5 African approaches to international law: A communitarian ethic as a cultural critique of the western understanding of the human rights corpus

*Miyawa Maxwel**

Abstract

African approaches to international law and the related aspect of an African conception of human rights are familiar minefields of contestation animated by two basic concerns: the role, if any, that African ethics has played in their making; and whether African ethics have and continue to shape the normative character of international human rights law. Underlying these ideological polarities is the controversy surrounding the existence, or even awareness of African pre-colonial concepts of rights. The dynamic of African approaches to human rights law is therefore intellectually problematic as it challenges and discounts the dominant libero-Western theoretical and philosophical bases in terms of which the universal human rights regime is articulated and understood. Addressing these diametrically opposing normative claims and standpoints is beyond the scope of this chapter. However, I address three important and related questions. The first is to highlight the reason for the chasm between liberalism, the dominant frame within which rights are conceptualised, and the contending African conceptual paradigm. I then examine the intellectual and normative African compass in international human rights law from the perspective of academic writers. This second question seeks to establish whether African approaches have developed a clear core creed or basic precepts in terms of which we can define them, in comparison, for instance, to TWAIL's familiar epistemic traditions. I focus on this new set of questions to identify and collate, from the rich tapestry of literature, how the African human rights fingerprints may contribute to international law. I argue for an African human rights fingerprint – born of African cultural and traditional conceptions of life, humanity, individuality, community, responsibility, worth, and other social values and principles – which emphasises a communal conception of rights and advances the notion

* LLB (Nairobi), LLM (Nairobi), PhD (Osgoode Hall Law School, York). Dr Miyawa is a research fellow at Osgoode Hall Law School, CARISSA Law Project, a lecturer at Egerton University, Kenya and an adjunct lecturer at Strathmore University Law School.

of individual duties. This fingerprint is then defined in terms of a 'core creed' which I use to critique the libero-Western understanding of rights, particularly its capture by and failure to regulate transnational corporate triumphalism and the associated violations that the neoliberal development blueprint continues to unleash on Africa's people.

1 Introduction

African approaches to international law and the related African conception of human rights are familiar minefields of contestation whose ideological polarities centre on the role, if any, that traditional African ethics has played in the making of international law. Has the character of international human rights law impacted on the development of international law and does it continue to do so? Underlying this debate is one simple question: 'Does pre-colonial Africa support the concept of "rights"?'[1] The dynamic of African approaches to international human rights law is intellectually problematic because of its perceived stance in challenging or seeking to discount the dominant libero-Western theoretical and philosophical bases on which the 'universal human rights' regime is articulated and understood.[2] Howard, a fierce denialist of Africa's contribution to the human rights corpus, has, for example, always maintained that while culturally embedded concepts of human dignity existed in Africa, these concepts should not be conflated with human rights.[3] As I show in what follows, this position is fiercely at odds with a majority of early African human rights scholarship and continues to elicit strong opposition from contemporary African human rights scholars.

Underlying the debate on Africa's involvement and normative contribution to or participation in international law, is a plethora of academic writing indicating the primordial existence and protection of

1 A good text containing this drawn out contestation by authors of different shades of opinions and philosophical inclinations is AA An-Na'im & FM Deng (eds) *Human rights in Africa: Cross-cultural perspectives* (1990). See also J Donnelly *Universal human rights in theory and practice* (1989) 170; T Fernyhough 'Human rights and precolonial Africa' in R Cohen and others (eds) *Human rights and governance in Africa* (1993) 49; A Legesse 'Human rights in African political culture' in KW Thompson (ed) *The moral imperatives of human rights* (1980) 123.

2 I use the term 'universal human rights' as defined by Henkin to mean 'a system of international law and international institutions that render the rights of human beings subject to national law within national societies, under international supervision'. L Henkin 'The Universal Declaration at 50 and the challenges of global markets' (1999) 25 *Brooklyn Journal of International Law* 17 at 20.

3 RE Howard *Human rights in Commonwealth Africa* (1986) 17.

human rights[4] and political governance,[5] including conceptions of justice, in pre-colonial Africa.[6] Through both its diversity and its similarity, this body of literature emphasises and elaborates on the concrete forms of Africa's contribution to universal human rights in contradiction of assertions that Africa has not contributed to the international human rights corpus.

By way of example, the right to development is recognised as a right born of African political and diplomatic dissent challenging the political economy of international structural arrangements during the decolonisation period.[7] Eminent norm entrepreneurs such as Kéba Mbaye and Doudou Thiam who pioneered this idea, raised Africa to the international plane on the basis of the imaginative and oppositional ideas they advanced to link the structural injustice of the international political economy to human rights' causes.[8] By invoking the notion of a right to

4 SKB Asante 'Nation building and human rights in emergent African nations' (1969) 2(1) *Cornell International Law Journal* 73; CE Welch Jr 'Human rights as a problem in contemporary Africa' in CE Welch Jr & RI Meltzer (eds) *Human rights and development in Africa* (1984) 11.

5 DM Wai 'Human rights in sub-Saharan Africa' in A Pollis & P Schwab (eds) *Human rights: Cultural and ideological perspectives* (1979) 115.

6 Legesse (n 1) 125.

7 For this view, see OC Okafor 'A regional perspective: Article 22 of the African Charter on Human and Peoples' Rights' in United Nations Office of the High Commissioner for Human Rights (OHCHR) (ed) *Realizing the right to development: Essays in commemoration of 25 years of the United Nations Declaration on the Right to Development* (2013).

8 K Mbaye '*Le droit du developpement comme un droit de l'homme*' (1972) 5 *Revue des droits de l'Homme* 503-534; K Mbaye paper delivered at UNESCO Meeting of Experts on Human Rights 'Human needs and the establishment of a New International Economic Order' Paris 19-23 June 1978, reprinted in UNESCO Doc SS-78/CONF.630/8; RJ Dupuy *The right to development at the international level* (1980); A Pellet *Le droit international du developpement* (2nd ed 1987); I Brownlie 'The human right to development' Commonwealth Secretariat Human Rights Unit Occasional Paper (1989); A Pellet 'The functions of the right to development: A right of self-realization' (1984) 3(9) *Third World Legal Studies* 129. Doudou Thiam is cited in Daniel J Whelan 'Conflicting human rights and economic justice: A genealogy of the right to development' in M Labonte & K Mills (eds) *Human rights and justice: Philosophical, economic, and social perspectives* (2018) 59: 'What is our task? We must lay the foundations for a new world society; we must bring about a new revolution; we must tear down all the practices, institutions and rules on which international economic relations are based, in so far as these practices, institutions and rules sanction injustice and exploitation and maintain the unjustified domination of a minority over the majority of men. Not only must we reaffirm our right to development, but we must also take the steps which will enable this right to become a reality. We must build a new system, based not only on the theoretical affirmation of the sacred rights of peoples and nations but on the actual enjoyment of these rights. The right of peoples to self-determination, the sovereign equality of peoples, international solidarity – all these will remain empty words, and, forgive me for saying so, hypocritical words, until relations between nations are viewed

development, Mbaye and Thiam's innovative thought directed attention to underdevelopment, often an outcome of economic misallocation in an unjust and inequitable international order, as a human rights issue. Using this idea, they introduced their beliefs to the larger global political discourse, presenting the perceptions of what they reimagined as a novel post-colonial practice based on a new normative approach. The pioneer thoughts of these eminent African personalities at the United Nations (UN) resulted in the debate on the right to development focusing pre-eminently on the structural injustices in international development processes.[9] These UN debates tended to refer expressly to structural inequality as a human-rights concern, a nascent form of the human rights framing of justice in development.[10] This idea would later radically challenge core assumptions of international law and the development praxis.[11] Consequently, this seminal African contribution first focused liberal international law on reimagining the inequity of the international order. This African reimagination or repurposing of the human rights discourse also heralded the South's bold interrogation of the governance of the international order by questioning the democratic integrity of certain international institutions.[12]

in the light of economic and social facts.'

9 Issa G Shivji 'Constructing a new rights regime: Promises, prospects and problems' (1999) 8(2) *Social and Legal Studies* 253; Philip Alston 'Development and the rule of law: Prevention versus cure as a human rights strategy' International Commission of Jurists Conference on Development and the Rule of Law, The Hague, 27 April-1 May 1981 at 9.

10 For a more recent conceptual account of the concept of development justice envisioned by the right to development regime, see MO Miyawa 'Towards development justice: Re-visiting the accountability of the World Bank and IMF from a right to development perspective' PhD thesis, Osgoode Hall Law School, York University (2020) at 60. See further 'Proclamation of Tehran, Final Act of the International Conference on Human Rights, Tehran, 22 April to 13 May 1968' UN Doc A/CONF.32/41 (1968) para 12. See also 'The widening gap: A study of the realization of economic, social and cultural rights' UN Doc E/CN.4/1131 (1 January 1974) subsequently published by the Commission on Human Rights as Manouchehr Ganji 'The realization of economic, social and cultural rights: Problems, policies' UN Doc E/CN.4/ 1108/Rev.1 (1975).

11 See, eg, J Gathii 'Africa and the radical origins of the right to development' (2020) 1 *TWAIL Review* 28; J Donnelly 'In search of the unicorn: The jurisprudence and politics of the right to development' (1985) 15 *California Western International Law* 498; A Sengupta 'On the theory and practice of the right to development' in A Sengupta, A Negi & M Basu (eds) *Reflections on the right to development* (2005) 68.

12 M Bedjaoui *Towards a new international economic order* (1979) 216; 'Global consultation on the right to development' E/CN.4/1990/9/Rev.1, 26 September 1990 paras 167 & 168; B Rajagopal 'Global governance: Old and new challenges' in OHCHR (n 7) 172; J Gathii 'Good governance as a counter insurgency agenda to oppositional and transformative social projects in international law' (1999) *Buffalo Human Rights Law Review* 117.

