1

Towards an African professional history of international law: The life and work of Kéba Mbaye

*Humphrey Sipalla**

History is a weapon. The struggle of man against power is therefore the struggle of memory against forgetting.[1]
Milan Kundera, *The book of laughter and forgetting*, 1979

Abstract

There are a number of ways in which the history of international law can be studied. In all these, it seems unavoidable that, as accounts of the actions of real men and women in concrete circumstances, such study cannot fail to take cognisance of the colossal figures whose life's work impacted on the respective discipline being studied. In the case of African international law, the life, personality and work of Senegalese jurist Kéba Mbaye is epitomic of such an approach to the study of the history of international law. Judge Mbaye's piercing intellect and irreproachable integrity revolutionised a wide range of legal sub-disciplines: constitutional law, electoral law, public international law, sports law, arbitration and international investment law, family law, business law in Africa and last but not least, human rights law. This chapter proposes methodical elements fundamental to the study of the history of African international law by way of what can be called professional historical method, and apply these elements to Kéba Mbaye as both subject and object of study. In this sense, this chapter is not only an exploration of historical method in the study of Africa's involvement with international law, but also properly, a biographic of Kéba Mbaye. Through Kéba Mbaye's innovative contributions to the areas of international law he practised, the author can trace a history of Africa's involvement in the discipline, and benefit from his insights to understand the nuances of the contemporaneous developments.

* B.Ed (Kenyatta), MA (UPeace). Humphrey Sipalla teaches at Kabarak University Law School and is Editor-in-Chief, Kabarak University Press.

1 Bethwell Ogot *History as destiny and history as knowledge: Being reflections on the problems of historicity and historiography* (2005) 15. The quote itself is much older, see Milan Kundera *The book of laughter and forgetting* (1979).

1 Introduction

Kéba Mbaye (1924-2007)[2] was a Senegalese jurist who served with distinction in the Senegalese judiciary, the United Nations human rights system, the International Court of Justice (ICJ), in ad hoc international tribunals, and in the Olympic movement.[3] He was most notably the 'inspirer and author of the preliminary draft'[4] of the African Charter on Human and Peoples' Rights (African Charter). He also led the drafting of important international legal instruments including the Organisation for the Harmonisation of Business Law in Africa (OHADA)[5] legal framework, the Statute of the Court of Arbitration for Sport, and the Linas-Marcoussis Peace Agreement. He served on international commissions on bioethics, labour law, and for the investigation of mass human rights violations in Yugoslavia, Southern Africa, and Palestine, among others. He helped mediate peace through conciliation first in the OAU structures of the 1980s, and later in the Ivorian peace process. He both campaigned against apartheid in the early 1980s and led South Africa's readmission to the Olympic movement after the fall of apartheid. At home, he guided Senegal's transition to multiparty politics in the early 1990s.

Kéba Mbaye is arguably the pre-eminent African jurist of his generation. His life is a fascinating litany of exceptional ethical, professional and intellectual achievements. His contributions have indelibly marked five distinct areas of law: general public international law; human rights law; sports law; business law; and constitutional law. However, his influence spanned even more sub-disciplines, such as family law, election law, anti-corruption, and the legal regulation of good governance and ethical leadership. Uniquely, he worked in global, regional, sub-regional, and national levels of legal organisation, having risen to the apex in each of these areas of legal practice.[6] Running through these achievements are

2 ICJ 'Solemn sitting in memory of Judge Kéba Mbaye, former judge and Vice-President of the Court', Press release 2007/15 31 May 2007.

3 Given Judge Mbaye's vast imprint, I am surprised to find no significant contribution to the ECOWAS legal regime in this preliminary research, save for his co-chairing of the Linas-Marcoussis negotiations 15-23 January 2003 under the ECOWAS diplomatic initiative to resolve the Ivorian crisis.

4 F Ouguergouz 'The African Charter on Human and Peoples' Rights: A living and evolving instrument for the promotion and protection of human rights in Africa' address to the 30th Anniversary of the African Charter, Banjul, nd at 5. See also HB Jallow *Journey for justice* (2012) 63.

5 *Organisation pour l'harmonisation en Afrique du droit des affaires* (OHADA).

6 R Higgins 'Tribute to the memory of Judge Kéba Mbaye' public sitting 4 June 2007 Peace Palace, The Hague VERBATIM RECORD CR 2007/15 at 4-5.

consistent themes which reflect the man and his work: ethical standards and personal integrity; promotion of human rights[7] and the rule of law; and the defence of Africa.

Despite the breadth and depth of his oeuvre, Mbaye is woefully under-researched. For one whose achievements span so vast an area of law and international governance, and who is celebrated across these fields, there appears to be little by way of systematic study of the oeuvre of Kéba Mbaye – certainly not in English-speaking Africa. This preliminary research could find no *festschrift* honouring a retiring ICJ judge – as is customary – but has found that even his role in creating the legal concept of the 'right to development' is not without controversy.[8] His central role in the design of current sports dispute resolution systems is certainly under researched, as is his early work in the 1960s on family law in Africa.

In many ways, Mbaye's and Africa's role in the construction of international law share striking similarities – both are unacknowledged and under researched in breadth and depth. As such, Judge Mbaye's towering figure presents a unique opportunity to consider the nature and method by which contemporary Africa has and continues to interact with and shape international law. What in the conduct of Africa and Africans betrays an African approach to international law? By what method may we accurately study and reach valid conclusions on such approaches?

This chapter proposes to test the proposition that the African professional international lawyer, particularly one of the stature of Kéba Mbaye, provides an exceptional method to study African approaches to international law. This chapter is presented in three parts. In the first, the methodological questions are appraised, taking particular care first to note that the African professional method of studying the history of African approaches to international law is both historical and legal. As such, historical methods will be understood in both their legal and their unique disciplinary concerns. The second part explores in depth, the vast achievements of Kéba Mbaye's life. Written a biographic approach, it

7 Rosalyn Higgins describes these as Kéba Mbaye's 'main concern'. Higgins (n 6).

8 Higgins (n 6) describes this as follows: 'Many attribute to him the concept of the "right to development" which first emerged in the 1970s and was recognized as an inalienable human right by the General Assembly in 1986.' CG Weeramantry in *Gabcikovo-Nagymaros,* Weeramantry Sep Op, 88 n 2, who, while tracing its origins back to the Universal Declaration and the views of Eleanor Roosevelt, identifies Mbaye as the first to lay down a clear legal argument in his 1972 address at the Third Session of the *Institut international de droits de l'homme*, published as K Mbaye *'Le droit au développement comme un droit de l'homme'* (1972) 5 *Revue des droits de l'homme* 503. See also JT Gathii 'Africa and the radical origins of the right to development' (2020) 1 *TWAIL Review* 28-50.

traces Mbaye's growth chronologically from the only African to choose to abandon the French civil service for the Senegalese to his many peaks of achievement. In the third part the methodological propositions identified in the first part are applied to the biographical presentation in the second. As Mbaye's unshakable integrity is *the* hallmark of his life, references to this are replete in this part. The chapter then concludes, with some poetic licence as to questions on how the methodological propositions exposed earlier would apply to contemporary questions, or rather, how the Mbayean approach exposed in the chapter would apply to contemporary questions.

2 Proposition as to method: Historical method and African approaches to international law

James Crawford and Cameron Miles have argued that there are three established ways that the history of international law has been widely studied: narrative; theoretical; and political.[9] They then propose a fourth, the professional, to which I address myself.

