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The Impact of African Philosophy on the Realisation of International Community and the Observance of International Law

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Abstract
The legal nature of international law is uncertain, despite being the foundation of the international community. Its non-universality questions the cohesion and efficacy of the international community. The international community operates as an exclusive club, coalescing around certain shared values, like liberal democracy and free market economy. Sub-Saharan Africa is usually excluded from being an active part of the international community due to differing values; a shared understanding of community which conflicts with the shared values of the core of the international community. Furthermore, their post-colonial nature deters African states from choosing their own path or adopting the norms of the 'international community.' A paradigmatic shift in research into sub-Saharan Africa and the international community is necessary to ensure a truly effective international community and wider observance of international law.

Keywords: international community, African legal philosophy, state failure, sub-Saharan Africa, international law

1. Introduction

The international community is not well defined, a problem that can be seen as rendering it ineffective. It is also not international – the requirements for entry do not reflect the diversity of its members, further enhancing this ineffectiveness. The impact on sub-Saharan Africa is that the international community, and the international law that arises from it, fosters internal divisions by holding sub-Saharan African states to requirements that the very nature of these states prevents them from achieving. African internal ideology can cure these deficiencies by emphasising the communal nature of community. African philosophy focuses on the cyclic nature of the relationship between the community and individual; an adoption of a similar approach by the international community would refocus the effects of the international community on the well-being and needs of individuals and populations instead of blindly shoring up ineffectual states. To achieve these aims, international legal theory research has to engage in a paradigm shift. Research needs to be deconstructive, interdisciplinary and critical of accepted legal imperatives. If these problems are not addressed, the international community will continue to be ineffective: international law may be flouted with impunity as the shared values that supposedly underpin it are not universally accepted; ratification of treaties is not backed by adherence. The implications of these factors on the international sphere could be widespread and are borne out by increasing academic disillusion with the enforcement of international law norms by the international community.[1]

The normative status of international law is often disputed; it is sometimes said to be more related to politics or international relations. One reason for this is the lack of a defined international sovereign. The international community is often called upon to play the role of sovereign. The possibility of the international community performing the role of a unitary

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[1] Eric A. Posner, *The Twilight of Human Rights Law* (Oxford University Press, 2014); Stephen Hopgood, *The Endtimes of Human Rights* (Cornell University Press, 2013).

cohered, supreme actor becomes increasingly dim the in light of various situations around the world such as the crises in the Middle East and Ukraine, poverty in the third world, human rights violations, the spread of disease and the imperfect operation of democracy. Various attempts have been made to define or evaluate the existence of the international community; these attempts exhibit the deep schisms that exist not only in global society, but also in academic theory.[2] They also reflect the less than pervading nature of international law. The nature of international law and the composition of the international community are intrinsically linked. International law determines the values of the international community; the values of the international community determine the content of international law and provide for entry into the community; the cohesion of the international community determines the normativity of international law. Any disconnect in the diffusion of function between international law and the international community reduces the efficiency of both.

The 'international community' as an accepted (though nebulous) paradigm is exclusive,[3] it normally excludes sub-Saharan Africa, while insisting on and prescribing the internal order of its states. Further, the ever-changing nature of the international system, fluctuations in the prominence of certain states and the shift of prevailing issues on the world stage continue to affect the practical determination of the core composition of the international community.[4] The character of the international community is affected by the rise to prominence of non-mainstream states such as China, Russia and Brazil, whose internal ideologies are not necessarily indicative of liberal democracy or a free market economy.[5] The tensions on the character of the international community are exacerbated by the fact that non-'Western' ideology does not monolithically coalesce, having repercussions across the international sphere.[6]

The elusive nature of the international community can be traced to the interconnected nature of international law and international politics. In domestic law, the strict observance of the law does not allow for pragmatic flexibility. Nevertheless in the international sphere, political operations are eased by reduced normativity in practice.