Today, however, because of amalgamation with diverse voices and ideological persuasions – few of which are necessarily related to African tradition – the right to development is anchored in a brokered understanding. The dominant contemporary understanding of the right to development, particularly at the UN level, appears to view it as a policy paradigm linking human rights and development under a specific strategy aimed at ending global poverty and inequality.[13] This understanding is in line with a broader conception of development dating from the 1970s, which emphasised that the development process is complex and that human rights (the social element) is but one of its many dimensions.[14] The true import of this conception is that relevant human rights norms, principles, and standards are applicable to development policy practice.[15] This conception also signals that development must ensure the enjoyment of all freedoms together, or as an integrated whole.[16] Indeed, policy shifts in development from Millennium Development Goals (MDGs) to Sustainable Development Goals (SDGs) – which are said to be global commitments grounded on and linked to furthering the realisation of the right to development – capture this larger vision.[17] Sadly, MDGs and SDGs policies have eclipsed Mbaye's original ideas of challenging structural injustices through rights ideas. Indeed, this discourse tends not to sufficiently reflect a genuinely transformative ambition to expose the structural injustices embedded in the international economic order and the associated developmental practices.

No matter the endurance of this diluted version that displaces Mbaye's egalitarian orientation, the right to development remains a sui generis norm

13 See P Alston & M Robinson 'The challenges of ensuring the mutuality of human rights and development endeavours' in Alston & Robinson (eds) *Human rights and development: Towards mutual reinforcement* (2005) 1; JD Wolfensohn 'Some reflections on human rights and development' in Alston & Robinson (n 13); UNGA 'Transforming our world: The 2030 agenda for sustainable development' A/RES/70/1 25 September 2015 paras 7-10; K Tomaveski *Development and human rights* (1989) 21; Hans-Otto 'Development and human rights: The necessary, but partial integration of human rights and development' (2000) 22 *Human Rights Quarterly* 741-742.

14 T Kunanayakam 'The declaration on the right to development in the context of the United Nations standard-setting' in OHCHR (n 7) 18.

15 A Cornwall & C Nyamu-Musembi 'Putting the "rights-based" approach to development into perspective' (2004) 25(8) *Third World Quarterly* 1415.

16 This is the gist of art 1 of the Declaration on the Right to Development read together with the Preamble, which defines development as 'a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom'.

17 UNGA (n 13).

in that it seeks to constrain not only the state but also other paradigms of power above and below the state consistent with the cosmopolitan conception that the Afro-communitarian ethic embraces. It is therefore arguable that a from-Africa-to-the-world understanding of international human rights law has always existed.[18] That African understanding of the human rights paradigm is now discernible, although it is still uncertain whether it draws from, supplements, or altogether departs from or is part of Third World Approaches to International Law (TWAIL) epistemic traditions. Accepting such a position spearheads the position that human rights are not only universal but embody diverse cultural and moral norms reflecting the diversity of the universe we occupy.

This chapter addresses this theme of the African human rights fingerprint the essence of which is to retrieve and collate, from the rich tapestry of literature, judicial opinion, and African human rights instruments, what the African human rights fingerprint has been in the sphere of international law. The chapter proceeds as follows: in section two, I highlight the reason for the chasm between liberalism, the dominant paradigm within which rights are conceptualised, and the contending African conceptual paradigm. In section three I address the theme of this chapter and ask what the intellectual and normative African compass has been in international human rights law. I examine the perspectives of academic writers and other interlocutors including some more contemporary scholars writing on the application of the African Charter on Human and Peoples' Rights (African Charter), the various human rights approaches set out in actual African human rights treaties and other instruments, as interpreted by African treaty bodies, and the constitutions of selected African countries as interpreted and applied by courts. This second question draws on the extensive body of literature to establish whether African approaches have evolved distinct and defining features or basic precepts in terms of which we can define the approach when compared, for example, to familiar TWAIL epistemic traditions.

I then define the fingerprint in terms of a *core creed of communitarianism*. In section four, I use this core creed to critique the Western-liberal understanding of rights. In particular, I consider how the Western-liberal episteme and its capture of and failure to regulate transnational corporate triumphalism. On the same breath, I use the African communitarian conception to critique the associated violations which the neoliberal

18 In the post-colonial period W Benedek & K Ginther (eds) *New perspectives and conceptions of international law: An Afro-European dialogue* (1983) 4 saw Africa's contribution in terms of the phenomenon of regionalism, the vehemence of the idea of a New International Economic Order, and spurring debates regarding the right to development.

development blueprint continues to impose on the African people. The main conclusion of this chapter is that there is indeed an African human rights fingerprint – born of African cultural and traditional conceptions of life, humanity, individuality, community, responsibility, and other social values – which emphasises a communal conception of rights and respects the notion of individual duties. This perspective, I argue, ought to be taken into account in resolving and reforming the contested normative status of obligations attendant upon rights in the private sphere.

2 Divergence and tension between the African, western, and TWAIL approaches

The different ways in which the human rights project has been construed and articulated in international law is closely linked to the philosophical chasm between liberal and African conceptions of human rights. This dynamic recalls the history of the universal human rights enterprise, especially in the post-World War II period which witnessed an unprecedented escalation in universal ideals. This analysis reveals that the philosophical bases of human rights, apart from being highly complex, have also been deeply misconstrued and incorrectly characterised.[19] It is recorded that even in 1947 at the first sitting of the Human Rights Commission profound philosophical and ideological questions as to the meaning, origin, and purposive role of human rights emerged.[20] Lauren records that it was at this point that the fundamental polarities on which no doctrinal concord could be struck were recognised. It was also recognised that the issues could not be resolved simply by resort to Western philosophical worldviews and that 'wide-ranging perspectives' from a galaxy of scholars from all parts of the world should be sought.[21] Consequently, a rich diversity of opinion was presented on issues including individuality, government, natural law, and cultural diversity.[22] But even with the aid of these manifold, culturally-founded views of leading scholars of the time, argues Lauren, no single

19 In this regard, the contrast painted on the philosophical bases and genealogy of rights by Sirkku K Hellsten 'Human rights in Africa: From communitarian values to utilitarian practice' (2004) 5(2) *Human Rights Review* 63 is instructive: 'While there is a fair degree of consensus that human rights conceptions embodied in the various international and national instruments are of Western origin, there is less agreement on the root of their philosophical basis. Many African and other third world writers have argued that the philosophy and conceptions of human rights existed in other cultures as well although some of the Western conceptions may not have exact parallels in the traditions conceptions of human rights in Africa and elsewhere.'

20 PG Lauren *The evolution of international human rights: Visions seen* (1998) 221.

21 As above.

22 Miyawa (n 10) 223.

account which captured the philosophical bases of human rights could be advanced.

And so, the polarising question as to the philosophical bases and usefulness of human rights was born alongside the emergence of the universal human rights regime. This polarity has since flourished emerging in every conceivable discursive arena involving the human rights project. For example, the question of human rights norms in the private sphere has been sparked, primarily, by the contested statist understanding and liberal notions of the utility of rights. Much the same can be said of the rejectionist attitudes towards the right to development.[23] It is apt at this point to reiterate that the misconceptions about the philosophical bases of human rights also lie at the root of rejectionist attitudes which deny African human rights a fingerprint. Different shades of opinion, some not necessarily African, have illustrated this theme.

Makau Mutua, a devout proponent of an African human-rights fingerprint, argues that African notions of human rights differ fundamentally from the Western conception of human rights.[24] As I elaborate below, he too, has discussed the cultural *specificity* and *exclusivity* that animated the tension between liberal rights theory and African philosophy of human rights.[25]

Critics point out that the polarities pitting African against Western cultural perspectives on rights arise from two different understandings of two main issues: deification of the state in the universal rights praxis; and excessive individualisation of 'rights-talk' – both common to the liberal traditions of the West. In classic liberal philosophy rights were seen as an 'instrumental' bulwark for the human person against the state.[26] The individual was projected as 'the ultimate repository of rights… held in a virtually sacralised position'.[27] The guarantee of rights could be exercised or claimed only against the state which was regarded as the sole addressee and protector of rights, obligations, and duties. The individual had rights and the state had duties. Drawing on positivist international law thinking, the liberal template venerates the state excessively and

23 Donnelly (n 11).

24 M Mutua *Human rights: A political and cultural critique* (2002) 73.

25 Mutua (n 24) 80.

26 For a liberalist view of rights as a buffer against state excesses, see Donnelly (n 1) 33; J Donnelly & RE Howard *International handbook of human rights* (1987) 20; M Nowak & KM Januszewski 'Non-state actors and human rights' in M Noortmann, A Reinisch & C Ryngaert (eds) *Non-state actors in international law* (2015) 131.

27 Legesse (n 1) 124.

accords it *a priori* standing in the international scheme of things. In terms of this view, the state doubles as the norm-giver, the subject, and the addressee of international law.[28] In the post-World War II period, foundational human rights instruments were formulated in conformity with the strict anti-state posturing and counter-sovereignist logic which positivist scholarship had succeeded etching in the telling of international human rights law. Drawing from the Lockian political tradition – or how liberal adherents have construed that tradition – rights are seen, in the main, as negative claims by individuals against public authority. Rights came to operate as negative constraints on public authority and as binary demarcations of autonomy between the individual and the state.[29] Some rights, for example, socio-economic and cultural rights, certainly have a different source. They embrace a distinct vision of mandating the state to eradicate distributive market distortions. These rights have generally been understood to impose positive duties on the state. As limited and limiting as this conception is, this strongly-contestable, received understanding has dominated international human rights discourse.

Conversely, the African understanding of human rights proceeds from a different *ethical* perspective and takes a distinct philosophical trajectory. It rejects as wholly inadequate both the Western conception and the historiography of the state. It discounts the fundamental premises – in particular, delinking rights and duties so that duties fall only to the state while individuals enjoy rights.[30] It repudiates this dichotomisation as being 'of limited utility in imagining a viable regime of human rights'.[31] In its criticism of the Western model, the African human rights ethic tends to favour the rights of the community over those of the individual. It is this non-individualist, non-statist, and collectivist approach that has earned African human rights its communitarian tag.[32] In the communitarian

28 L McConnell *Extracting accountability from non-state actors in international law: Assessing the scope for direct regulation* (2017) 167.