> [Professional] history would seek to come to terms with how international lawyers saw themselves at particular points in time and how they acted in given cases, in conduction with others. Such an approach observes international law through the eyes of those personalities involved in decision making and advice, while taking due account of the events, ideas and politics that contributed to its present state of development.
>
> Who then are international lawyers? From a historical standpoint, the answer is surprisingly broad. They may be seen to include a broad range of individuals, including political leaders, diplomats, practitioners and scholars.[10]

9 'Narrative histories seek to present the law in relation to the chronological sequence of significant events … theoretical histories…trace the evolution of international law through the development of concepts and ideas. Political histories…tend to treat the "reality" of international law as an extension of international politics' J Crawford & C Miles 'Four ways of thinking about the history of international law' in JC Sainz-Borgo and others (eds) *Liber amicorum in honour of a modern renaissance Man, HE Gudmundur Eiriksson* (2017) 271ff. Crawford and Miles mention Arthur Nussbaum's *A concise history of the law of nations* (1954) and Stephen Neff's *Justice among nations: A history of international law* (2014) as examples of narrative histories. Marti Koskenniemi's *The gentler civilizer of nations: The rise and fall of international law 1870-1960* (2001) and *From apology to utopia: The structure of international legal argument* (2005) exemplify theoretical histories. Crawford & Miles propose the *Trent* affair during the US Civil War as an example of the political.

10 Crawford & Miles (n 9) 285.

The study of the history of international law must be both legal and historical in the sense of being cognisant of and applying the tools of the legal and historical methods. The '5Cs' of the historical method are fundamental: change over time; causality; context; complexity; and contingency. To deepen my discussion, I turn to the counsel of Kenya's foremost historian, Bethwell Ogot. Ogot presents the ontological problems that present themselves to any keen student of the study of the affairs of humanity. He juxtaposes historicity and historiography as opposing methodological approaches, which logically affect the outcomes of one's research.

Historicity can be understood as account-telling that projects contemporary cultural perceptions into the past, thereby superimposing contemporary meaning on such account-telling. Historiographical account-telling, on the other hand, aims to be disinterested and faithful to time and context. The historiographer restricts him- or herself from joining the recounting and therefore limits the impact of his or her perceptions and understandings to their accounts. As one can imagine, these two approaches to the historical method, though conceptually distinct, are not easily separated in practice.

Historicity tends to present historical accounts as destiny, and thus orients thinking to what Mahmood Mamdani has termed 'unilinear evolutionism'.[11] Historicity, which therefore is hardly scholarly, smacks of conjured histories and selected memories, and even socio-political ideology. Yet, the historicist trap should not be so easily dismissed. The ontological problems of the historical method tend to elude one, even as they critique them. And Ogot insists that historicity is 'inherent for all humankind', 'a need as universal as tool-making'![12] He sees historicity as inextricable to the analysis of lived experience, choosing 'from the nearest lived experience the image of actors and of behaviours' that construct a guiding symbol and coherent view of knowledge.

Historiography, on the other hand, while responding to the same human needs, tends to the more disinterested scientific methods: assessment of probabilities; submission of assumptions to verification; and active experimentation 'above the intuitive acceptance of the transfigurations of the emotive order'.[13] As such, historiography rejects destiny, seeking to account for time in its stages, substituting mythical fixed futures with

11 Mahmood Mamdani *Citizen and subject: Contemporary Africa and the legacy of late colonialism* (1996) 9.

12 Ogot (n 1) 8.

13 As above.

real progressing accounts of events and persons[14] – and their vagaries we presume.

While these two methods seem quite easy to distinguish in theory, in practice the historical methods and their products are not so distinguishable and historians themselves regularly fail at drawing this distinction. Those aiming at historicism inevitably use historiographical methods, and even worse, the converse also happens.[15]

It is curious, for instance, how even when attempting a critical history of Africa's involvement with international law, one can end up being 'contributionist', to apply James Gathii's taxonomy.[16] A participant at the conference and a former student of mine, Lizzie Kibira, once insightfully noted that even as Mamdani vigorously cautions us against 'doing history by analogy,'[17] his very same work finds itself, at times, applying the same method.

Ogot applies his reflections on historicism and historiography to Africa: 'In pre-colonial Africa, practically all societies treated history as destiny.'[18] The three dimensions of African history – kinship, the territorial, and the cosmic – create a universe where 'the appearance of gods and the appearance of human beings both occurred in history without a differentiation in their sphere of action'.[19] These reflections are of no mean import to our method for the study of African approaches to international law, that is, the professional historical. The real professionals acting in their contemporary world were nonetheless creatures of a historicist worldview, and no less for such a one as Kéba Mbaye who was deeply spiritual and deeply rooted in his Wolof traditions. Ogot concedes that this contingent background of near universal historicism 'partly explains why it is much less easy to write a general history of Africa than of particular histories'.[20] It is also, we contend, the counter-intuitive reason why the professional historical method better suits the historiographical than a generalised

14 Ogot (n 1) 8-9.

15 Ogot (n 1) 10-11 offers the examples of Thucydides, whom western discourse considers the 'father of modern historiography' and St Luke, whose historiographical works in the Bible proclaim the inevitability of future outcomes.

16 J Gathii 'International law and eurocentricity' (1998) 9 *European Journal of International Law* 184; J Gathii 'Africa' in Bardo Fassbender and others (eds) *The Oxford handbook of the history of international law* (2012).

17 Mamdani (n 11) 9ff.

18 Ogot (n 1) 11.

19 As above 11.

20 Ogot (n 1) 12.

account of African approaches in the narrative, theoretical, or political methods.

Studying the real professional in his or her contingent environment helps to show the complexity of human nature and, by corollary, the complexity of the human figures of that time.[21] It articulates causality in a specific space and time and helps elucidate the seeming paradox that he or she who may have appeared to be 'contributionist', has actually been 'critical', and that the 'critical' was in reality merely accommodating.[22]

Ogot identifies two paradoxes of this interplay; generalisations that occur, one in space, and the other in time.[23] For the first, historicism only works by subsuming the particular, the local, the 'other' into its core. It does this by assigning value of the 'other' based on how it can serve the core. As such, a society may have diversities and interact with other cultures, but only really recognises the aspects it considers compatible, co-opting them into its destined path. Historiography does the exact opposite; it identifies and articulates the agent in its particularity as it seeks no predetermined end. A generalisation is a by-product of that analysis, not its purpose.

For the second. In time – and here is where the political import of history parades its resplendent value – the destiny inherent in historicism necessarily includes the past, the present, and the future. It is destined to be so, after all. As such, the historicist attributes meaning today to events past, disregarding many of the 5Cs discussed earlier. It therefore transports meaning into a past that may have seen itself quite differently from the categories that underlie contemporary study. Ogot argues that such a construction of meaning is referred back to the immanent. For our purposes, fascinating lines of reflection are opened, to which we currently have no answers. For instance, to whom may we assign the role of the immanent of international law? Of African international law? Even when considering the history of the international law of the Hashemites of Hejaz or the Ethiopian Empire, the immanent to which all meaning returns is not easily identifiable, despite the theocentric nature of these international actors in history.

21 JT Gathii, 'A critical appraisal of the international legal tradition of Taslim Olawale Elias' (2008) 21 *Leiden Journal of International Law* 317; C Gevers 'Literal "decolonization": Re-reading African international legal scholarship through the African novel' in J von Bernstorff & P Dann (eds) *The battle for international law: South-North perspectives on the decolonization era* (2019).

22 Referring also to M Mutua's taxonomy. See M Mutua 'Typologies of scholarship on Africa' (2013) 107 *Proceedings of the Annual Meeting of the American Society of International Law* 191.