There is debate in international law, international politics and international relations surrounding the possible existence of a unitary actor on the international scene known as the "international community" or an emergence of an international collective order.[7] It is almost

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[2] Kofi A. Annan, "Problems without Passports", 132 *Foreign Policy* (2002) 30-31; Rajan Menon, "Pious Words, Puny Deeds: The 'International Community' and Mass Atrocities", 23 *Ethics & International Affairs* (2009) 235-246; Barry Buzan and A. N. A. Gonzalez-Pelaez, "'International Community' after Iraq", 81 *International Affairs* (2005) 31-52; Frank Schimmelfennig, "Goffman Meets IR: Dramaturgical Action in International Community", 12 *International Review of Sociology* (2002) 417-437; J. Bryan Hehir, "The Limits Of Loyalty." 132 *Foreign Policy* (2002) 38-39; How World Opinion Kidnapped By West's 'Int'l Community' Rhetoric (People's Daily Online) 11:03, September 01, 2012; Tony Blair, "Doctrine of the International Community." *Speech to the Economic Club of Chicago* 22 (1999). 22 April 1999; David C Ellis, "On the Possibility of 'International Community'", 11 *International Studies Review* (2009) 1-26; Andrew Gowers, "The Power of Two", 132 *Foreign Policy* (2002) 32-33; Andreas Paulus, "The Influence of the United States on the Concept of the 'International Community'", in M. Byers and G. Nolte (eds.), *United States Hegemony and the Foundations of International Law* (2003) 57 – 90; Frank Ching, "Who Defines the 'International Community?'" *The Diplomat* September 12, 2012
[3] Hannes Peltonen, "In or Out? International Community Membership: Beliefs, Behaviour, Contextuality and Principles", 27 *Cambridge Review of International Affairs* (2014) 489; Bruno Simma and Andreas L. Paulus, "The 'International Community': Facing the Challenge of Globalization", 9 *European Journal of International Law* (1998) 268; Paulus (n. 2) 58.
[4] Ellis (n. 2) 23.
[5] William W. Burke-White, "Power Shifts in International Law: Structural Realignment and Substantive Pluralism", *U of Penn Law School, Public Law Research Paper No. 14-2* (2014) 7; Paulus (n. 2) 59
[6] Burke-White (n. 5) 7.
[7] Menon (n. 2) 235 – 246; Samantha Besson "Ubi Ius, Ibi Civitas: A Republican Account of the International Community." In S. Besson and Marti (eds.), *Legal Republicanism: National and International Perspectives.*

logical to say that the use of the word "community" precludes it from being an actual unitary actor but a community of actors (state and non-state). Menon constructs this as a conception of a virtual 'international community, unified by a conception of the common good and with the means to prevent egregious violations of its core principles.'[8] The international community as a narrative is more generally used either as an appeal for collective action or an appeal to collective morals,[9] notwithstanding the fact that the basis for such belief in collective unanimity is not often well-founded. As a call for action, the international community is widely perceived as referring to the West,[10] thus, the collective morals usually espoused on behalf of the international community are often coloured by precepts which have been claimed to be Western precepts, such as liberal democracy, human rights and free market economy.[11] Actions in the name of the international community are therefore frequently engaged in by US, Europe and their allies.[12] In response to this perception, China has derived its own definition of the international community.[13] The effects of these tensions are far-reaching, and the solutions require innovative and inclusive approaches to research. Some answers can be found in sub-Saharan African moral and legal philosophy. In this article, sub-Saharan Africa and Africa is used interchangeably, and sub-Saharan Africa is meant except where the whole of Africa is referred to. This article will examine the processes which define the international community; the place of African states within this community; African political ideology's conflict with international legal theory; a different process for defining the international community that does not institutionally exclude Africa; and the consequences of African exclusion.

2. What is the International Community?

Section 53 of the Vienna Convention on the Law of Treaties (VCLT) is one of the strongest and most accepted indications of the legal recognition of the international community as a unitary actor. It suggests that obligations *erga omnes* can be owed to it, thus establishing the peremptory nature of certain international norms.[14] The ideological view of the international community as the conscience of mankind or a value system,[15] is not mutually exclusive of the practical legal consequences of inferring the existence of an, albeit fictional, international community. Values frequently alluded to by states, usually through the architecture of the United Nations (UN), include freedom, equality, tolerance and dignity.