29 See, eg, RE Howard & J Donnelly 'Human dignity, human rights, and political regimes' (1986) 80(3) 805 *American Political Science Review* 805 who state: 'In the economic sphere, the traditional liberal attachment to the market is not accidental: quite aside from its economic efficiency, the marketplaces minimal restraints on economic liberty, and thus maximizes personal autonomy. However, market distribution of resources can have grossly unequal outcomes. Inequality per se is not objectionable to the liberal, but the principle of equal concern and respect does imply a floor of basic economic welfare; degrading inequalities (Shue, 1980, 119-23) cannot be permitted. The state also has an appropriate interest in redressing market-generated inequalities because a "free market" system of distributing resources is actively backed by the state, which protects and enforces property right.'

30 Mutua (n 24) 73.

31 Mutua (n 24) 72.

32 Scholarship that has endorsed the African human rights approach as a communitarian

logic, rights, entitlements, or claims by the individual only make sense when tempered, weighted, or understood in the context of duties imposed on the individual.[33] In other words, individuals owe duties to others, to the community, and to the state.

In propounding the communitarian ideal, I emphasise that we should not forget that in a world of multiple value systems, there are certainly numerous political and moral theories and claims in terms of which the human rights project, or any other ideal for that matter, can be explained.[34] The African communitarian proposition is just one among many lenses through which we can view the philosophical bases of rights and the functions they serve.

Notwithstanding the tension between these two schools, the Western articulation has long held sway in human rights praxis. For the most part, it is challenged for its conceptual rigidity which refuses to yield ground to contending theories or alternative ways in which rights can be applied to liberate humanity from the new and unprecedented violence of neoliberal globalisation. The liberal conception of rights also lies at the root of traditional rejectionist attitudes to notions of African approaches to international human rights law.[35] This rigidity is also the fundamental reason why the universal human rights rhetoric has in its seven decades of existence failed to constrain the excesses of non-sovereign repositories of power and private actors exercising public authority in invasive and virulent ways that threaten human dignity and progress.[36] The main theme

ideal includes: Hellsten (n 19) 63 & 69; RH Bell 'Understanding African philosophy: A cross-cultural approach to classical and contemporary issues' (2002) 37, 59, 85; JM Cobbah 'African values and the human rights debate: An African perspective' (1987) 9(3) *Human Rights Quarterly* 325.

33 M Mutua 'The African human rights system: A critical evaluation' (1987) 8 http://hdr.undp.org/sites/default/files/mutua.pdf (accessed 25 March 2019).

34 P Alston 'Conjuring up new human rights: A proposal for quality control' (1984) 78 *American Journal of International Law* 615 argues that 'rights should reflect a fundamentally important social value; be relevant, inevitably to varying degrees, throughout a world of diverse value systems… be capable of achieving a very high degree of international consensus'.

35 Legesse (n 1) 130; L Marasinghe 'Traditional conceptions of human rights in Africa' in Welch & Meltzer (n 4) 42.

36 B Rajagopal *International law from below: Development, social movements and Third World resistance* (2003) 12. He notes that: 'During the last couple of decades it has become increasingly hard to place much hope in the capacity of Third World States, as state sovereignty has become parceled out up (to international institutions such as the World Trade Organization-WTO-and Bretton Woods Institutions) and down (to market actors and NGOs).' The consequence, he argues, 'is that this developmental state with eroded sovereignty has become a significant threat to the most vulnerable in the society.'

for some scholars is that the historiography of human rights has been misconstrued from the outset, in both its articulation and its reception in the scholarship, thus producing the contested understanding of the universal human rights project.[37]

TWAIL, like the African approach, opposes the traditional stance and repudiates international law, its origins, and its contemporary iterations as deeply rooted in European thought and consciousness.[38] Although TWAIL does not disavow the universal human rights project in its entirety, it does mistrust the 'glib' aspects of universalism which mask a clear parochial and imperialist intention to oppress and subjugate with which some international norms are adopted and exported. Baxi, for instance, sees a gradual whittling away of the original human rights agenda in the context of globalisation through a shift to versions of human rights fraught with an ethos more commercial than humane.[39] Agbakwa has deconstructed the patently hegemonic persona of international law as revealed in its tendency to exclude individuals and TNCs from regulation and the constraints of normativity of obligations attendant upon rights.[40]

TWAIL's attitudes often see international law as having ulterior motives of Western domination and dehumanisation.[41] This is echoed in Chimni's recent observation that European interests, traditions, and thought that have permeated and defined most aspects of the international legal systems still inform the content and character of international law today.[42] Anghie, yet another leading TWAIL scholar, argues, for his part, that it is not impossible to present an historical rendering of international law which differs markedly from mainstream scholarship – without forgetting its relationship with colonisation and imperialism.[43]

37 A Sengupta 'Poverty eradication and human rights' in T Pogge (ed) *Freedom from poverty as a human right: Who owes what to the poor* (2007) 328-329.

38 BS Chimni 'Customary international law: A Third World perspective' (2018) 112(1) *American Journal of International Law* 12.

39 U Baxi *The future of human rights* (2006) 301.

40 S Agbakwa 'A line in the sand: International (dis)order and the impunity of non-state corporate actors in the developing world' in A Anghie, BS Chimni, K Mickelson & OC Okafor (eds) *The Third World and international order: Law, politics and globalization* (2003) 5.

41 SBO Gutto 'Responsibility of states and transnational corporations for violation of human rights in the third world within the context of the new international economic order' in W Benedek & K Ginther *New perspectives and conceptions of international law: An Afro-European dialogue* (1983) 37.

42 Chimni (n 38) 12.

43 A Anghie *Imperialism, sovereignty and making of international law* (2005) 241-242; A Anghie 'Francisco de Vitoria and the colonial origins of international law' (1996)

When compared with TWAIL, African approaches do not appear to question the motives underlying the universal human rights enterprise. Rather, as a field of inquiry African approaches tend to focus its criticism on the dominant Western philosophical accounts of the origins, functions, and usefulness of the human rights project from a radical cultural perspective. Despite these schisms in the critique and accounts of the origin of human rights, academic writing evidences the claim that African civilisations had cultural values and ethical foundations that supported notions of human rights pre-colonisation. I turn to this issue in the next section.

3 The African human rights fingerprint in international law: What is Africa's core creed?

The idea that African aspects of human rights, however unfamiliar and peripheral, predated colonial influences coincides with some scholarship suggesting that Africa played a role in the origins and making of international law during the pre-colonial period. Others, while not questioning the African or European orientation of international law, reject outright the idea that human rights concepts existed in or are an aspect of African culture.[44] Howard is in the vanguard and argues that 'traditional Africa protected a system of obligations and privileges based on ascribed statuses, not a system of human rights to which one was entitled merely by virtue of being human'.[45] Deng and Wiredu contest this cynical denial of human rights as a cultural heritage, and argue trenchantly that human rights are not intrinsically Western. They point out that one can also find 'a veritable harvest of human rights' in African cultural values.[46] Accordingly, scholars of African culture asserted – albeit not dogmatically – that international law, and by extension its human rights variants, had embedded African cultural imprints in much the same way as Western conceptions of law and legal systems have impacted on various aspects of international law.

5(3) *Society & Legal Studies* 321; J Gathii 'International law and eurocentricity' (1998) 9 *European Journal of International Law* 184.

44 RE Howard 'Group versus individual identity in the African debate on human rights' in An-Na'im & Deng (n 1) 167 argues that 'traditional Africa protected a system of obligations and privileges based on ascribed statuses, not a system of human rights to which one was entitled merely by virtue of being human'.

45 As above.

46 K Wiredu 'An Akan perspective on human rights' in An-Na'im & Deng (n 1) 257; FM Deng 'A cultural approach to human rights among Dinka' in An-Na'im & Deng (n 1) 261.

The cultural relativist notions and posturing informing the rejection of Africa's cultural and traditional imprint in the making of international law is nothing new. In a comprehensive review of one of the earliest writings on the African approach to international law by TO Elias, a leading post-colonial legal scholar, Gathii, has sought to dispute claims of Africa's lack of contribution. He recounts that among the many aims of Elias's influential work *The nature of African customary law*,[47] was to dispel the entrenched international law biases that denigrated all things African as primitive and having made no cultural contribution in shaping modern iterations of international law. Gathii recognises that Elias's scholarship extolled 'Africanness' to counter the prejudices and biases in international law which projected the African as inferior and backward. Elias aimed, in Gathii's view, to 'uphold the African dignity, identity and self-determination of the African race as a race equal to others'.[48] Gathii posits that Elias aimed to redefine things African from the perspective of a 'race-blind' and neutral post-colonial international law.[49] Based on his reading of these early African contributions to the intellectual history of international law, he recounts that their key commitments and perspectives were to salvage the sullied image and representation of the African in international history. For these reasons and more, Elias had to focus his account of Africa's participation in the making of international law on the pre-colonial period so as to identify evidence that could discredit some of the myths that dismissed African culture and traditions as irrelevant in the making of universal international law. Being an avowed TWAIL scholar, Gathii however laments that Elias failed to identify the imperialist and subjugating motives and tendencies of international law in perpetuating European domination of the international political economy.[50]

Elias relied on various snippets from the history of encounters and relationships with Europe to show that the image of a dark continent was unfounded. The example of the Carthaginian empire and commercial interaction in Guinea serve to remind all of Africa's 'internationality'; that is, participation, contribution, and involvement in international law.[51] In other words, the narrative Gathii advances serves to show the 'undeniable Eurocentrism in international legal history' and its propensity to label Africans in stereotypes fraught with a racial prejudice that denied

47 (1956).

48 J Gathii 'A critical appraisal of the international legal tradition of Taslim Olawale Elias' (2008) 21 *Leiden Journal of International Law* 320.

49 As above.

50 Gathii (n 48) 324-326.

51 Gathii (n 48) 322.

Africa a place in the making of international law.[52] Elias is not alone in these reflections or recriminations. Legesse's lucid writing on this theme cannot be overlooked. He declared that to avoid repeating the mistakes of early European imperialism, discourses on universalism in international law must incorporate elements drawn from diverse cultural backgrounds so as to dispel the myths of Western telling of the *international*. More recently, too, others have disputed the common frame of thinking and the assumptions of the Treaty of Westphalia as the beginnings of modern international law. In their place Levitt, for example, argues that international law can be traced back to the Nile Valley civilisation which predated and inspired European conceptions of international law.[53]

What then is the relevance of African human rights as a concept? And how has it contributed to a peculiar understanding of international human rights law? And can it potentially fulfil the liberal conception of rights?