23 Ogot (n 1) 9-10 calls these spatial and temporal generalisations.

On the other hand, the historian – the historiographer – in time, 'borrows his local criteria from the present, subjects all statements to the principles of verification'[24], and denies any privilege to the notion of a creator or end to which time is oriented.[25] Yet, while sounding perfectly scientific, the ontological categories of 'verification' are not immune from contemporary biases. If applied to our discipline, an interesting manifestation can be the categorisation of statehood or the development of international custom on diplomacy. Is an African customary prohibition against injuring the envoys of European kings evidence of diplomatic immunities in pre-colonial Africa?[26] I mean, had such privilege not existed, how then, surely could they have negotiated the treaties they claim ceded African sovereignty to the protection of European states? All this is contingent on whether one sees in their contemporary analysis, the equal statehood of the political organisations of all eighteenth century peoples, regardless of their continent of origin. As we well know, unlike the African the contemporary analysis in Europe did not tend to equality. But on the other hand, contemporary to ourselves, such assertion by an African may be viewed as 'contributionist'.[27] Yet, when Ngugi wa Thiong'o's *Moving the centre* and *Decolonising the mind* theses are applied, the centre to which contributions are made is contingent on the point of view of the analyser.

In this sense, 'the invocation of history is … indispensable to nations and groups in the process of making themselves'.[28] This approach is exemplified by the Negritudian movement, for instance, which one can presume had some influence on the Africanist approach of Kéba Mbaye. However, such understanding must come with some caution. The society whence Mbaye issued does not lack self-knowledge, but rather is probably so steeped in its lived experience that its self-knowledge is unconscious, almost instinctive.[29] Contrasted with the emergence of the Afro-American approach which arises precisely as 'a rose that grew from concrete'[30] then

24 Ogot (n 1) 10.

25 By this method as elucidated by Ogot, one cannot but wonder at the apparent historicist claims that suggest an end – in both purpose and finality – to history in another discipline closely related to international law, international relations.

26 TO Elias explored these concepts in *Africa and the development of international law* (1972).

27 Elias (n 26) is seen as one such example. See also, Gathii (n 21) 317.

28 Ogot (n 1) 13.

29 The other obvious figure in Senegalese Africanist scholarship that is somewhat influenced by the 'Negritude movement' but born from and practised in distinct lived experience, is Cheikh Anta Diop.

30 The phrase is borrowed from the hip hop album Tupac Shakur 'The rose that grew from concrete' Interscope, 2000.

'the failure to celebrate the past … is a powerful reason for low self-esteem in the present. … This partly explains the genesis of "Afrocentricity"'.[31]

This is not to imply that such invocations are benign. Far from it. The approach of recovering bygone glories and heroes as a remedy for present low self-esteem is itself politically dangerous, and prone to inspire all sorts of prejudices, counter-racisms, and xenophobia. And even beyond the socio-political dangers, Toni Morrison specifically cautions against a debilitating self-doubt that can underlie 'contributionist' invocations:[32]

> The very serious function of racism … is distraction. It keeps you from doing your work. It keeps you explaining, over and over again, your reason for being. Somebody says you have no language and so you spend 20 years proving that you do. Somebody says your head isn't shaped properly so you have scientists working on the fact that it is. Somebody says that you have no art so you dredge that up. Somebody says that you have no kingdoms and so you dredge that up. None of that is necessary. There will always be one more thing.

Methodologically speaking, it is decidedly historicist to import contemporary meanings into the past. However, it is possible and desirable to do the converse – to study how the present is *an* outcome of the past. And so, in tandem with the historian's space-time conundrum – as opposed to the physicist's space-time continuum – the student of the history of one or other discipline should not recoil from but rather welcome the dualities and incongruences in historical analysis. Such a student should, in fact, view unilinear analyses that easily pigeon-hole history and its agents with great scepticism. This explains, in the case of our subject Kéba Mbaye – and indeed our object, that is African approaches to international law – that Mbaye is both disdainful of Western individualistic autonomy but fervently defends civil and political rights; that he values the restrictive order of pre-colonial society but abhors authoritarian attempts at violating the constitutional separation of powers – as Leopold Sedar Senghor learnt with some difficulty in 1971.[33]

31 Ogot (n 1) 16-7 citing Malcolm X affirms: 'The thing that has kept most of us, that is, African-Americans almost crippled in this society has been our complete lack of knowledge concerning the past.' See also, AG Hilliard, L Payton-Stewart & LO Williams (eds) *The infusion of African and African American content in the school curriculum: Proceedings of the first national conference*, October 1989, Atlanta, 1990.

32 '12 of Toni Morrison's most memorable quotes: The author's thoughts on writing, freedom, identity and more' *The New York Times* (New York) 6 August 2019.

33 In 1971 Senghor attempted to bring the judiciary under the General Inspectorate of State, a function of the Presidency, a proposal which Mbaye flatly rejected. Senghor then had to accept the establishment of an Inspectorate of Courts and Tribunals that was immune from executive control. Cheikh Yerim Seck *Kéba Mbaye: Parcours et combats d'un grand juge* (2009).

An exhaustive listing of such fascinating dualities in a single man are beyond the space and scope of our reflections. The point is rather to articulate the merits and demerits of the historical method we have chosen, and apply them to our subject – and certainly, to the object of our study: with great scepticism, African approaches to international law.

The professional-histories method of studying the history of international law is ideally suited to African approaches for a number of reasons. First, it is traditional in scholarly work and a necessary consequence of the obligation to attribute ideas to their originators; to pay homage to the forebearers of any discipline. Second, such respect is a time-honoured African tradition. Third, and speaking to more scholarly aims, the professional history allows for higher precision in contextualising the history of international law, the above complexities of such endeavour notwithstanding. The life and works of a central figure of a discipline demand that the context, of time, place, political persuasion, pressures, and they institutions they worked in, be fully recognised.

Admittedly, mine is an historiographical approach to reading Africa's contributions to international law. The study of how key figures influence the development of international law on our continent – or any other for that matter – more closely demands that such developments not be divorced from their contemporary world. Such divorce is offensive to the historical method, and particularly, the 5Cs of historical analysis: change over time; context; causality; contingency; and complexity. It is important to the analysis of our continent's involvement in international law that such a study not be allowed to regress into unilinear evolutionism, ascribing fictional destinies to the vast range of possibilities and diversities that have constructed our contingency. The assumption here remains that the study of key personalities demands that we pay attention to how and why they came to influence the development of the law on Africa that they practised.

Most importantly, in studying the characteristics of African approaches to international law, the *Africans* themselves who fashioned these approaches can surely not be excluded from the exercise – in fact, they should surely be our first port of call.

African approaches to international law is admittedly a sub-discipline of Third World Approaches to International Law (TWAIL). TWAIL's contributions to international legal theory have been shifting over the last two decades, particularly to the actors of the Global South.[34]

34 For an updated and comprehensive overview of the TWAIL project, see JT Gathii

However, among the most important of criticisms directed at TWAIL is that by encompassing the Global South, it may fail to or may gloss over particularities arising from the specific differentiated lived experiences of the peoples of the Global South. Although unintentional, TWAIL can tend to universalise the Third World and therefore obscure important specificities.

There must surely be even more specific anti-hegemonic approaches to international law, as there are more specific hegemons in the regions. It follows that if Africa has been engaging in the international relations that make international law, and the scholarship and practice of this international law, then there must be African approaches to international law. Yet, the internal diversities, even a specific region like Africa, are numerous. TWAIL scholars are conscious of this diversity and have wrestled with the different histories and experiences of subjugation that the Third World has suffered.

So yes, there is only a fragile similarity of shared history within Africa.[35] Bethwell Ogot has explained this. Interrogating the distinct forms of colonialism and post-colonialism[36] remains vital to the study of African approaches to international law. The real-life effects, the very nature of the continued colony – otherwise falsely termed 'post' colony – find their roots and lifelines in these distinct but equally brutal forms of colonialism and their views on international law and relations. In other words, we are, after all, constructed by our histories, especially the painful and uncomfortable ones.