(Oxford University Press; 2009) 205 – 238; Adeno Addis "Imagining the International Community: The Constitutive Dimension of Universal Jurisdiction", 31 *Human Rights Quarterly* (2009)129–162; Philip Allott "The Emerging Universal Legal System" In J. Nijman and A. Nollkaemper (eds.) *New Perspectives on the Divide Between National and International Law* (Oxford University Press; 2007) 81-83.

[8] Menon (n.2) 237.
[9] Buzan and A. N. A. Gonzalez-Pelaez (n. 2) 32 -33.
[10] Ibid 33; Dino Kritsiotis, "Imagining the International Community", 13 *European Journal of International Law* (2002) 991.
[11] How World Opinion Kidnapped By West's 'Int'l Community' Rhetoric (People's Daily Online) 11:03, September 01, 2012.
[12] Peltonen (n. 3) 475
[13] Frank Ching (n. 2)
[14] Article 53 reads in part *"For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted..."*
[15] Simma and Paulus (n. 3) 268; Edward Kwakwa, "The International Community, International Law, and the United States: Three In One, Two against One, or One and the Same?" in M. Byers and G. Nolte (eds.), *United States Hegemony and the Foundations of International Law* (2003) 33 – 34.

Due to its ideological origins, the international community is not only fictitious but intangible. Therefore Menon observes that the phrase 'international community' has been considered 'merely a cliché or a soothing sentiment invoked reflexively by leaders who can offer no meaningful response in the face of mass atrocities';[16] and Ogata asserts that the international community is invisible and impotent.[17] The international community is a community whose existence and recognition is dependent on the actions of its constituent actors. The use of the term ultimately obscures, and allows states to avoid responsibility.[18] In the evolution of the international community, the continuing action of actors in the international arena would ultimately determine the emergence of a recognisable international community would be. The problem with the use of the phrase "international community" is that it invites obfuscation;[19] presently the 'international community' has no apparent recognisable legal personality. Attempts to define of the international community rely on certain theories of international legal and political thought.

2.1. The Community of States

Phrases like the 'international community of states', suggest that it is generally restricted to statehood, as states are regarded as the basic unit of the international system.[20] The emphasis on states in defining the international community grants states dominant status over people. The impact of the primacy and sovereign equality of states can be dampened by the concept of self-determination and equal human rights.[21] Nevertheless, the peculiar nature of statehood in sub-Saharan Africa contributes to excluding them from the international community. Furthermore, increasingly, we see economic, military and social power transcending boundaries, political influence is peculiarly still confined by fictional boundaries.[22] Nowhere are they more fictional than in sub-Saharan Africa. The concept of '*pays frontier*' defined as 'geographical areas that lie across the boundary separating two or several neighbouring states, and are inhabited by people bonded by socio-cultural and economic links' is of special significance to sub-Saharan Africa.[23]

2.2. The UN as the International Community

The UN is often seen as the physical embodiment of the international community.[24] Traditionally the authority to use force or approve the use of force to protect international peace and security belongs to the UN. Therefore, the UN has been identified as either the international community, the primary agency of the international community, or the only institution through which the international community can legitimately act.[25] Nevertheless, where a humanitarian situation is sufficiently grave, either as regards suffering populations or the entity wanting to intervene, the need to seek the approval of the UN diminishes.[26] For

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[16] Menon (n. 2) 235.
[17] Sadako Ogata "Guilty Parties", 132 *Foreign Policy* (2002) 40.
[18] Gowers (n. 2) 32-33
[19] Thomas G. Weiss, "Researching Humanitarian Intervention: Some Lessons", 38 *Journal of Peace Research* (2001) 423.
[20] Paulus (n. 2) 62; Georges Abi-Saab, "Whither the International Community?" 9 *European Journal of International Law* (1998) 249.
[21] Abi-Saab (n. 20) 261.
[22] Jeffrey Herbst, "Responding to State Failure in Africa", 21 *International Security* (1996) 140.
[23] Report of the Meeting of Experts on the Border Programme of the African Union Bamako, Mali, 8 – 9 March, 2007 paragraphs 16-18; Memorandum on "Cross-Border" Concept or Local Integration" ECOWAS 2005, paragraph 6. These areas are also known as "cross-border areas" or "Borderlands" or "border regions."
[24] Noam Chomsky, "The Crimes of INTCOM", 132 *Foreign Policy* (2002) 34.
[25] Ellis (n. 2) 14.
[26] George R Lucas Jr, "The Role of the 'International Community' in Just War Tradition - Confronting the Challenges of Humanitarian Intervention and Preemptive War", 2 *Journal of Military Ethics* (2003) 127.