Most African academic writers agree on the existence of African cultural human rights marked by specific features, ethos, and social values in pre-colonial African society.[54] The first relevant feature of an African concept of human rights derives from the traditional African worldview of the individual and his or her relationship with and orientation within society: a communitarian account that emphasises the rights of the community and distances itself from the individual-rights paradigm.[55] Central to this mode of thought is that an 'African concept of rights is the direct opposite of the Western model, emphasizing the community rights over individual rights and freedoms'.[56] Communalism refers to the primacy of the group or society's collective interests over those of the individual: the notion that the individual good is inextricably linked to and serves the overall good of the group rather than the isolated self-interest of a single individual[57] – 'The doctrine places emphasis on the activity and success

52 Gathii (n 48) 323.

53 JI Levitt 'The African origins of international law: Myth or reality' (2015) 19 *University of California Los Angeles Journal of International Law, Foreign Affairs* 113.

54 CC Mojekwu 'International human rights: The African perspective' in JL Nelson & VM Green (eds) *International human rights: Contemporary issues* (1980) 85; Marasinghe (n 35) 32.

55 Mojekwu (n 54) 87.

56 EA El-Obaid & K Appiagyei-Atua 'Human rights in Africa: A new perspective on linking the past to the present' (1996) 41 *McGill Law Journal* 830.

57 I draw inspiration on African moral philosophy expounded by the eminent and influential scholar, K Gyekye 'African ethics' First published 9 September 2010, *Stanford Encyclopaedia of Philosophy* https://plato.stanford.edu/entries/african-ethics/ (accessed 21 September 2022). In his view: 'Social or community life itself, a robust feature of the African communitarian society, mandates a morality that clearly is

of the wider society rather than, though not necessarily at the expense of, or to the detriment of, the individual.'[58] The notion of identifying and expressing solidarity with the wider interest of the community – a characteristic of ubuntu – reflects a communitarian value system found in Southern or East African communities' cognate value of 'utu' (a Swahili term for acting humanely).[59]

Essentially, the communal ethic does not negate the individualist notion of rights – the necessity of self-preservation – rather, it denies the individual person the sacrosanct standing and denounces excessive reverence for the private sphere which Western thought accords. It recognises that the individual is not an isolated or abstract entity but part and parcel of the community.[60] In other words, all the benefits (entitlements and claims) conferred on the individual derive meaning only in the context of solidarity within the group. To begin to see how this communitarianism is a lived reality we resort to the example of the ubuntu-oriented perspective that prioritises the 'communal relationship with others' over the individualist conception of interests and rights.[61]

Rooted in this communitarian African sensibility is a 'social morality' that underlies the interests of the community. This distinctive African philosophy of rights denounces the received understanding of rights as boundaries between the individual and the state, and rights as demarcations and legitimisation of power or sovereignty. It displaces the atomism, the Western postulate that human persons are constantly in conflict with the immediate society so warranting government intervention. It refutes excessive individualism that is always the focal point in Western understanding and liberal thought, and treats such thinking as alien to African moral thought. The communitarian perspective of rights is suspicious of the individualist account, and on this foundation conceptually severs itself from the Western idea of human rights that venerate the individual.[62] Communitarian approaches draw from a

weighted on duty to others and to the community; it constitutes the foundation for moral responsibilities and obligations.'

58 K Gyekye *An essay on African philosophical thought: The Akan conceptual scheme* (1987) 155.

59 T Metz 'Ubuntu as a moral theory and human rights in South Africa' (2011) 11(2) *African Human Rights Law Journal* 538.

60 This is what JS Mbiti *African religions and philosophy* (1969) 141 refers to in the much-quoted axiom: 'I am because we are, and because we are therefore I am.'

61 Metz (n 59) 338. For a contrary view on the communitarian status of rights see OA Oyowe 'Strange bedfellows: Rethinking ubuntu and human rights in South Africa' (2013) 13(1) *African Human Rights Law Journal* 1-22.

62 Cobbah (n 32) 314.

collectivist conception of personhood in terms of which the interests of the community are prioritised over those of the individual as the individual is deemed to be ontologically located within the collective:[63] 'The African notion of family seeks vindication of the communal well-being. The starting point is not the individual but the whole group including the dead.'[64] In essence, the fact that the collective interest prevails over the will of the individual informs the existence of the group, collective, or communal concept of rights in Africa.[65] Mutua, too, argues that the African communitarian ethic is collectivist and expresses his discomfort with an 'unremitting emphasis on the individual'.[66]

Indeed, the African Charter has six articles that deal with the concept of peoples' rights.[67] It is on this ideological pedestal, by insisting on identity and solidarity with the community and not uncompromising individualism, that the African approach confronts and exposes the flaws and myths inherent in the Western or liberal conception of rights.[68] This confrontation and exposure stem from the collectivist conception of personhood grounded on cultural values such as those associated with ubuntu. Ubuntu's social morality underlying community interests hold that: 'Harmony is achieved through close and sympathetic social relations within the group'[69] and that this social morality '[expresses] commitment to the good of the community in which their identity were formed, and a need to experience their lives as bound up in that of their community'.[70]

63 OA Oyowe 'An African conception of human rights? Comments on the challenges of relativism' (2014) 15 *Human Rights Review* 333. For an ubuntu perspective, see M Munyaka & M Motlhabi 'Ubuntu and its socio-moral significance' in FM Murove (ed) *African ethics: An anthology of comparative and applied ethics* (2009) 67, 71-72.

64 Cobbah (n 32) 322.

65 B Ugochukwu O Badaru & OC Okafor 'Group rights under the African Charter on Human and Peoples' Rights: Concepts, praxis and prospects' in M Ssenyonjo (ed) *The African regional human rights systems: 30 years after the African Charter on Human and Peoples' Rights* (2012) 101.

66 M Mutua 'The ideology of human rights' (1995-1996) 36 *Virginia Journal of International Law* 642; BO Okere 'The protection of human rights in Africa and the African Charter on Human and Peoples' Rights: A comparative analysis with the European and American systems' (1984) 6 *Human Rights Quarterly* 141 & 148.

67 Arts 19-24.

68 T Metz 'African values and human rights as two sides of the same coin: A reply to Oyowe' (2014) 14(2) *African Human Rights Law Journal* 307-321.

69 Y Mokgoro 'Ubuntu and the law in South Africa' (1998) 1 *Potchestroom Electronic Law Journal* 3.

70 GN Nkondo 'Ubuntu as a public policy in South Africa' (2007) 2 *International Journal of African Renaissance Studies* 91.

Let me pause briefly to point out that the communitarian conception had been rejected by Donnelly and Howard, two devout doctrinaire liberal apologists, on ground that universal human rights is based on one's humanity and not community, and is therefore alien to the African culture.[71] For Donnelly, human rights have a Western 'genesis' and for this reason any refutation can only be viewed as 'a cynical manipulation of tradition'. [72] While Howard agrees that the ethic of communalism supports the argument for human rights, she argues that rights are alien to African culture and rejects relying on the concept of communalism to dispute the Western individualist notion of rights.[73] I argue that the Western understanding of origins, philosophy, and usefulness of rights which rejects alternative accounts is more mythical than realistic.

The other key contribution from an African human rights perspective discussed in detail by various scholars, is the *sui generis* 'dialectic of duty and rights' enshrined in the African Charter.[74] Gyekye reiterates that African cultural philosophy conceives the right-duty interaction quite differently from the doctrinaire liberal standpoint, in that while everyone is considered to be vested with rights, the fact that they also owe duties to the community has a more exalted status.[75] Thus, it can be said that the duty-right dialectic is the polar opposite of individualistic notions of liberalism, a normative departure expressing the duty-orientation rather than rights-orientation of the human rights regime, at least in African ethical/communitarian thought. This recalibration is firmly rooted in the African communitarian sensibility with its insistence on the 'collectivist traditional values of solidarity and egalitarianism'.[76] Mutua observes that the harmonisation of the community and individual into the collective good, and the conception of the individual as 'a moral being endowed with rights but also bounded by duties' underpins the communitarian and

71 J Donnelly 'Cultural relativism and universal human rights' (1984) 6 *Human Rights Quarterly* 410; RE Howard, 'The full-belly thesis: Should economic rights take priority over civil and political rights? Evidence from sub-Saharan Africa' (1983) 5 *Human Rights Quarterly* at 467; RE Howard 'Is there an African concept of human rights?' in RJ Vincent (ed) *Foreign policy and human rights: Issues and responses* (1986) 11.

72 Donnelly (n 71) 410 at 412.

73 Howard (n 44)168.

74 Hellsten (n 19) 63; Okere (n 66) 145; M Mutua 'The Banjul Charter and the African cultural fingerprint: An evaluation of the language of duties' (1994-1995) 35 *Virginia Journal of International Law* 339.

75 Gyekye (n 57) notes that the communitarian 'considerations elevate the notion of duties to a status similar to that given to the notion of rights in Western ethics', which in another idiom implies that 'African ethics does not give short-shrift to rights as such; nevertheless, it does not give obsessional or blinkered emphasis on rights.'

