Second, the Charter itself includes language that would prevent human rights-based claims justifying such practices. Article 61, for example, requires the African Commission to take into account "African practices *consistent with international norms on human and peoples' rights*."<sup>361</sup> Concubinage and similar practices are not consistent with international human rights norms and therefore could not

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<sup>353</sup> *See id.*

<sup>354</sup> African Charter, *supra* note 169, art. 1 (all state parties must recognize "the rights, duties, and freedoms" enshrined in the Charter); *see* Quashigah, *supra* note 189, at 130 (arguing all state parties are obligated to create domestic legislation, or other measures, to give effect to the Charter's requirements).

<sup>355</sup> *See generally supra* notes 182-188 and accompanying text (arguing the African Charter's drafters intended all social and cultural rights to be fully justiciable).

<sup>356</sup> *See supra* notes 264-267 and accompanying text.

<sup>357</sup> *See* Kelley, *supra* note 18 at 341 (2014) (arguing Niger's word and contemporary social category of *wahay* is close to the English word "concubine").

<sup>358</sup> *See* Lalaina Fatratra Andriamasinoro, *COVID-19: A Threat to Progress Against Child Marriage in Niger*, UNICEF (Apr. 29, 2021), <https://www.unicef.org/niger/stories/covid-19-threat-progress-against-child-marriage-niger> (arguing three out of four girls in Niger are married before their 18<sup>th</sup> birthday).

<sup>359</sup> *Female Genital Mutilation (FGM)*, UNICEF, <https://data.unicef.org/topic/child-protection/female-genital-mutilation/> (June 2023) (arguing female genital mutilation is prevalent in many African countries).

<sup>360</sup> Ramcharan, *supra* note 128, at 308-09.

<sup>361</sup> African Charter, *supra* note 169, art. 61 (emphasis added).

be defended as African human rights.<sup>362</sup> Furthermore, Article 18 explicitly requires the Convention's state parties to "ensure the elimination of every discrimination against women. . ."<sup>363</sup> Surely a reasonable jurist would conclude that concubinage is a form of discrimination against women.<sup>364</sup>

## CONCLUSION

The Organization of African Unity and its successor, the African Union, have accomplished much in the realm of human rights.<sup>365</sup> Despite attempts by some African heads of state to throttle African human rights in the cradle, the African Commission in the 1980s and 1990s made surprising progress defining and upholding human rights for the continent.<sup>366</sup> It interpreted the Charter's ambiguously worded civil and political rights broadly and its infamous clawback clauses narrowly.<sup>367</sup> It led the world in establishing that social, economic and cultural rights were just as important, and just as justiciable as civil and political rights.<sup>368</sup>

In later years, when the OAU morphed into the AU, its constitutive documents made protecting human rights a central aspect of the organization's mission.<sup>369</sup> Most recently, the AU has created the African Court of Human and Peoples' Rights (later reconstituted as the African Court of Justice and Human and Peoples' Rights).<sup>370</sup> Although the new court has struggled to establish its preeminence on the continent, it remains as a symbol of Africa's commitment to enforcing human rights.<sup>371</sup>

Given all this progress on African human rights, why has nothing been done to define and uphold the African values and traditions – the African

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<sup>362</sup> See generally *Hadijatou Mani Koraou v. The Republic of Niger*, No. ECW/CCJ/JUD/06/08 (ECOWAS Community Court of Justice, Oct. 27, 2008).

<sup>363</sup> African Charter, *supra* note 169, art. 18.3

<sup>364</sup> See generally *Hadijatou Mani Koraou v. The Republic of Niger*, *supra* note 362.

<sup>365</sup> See *supra* Part II.C.3

<sup>366</sup> *Id.*

<sup>367</sup> *Id.*

<sup>368</sup> *Id.*

<sup>369</sup> See *supra* note 242 and accompanying text.

<sup>370</sup> See *id.* (briefly describing the OAU's recent institutional evolution).

<sup>371</sup> Lilian Chenwi, *Successes of African Human Rights Court Undermined by Resistance from States*, THE CONVERSATION (August 31, 2021), <https://theconversation.com/successes-of-african-human-rights-court-undermined-by-resistance-from-states-166454>.

humanism—that was supposed to be at its core? There is no clear answer, but one can speculate.

One reason may be that lawyers and judges are daunted by the Charter's lack of specificity on African values and traditions.<sup>372</sup> The Charter's language requires states to uphold the historical traditions and values of African civilization,<sup>373</sup> but exactly what are they and what happens when they are in tension with universal (meaning European) human rights principles? The Charter likewise requires individuals to preserve and strengthen positive African cultural values,<sup>374</sup> but what qualifies as an African cultural value and what are individuals required to do in support of those values? According to Article 61, human rights are to be interpreted in light of African customary law,<sup>375</sup> but what comprises that law and what are its valid sources? Similarly, member states have a duty to assist families in upholding traditional communal values,<sup>376</sup> and individuals have duties to preserve the harmonious development of the family,<sup>377</sup> but what is the definition of "family?" Does it mean immediate family, or everyone connected to one's family lineage?

The challenge of interpreting and applying this broad language is heightened by at least two factors. First, Africa is a continent of legal pluralism.<sup>378</sup> There may be continent-wide values and traditions as described by African philosophies such as Negritude and *ubuntu*,<sup>379</sup> but when it comes to law, especially customary law, there's tremendous regional variation and much of it is unwritten.<sup>380</sup> Thus, taking African customary law into account when defining African human rights is a daunting task.<sup>381</sup>

Second, the drafters of the African Charter left behind comparatively few clues about exactly what they meant when they included terms such as African values and traditions. As other scholars have noted, the drafting

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<sup>372</sup> See *supra* Part II.B.2.