It should, therefore, not be surprising that there can only be African approaches to international law, in the *plural*.

'The agenda of Third World Approaches to International Law (TWAIL)' in J Dunoff & M Pollack (eds) *International legal theory: Foundations and frontiers* (2019). See also, JT Gathii 'The promise of international law: A Third World view' (2021) 36(3) *American University International Law Review* 377.

35 As can be gleaned from JS Mbiti *African religions and philosophy* (1969). For an important, meticulously researched and powerfully delivered contrary view, see L Magesa *African religion: The moral traditions for an abundant life* (1997) and *What is not sacred? African spirituality* (2013). It is our contention that Magesa's analyses would have resonated with Kéba Mbaye had he read these works.

36 Our mind here goes to the easily discarded troubled start to the OAU as Africa's premier international organisation, a pre-eminence that was challenged barely two months later by *Union africaine et malgache* (UAM), which soon morphed into *Union africaine et malgache de cooperation economique* (UAMCE) and later the *Organisation commune africaine et malgache* (OCAM). For a fascinating personal account of the vagaries of UAM-UAMCE-OCAM decision making at head of state level which all but suggests a neo-colonial underhand, see Moktar Ould Daddah *La Mauritanie contre vents et marées* (2003) 431-9.

3 Kéba Mbaye's life as a deep and vast oeuvre

Kéba Mbaye, as earlier suggested, is arguably his generation's most intellectually adroit African jurist, in addition to being *the* definitive moral figure of contemporary Senegalese society. His intellectual contributions and moral convictions were first felt – somewhat aptly – at the national level. In his earlier years he taught law at the University of Dakar and at the *Ecole nationale d'administration* of Senegal.[37] Having trained for the magistrature,[38] he served as deputy judge and later deputy to the Public Prosecutor for Papeete in French Polynesia.[39] He joined Senegal's public service in 1960, where he was instrumental in the 'legal reform explosion' Senegal underwent immediately after independence.[40] In 1963 he was appointed President of the Supreme Court of Senegal, a role in which he served for 17 years.[41] He was later named this court's Honorary First President,[42] and on retiring from the ICJ, he served as President of the then Constitutional Council of Senegal (1990-1993).

Judge Mbaye served in the UN human rights, UNESCO and ILO systems. He was a member of the UN Commission on Human Rights (1972-1981),[43] and served as its chair in 1978. He was also the President of the ad hoc Working Group of Experts of the UN Commission on Human Rights responsible for investigating human rights violations in southern Africa, and President of the Conciliation and Good Offices Commission of the Convention against Discrimination in Education.[44] He was also a member of the UN Commission of Experts established pursuant to UNSC resolution 780 of 6 October 1992, to look into widespread violations of international humanitarian law in the former Yugoslavia, particularly in Bosnia-Herzegovina, and a member of the ILO Committee of Experts on the Application of Conventions and Recommendations (1982-1995).[45] He also served on the first panel of the UNESCO International Bioethics Committee (1993-1997).

37 Higgins (n 6) 4.

38 Fondation Kéba Mbaye 'Biographie: Juge Kéba Mbaye' www.fondationkebambaye.org/documentt/cv _kebambaye.pdf (accessed 5 March 2017).

39 Higgins (n 6) 4.

40 Fondation Kéba Mbaye (n 38) 1.

41 As above. Higgins (n 6) 4 reports this as 18 years.

42 As above.

43 As above.

44 Higgins (n 6) 5.

45 Fondation Kéba Mbaye (n 38) 2.

In the pacific dispute settlement system of general public international law, Judge Mbaye was member of the ICJ (1982-1991) and its Vice-President (1987-1991). He later served as judge *ad hoc* in cases before the ICJ.[46] He was member of the Arbitration Tribunal in the delimitation of the maritime boundary between Guinea and Guinea-Bissau,[47] and adjudicated in investment arbitration.[48] In the continental level, Judge Mbaye sat on the OAU Mediation Commission in the border dispute between Upper Volta and Mali.[49]

To many, Judge Mbaye's best known legal drafting achievement is his contribution, as Chair of the Drafting Committee of the African Charter,[50] and as General Rapporteur of the 1981 Conference of the Organisation of African Unity, to the adoption of the African Charter.[51]

Having spearheaded calls for the harmonisation of African law from the 1960s,[52] Judge Mbaye was called upon to lead the technical team that prepared the legal instruments on harmonisation of business law in Africa (1993-97),[53] which he subsequently actively championed.[54]

He was a member of the International Olympic Committee (IOC) for close to three decades (1973-2002),[55] serving as Vice President (1988-1992 and 1998-2002) and a member of the executive board.[56] He also chaired

46 ICJ (n 2). Among these were *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening)* Judgment, ICJ Reports 2002, p 303.

47 Higgins (n 6) 5.

48 Most notably, *Société ouest africaine des bétons industriels (SOABI) v Senegal* ICSID Case No ARB/81/1, Kéba Mbaye dissenting, 25 February 1988 and *American Manufacturing & Trading, Inc (AMT) v Zaire* ICSID Case No ARB/93/1 Award 21 February 1997. See also, PJ Martinez-Fraga & HJ Samra 'A defense of dissents in investment arbitration' (2012) 43 *University of Miami Inter-American Law Review* 445-79.

49 Higgins (n 6) 5.

50 Jallow (n 4) 63.

51 ICJ (n 2) 5.

52 Fondation Kéba Mbaye (n 38) 1; see also, Kéba Mbaye '*L'unification du droit en Afrique'* (1971) 5 *Revue sénégalaise de droit* 10, 65-81.

53 KJ Alter 'The global spread of European style international courts' Buffett Center for International and Comparative Studies Working Paper Series Working Paper 11-003 16 June 2011, 16 citing F Katendi & JB Placca '*Savoir accepter la pauvreté: Interview de Kéba Mbaye'* www.afrology.com/af/eco/pdf/kebam.pdf (accessed 30 September 2022).

54 A Mouloul *Understanding the Organization for the Harmonization of Business Laws in Africa* (2nd ed 2009) 10.

55 ICJ (n 2).

56 Higgins (n 6) 5.

the IOC Juridical Commission and the Sports and Law Commission.[57] Among his notable contributions, considering his earlier work investigating apartheid crimes at the UN *ad hoc* Working Group, was championing the readmission of South Africa to the Olympic movement in his role as President of the IOC Commission on Apartheid and Olympics (1989-1992).[58]

Judge Mbaye drafted the founding statute of the Court of Arbitration for Sport (CAS) as the premier dispute resolution system in sports law, and served as its President from 1983 until his death in 2007.

In civil society, in 1971 Judge Mbaye co-founded the *Comité Sénéglais de droits de l'homme* (CSDH), essentially therefore being responsible for the establishment of the first of what would later become national human rights institutions, an institution which was also provided for in article 26 of the African Charter. He was member and Chairman of the International Commission of Jurists, Honorary President of the World Federation of United Nations Associations, Honorary Member of the *Institut de droit international,*[59] and Vice President, *Curatorium,* at the Hague Academy of International Law, among others.

Probably his most resounding influence was felt in human rights law at the global, regional, and national levels. At the UN Commission for Human Rights he argued strongly, though somewhat unsuccessfully at the time, for the recognition of the right to development,[60] thus foreshadowing the 1986 UN Declaration on the Right to Development. Mbaye's conviction in the unity of human rights and the significance of the rights to peace and development are reflected in the hard law of the 1981 African Charter, over a decade before the 1993 Vienna Declaration.