76 Hellsten (n 19) 63.

group-centred understanding of rights.[77] A group-centred approach is the basis of the notion of a peoples' right enshrined in the African Charter.[78]

As has been noted by the majority of scholars, the enshrinement of duties of the individual is the foremost African contribution to the universal human rights corpus.[79] It recognises individuals not as atomistic persons in perpetual war of all against all – a common feature of Western understanding of human rights philosophy – but as constituted by and constituting the communal unit to which they owe duties:[80] 'Nowhere in the African Charter are duties used to qualify existing rights.'[81] Legesse argued that an African culture frowns on 'the concept of sacralised individual' intrinsic to the liberal Western worldview.[82] Benedek unequivocally affirms that 'the African Charter might be regarded as proof of the existence of a concept of human rights different from the Western/individualist concept'.[83]

This dialectic of peoples and individuals vested with rights but bounded by duties reveals the second fundamental distinction between the African and Western Enlightenment worldviews of society, social institutions, humanity, and the individual.[84] If only to reiterate, this distinct African cultural fingerprint is restated in the Preamble to the Charter which makes it clear that the 'enjoyment of rights and freedoms also implies the performance of duties on the part of everyone'.[85] That everyone owes duties is in fact reiterated in article 27(1) which provides: 'Every individual shall have duties towards his family and society, the state and other legally recognised communities and the international community.' This *sui generis* African concept of human rights that privileges the imposition of duties on individuals and children is also found in article 31 of the African

77 Mutua (n 24) 84; ML Balanda 'African Charter on Human and Peoples' Rights' in Ginther and Benedek (n 18) 138.

78 Okere (n 53) 149.

79 Mutua (n 24) 85.

80 See W Benedek 'Human rights in a multi-cultural perspective: The African Charter and the human right to development' in Benedek & Ginther (n 18) 151 for the observation that 'the African concept of society is firmly based on the family as the basic unit of society. Duties in the African Charter therefore do not mean allegiance to the state in the first place contrary to a liberal approach, but the expression of African traditional values in a modern document'.

81 Benedek (n 80) 152.

82 Legesse (n 1) 124.

83 Benedek (n 80) 152.

84 J Sloth-Nielsen & BD Mezmur 'A dutiful child: The implications of Article 31 of the African Children's Charter' (2008) 52(2) *Journal of African Law* 164; Mutua (n 33).

85 The duties are enumerated in art 29 of the Charter.

Children's Charter. The imposition of 'a more specific and detailed range of duties of the individual is the trademark of the African human rights system'.[86] Such a culturally authentic right and duty system which extends even to the protection of children, is a legitimate body of norms and values that convey the African notion of the rights of the child.[87]

The collective, as opposed to the individualist, approach to rights of the African philosophy debunks the notion of the exaltation of the individual sphere and autonomy that is sacrosanct in the contemporary conception of human rights. The override of the community rights over the individual's is a standpoint based on what Mbiti explains as the individual 'does not and cannot exist alone except corporately…[given that]… 'he owes his existence to other people…He is simply a part of the whole…[and the]…community must therefore make, create, or produce the individual.'[88] The fact that individual rights can be 'explained and justified only by the rights of the community'[89] is the antithesis of the dominant understanding of human rights.

In the contemporary practice of human rights, the subordination of the individual interest to that of the community would only act as an unwelcome exemption to the general rule. Those who argue that the African communitarian sensibility amounts to 'grounding human rights on a conception of human nature that is logically suspect' are therefore justified.[90] The collective approach embodied in the notion that the individual owes duties to the community, and that community rights take precedence over those of the individual, is an undesirable way of preferring the rights of the individual over those of the community.[91] The African conception of human rights, may, in the views of adherents such as Oyowe, conflict with and defeat the entire purpose of the human rights agenda for the protection of human dignity. The reasoning by Oyowe is that the notion of the supremacy of community rights over individual rights that African communitarianism imports negates the whole principles of indivisibility and non-supremacy of one right over the

86 Sloth-Nielsen & Mezmur (n 84) 160.

87 T Kaime 'The Convention on the Rights of the Child and the cultural legitimacy of children's rights in Africa: Some reflections' (2005) 5(2) *African Human Rights Law Journal* 225.

88 Oyowe (n 63) 333.

89 As above.

90 Oyowe (n 63) 334.

91 As above.

other.[92] Furthermore, it can be argued that this notion also puts into direct conflict the individual right and the collective good of the community.

Ultimately, one way in which the African Charter is juridically autochthonous[93] lies not only in its elucidation of individual duties in articles 27-29, but also in the express guarantee of group or peoples' rights in articles 19-24. This specific category of group rights is grounded in what the Preamble to the Charter states to be the 'virtues of their historical tradition and the values of African civilization'. The emphasis on the group or collective is the intrinsic idea that grounds communitarianism undergirded by the notion of peoples', group, or community rights.[94]

It is indeed the concept of group rights which animates the content and orientation of the right to development in article 22 of the Charter. This right has been given a more expansive meaning by the African Commission's jurisprudence in the *Endorois* case.[95] In giving effect to the concept of group rights that underpins the right to development, the African Commission has authoritatively stated that to ensure the greatest possible enjoyment of the right to development, participation of the ethnic groups and indigenous peoples in the states' development process is cardinal.[96] Another such pioneering African decision on communitarian or group rights claims is the *Ogiek*[97] case in which the African Court further clarified the scope of article 22 of the Charter. The court held that the right to be consulted, to consent, and to free, active and meaningful participation ought be accorded prominence in both national and international development processes and praxis. This further gave scope and content to the concept of a collective approach to indigenous community's rights.[98]

As Okafor and Miyawa note, 'through its own knowledge production, Africa has now contributed a norm that in practice now governs international law and development praxis *in some places and to some extent*

92 Oyowe (n 63) 335.

93 F Viljoen 'Africa's contribution to the development of international human rights and humanitarian law' (2001) 1 *African Human Rights Law Journal* 20.

94 See C Baldwin & C Morel 'Group rights' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The system in practice 1986-2006* (2008).

95 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* Communication No 276/03 25 November 2009.

96 *Endorois Welfare Council* (n 95) para 298.

97 *African Commission on Human and Peoples' Rights v Republic of Kenya* Application No 006/2012, 2017.

98 As above para 209.

(and not just on the African continent)'.[99] Such a group-centred norm of practice has been actively used by ethnic and indigenous communities to challenge states' development models which they perceive as harmful to their interests and livelihoods.[100] This very epistemic orientation toward a group-centred conception of rights informed the *Bakweri Lands Claim* case which challenged the dispossession of the Bakweri indigenous communities of their native lands to be used for non-native, pro-capitalist development initiatives.[101] As Okafor and Miyawa further note, 'one practical and progressive implication' of the African philosophy of rights to which the right to development, thought, and practice in Africa contributes, is that it has resulted in Africa being regarded as a theatre (of real life drama) in which ethnic and indigenous power-minority communities facing the (quick and slow) violence of the development apparatus have in practice expanded their terrains of struggle to include living and breathing Africa's human rights regimes to significantly augment the pressure on their governments to pay heed to their emancipatory claims for much greater justice in the development process. This is something that was until recently alien to and impossible within international law and development praxis.[102]

The group rights jurisprudence of the African Commission has clarified other articles of the African Charter such as article 19 which ensures the right to equality of all peoples. In *Kevin Mgwanga Gunme and Others v Cameroon*[103] the complainants alleged a violation of their collective rights through government marginalisation by acts of denial of economic enterprises to the people of Southern Cameroon and relocation or allocation of a series of economic infrastructure projects – such as the Chad-Cameroon Oil pipeline, the deep seaport, and the oil refinery – to towns and cities in the Francophone areas of Cameroon.[104] The Commission found that 'the relocation of business enterprises and location of economic projects to Francophone Cameroon, which generated negative effects on the economic life of Southern Cameroon constituted violation

99 OC Okafor & M Miyawa 'Africa as a "theatre" of international law and development: Knowledge, practice and resistance' in R Buchanan, L Eslava & S Pahuja (eds) *Oxford handbook of international law and development* (2020).

100 E Ashamu '*Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*: A landmark decision from the African Commission' (2011) 55(2) *Journal of African Law* 307.

101 *Bakweri Land Claims Committee v Cameroon* Communication No 260/02. [2004] ACHPR 60 (7 December 2004) para 6 https://africanlii.org/afu/judgment/african-commission-human-and-peoples-rights/2004/60 (accessed 21 September 2022).

102 Okafor & Miyawa (n 99).

103 Communication No 266/2003 26th Activity Report 2009, Annex IV.

104 Paras 9 & 157.

of article 19 of the Charter'.[105] In the *Ogoni* case, claimants raised the violation of article 21 of the Charter which provides that the peoples shall have the right freely to dispose of their wealth and natural resources.[106] They alleged that the government of Nigeria failed to monitor or regulate the operations of oil exploration companies and that this subsequently enabled a free and destructive exploitation of the Ogoniland oil reserves by the oil consortiums. The Commission later found a violation of article 21 noting that the government of Nigeria had facilitated the destruction of the collective wellbeing of the Ogoni people.[107] It is by holding dear the collective rights mindset that the Commission urged the Nigerian government to uphold the Ogoni peoples' right to health, environment, and livelihood. Later, the Commission again applied this communitarian jurisprudence to found a violation of article 21 in *Endorois*[108] case and in the *Democratic Republic of Congo v Burundi, Rwanda and Uganda*.[109]

These contradictions and chasms between African and Western approaches to rights and their utility lead to the conclusion that the ethnocentric, doctrinaire, liberal accounts that reject any alternative accounts of the universal rights enterprise, are based on misconceptions of positive international scholarship. Conventional international law has fetishised the state, and the concept of sovereignty, and over-glorified the individual's standing in relation to his or her society.[110] And yet, innate in the contending philosophical accounts, is an acknowledgement that it is the existence of a world of multiple value systems that necessitates the different ethical, political, and moral theoretical bases of human rights. More fundamentally, alternative perspectives now expose the ulterior imperialistic motives inherent in the *a priori* standing of the state and glorification of the individual were intended to serve.[111]

Even though the African fingerprint has not soared to the levels of dominance enjoyed by its liberal counterpart – or antithesis – it has come to upset the fundamental premises and assumptions of the Western perspective. This it does by questioning the worldviews that liberalism

105 Para 162.

106 *Social and Economic Rights Action Center and Center for Economic and Social Rights v Nigeria* African Commission on Human and Peoples' Rights Communication No 155/1996.

107 As above para 58.

108 African Commission (n 95) para 268.

109 Communication No 277/99 '20th Activity Report, January 2006-June 2006' Thirty-third Ordinary Session of the African Commission on African Human and Peoples' Rights May 2003.