example, the UN Security Council gave retrospective approval of the Economic Community of West African States (ECOWAS) interventions in Sierra Leone and Liberia.[27] Where the situation is grave enough and the political will not globally distributed, the UN's relevance is uncertain.

2.3. The People of the World as the International Community

Hehir's perception of the international community removes the groupings of state that differentiate human existence and chooses to perceive the world without the lines on the ground – the sum of humanity as a cohesive whole.[28] Hehir's view is interlinked with the belief that the international community has a conscience,[29] as states and institutions only have a conscience in so far as their human components have a conscience. The role of civil society can be seen as an extension of this conscience – global civil society is thus perceived as an integral part of the international community. Thus, an international organisation such as the UN will sometimes directly address non-state actors.[30] However, this conceptualisation disregards the importance of states and the necessity of non-state institutions with some normative authority. Nevertheless, this conception of the international community is a progressively post-Westphalian idea in tune with the human security narrative. Human security is regarded as a post-Cold War concept.[31] It involves a paradigm shift of the 'focus of security to the ability of individuals to live, rather than states to exist.'[32] It is a mechanism 'to protect the vital core of all human lives in ways that enhance human freedoms and human fulfilment'.[33]

2.4. US and Europe

Another view of the international community is reflected in Gowers' assertion that when the 'international community' is called upon to act, the entity to whom this plea is made is usually the United States and Europe.[34] In his opinion this is because these are the powers capable of determining the course of world events, the powers whose common values have decided the direction of the international community.[35] Thus the US, for example cannot disobey the international community, because it cannot disobey itself.[36] Likewise, Chomsky's definition of the international community recognises the US and its allies as this elusive entity;[37] while Hehir accepts the international community as the entity that is able to 'inform policy choices.'[38] Thus in the view of some authors the international community is paradoxically not international[39] and does not represent the majority of the world's

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[27] Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law* (Oxford University Press; 2001) 122, 135- 137, 156; Liberia - UN SC resolutions S/RES/788 on 19/11/92; S/RES/866 on 22/9/93; S/RES/950 on 21/10/94; Sierra Leone - UN SC resolutions S/RES/1132 on 8/10/97; S/RES/1181 on 13/7/98; S/RES/1162 on 17/4/99.

[28] Hehir (n. 2) 38.

[29] Annan (n. 2) 31.

[30] Simma and Paulus (n. 3) 275.

[31] Taylor Owen, "The Critique That Doesn't Bite: A Response to David Chandler's 'Human Security: The Dog That Didn't Bark,'" 39 *Security Dialogue* (2008) 113.

[32] Taylor Owen, "The Uncertain Future of Human Security in the UN" in M. Goucha and J. Crowley (eds.), *Rethinking Human Security* (Blackwell Press, Oxford; 2008) 447.

[33] Cited in Owen (n. 31) 118.

[34] Gowers (n. 2) 32-33.

[35] *Ibid.,* 33.

[36] Chomsky (n. 24) 34; Kwakwa (n. 15) 56.

[37] Chomsky (n. 24) 34.

[38] Hehir (n. 2) 38.

[39] Arjun Appadurai, "Broken Promises", 132 *Foreign Policy* (2002) 43; Gowers (n. 2) 32-33; Chomsky (n. 24) 34.

population.[40] In other words, they perceive it to be limited to the proportion of the states of the world that exhibit signs of political and economic dominance. This characterisation ignores that fact that each region has local hegemons who would be more likely to determine the course of their own 'world' events.