Judge Mbaye was a passionate sportsman and avid golfer. He saw the International Olympic Movement as a living reflection of the ideals of peace, universal coexistence, and the development of the person.[61]

57 As above.

58 As above; Fondation Kéba Mbaye (n 38) 3.

59 Higgins (n 6) 4-5.

60 BG Ramcharan *Contemporary human rights ideas* (2008) 85 citing K Mbaye '*Le droit du développement comme un droit de l'homme*' Inaugural lecture International lnstitute for Human Rights, Strasbourg, France, 1972; K Mbaye 'Emergence of the "right to development" as a human rights in the context of new international economic order' address to a meeting of experts on human rights, human needs and the establishment of a new international economic order 16 July 1979 SS-78/CONF.630/8.

61 T Bhuvanendra 'Human rights in the realm of sports' (1998-1999) 26 *Olympic Review* 15.

Judge Mbaye cherished Africa,[62] and his life bears testimony to his belief in *African agency*.[63] He belongs to a generation of Africans, the first post-independence professionals whose mission was to build Africa both nationally and regionally, and to assert Africa's place on the global stage.[64] Mbaye belongs to a generation of the exceptional few who not only advanced the disciplinary knowledge in which they were trained, but sought to interrogate the philosophical and cultural questions which explain what Africa is, and then apply that understanding in their disciplinary practice.[65]

Jaques Rogge, IOC President at the time of Judge Mbaye's death, described him as 'one of those men whose humanity and charisma mark you for life' and remembered his 'unshakeable faith in humanity and its ability to build a better world'.[66]

From the early 1960s, Judge Mbaye was utterly convinced that the Third World, and Africa in particular, would not achieve its aim of economic and social development without significant legal reform that takes Africa's weaknesses into account, sheds certain traditions, and envisions a future prosperous Africa.[67] With apparent links to Senghorian *negritude*, in his role as member of the *Société de législation comparée* and Vice President of the *Comité international de droit comparé,* Mbaye called for a 'rehabilitation' of African law, asserted the unity of African law, its originality and its virtues.[68] By the mid-1960s, Judge Mbaye's writings and conference speeches had already settled on what would probably be his most renowned contribution to international law – the right to development.[69]

62 Higgins (n 6) 6.

63 For a discussion of our understanding of African agency, see H Sipalla 'African agency in contested contexts: A reflection on TrustAfrica's work on international criminal justice' in H Mahomed & E Coleman (eds) *Claiming agency: Reflecting on TrustAfrica's first decade* (2016) 30-34.

64 Sipalla (n 63) 31-33.

65 For instance, in his *Les droits de l'homme en Afrique* (1992), Judge Mbaye does not simply present a legal analysis of the African Charter but begins by deconstructing the African cultural context and its relation the notion of universal human rights. In fact, the title of the book itself affirms the focus of his reflection is wider than a narrow legal analysis of the African Charter. See René Provost 'Book review: *Les droits de l'homme en Afrique* by Kéba Mbaye; *La Charte africaine des droits de l'homme et des peoples: une approche juridique des droits de l'homme entre tradition et modernité* by Fatsah Ouguergouz' (1995) 17(4) *Human Rights Quarterly* 807-812.

66 Higgins (n 6) 6.

67 Fondation Kéba Mbaye (n 38) 1.

68 As above.

69 He published *Droit et développement en Afrique francophone* (1966).

In international investment law he asserted an Africanist, Third World approach. In elections law, his very person, universally trusted as beyond reproach, allowed him to steer Senegal's transition to multi-partyism, a brush with the corrupting essence of politics from which it appears he barely recovered.[70]

While Judge Mbaye's judicial thought is largely cocooned in collegiate writings of majority judicial opinions, he issued a few separate opinions – sometimes in dissent – that point to his own approach to the Africanist legal method,[71] including *SOABI v Senegal*, and *AMT v Zaire,*[72] *Cameroon v Nigeria,*[73] and *Tunisia/Libya.*[74] *Extra-cathedra*, however, Judge Mbaye left us a rich corpus of thought.

4 Applying the professional historical method

4.1 *Judge Kéba Mbaye: A complex figure*

Kéba Mbaye portrays a complex and seemingly paradoxical figure. He is both very traditional and progressive, deeply rooted and supremely adaptable, humble yet always appearing in refined mien, Africanist and suspicious of neo-colonial tendencies[75] yet open to working with the West to establish rule of law institutions in the Eurocentric tradition,[76] issued from an oral society but committed to written law, etcetera.

70 Seck (n 33) 93-99.

71 Kehinde Olaoye treats of this point in fuller detail in Chapter 3 of this volume: 'The hidden majority: Investor-state arbitration and the legacy of Kéba Mbaye'.

72 *SOABI v Senegal* 2 ICSID Rep 190 (25 February 1988) (Award), Mbaye Diss Op; *AMT v Zaire,* Award of 21 February 1997, Mbaye Dissenting Opinion cited in AJ van den Berg 'Dissenting opinions by party-appointed arbitrators in investment arbitration' in M Arsanjani and others (eds) *Looking to the future: Essays on international law in honor of W Michael Reisman* (2011) 821-843. See also PJ Martinez-Fraga & HJ Samra 'A defense of dissents in investment arbitration' (2012) 43 *University of Miami Inter-American Law Review* 445.

73 Order (Provisional Measures) 15 March 1996, Declaration of Judge *ad hoc* Mbaye.

74 (Intervention) (1984) Separate Opinion of Judge Mbaye.

75 As evidenced by his views on the right to development, his dissents in international investment law, and his early drafts of the African Charter on Human and Peoples' Rights.

76 While Mbaye work to the OHADA legal framework was at the initiative of the French Ministry of Foreign Affairs in 1991, his theory of the harmonisation of African law dates back to the 1960s. Alter (n 53) 16. Joseph Issa-Sadegh traces this back to 1971. See n 83 below.

Kéba Mbaye was wary of capitalism and disdainful of the individualistic western societies it wrought,[77] but was equally suspicious of Eastern-bloc type communism. He was also, quite like Julius Nyerere, both conscious of possible linkages between African values and socialism, and suspicious of the state-centric political ideologies that carried those names. He wrote in 1975 of the African approach to socialism and property:

> Despite the option of the Marxist-Leninist approach that certain states assert, the general tendency in Africa, it seems, is to seek an original approach… Africa has participated in the manifestations of the grandeur and weaknesses of capitalism.

His biographer puts it this way: 'A man steeped in African culture and proudly so, Kéba Mbaye preserved, behind his refined French and westernised upper class mannerisms, a deep love for his roots'.[78] And this is consistent with his upbringing: '[he was] brought up in a mixture of Islamic principles and African values, but well-grounded nonetheless'.[79]

Mbaye recalls that, at his first posting as magistrate in Senegal, some locals thought he was Caribbean, and would, in an attempt to intimidate the young magistrate, perform elaborate gesticulations as if to bewitch him – or to intimidate him into so thinking. He would smile, safe in the knowledge his mother had herself cast the appropriate protective charms.[80]

In fact, so grounded was he that he was deeply uncomfortable with even simply living in the West. At independence in 1960 he was already a magistrate in the French judiciary but immediately chose – as the choice was offered to then French civil servants – to join the new Senegalese judiciary, becoming the only serving African magistrate. Three decades later he turned down the possibility of running for a second term at the ICJ precisely because of having to live in The Hague.[81]

Mbaye was all through his life a prime mover for the Africanisation of law. Joseph Issa-Sadegh recalls of him, that from the very beginning – presumably of joining the Senegalese judiciary at independence – he seemed to be the type of person who would, and eventually certainly did,

77 Seck (n 33) 72. See also, Kéba Mbaye '*Les adultes et l'escalade de la jeunesse*' (1976) 7 *Ethiopiques: Revue socialiste de culture negro-africaine*.