110 U Özsu, *Book review*: Patrick Macklem *The sovereignty of human rights* (2015).

111 Mutua (n 66) 642.

has conjured up. It reveals that the statist and individualistic conceptions central to liberalism are a myth we can no longer rely on to govern our thinking and perceptions about the foundations and utility of rights and rights talk.[112] Seen through both the African cultural prism and TWAIL lenses, the individualistic notion of rights intrinsic to liberalism is rendered deeply problematic and portrayed as distorting the real functions of the human rights project. The liberal rights paradigm conceals, through the myth and dogmas it produces and perpetuates, versions and accounts of law that are self-serving and contribute little in advancing the cause of human dignity which it purports to serve.

4 What is the utility of the African communitarian ethic in the neoliberal world order?

So far, we have identified two normative aspects of the African cultural philosophy and the continent's contribution to the human rights enterprise: a communal conception of rights; and the duty-right dialectic. I argue that these two aspects constitute the core creed of African approaches to international human rights law. Crucially, central to the African communitarian perspective and the derived core principle of individual duty, is a searing critique of the social universe constructed by dominant European thinking.[113] Such a critique, I argue, ought to extend not only to the philosophical bases and ascribed meanings, but also to the utility of human rights in the contemporary world marked by 'blueprints of modernisation' that constantly condemn a majority of people in the Global South to dehumanising conditions and vulnerability.[114]

4.1 Taking a bankrupt African human rights scholarship to task

The African human rights blueprint, I argue, can only rise to high levels of respectability if it shows its mettle in dealing with what Eslava and Pahuja have called the 'the mundane and quotidian' problems of society.[115] To use Karl Marx's immortal phrase that has since attained a life of its own, the African human rights fingerprint, must be applied to change the world, and not merely seek to interpret it.

112 P Alston 'The shortcomings of a Garfield the cat approach to the right to development' (1985) 15 *California Western International Law Journal* 516.

113 DN Kaphagawani 'Some African conceptions of a person: A critique' in I Karp & DA Masolo (eds) *African philosophy as a cultural inquiry* (2000) 73.

114 G Esteva & M Prakash *Grassroots post-modernism: Remaking the soil of cultures* (2014) 4.

115 L Eslava & S Pahuja 'Between resistance and reform: TWAIL and the universality of international law' (2011) 3 *Trade Law & Development* 109.

The contemporary world I refer to as deserving change or some countervailing values authentic to an African cultural heritage, is neoliberal globalisation. The neoliberal world order differs fundamentally from the world of 1948 when the International Bill of Rights – the Universal Declaration and its progeny – were forged (in the classical liberal language and thought) solely to curtail the excesses of sovereignty.[116] True to the exacting standards of their career and alerted to the weaknesses of their legal handiwork, international lawyers have since reckoned that we are in a different epochal moment whose exigencies question the cardinal rulebook of state-centric international law and politics.[117] TWAILers, like their counterparts, recognise that the contemporary world is made up of states subordinated by networks of transnational capital and hegemonic supranational institutions to which vital decision making has been devolved – albeit with deep accountability voids.[118] And yet international law has either 'discounted' or 'has yet to recognize' the essence of regulation of trans-national corporations (TNCs).[119]

Other historical examinations have revealed something even more disturbing about this emergent phenomenon: that Western liberal conceptions of rights have proved inadequate and ineffective in constraining the new threats to human dignity and wellbeing which globalisation has unleashed on humanity.[120] But the African fingerprint has been missing from these emergent critiques of and onslaughts on the perceived weaknesses of international law. Africa's share of blame lies in its failure to evolve beyond scholarship into an assertive normative posture that can re-tool or stand in for the conceptual defects of liberal rights theory. I note with sadness that the African worldview of human rights and conception of society has not advanced beyond the realms of academic writing to performative terrains and practices. Worse still, is that since the 1980s only a handful of dedicated scholars have elected to advance the African approach debate. But even with only a handful of writing, African approaches to international law have been more ubiquitous in the scholarship for their polarising persona and less for their practical impact in human rights practice.

116 M Mutua 'Looking past the Human Rights Committee: An argument for de-marginalizing enforcement' (1998) 4 *Buffalo Human Rights Law Review* 211 argues that the role of human rights is to 'contain predatory impulses of the state'; P Macklem *The sovereignty of human rights* (2015) 25-26.

117 P Alston 'The myopia of the handmaidens: International lawyers and globalization' (1997) 3 *European Journal of Law* 442.

118 Baxi (n 39) 306; A Goetz & R Jenkins *Reinventing accountability: Making democracy work for human development* (2005) 17.

119 Agbakwa (n 40) 2.

120 S Moyn *Not enough: Human rights in an unequal world* (2018).

What exactly should an African human rights approach cure in the neoliberal era? Put differently, what sort of problems should a pragmatic African jurisprudence be directed at resolving? Towards the end of the chapter on the African human rights contribution, Mutua, who is passionate about this theme, has provocatively called on we scholars of African extraction, or at least those who share in the African communitarian ethic, to begin re-thinking the utility of African ideals in finding African solutions to African problems. Of course, Africa faces a myriad of multi-pronged political, social, and economic challenges, some of which are deeply embedded in the international political economy in which the continent finds itself. It is difficult to imagine what specific strands of the problem can be easily redressed as a matter of priority without alienating other areas where intervention is as sorely needed. There is, however, one extraordinary challenge at the centre of most contemporary discourse on human rights in the era of globalisation; what Baxi's TWAIL orientation unmasks as 'trade-related, market friendly human rights' – a paradigm that has come to justify the triumph and protection of the rights of TNCs amid the dethronement or displacement of regulatory autonomies of states in the South.[121]

4.2 The 'political economy of impunity' of global capital

But why is the dynamic of TNCs foray into Africa seen in so deeply problematic a light? The answer to this question is nothing new. It arouses in our minds the familiar narratives that transnational corporations' exploitation of African resources and markets have always been facilitated by the policies and interventions of the World Bank and the IMF.[122] In which case, there is a compelling need for the African human rights discourse to prioritise accountability of international financial institutions for their role in influencing global policy priorities that impact considerably on human development. For now, however, my focus is only on the human rights obligations deficit resulting from TNCs engagement and exploitation of African resources and markets.

Enabled by policy interventions by international financial institutions, TNCs have shored up capital investments in developing countries by courting favour with and amassing power and influence over host states or state bureaucracies. Baxi argues that supranational institutions' policy recommendations for Southern states invariably come with the need to

121 Baxi (n 39) 289.

122 ME Salomon 'International economic governance and human rights accountability' in ME Salomon, A Tostensen & W Vandenhole (eds) *Casting the net wider: Human rights, development and new duty-bearers* (2007) 153.

prioritise the 'the protection of rights of foreign investors [deemed] of such a high order as to deconstruct all traditional and newly emergent human rights as trade distorting policy obstacles'.[123] Insistence by global capital on express guarantees of rights, he adds, has 'profound destructive impacts on the human rights of human beings'.[124] The result has been states which facilitate the logic of 'economic rationalism' while neglecting, if not relinquishing, their human rights obligations and assuring preferential regulatory intervention privileging investors in certain sectors of the economy.[125] In several instances states have failed to regulate or provide effective regulation to prevent, indict, or relieve violations of transnational corporate investors within their jurisdiction. In effect, the policy instrument of deregulation and the logic of facilitative states constitute an exogenous factor imposed by supranational institutions to limit the protection to local communities and the realisation of their rights and have fostered the exploitation and immiseration of the local people and communities by transnational corporations. The considerable decline of state autonomy as regards power and regulation by global institutional structures which have arrogated to themselves enormous regulatory powers that threaten human dignity, is a phenomenon that calls for recognition of human rights responsibilities beyond the state.[126]

The traditional human rights discourse has, for the most part, failed to offer a viable solution to this destructive potential of neoliberal globalisation. This is because, as numerous scholars have argued, 'the political economy of impunity' rejects any form of regulation and refutes accountability; all the while drawing support from Western ideas and dogmas underpinning human rights.[127] Common to this school of thought has been the rejection of broadening the net of binding human rights obligations far beyond the state to include agents and persons vested with coercive capacities to limit human prosperity. The limited statist understanding of rights as instruments of protection against the state has failed to stem the violence of neoliberal globalisation. As a result, other entities with the capacity to impact adversely on human dignity and human wellbeing are left out of the net of obligations even when they have expressly assumed public

123 Baxi (n 39) 301.

124 As above.

125 Baxi (n 39) 305 which he termed the 'trade-related-market-friendly human rights paradigm' by which states prefer corporate interests over human rights obligations owed to its people.

126 M Miyawa 'The right to development and non-state actors: Rethinking the meaning, praxis and potential of accountability of non-state actors in international law' (2016) 3 *Transnational Human Rights Review* 53.

127 Agbakwa (n 40) 5.

functions through, for example, privatisation, public-private ventures, or delivery of essential services key to the economy of the state. Flowing from this is the common refrain that corporate behaviour – or acts within the private sphere – are not susceptible to regulation by human rights standards.

The predicament presented above prompts us to start thinking of appropriate approaches or measures by which to resolve the problem most effectively. Can the African communitarian blueprint and its re-characterisation of the right-duty dialogue, be deployed to address this vexing challenge which the liberal rights theory has been unable to resolve? Can it offer something new that traditional international scholarship has failed to provide?

Africa is strewn with innumerable anecdotes of resource curses that trigger violence, rights violations, and environmental degradation.[128] The Lonmin's indictment in the Marikana massacre (South Africa),[129] Shell-Petroleum and the Ogoni strife (Nigeria),[130] and lately the Tullow-Oil and Turkana spates of unrest (Kenya),[131] spring readily to mind. The weak governance of extractive transnational corporations' activities indicts and signals the inadequacy and even unsuitability of conventional international law doctrines and institutions to contain TNCs' complicity in or proximity

128 U Idemudia 'Corporate-community relations in Nigeria's oil industry: Challenges and imperatives' (2006) 13(4) *Corporate Social Responsibility and Environmental Management* 194-206.

129 M Power & M Gwanyanya 'The Marikana massacre' (2017) 25(14) *SUR International Journal of Human Rights* 61-69. On 16 August 2012 the South African Police Service shot and killed 34 protesting miners at the Marikana platinum mines while injuring 112 others.