2.5. Liberal Democracies with Free Market Economies

A more conceptual approach is employed in Buchan's summation of the international community as an extension of the identity of its liberal member states, thus the community, to maintain its communal aspect, is of necessity exclusive.[41] According to Buchan, for states to be considered part of international community, they have to exhibit traits of liberal democracy, even if their internal political culture is not one of liberal democracy. Essentially, to join the club you have to wear the tie, the other items of clothing are not as important. This articulation of the international community is reflected in US foreign policy, that is, democracy and free market economy, includes states and international organisations in the international community – allying them to the US – accords them legitimacy and protects them from multilateral intervention from the US.[42]

Despite this insistence on democracy, the international system is not entirely democratic, this is exemplified in the power and position granted the five permanent members of the Security Council.[43] Allot attributes the format of the international community to the fact that liberal democracy evolved from constitutional monarchy and still retains some monarchical precepts – governments are sovereign, absolute monarchs with absolute sovereignty over their own territories.[44]

Nevertheless, liberal states still need a point of convergence. The need to find a universal judge or standard setter, and this causes the international community to crystallise around an identifiable entity.[45] Generically the UN forms the nucleus around which state and non-state actors exhibit traits of community in the organism known as the international community. In cases where the UN is unable, unwilling or unsuited to act as the nucleus or pivot, the organism changes character and any of the preceding formulations take precedence. For example, when a regional organisation such as ECOWAS exhibits the characteristics of the international community within its region without recourse to the UN except for retrospective approval, binary fission occurs, splitting the international community into different organisms with different self-interests around regional hegemonies.[46] Thus the international community can be described as nothing more than a fluid super-social order which coheres in different ways to protect interests that cannot be protected nationally.[47]

3. The 'International Community', International Law and Global Action

The term 'international community' is thus used to imply cohesion in a purposive way, therefore the act of repetition implies and virtually ensures reality. Article 53 of the VCLT

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[40] Jeane Kirkpatrick, "The Shackles of Consensus", 132 *Foreign Policy* (2002) 37; Appadurai (n. 39) 43.

[41] Russell Buchan, "A Clash of Normativities: International Society and International Community", 10 *International Community Law Review* (2008) 5.

[42] Paulus (n. 2) 87; Kwakwa (n. 15) 39.

[43] Kirkpatrick (n. 40) 36.

[44] Philip Allott, "The True Function of Law in the International Community" 5 *Indiana Journal of Global Legal Studies* (1998) 407.

[45] *Ibid.,* 411.

[46] Simma and Paulus (n. 3) 272; Kwakwa (n. 15) 44.

[47] Santiago Villalpando, "The Legal Dimension Of The International Community: How Community Interests Are Protected In International Law", 21 *European Journal of International Law* (2010) 391, 396, 397.

indicates that states ambitiously assume that it is principles of international law that bind the state and non-state constituents of the international community together into a unitary actor.[48] This ignores the innate reflex of exclusivity and alterity that characterise human existence and history and is constantly exhibited in international relations. This conceptualisation of the relation of the international community to international law relies on the presumption of a purposeful shared morality.[49] Koskenniemi warns of the use of moralisation to fuel and fuse international politics and law;[50] he states that it moves the discussion from the public realm to that of private conscience. Furthermore, a confusion between morals, law and politics reflect a persistent conflation of ideas with similar ideologies, such as the conflation of the meaning of international community in the 'Just War' tradition and international law, implying a lack of distinction between the normative and the descriptive.[51]

An assumption of shared values is predicated on the false assumption that morals are irretrievably shared by peoples and states,[52] and values can never coincide, though agreement may occur where cross cultural value judgments need to be made.[53] Political will which arises from national self-interest is more relevant to international community action than altruism, situations in other states only become relevant when acting would be advantageous, the mere fact of foreignness may suffice to make the situation irrelevant.[54] The need to generate political will among the members of the international community can be traced primarily to the fact that any proposed action has no material advantage for them. Weighed against stretched resources, competing national interests and the intricacies of international politics, the will for positive action diminishes. Effective action appeals to individual self-interest and not collective morality. The use of 'international community' usually arises from an underlying aim, be it a call for action or an appeal to morality; to avoid confusion, the use of the phrase should be curtailed or accompanied by making the purpose of its use overt.[55]

According to Ellis and Schimmelfennig, the existence of an international community is dependent on a specific intersection between common values and interaction in the unified pursuit of a joint purpose.[56] What Ellis and Schimmelfennig suggest is that international community is achieved by high interaction density and high levels of common ethos/interest. Where there is high interaction but no common interest what results is a desire and need to obey international law; a situation called interdependence.[57] The existence of the UN Charter and the attendant prospect for international constitutionality can be cited as an example of the organised interdependence required by Westphalian states to survive in the international system. Tony Blair in his 1999 speech to the Economic Club, suggested that national aims could only be achieved by international cooperation,[58] thus states depend on each other to achieve aims that are increasingly international.