78 Seck (n 33) 71.

79 As above.

80 Seck (n 33) 72.

81 Seck (n 33) 74.

'Senegalise'[82] and update what were foreign and outdated codes that was the French law in force in Senegal at the time.

Issa-Sadegh would later be a close collaborator of Kéba Mbaye in the construction of OHADA law, in fact asserting that as far back as 1971 Judge Mbaye had already conceptualised OHADA law, 'not necessarily the definite structures we know today, but through articulating a theory for the harmonisation of law in Africa'.[83]

If conviction in the utility and validity of the harmonisation of law in Africa proceeded from his belief in African unity, then this impulse dates even further back. In the speech Kéba Mbaye delivered on 1 January 1981, at the swearing in of Abdou Diouf as President of Senegal, a speech which he repeated at length at his 2005 Université Cheikh Anta Diop (UCAD) inaugural lecture, Judge Mbaye expressed deep regret at the collapse of the Mali Federation in these words:[84]

> I will regret this breakup all my life, especially today when everyone is convinced that the main mistake on this continent is of having accepted to divide it into micro-states which led, in the face of our former masters, to the fatal law of a division that undermines and weakens that which it divides.

Judge Mbaye understood how to both affirm ethical standards while not hesitating to challenge any attempts to racialise corrupt misconduct, as initially happened when the Salt Lake City Olympics scandal surfaced. He was at this time Vice President of the International Olympic Committee[85] and such a principled stance could not be possible were he not himself beyond reproach.

Kéba Mbaye was not only monastic in his strict and austere lifestyle, but also abhorred publicity for the public services he rendered. He certainly was no politician. While this endeared him to many, it also endears him to this choice of historical method, being relatively free of the grandstanding

82 Fondation Kéba Mbaye 'Vidéo Juge KÉBA MBAYE' https://www.youtube.com/watch?v=y4RyKdUM_Vk (accessed 24 February 2021).

83 *Film témoignage sur le juge Kéba Mbaye* produced by Fondation Kéba Mbaye https://www.youtube.com/watch?v=zlEduKEjdAM (accessed 24 February 2021).

84 Inaugural lecture given by Judge Kéba Mbaye at the Université Cheikh Anta Diop de Dakar 14 December 2005. https://www.youtube.com/watch?v=e3qGeq6fRus (accessed 10 June 2021). Author's translation of the following original: '*Je regretterai cette rupture toute ma vie, surtout aujourd'hui où chacun est convaincu que la principale erreur sur ce continent est d'avoir accepté de le diviser en micro- Etats livrés, face à nos maîtres d'hier, à la fatale loi de la division qui amoindrit et affaiblit ce qu'elle divise*.'

85 Seck (n 33) 75.

that may distort, through hyperbole, the impact of the professional in the construction of the discipline.

Kéba Mbaye, like any great Baobab tree, was, at once well rooted and in touch with the fleeting air of the wide world to the skies. One can only smile to imagine that scene, at lunch time at his house in the upper class Fann Résidence neighbourhood of Dakar, eating *djeboudjenne* – Senegal's staple rice dish – in the large common tray with others in the house and not individually served on individual plates accompanied by fork and knife individuality,[86] as Senegalese traditionally do, while in the midst of deep discourse on some complex technicality of law, all expressed in eloquent French with the occasional emphasis in a complex multi-layered Wolof proverb.

These are not merely comic recountings with no import to the erudite study of international law and the history of its African approaches. Kéba Mbaye himself insists that one's cultural provenance directs one's approach to international law in language worthy of fuller reproduction:[87]

> There are always several solutions to a legal problem. The choice of solution will depend on the civilisation, on the culture one belongs to. This is why I earnestly think that a Third World jurist or an African jurist can make original contributions to the International Court of Justice.

Kéba Mbaye's long exposure to the West did not draw him away from his roots. His erudite professionalism did not engender a disdain for the mystical African life he kept close to all his life. He is, in a sense, a personification, not merely of that unending tension between historicity and historiography, but in fact its master, and in Africanist terms, an ancestor worthy of emulation. A man, not of too many faces but one who wears but one mask.[88]

86 Traditional table manners are a distinct sign of affinity with traditional culture, and this sentiment runs true across the continent. In a 1980s Kenyan love song, the persona in describing just how smitten he is, remarks that he is behaving abnormally, 'to the point of eating with a spoon!' 'Nakupenda wewe' *Safari Sound Band* 1984 reissued 1996. Kéba Mbaye's love for *djeboudjenne,* served in the traditional open common tray to be shared with others, is often recounted in Dakar folklore.

87 Seck (n 33) 75 (author's translation).

88 Sting *Shape of my heart* (1993): 'Am not a man of too many faces, the mask I wear is one'. The author understands this line to refer to the trait that the most honest and integral of men and women bear. They have no 'pretences' in the form of 'many faces' but only one frank respite from the glare of the world, 'the mask'. As we show in this chapter, Kéba Mbaye was as honest, austere, and imbued with integrity as could possibly be in one single person.

This persistent duality that the average African lives with today, as did Kéba Mbaye then, may endear us not to be perturbed by but to welcome the paradoxical outcomes of the inextricable interplay of historicity and historiography, or to put it plainly, the incessant nagging interference of historicism in historiographical endeavours.

4.2 '*Nit moodi garabou nit*':[89] Judge Kéba Mbaye as a moral figure

'Man is man's medicine.' This proverb is ubiquitous in Wolof and Senegalese culture and is central to Wolof public consciousness, having also been celebrated by the Senegalese salsa maestro Pape Fall and his band African Salsa in *Ke jaraxam*.[90]

This Wolof proverb expresses the 'golden rule' of treating others as you wish to be treated. It exemplifies the purpose of the 'golden rule' of uniting intra-personal responsibility with inter-personal obligation, uniting individual duty with social entitlement. Yet it does so while affirming an intriguing interplay of autonomy and agency in the sense that individual conduct, borne of autonomy, *is* the agent of social harmony.

Nit moodi garabou nit therefore appears to be unconscious of a dichotomy between individual autonomy and social entitlement. Each drives the other. To Kéba Mbaye this proverb meant 'emphasising human rights values of fairness, equity, support, and fair play'.[91] In fact, we can safely assert that it is impossible to understand Kéba Mbaye's approach to the interplay between individual and collective rights,[92] an approach that gave us the African Charter, outside this philosophical milieu in which he

89 LS Senghor 'Address at the opening of the Meeting of African Experts preparing the draft African Charter' in Dakar, 28 November to 8 December 1979' in C Heyns (ed) *Human rights law in Africa 1999 - Documents on the African Charter on Human and Peoples' Rights* (2002) 79.

90 https://www.youtube.com/watch?v=cYVu2TY3-PA&list=PLkZ9-FYcX57ntMry-8Hff3_xyfoZRkQlV& index=3 (accessed 10 June 2021). Also spelt as '*nit moy garabou nit*', I am grateful to my good friend, human rights lawyer, and encyclopedic musicologist, Gaye Sowe, for directing me to Pape Fall and clarifying the variant Wolof orthography. It should also be noted that the Gambian, prone to anglicised orthography would transliterate the following vowels as 'i' and 'u' vowel while the Senegalese, susceptible to francised orthography would transliterate as 'y' and 'ou' respectively. I have opted for '*garabou*' as the subjects here are Senegalese.

91 Cited in MS Joff 'We cannot hope African governments will uphold legal provisions' *Front Page International* 24 April 2013 https://frontpageinternational.wordpress.com/2013/04/11/we-cannot-hope-african-governments-will-uphold-legal-provisions/ (accessed 4 March 2017).