130 CE Welch Jr 'Human Rights, environment and the Ogoni: Strategies for non-governmental organizations' (1999) 7 *Buffalo Environmental Law Journal* 251; F Coomans 'The Ogoni case before the African Commission on Human and Peoples' Rights' (2003) 52(3) *International & Comparative Law Quarterly* 749-760. In this case, the Ogoni people rose and protested against the military government of Nigeria which had facilitated or allowed the oil exploration companies in the Niger Delta to violate the rights of the Ogoni people, including by polluting waterways, air and land contamination. The government had subjected the Ogoni people to a range of brutalities committed by the oil companies assisted and condoned by the military such as burning homes, destroying crops, and killing animals and people.

131 https://www.business-humanrights.org/en/kenya-tullow-oil-says-it-might-shut-operations-if-protests-by-locals-over-benefits-sharing-insecurity-persists (accessed 21 September 2022). Since the start of oil exploration in Kenya by Tullow Oil, a UK owned transnational oil explorer, there has been spates of unrest and protest by the the region of the Turkana community living in the North-Western part of Kenya. The Turkana, largely a pastoralist community, occupy the land where oil exploration is being conducted. Some of their reasons for unrest are the notable instances of oil spills and the degradation of their grazing lands.

to the massive rights violations.[132] Former Supreme Court of Canada Justice, Ian Binnie, is quoted below in a phrase that reveals more about the techniques of state subordination by transnational networks of capital: [133]

> The economic influence of transnational companies is often such that states, competing amongst each other for investment opportunities, have little incentive to regulate. Even where the incentive exists, the political influence of transnational companies, particularly in conflict-ridden and economically underdeveloped countries, may be such that a state has little real power to impose its will.

5 A conversation between TWAIL tradition and the AAIL

The question of how to liberate human rights from the chains of Western tradition and legal thought that dominate all dimensions of its practice in the international scene is very pertinent here. While relying on the African conception of law and rights derived of African culture and traditions, we must seek to find solutions to African problems. An indigenous and culturally grounded approach of questioning and critiquing most aspects of our political and socio-economic universe offers profoundly unique ways of emancipatory thinking capable of realising new possibilities. After all, as David Kennedy reminds us, the 'global struggle is a matter of persuasive arguments'.[134] Is it not for African human rights scholarship to embrace knowledge entrepreneurship by offering ideas and expert knowledge relevant for our time and capable of placing counter-discourse in opposition to those through which hegemonic ideas are legitimated and acquiescence obtained?

In the neoliberal world it has become abundantly clear that it is futile to place any hope of redemption in the liberal rights enterprise. This troubling reality must lead us radically to reimagine viable and culturally legitimate alternative ways of confronting the 'cruel logics of social exclusion and abiding communities of misfortune' which have resulted

132 Alston (n 117) 448; Osgoode Hall Law School & Justice and Corporate Accountability Project 'The Canada brand: Violence and Canadian mining companies in Latin America' (2017) 28 https://justice-project.org/the-canada-brand-violence-and-canadian-mining-companies-in-latin-america/ (accessed 21 September 2022).

133 As quoted in 'Legal redress for corporate participation in international human rights abuses' (2009) *The Brief* 44 & 45.

134 D Kennedy *A world of struggle: How power, law, and expertise shape global political economy* (2016) 59.

from the cross-border free flow of capital and investments, which anti-state posturing on rights has failed to stem.[135]

In thinking about African approaches to human rights law, we should also consider what other contemporary schools that oppose Western human rights paradigms have achieved. This way, we are able to assess what animates those theoretical chasms and possibly come up with new ways of reshaping our responses to match the true dynamics of the problem. In this endeavour, I rest on the understanding that 'the pluralistic nature of the world absolutely [requires] the avoidance of ethnocentrism by incorporating the accepted ideologies and values of many different cultures [and] schools of thought'.[136] One school that immediately springs to mind is TWAIL. Coincidentally, the field of universal human rights has seen trenchant TWAIL critiques, albeit for reasons that may appear to differ from those that animate African approaches. TWAIL has critiqued three aspects of human rights: its historiography; its jurisprudence; and its praxis in the contemporary context.

To begin with, and as part of understanding the relationship between TWAIL and the African human rights creed, it is imperative that I cite the work of Okafor, one of the founders of TWAIL. He has summarised some of the essential properties on which 'TWAIL-ers' rely in their analyses and study of international law. These 'techniques and sensibilities' which amplify a number of other TWAIL writings, include greater attention to actual Third World experience in a variety of areas in which international law norms, doctrines, and institutions are involved; recording major historical antecedents, especially of the Third World, in the telling and re-telling of international law;[137] rejecting the notion of differentness and otherness by insisting on formal equality for all of humanity in the thinking and practice of international law; tracing continuities of injustice and subordination in the ruptures of history of international law and institutions; maintaining an oppositional persona in the disavowal of purported 'universalism' which masks Western motives of exploitation and domination; and writing 'epistemic and ideational resistance' to the hegemonic forces.[138]

135 Baxi (n 39) 309.

136 Lauren (n 20) 223.

137 Gathii has contended that TWAIL provides 'a historically aware methodology'. See James T Gathii 'TWAIL: A brief history of its origins, its decentralized network and a tentative bibliography' (2011) 3(1) *Trade, Law & Development* 34.

138 OC Okafor 'Newness, imperialism, international legal reform in our time: A TWAIL perspective' (2005) 43(1&2) *Osgoode Hall Law Journal* 178-179.

These defining traits and properties aside, Okafor also argues that TWAIL can still be identified with a creed to which the majority of its proponents subscribe. TWAIL, Okafor reiterates, is an epistemic 'chorus of voices' committed to the 'intellectual…struggle to expose, reform, or even retrench those features of the international system that help create or maintain the generally unequal, unfair, or unjust global order'.[139] Key Third World scholarship thinking revolves around this credo. For example, Fahkri shares TWAIL's intellectual tendency to 'understand how international law's imperial history affects structures and understandings of contemporary international institutions'.[140] But to what extent has this intellectual commitment crystallised into a successful critique of the Eurocentric international law enterprise which renders resort to other approaches unnecessary? And how does the TWAIL critique differ from African approaches to human rights law?

Baxi argues that the capture and incarceration of human rights enterprise by waves of market fundamentalism is nothing new; historically, human rights language has always been used to serve the ends of 'triumphant economic interests'.[141] TWAIL's thesis of continuity amid discontinuity emerges clearly and 'alerts us to the fact that within the modalities of human rights enunciation pulsate the regular heartbeats of hegemonic interests'.[142] Rajagopal sees the hegemonic dimension of human rights.[143] He has exposed the conceptual and practical defects of human rights rhetoric, including the right to development, (perceptibly an emancipatory right in the view of most Third World exponents) for their ironic relapse into counter-sovereignty posturing that neglects the real dynamics of neoliberal globalisation.[144] He argues that the orthodoxy of human rights as claims and shields against the state – in practice, state accountability – has been deposed by the extant realities of globalisation which show that 'sources of violations and the remedy for them appeared to arise beyond the traditional regulatory competence of such States'.[145]

Similarly, Gutto explains that the link between imperialism and colonialism, from the days of yore, aimed at unionising corporate

139 As above.

140 M Fakhri 'Law as the interplay of ideas, institutions, and interests: Using Polyani (and Foucault) to ask TWAIL questions' (2008) 10 *International Community Law Review* 456.

141 Baxi (n 39) 307.

142 As above.

143 B Rajagopal 'International law and the development encounter: Violence and resistance at the margins' (1999) 93 *American Society of International Law Proceedings* 16.

144 Rajagopal (n 36) 246.

145 B Rajagopal 'Global governance: Old and new challenges' in OHCHR (ed) (n 7) 170.

interests and state power to enable and protect corporate expansion to new territories.[146] The mercantile agenda interwoven with the colonial project evidences the same logic in terms of which international law and its iterations are tailored to facilitate or altogether neglect TNC impunity today.[147]

6 A synopsis on bridging the conceptual gap: An African approach

What, if anything, can an African cultural worldview on human rights contribute to the resolution of extant global problems such as the TNC human rights accountability deficit? How can an African human rights fingerprint recalibrate the flawed assumptions of individualistic, state-centric rights paradigms? What can the communitarian conception of rights and the individualised duty dialectic add to the resolution of the fundamental flaws in liberal rights theory? In what ways can an African framework re-tool liberal rights theory with fresh insights and precepts capable of confronting the all-pervasive corporate domination?

These questions I pose here are by no means new; they have seen a staggering overproduction of literature focusing on what is popularly known as business and human rights or the human rights accountability of TNCs. What is new, however, is that I pose these questions from the perspective of an African approach to human rights. This part is therefore merely a summary of what African approaches may potentially contribute to some of the most controversial discussions on the contested normativity of rights in the regulation of TNCs.

Conventional approaches to the contestation of rights normativity in the private sphere have approached the dilemma of corporate triumphalism within the flawed parameters set by liberal rights theory. Looking at the situation through these questionable lenses, they have sought to fill the void by various interpretive and formalistic responses.[148] Their attention and critique have centred on the overly state-centered human rights law, attacking its rigid trait of delegitimising the rights 'responsibility' of non-state or private actors or persons. They reminded us that the traditional liberal worldview rejected the idea of direct obligations vesting in transnational corporations and the international investment regime as

146 S Gutto *Human and peoples' rights for the oppressed: Critical essays on theory and practice from sociology of law perspectives* (1993) 104.