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[48] Simma and Paulus (n. 3) 267

[49] Hehir (n. 2) 38.

[50] Martti Koskenniemi "'The Lady Doth Protest Too Much' Kosovo, and the Turn to Ethics in International Law", 65 *The Modern Law Review* (2000) 161.

[51] Lucas Jr (n. 26) 128, 129, 142 – 143.

[52] Buzan and A. N. A. Gonzalez-Pelaez (n. 2) 38; Ikechi Mgbeoji, "The Civilised Self and the Barbaric Other: Imperial Delusions of Order and the Challenges of Human Security", 27 *Third World Quarterly* (2006) 861.

[53] Allott (n. 44) 412.

[54] Tony Blair, *"Doctrine of the International Community: 10 Years Later"*, 4 *Yale Journal of International Affairs* (2009) 13; Burke-White (n. 5) 34, 38; Paulus (n. 2) 63, 64; Berit Bliesemann de Guevara and Florian P. Kühn, "'The International Community Needs to Act': Loose Use and Empty Signalling of a Hackneyed Concept, 18 *International Peacekeeping* (2011)136; Allott (n. 44) 405.

[55] Buzan and A. N. A. Gonzalez-Pelaez (n. 2) 35

[56] Ellis (n. 2) 8

[57] Schimmelfennig (n. 2) 427

[58] Blair (n. 2)

Ellis and Schimmelfenning, state that where there is common interest and low interaction density this is a situation where 'collective outcomes' are shaped by internationally accepted law called 'civilization.'[59] Furthermore, where there is no common interest and low interaction density states coexist and do not have to be or want to be bound by any international norms.[60]

Interdependence is one step below the institution of a functioning international community. Neither step can be achieved without effective and observed international law. The existence of the international community is thus intrinsically bound to the operation of international law and goes beyond mere interaction or interdependence but is predicated on these factors.[61] Part of the close relationship causes and is caused by the similarity of international law to international relations/politics.

The operation of international relations occurs due to common interests and values in the international system.[62] The perceived incidental actualisation of the international community should protect states' interests;[63] at the most sophisticated level of interaction and communality the interests of states as well as individuals may be protected.[64] This protection relies on commonly accepted international law. This can be evinced from the concept of universalism and the belief in some fundamental essence of humanity that remains immutable across cultures and geographical spaces.[65] Universal jurisdiction over crimes which are ostensibly committed against individuals – or a group of individuals – presumes that there is an international community which is also a victim. If there was no international community there should strictly not be universal jurisdiction for these types of crimes. Genocide and terrorism increasingly, for example, have been said to be attacks on the diversity of the international community.[66] States are increasingly vulnerable to international crimes, it is the nature of those crimes that requires international cooperation to prevent and prosecute; they therefore fall into the sphere of international interest.[67] Addis creates a verbal picture of this global interconnectedness: 'the world has become like a drum – if hit on one end, the whole thing will vibrate.'[68]

International law, therefore, presumes the common values of the international community;[69] these common values themselves are tentative evidence of the existence of a community with shared interests and common goals in the international sphere.[70] Allott maintains that the nature and function of law in the international community mimics the nature and function of law within state borders.[71] He goes on further to state that law 'is a systematic actualizing of a given society's values.'[72] Allot therefore portrays international law as a reflection of and actualization of the international society's/community's values.[73] International law can be said to be a system of collective state agreement on what the shared

[59]Schimmelfennig (n. 2) 427

[60] *Ibid.*

[61] Peltonen (n. 3) 487.

[62] Schimmelfennig (n. 2) 426; Ellis (n. 2) 7; Kritsiotis (n. 10) 967.