92 Kéba Mbaye 'Human rights and peoples' rights – Introduction' in Mohammed Bedjaoui (ed) *International law: Achievements and prospects* (1992) 1052.

grew up and *chose* to live his whole life. It expresses his Afrocentricism. As he recounted to his biographer: 'Individual autonomy, which is so often invoked in the West, has led to the current decline and moral chaos of western societies.'[93]

Furthermore, *nit moodi garabou nit* stresses a fascinating point about Wolof culture and Kéba Mbaye's place in Senegalese public consciousness. In a memorial documentary produced by the Kéba Mbaye Foundation, a figure no less than Serigne Maodo Sy makes a fascinating observation about the moral figure that is Kéba Mbaye – He 'believed in Man'.[94] Alioune Ndiaye,[95] who understudied Judge Mbaye, notes an interesting distinction that Kéba Mbaye would make on the role of a judge in society:[96]

> He would often tell me that the judge must serve the aspirations of the people, and not public opinion. And this is important because he thought the judge must be of his times, and of his people.

In his 2005 Université Cheikh Anta Diop (UCAD) inaugural lecture, Judge Mbaye laid down the three nefarious influences against which the judge and the judiciary must be guarded:[97]

> The judiciary must be independent of [state] power, of the parties in proceedings, and of the public.

In this sense, the aspirations of the people are immutable while the other three influences are ephemeral and would lead the judge to injustice and disrepute. It is clear that for Judge Mbaye ethical conduct was the highest to which one could dedicate one's life. To be, in their personal conduct, the medicine for the ills that afflict humanity. Such belief in the majesty of individual agency and social autonomy is the hallmark of Kéba Mbaye.

93 Seck (n 33) 72.

94 The complete observation is: 'El Hadj Kéba Mbaye was a man of integrity, justice and dignity. He believed in Man. He was a judge whose greatest concern was to be fair and just [or was to render equitable justice].' Fondation Kéba Mbaye (n 82). That Serigne Sy specifically uses the qualified term 'equitable justice' and does so with his spoken intonation placing such emphasis on the term, and that he renders it in the French, rather than attempting a Wolof equivalent, leaves no doubt as to his intention to be clearly understood about this important character trait of Judge Mbaye.

95 Président du Tribunal de Commerce Hors-Classe de Dakar https://tribunaldecommerce.sn/siege/ (accessed 24 July 2021).

96 Alioune Ndiaye, after further describing Mbaye's exceptional qualities, notes, 'having spent time with him, it was clear that God had chosen him'. Fondation Kéba Mbaye (n 82). (author's translation).

97 Mbaye (n 84).

In addition, this high regard for human agency in the construction of a just world is central to the Wolof worldview which is curiously at once theocentric and anthropocentric. To repeat Yerim Seck, '[he was] brought up in a mixture of Islamic principles and African values'.[98] Therefore, Judge Mbaye's personification of this trait, must surely have struck a deep cord in his compatriots.

In his inaugural lecture,[99] Mbaye expresses, in his characteristic refined French, the democratic and rule of law effects of individual agency and social autonomy that to our mind recalls *nit moodi garabou nit*. The applause that followed this part of his lecture does not explain itself – does it love the beauty of Mbaye's language or the philosophical depth of the assertion? Speaking on 'Ethics today', Judge Mbaye says:[100]

> Ethics should be adopted by our country as the measure of everything because, accompanying work, it is the [condition] *sine qua non* of social peace and national harmony, solidarity and development.
>
> That those who hold a bit of power and abuse it, or who have enriched themselves by trampling on ethical rules, we should make it clear; they do not inspire the respect of their fellow Senegalese. Respect of our fellow citizens is the most precious asset in the world. It's the only one what to desire, to seek ….

Yet, Mbaye – and this explains precisely the point made by Serigne Sy and Alioune Ndiaye above on Mbaye's view of the role of a judge being not

98 Seck (n 33) 71 (author's translation).

99 One cannot overstress the public consciousness value of inaugural lectures in Senegal. Beyond the high esteem accorded such lectures in the epistemic community across the globe, Senegalese culture highly regards traits of an inaugural lecture that elevate it to the highest rank in general public consciousness: poetic articulation, rhetoric, *and* the consistency of the rhetorician's conduct in personal life with the words of his mouth. 'In Wolof … "*wax*" means to speak; "*waxeet*" on the other hand means to undo that speech, to unspeak, literally. The Senegalese take great pride in the art of rhetoric. Complex argumentation is a skill worn prominently on the streets of Senegal. In Senegal you are what you say, eloquently and loudly.' And in Senegal, the unspeakable is to not live by one's word, to undo one's speech. See H Sipalla 'Wade, ECOWAS Court and the one-man Senegalese state' *Mail and Guardian* (Johannesburg) 4 April 2012.

100 Mbaye (n 84). Author's translation of the following: *'L'éthique devrait être adoptée par notre pays comme la mesure de toute chose car, accompagnant le travail, elle est la condition sine qua non de la paix sociale, de l'harmonie nationale, de la solidarité et du développement. […] Que ceux qui détiennent une parcelle de pouvoir et en abusent, ou qui se sont enrichis en foulant aux pieds les règles d'éthique se le disent bien; ils n'inspirent aucun respect aux autres Sénégalais. Or le respect de ses concitoyens est le bien le plus précieux du monde. C'est le seul qu'il faut désirer, qu'il faut rechercher.'*

simply to apply positive law but to render equitable justice and serve the aspiration of his people – is clear on the limits of positive law:[101]

> In saying this, I place myself outside the law. 'Ethics is not the law' as Professor Abdoulaye Sakho recently wrote.

But ever keen to fashion positive law to greater ends, Mbaye urges the Senegalese to seize their agency and refashion their world by first improving their own country, specifying that one remedy is to 'erect certain fundamental principles of ethics as obligations *erga omnes*'.[102]

This is a curious statement for 2005, as African peoples have increasingly adopted constitutions that explicitly provide for ethical conduct as constitutional obligations *erga omnes* – owed to all under the constitution – and in fact grant standing to any citizen to complain of a violation of such ethical principles by the leadership.[103] Ironically, the Senegalese Constitution still lacks such provisions. Mbaye's use of this particular term, 'obligations *erga omnes*', clearly in reference to national not international law, is pleasantly surprising.

Seeing Kéba Mbaye as the moral figure of his society tells a fascinating tale of two African monastic philosopher 'kings'. One can see certain parallels between these two contemporaries. Julius Kambarage Nyerere (1922-1999) is the unflinchingly, monastic, incorruptible, Catholic Africanist who spends a lifetime constructing, in politics, a socially just Tanzania and Africa. Kéba Mbaye (1924-2007) is the unflinchingly, monastic, incorruptible, Muslim Africanist who spends a lifetime constructing, in law, a socially just Senegal and Africa. They are both very complex figures, austere and firm yet progressive and tolerant. The memory of their achievements appear to vary in expression depending on the standpoint of the viewer. Having lived the colony, and the ever-changing but never attained post-colony, they held strong principles and acted firmly. Lying in geographically extreme ends of Africa, they remain saintly figures in the public psyches of the nations they constructed, revered more in memory than in contemporary deed.

101 Mbaye (n 84). Author's translation of the following: '*En disant cela, je me place en dehors de la loi. "L'éthique n'est pas le droit" a récemment écrit le professeur Abdoulaye Sakho'*.

102 Mbaye (n 84).

103 For instance, Constitution of the Republic of South Africa, 1996; Constitution of Kenya, 2010 art 10, Chapter 6. However, comparative constitutionalism is beyond our scope, but is, to our minds, worthy of further research.