147 Agbakwa (n 40) 12.

148 Miyawa (n 126).

businesses do not incur human rights responsibilities.[149] We are told that corporations disclaim the notion of 'new duty bearers' and argue that human rights instruments recognise only the duties of states and, therefore, that the obligations embodied in those instruments are enforceable only against the state. It is argued that states can only regulate transnational corporations within the confines of the state duty to protect and promote human rights, while, according the Ruggie framework, TNCs have a duty to respect them – what some prefer to call a do-no-harm principle.[150]

Recognising the insurmountable theoretical stalemate which positivist formulations have entrenched in international law, the same black letter and hard-nosed international law scholars, ironically, are making last-ditch efforts to clean up their mess or to offer alternative ways out of the impasse, by cleverly proposing new interpretive and doctrinal approaches to the law. For instance, Clapham has taken the position that once it is accepted that individuals have human rights and duties under customary and humanitarian law, it follows that this status extends to legal persons.[151] For as long as corporations have rights and duties under international law which they can enforce by way of claims, so the polemic goes, they are deemed subjects of international law, like states, even though there are variations in character.[152] Thus, one can be a subject of international law on the basis of capacity to hold and exercise rights and be under duties even if they have no law-making powers.[153] Claims and propositions of binding human rights obligations are so numerous and go much further than this. Admittedly, they may not possibly be captured and exhausted in this paper.[154] Remarkable as they are, these responses are in no way ground-breaking. In point of fact, the right to development framework,

149 D Bilchitz 'A chasm between "is" and "ought"? A critique of the normative foundations of the SRSG's framework and the guiding principles' in S Deva & D Bilchitz (eds) *Human rights obligations of business beyond the corporate responsibility to respect?* (2013) 107-37.

150 Bilchitz (n 149) 111.

151 A Clapham *Human rights obligations of non-state actors* (2006) 79.

152 N Bernaz *Business and human rights: History, law and policy – Bridging the accountability gap* (2017) 89; JG Sprankling *The international law of property* (2014) 43 has argued that 'the quality of individuals (and private companies and other legal persons) as subjects of international law is apparent from the fact that, in certain spheres, they enter into direct legal relationships on an international plane with states and have, as such, rights and duties flowing directly from international law. It is no longer possible, as a matter of positive law, to regard states as the only subjects of international law.'

153 Clapham (n 151) 60, 68-69 & 80.

154 For an excellent summary, see Bilchitz (n 149) 112-113.

the African human rights fingerprint had long recognised obligations in respect of persons, states, and the international community at large.[155]

While doctrinal international law scholarship must be commended for modestly, albeit belatedly, trying to expose the dysfunctions and confronting the myopia and fundamental failings of their own handiwork – liberalism's rigidity underpinned by statist biases – we must also ask why liberal thinking has failed to win the crucial battle against TNC obligation deficit. We know it is not because their arguments are not legally sound or are too formalistic. It is because of the cognitive limitations of those constructs that the problems they have engineered cannot yet be suspended.

African human rights scholarship has all the while been silent therefore not felt in practice. We must now step up to fill this void that conceptual infirmities of liberalism have wrought and with which it is ironically and unsuccessfully trying to deal. There are after all many reasons for optimism in trying and testing the African human rights fingerprint. However, to qualify as a cutting-edge discipline, African scholarship must abandon Western ideological constructs and radically assert its culturally legitimate notions of human rights in international law. African human rights scholarship must now imprint its own voice on all facets of international human rights discourse as part of pluralising human rights regimes through new theories and rationalisations which improve rather than alienate it in the face of emergent neoliberal problems. The struggle for regulation of TNCs is a global struggle raging on different discursive levels, and the future of business and human rights promises to be transformed fundamentally. However, African scholarship must realise that such a struggle must be undertaken and waged through 'knowledge practices'.[156] As Kennedy reminds us, 'expert ideas and professional practices of assertion and argument construct and reproduce a world of inequality and injustice'.[157]

If correctly applied, the communitarian ethic central to the African idea should be woven into our understanding of the duties of TNCs as persons and agents. The view that TNCs are persons or members of the international community, or are organs of society is a doctrinal postulate drawn from a formalistic and legalistic understanding of the law. There has to date been little opposition to the claim that TNCs are persons. However, there is still no consensus on whether they can be constrained by universally recognised values such as human rights standards. The

155 Art 2(1).

156 Kennedy (n 134) 54.

157 Kennedy (n 134) 14.

Ruggie Framework presented as the most advanced attempt at recognising TNCs' duty to 'respect' is itself highly contested, deeply misunderstood, and operates as soft law – a normatively weak standard that trivialises the human rights obligations of corporations in international law.[158]

It is in the face of these contestations that the communitarian creed must assert itself now more than ever if it is to become the dominant lens through which we can reimagine the fundamental failings and conceptual defects of positivist international law. As I present this challenge, I am fully aware that international law is currently facing affronts and scrutiny from many disciplinary directions, including cosmopolitanism, TWAIL, feminism, and post-developmentalism. Resort to African approaches to critique international law, its orthodoxies, and its assumptions should be seen in the same light as any other theoretical framework that questions established practice.

If we are to apply African communitarian theory, TNCs must first be assumed to be persons vested with rights to property and constituting the social group in the areas or zones where they operate. But for them to enjoy the returns on their investments, their interests 'must always be balanced against the requirements of the group' or the society in which they operate.[159] We may rest with this understanding of African philosophy which conceives and defines personhood in terms of an individual's fulfilment of social obligations.[160] The individual duty verses right dialectic is also relevant to the behaviour of corporations. It 'imposes the burden of obligations' on the conduct of TNCs as members of the global community.[161] This is the essence of the egalitarian ethic in African culture which rejects excessive reverence for the interests of the individual. According to Legesse, the egalitarian logic emphasises that while individuals have rights and entitlements within an egalitarian society, the autonomy of the individual derived from those rights must 'not deviate so far from the norm that they can overwhelm society'.[162] The African communitarian model brings to international law this new vision

158 S Deva 'Treating human rights lightly: A critique of the consensus rhetoric and the language employed by the guiding principles' in Deva & Bilchitz (n 112) 78, 79. For a comprehensive critique see S Deva & D Bilchitz 'The human rights obligations of business: A critical framework for the future' in Deva & Bilchitz (n 149) 1-26.

159 Cobbah (n 32) 321.

160 IA Menkiti 'Person and community in African traditional thought' in RA Wright (ed) *African philosophy: An introduction* (1984) 162.

161 N Sudarkasa 'African and Afro-American family structure: A comparison' (1980) November/December *Black Scholar* 11 at 50 as cited by Cobbah (n 32).

162 Legesse (n 1) 125.

of rights as 'a worldview of group solidarity and collective responsibility' from which all members of the global community cannot opt out.[163]

I contend that neo-corporatism or privileging corporations by deregulation or less stringent measures, as the new logic of development that the IMF and the World Bank proselytise, must be tempered by individual duty. As Howard, an ardent liberal thinker recalls, an African human rights concept knows only a redistributive rather than a profit-dominated society.[164] Underlying this ethic is the value of human wellbeing and development that sharply contrasts with the logic of the market, profit maximisation, and economistic development advocated by neoliberal globalisation. Taken to its logical conclusion, the value of human wellbeing as a standard of achievement dethrones, or at least countervails, the psyche of individualism characterised by profiteering and competition – the glue that binds corporate greed and market rationalism. This sensibility introduces Kaunda's notion of a humanistic society; 'a mutual society…organised to satisfy the basic needs of all its members'.[165]

The communitarian model is founded on collective relationships 'in which legal, political, and social institutions were intertwined'.[166] Carried to its logical conclusion, none of the entities forming the collective group can alienate or insulate themselves from the command of duties that the community imposes. If it does alienate itself, it loses all claims and entitlements it would have enjoyed as part of that community. By this logic, TNCs must respect the lives and environments of the communities in which their operations take place. This is the essence of the communal sense of human rights that Wiredu propounds. In his view, to enjoy rights, one must belong to a social group: 'One who ha[s] lost his membership in a social unit or one who [does] not belong – an outcast or a stranger – live[s] outside the range of human rights protection by the social unit.'[167] This is as far that human rights as a cross-cultural norm can go.

From the African cultural perspective, international law should recognise that as social institutions, TNCs are not abstracted entities. Their activities affect social groups and communities to which they owe the duty to refrain from causing harm. The duty not to harm, which is implied in the corporate responsibility to protect, has both a Western foundation and

163 Cobbah (n 32) 323.

164 Howard (n 3) 18.

165 KD Kaunda *A humanist in Africa*: *Letters to Colin M Morris from Kenneth D Kaunda, President of Zambia* (1966) 24-25 as cited in Howard (n 3).

166 Welch (n 4) 16.

167 Wiredu (n 46) 86.

an African cultural justification. A moral convergence of the Western and African modes of thinking is their emphasis on the common good – the good of human persons first, in their independent capacity; and second, as constituting the social group as a whole.

7 Conclusion

African human rights scholarship must blaze this trail to ensure that the fundamental theses of the communitarian conception of rights become the cornerstone of global human rights entrepreneurship. African scholars must export this blueprint now more than ever, on the same footing and in the same way that cosmopolitans[168] and TWAILers have asserted their worldviews from the fringes of international law into iron assertiveness that rival and even defy other entrenched accounts and theories. In making this call, I am under no illusion that the African intellectual apparatus must achieve or command multiple citations capable of demarcating its pride of place within the scholarship of international law. Although I emphasise that we do not live in a vacuum, we must inhabit new epistemological terrain. I therefore remind us to do more to rival other schools in our unique creed of scholarship and must critique the received wisdom or the underlying assumptions that fail satisfactorily to serve the exigencies of our time.

Heeding this challenge to assert the African human rights fingerprint in the international arena is not new. The benefit of hindsight reveals the various terrains in which specific African perspectives have influenced the development of new norms and principles, even though diplomatic and political compromise may have diluted their core ideological content. The right to development has 'significant African roots' as first emerged in the ideas of a Senegalese jurist, Kéba Mbaye.[169] Most significantly, it is the ideas and normative assertiveness that this African blueprint has since inspired in the repertoire of universal human rights project that should intrigue the current generation of African intellectuals.

But we should bear in mind that the African communitarian model does not propagate a radical new mode of thinking, or new human rights principles, or new human rights values. It merely promises to offer a new theoretical premise from which universal rights and their utility can be philosophically explained in keeping with the emergent trends critiquing

168 A good example of cosmopolitanism based on human rights is T Pogge *World poverty and human rights: Cosmopolitan responsibilities and reform* (2008); T Pogge 'Cosmopolitanism and sovereignty' (1992) 103(1) *Ethics* 51.

169 Okafor (n 7) 373.

and homogenising human rights theory far beyond classical liberalism. In doing so, it clarifies, while denouncing the erroneous assumptions on the Western 'genesis' of human rights that we have been made to follow during the past few decades of the international human rights enterprise.