[63] Simma and Paulus (n. 3) 268.

[64] Simma and Paulus (n. 3) 271; Addis (n. 7) 144.

[65] Addis (n. 7) 144.

[66] Addis (n. 7) 146; Michael Ignatieff, "The Danger of a World without Enemies: Lemkin's Word", 26 *The New Republic* (2001) 27-28.

[67] Addis (n. 7) 150, 151; Annan (n. 2) 31.

[68] Addis (n. 7) 151.

[69] Simma and Paulus (n. 3) 223.

[70] Addis (n. 7) 144; Annan (n. 2) 30; Simma and Paulus (n. 3) 268.

[71] Allott (n. 44) 395.

[72] *Ibid.* 398.

[73] Simma and Paulus (n. 3) 267.

values of the international system should be or are.[74] Shared values on the international scene therefore result in international society and international law to regulate that society and its interests, the conglomeration and increasing sophistication of the above circumstances result in the international community.[75] This accords a responsibility to law, and especially international law, which it is currently not equipped to handle.[76]

4. Sub-Saharan African States in the International Community

As a result of the shared history which links the states of Western Europe and states such as the US, their values have combined to ensure a block of economically influence-driven consensus which has been exhibited and maintained through the UN.[77] The effect of this monolithic accord has pervaded international law and international politics.

What this means for sub-Saharan Africa with its imperfect state structures is that the conception or formulation of international community excludes Africa, creates tension as sub-Saharan Africa governments' allegiances to the populace and international community differs dramatically. The notion of 'African solutions for African problems' is often used by African statesmen to bridge this divide, allowing them to discharge their obligations to the international community by purporting to utilise local ideology. There is, however, no conceptual bridge, in reality, between the requirements of community on the international stage, and fulfilling the aspirations of the people in sub-Saharan Africa. Furthermore, statesmen have often used cultural relativism as an excuse for human rights violations and abuse of process or power. Ideally, democracy should remove the ability of leaders using the peoples' culture to oppress this people; this has not always happened in practice. Realistically, states in Africa have more to lose from instability in the region, therefore African governments seek to contain domestic and sub-regional emergencies in unconventional ways. In this sense the urgency to ensure regional stability will lessen in proportion to the ripple effect of insecurity as it moves out of the region to the outer edges of the world. Where there is a disconnect between populace and government, this situation will leave populations isolated. Therefore, more account should be taken of the internal working of sub-Saharan Africa states, African jurisprudence and philosophy to attain a truly international, democratic and just 'international community'.

4.1. Sub-Saharan Africa, Liberal Democracy and Internal Political Ideology
Buchan suggests that what defines members of the international community is the practice of liberal democracy and free market economy because sovereignty is linked to non-interference; where the democratic elements are unobserved by a state, the international is no longer beholden to recognise its sovereignty.[78] This is because the international community is perceived as a more morally responsible entity.[79] It has been suggested that the faulty recognition accorded to sub-Saharan Africa states should be withdrawn.[80] Democracy can be considered as an international human right enshrined in Article 25 of the International Covenant on Civil and Political Rights (ICCPR) or a means of implementing the human

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[74] Bardo Fassbender, *The United Nations Charter as the Constitution of the International Community* (2009) 46 – 47.
[75] Ellis (n. 2) 8.
[76] Simma and Paulus (n. 3) 267 – 268.
[77] Lucas Jr (n. 26) 129.
[78] Buchan (n. 41) 4.
[79] Lucas Jr (n. 26) 124.
[80] Herbst (n. 22) 142.

rights codified in international human rights law. Democracy is encouraged because 'good governance is a crucial element for peace and development, while autocracy has been shown to fuel conflict, and human rights violations in a number of cases.'[81] Autocracy retards development, however, the economic rise of China questions the conventional accepted link between liberal democracy, free market economy and development. The requirement for democracy presupposes that democracy is the only form of 'good governance'. Furthermore, democracy is seen as a means of ensuring human rights protection or the shared values of the international community such as freedom, equality, tolerance and dignity are reflected in national life.