<sup>373</sup> African Charter, *supra* note 169, pmb., ¶ 5.

<sup>374</sup> *Id.* art. 29.7.

<sup>375</sup> *Id.* art. 61.

<sup>376</sup> *Id.* art. 18.2.

<sup>377</sup> *Id.* art. 29.1.

<sup>378</sup> See Kelley, *supra* note 18, at 335-37 (describing legal pluralism in Niger).

<sup>379</sup> See *supra* Part I.

<sup>380</sup> Kelley, *supra* note 18, at 335-37.

<sup>381</sup> See *generally id.* at n. 58 (arguing Nigerien lawyers and judges find it difficult to construct arguments based on customary law).

process lacked the careful *travaux préparatoires* that accompany the creation of most treaties.<sup>382</sup> The record does not include detailed meeting minutes, debate transcripts, or summaries prepared by the various drafting committees.<sup>383</sup> Without such a record to rely on, judges and lawyers must do the work that this article has done: comb through the historical record to shed light on the drafters' intentions.

In sum, one explanation of why African judges and lawyers have failed to flesh out the Charter's language on African values and traditions, including individuals' duties toward their collectives, is that doing so would be a slog that would require consulting with historians and legal anthropologists. It is comparatively easy to make progress on human rights by sitting in front of a computer researching readily accessible, well-established legal precedent from Global North human rights tribunals.<sup>384</sup> This is all the more understandable when one considers that the OAU/AU human rights institutions have been under-resourced for much of their existence.<sup>385</sup> All of these factors mentioned in the preceding paragraphs may help explain how the Commission and Court have thus far interpreted Africa's human rights with a heavily European gloss.<sup>386</sup>

Another possible explanation for the lack of Africa in African human rights may be that the jurists deciding these questions have little experience in rural village settings where African values and traditions are most prevalent.<sup>387</sup> In my own experience, African lawyers and judges tend to come from comparatively wealthy urban families.<sup>388</sup> They typically study in primary and secondary schools that follow the education systems of their

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<sup>382</sup> Viljoen, *supra* note 107, at 315.

<sup>383</sup> *Id.*; see Plagis & Riemer, *supra* note 122, at 563 (arguing the preparatory materials that do exist are "generally inaccessible").

<sup>384</sup> See Viljoen, *supra* note 107, at 325 (arguing one explanation of a lack of African content in human rights is that African judges over-rely on European sources and fail to consider the original intent of the drafters); see also Plagis and Riemer, *supra* note 122, at 563 (similar).

<sup>385</sup> See *supra* notes 163 and 218 and accompanying text (arguing the African Commission was deprived of resources).

<sup>386</sup> See Viljoen, *supra* note 107, at 325 (arguing African human rights judges rely on European sources of law).

<sup>387</sup> See *supra* note 71 and accompanying text (arguing Leopold Senghor and his ilk had little experience in traditional African communities).

<sup>388</sup> See Kelley, *supra* note 18, at 348-49, n. 268 (arguing most lawyers and judges are drawn from African societies' elite classes and educated according to European traditions).

former colonial rulers, systems grounded in liberal political philosophy that gives short shrift to African history, values and traditions.<sup>389</sup> Similarly, African law schools tend to focus on the formal state law left behind by the European colonialists and largely ignore the customary law that governs large majorities of their countries' populations.<sup>390</sup> In fact, many African jurists not only study European law, but study it in European institutions.<sup>391</sup> In sum, African judges and lawyers may be reluctant to make legal arguments based on traditional African values and customs because they know little about the subject and have neither the resources nor—given their liberal, European educations—the inclination to learn.

No matter the explanation for why African jurists have failed to flesh out the Africa in African human rights, it is high time for them to begin. It may be challenging for European-educated lawyers and judges to grasp and deploy the nuances of African history, tradition and culture, but that is their job.<sup>392</sup> Statutes and treaties alike are hardly ever complete. Yet, lawyers, judges, and tribunals must fill in the gaps.<sup>393</sup>

There is much to admire in traditional African culture: mutual support within extended families and villages as exemplified by the *bogu* of the Zarma people and *ubuntu* of southern Africa; a broad definition of family that ensures succor for all those in need, as exemplified by the orphan's many fathers in my Peace Corps village; respect for age as exemplified by the silence that fell in the presence of the village's oldest member who had walked back and forth to Mecca; and reverence for ancestors, as exemplified by Zarma landholding traditions. These cultural practices bind communities together and help them persevere amidst the privation left behind by trans-Atlantic and trans-Saharan chattel slavery, colonialism, and apartheid. The drafters of the African Charter were crystal clear that they wanted these cultural values to be respected and celebrated in any future version of African human rights. They knew that such values might conflict with certain liberal political and economic principles—like the inviolability of individual, fee simple land ownership—but that did not dissuade them. They wanted Africa to be included in African human rights.

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<sup>389</sup> *Id.*

<sup>390</sup> *Id.* at n. 58, n. 268.

<sup>391</sup> *Id.* at n. 268.

<sup>392</sup> Rubner, *supra* note 24, at 67.

<sup>393</sup> *Id.*