Mbaye uses Nyerere to reinforce his dismissal of a supposed incompatibility between civil and political rights, on the one hand, and economic and social ones, on the other:[104]

> Fundamental human rights and freedoms – [Mbaye citing Nyerere] – were a constant goal of the human being, who at the same time needed to satisfy his needs in all fields so that so as to be able to exercise his rights and freedoms. Conversely, the exercise of economic, social and cultural rights was – [again, Mbaye referencing Nyerere] – meaningless in the absence of the freedoms and other rights pertaining to the individual.

Mbaye continues: 'the "human rights-peoples' rights" tension…opposes the same antagonists'. Presenting arguments linking peoples' rights to the primary right to self-determination and the debates at the UNGA and the Commission for Human Rights over the Universal Declaration, Mbaye once again dismisses 'the virulence of the debate' as 'simply the reflection of opposing ideologies of the Cold War prevailing at the time'.[105] History did not fail this insightful analysis. The post-Cold War Vienna Declaration, issued a year after these words were published, finally agreed with Mbaye and Nyerere.

Having suggested the foregoing, it is only fair to note that Kéba Mbaye regarded politicians with disdain. He notes that a country is headed for infamy if, when asked about the state of the nation, the average citizen speaks of cabinet reshuffles and political party disputes. Party politicians, he adds, do not develop a nation:[106]

> Such type of politics is the easiest job in the world. It requires neither education nor apprenticeship. Rather than having great politicians, let's try to have great doctors, great engineers, great professors, great specialists in economics and finance and even geniuses. The most powerful countries in the world are not the ones where politics reign supreme. This is rather the opposite.

He then goes on to affirm the two necessary conditions for a national culture based on ethics. The first is that there should be an independent and competent judiciary as only this can ensure the integrity of institutions and the stability of the political system. The future security of current

104 Mbaye (n 92) 1052.

105 As above.

106 Mbaye (n 84), author's translation of the following: '*genre de politique est le métier le plus facile du monde. Il ne nécessite ni études, ni apprentissage. Plutôt que d'avoir de grands politiciens, cherchons à avoir de grands médecins, de grands ingénieurs, de grands professeurs, de grands spécialistes de l'économie et des finances et même des savants. Les pays les plus puissants du monde ne sont pas ceux où la politique est reine. C'est plutôt le contraire.*'

governments and confidence in economic activity closely depend on it.[107] The second is that younger generations must have access to excellent education to develop their technical capacities. This, he adds, requires that technical capacities are prioritised over political capacities.[108]

5 By way of conclusion

The reflections above are proposed as a methodological proof of concept. They seek to demonstrate how an African professional history in international law can be used to study African approaches to international law.

The prevailing mainstream scholarly and public discourse on the construction of the international legal order tragically still presents these human advances as Western imports to Africa. The life and work of Kéba Mbaye has the potential to show that much of what exists in the current international legal order and its rule of law structures is very much an African construct. While literature exists along these lines, there is not nearly enough attention paid to the Africans who contributed to this construct.

The life and works of Judge Mbaye constitute an important cultural heritage for contemporary Africa. Frantz Fanon argues that 'each generation must, out of relative obscurity, discover its mission, fulfil it, or betray it'.[109] To fulfil Fanon's belief in us, my generation would be well served by a fuller understanding of the vast achievements of our predecessors – contingency.[110]

Men and women are creatures of their times. And all times are complex and turbulent. Each person is complex and bears multiple identities. In studying a great personality, one may choose to study either one aspect of his or her life and work during a specific period, and thus go into great detail on the chosen focus, or to study the length and breadth of his or her life and times with the ebb and flow of time and history.

As noted earlier, Cheikh Yerim Seck is unequivocal that Judge Mbaye believed that the community formed the individual and was highly critical

107 As above.

108 As above.

109 F Fanon *The wretched of the earth* (1967) 166.

110 Contingency here referring to the historical methodological principle that the understanding of events is based – and hence contingent – on earlier events; that the present is necessarily determined by the past.

and wary of the decadence of the West, in which he saw the roots in extreme individualism. How does this view play out in his thought and work? In what way are we to understand him in contemporary praxis? How would the freedom of association and speech and rights of sexual minorities, to take two examples, co-exist in a Mbayean world? How could the principles he believed in, if so unwieldy, offer a legal basis for these rights and freedoms today? And can the individual claim rights against the community? What about the converse? Is community entitled to claim duties against the individual?

The interrelation between the concepts of right, on the one hand, and the state that bears the duty to guarantee it, on the other, also presents difficult questions. Insofar as a right is an entitlement to make claim against the state, what is the place of community in relation to the state in Mbayean theory; or rather what is the nature of the state in Mbayean thought?

This also begs the question: 'What is civil society if it is defined as the space between the individual and the state? Yash Pal Ghai argues as follows:[111]

> Rights regulate the relationship of individuals and corporations to the state. ... the reality is that the State has effectively displaced the community, and increasingly the family, as the framework within which an individual or group's life chances and expectations are decided. *The survival of community itself now depends on rights of association and assembly*.

And if the state is so central, on what politics does an Africanist communitarian state in the Mbayean sense rely? South African historian Sampie Terreblanche presents the conundrum in a way that would be intelligible to the Kéba Mbaye we have seen above:[112]

> Democratic capitalism [is] contradictory: *while democracy emphasizes joint interests, equality and common loyalties, capitalism is based on self-seeking inequality and conflicting individual and group interests.* The legal system that protects both democracy and capitalism is based on the principle of equality before the law, but maintains inequalities in the distribution of property rights and of opportunities in the capitalist system. The 'logic' of capitalism – given the unequal freedoms and unequal rights upon which it is based – thus goes

111 Y Ghai 'Rights, duties, responsibilities' in J Caughelin, P Lim & B Mayer-Konig (eds) *Asian values: Encounter with diversity* (1998) 169 (emphasis mine).

112 S Terreblanche *Lost in transformation: South Africa's search for a new future since 1986* (2012) 37-39.

> against the grain of the 'logic' of democracy … To emphasise the conflicting logics of democracy and capitalism is not to deny the complementary relationship between them … It is not advisable to study the history of political authorities (or states) in isolation from capitalism, or to study the history of capitalism in isolation from the history of the political authorities, for the interactions between capitalism and political authority should always receive the simultaneous attention that both deserve.

Interrogating this individual-community-state continuum is further complicated by Kéba Mbaye himself who led the legislation in hard law of group rights as legal entitlements. Prior to the African Charter, no international legal instrument so clearly asserted collective rights, and did so in such apparent equality and interdependence with individual rights as did the Mbaye-inspired African Charter.

Fidelity to cause and betrayal: True heroes make no specific effort to be heroic. Rather, they live their lives true to their principles. It is community or society that hails them as heroes. How do they remain true to their principles through time? Yerim Seck describes the deep hurt that Kéba Mbaye suffered in the 1990s while shepherding the transition of Senegal to multiparty democracy. His dissenting decisions in international judicial practice – particularly in investment law – also suggest his disappointment at the dishonesty of the international legal system, a critique that is positively 'TWAILian'. His very progressive first draft of the African Charter was watered down, despite retaining much of his revolutionary ideas. But certainly, the betrayal by the Senegalese political class as described by Seck, is what appears to have wounded Mbaye the most. This theme of the betrayal of the hero, consistent with the mythological form in literature, poses important questions in the study of the African professional in international law.

Thankfully, such heroes leave us with words full of conviction which refocus our minds. It is probably only fair that an attempt at a Kéba Mbaye biographic concludes with the subject's own words during his last public lecture:[113]

> I have the very clear conviction that just as it is agreed that freedom and power must be limited by the rights of others, likewise, ethics must be constituted as the compulsory measure of the exercise of all rights, freedom, and power.

113 Mbaye (n 84).