'Democracy' has been used as a tool for opposition politicians to deceptively garner the support of the international community.[82] Democracy in sub-Saharan Africa is purposively appropriated by the political elite and used to empower politicians and not populations.[83] This is facilitated by the nature of the international system. The results of implementing democracy through elections in sub-Saharan Africa have in many cases been counterproductive, causing conflict, human rights violations and further departure from democratic principles.[84] Finally, an entitlement to democracy within a state exhibiting institutional and operational failure is largely a redundant right.[85] The implementation of democracy in sub-Saharan Africa is hampered by the lack of modification of Western style democracy when applied to sub-Saharan Africa and an emphasis on civil and political rights at the expense of economic, social and cultural (ESC) rights.[86] Democracy and market-economy do not reflect the needs, aspirations and characteristics of the populations of sub-Saharan Africa, this is to the advantage of corrupt African leaders.[87] Further, democratic requirements must take into consideration the almost non-existent state in Africa.

Ultimately the understanding of personhood in sub-Saharan African philosophy is very dissimilar to Western personhood. The primacy of the community over the individual imbalances the concept of society and the post-colonial sub-Saharan Africa state was not designed and has not been adapted to liberal democracy or market economy.

4.2. African Traditional Philosophy and Ideology and the Nature of Statehood

4.2.1. African Philosophy

African philosophy is typified by 'ancient wisdom' and legal philosophy usually in the form of oral tradition passed from generation to generation,[88] this ensures that certain values become and remain part of the people. Theories such as *ubuntu, ujamaa, umunna bu ike*, illustrate African ideological belief in the predominance of the community and the family, the fact that all people within the community should work for the advancement of the community, promote collectivism, and harmony and frown on individualism, focus on

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[81] International Peace Academy, "The Regionalization of Conflict and Intervention", *IPA Seminar Report* (2003) 4.

[82] de Guevara and Kühn (n. 54) 145 – 147.

[83] Claude Ake, "The Unique Case of African Democracy", 69 *International Affairs (Royal Institute of International Affairs 1944-)* (1993) 240, 242.

[84] Foluke Ipinyomi, "Is Côte d'Ivoire a Test Case for R2P? Democratization as Fulfilment of the International Community's Responsibility to Prevent", 56 *Journal of African Law* (2012) 171; Michel Rocard, "What Is the International Community?", Published: Project Syndicate, 30 May 2013.

[85] Paulus (n. 2) 72.

[86] Ake (n. 83) 240, 241.

[87] *Ibid.,* 242 – 243.

[88] Adeyemi Adegoju, "Rhetoric in Conflict-Related Yoruba Proverbs: Guide to Constructive Conflict Resolution in Africa", 30 *African Study Monographs* (2009) 57.

interdependence, caring, humanity and show disregard for state boundaries.[89] The concept of '*pays frontier',* mentioned above, ensures not only that these ideological beliefs limit the operation of Westphalianism, but that they pervade most of the continent in a non-state based manner.

African philosophy as articulated by pan-African writers gives communitarian values predominance.[90] Menkiti illustrates how this differs from Western society, by pointing out that African community is a fused singular entity and a society is not constituted by individuals, but the society or community constitutes persons.[91] It is an almost collective African belief that a person attains personhood not by being born, but as a gradual process; personhood involves a continuous state of becoming.[92] A human being is not necessarily a person; there is usually no separate word for human being.[93] Therefore, the understanding of the words, 'person', 'community', and 'society', like so many concepts, lose something in translation.[94] By combining and dissecting various communities using colonial boundaries, allegiances to the community were not transferred to the state, but protected from the state, inciting negative peace. Negative peace is marked by increased tension and suspicion. There is a high level of systematic frustration and social, political and ethnic cleavages. [95]

The articulation of these ideologies arise out of a realisation of the impact of 'Europeanisation' on the internal nature of African cultural philosophy and political cultures.[96] This realisation and articulation occurs despite the irreversible nature of such impact. Being conscious of a distinct African ideology of constitutive community does not necessarily set it completely apart from other accepted ideologies; this is ideologically impossible in the case of African ideology that recognises the affinity and holisticality of human community. Furthermore, articulation of a singular or similar African ideology should be accepted with caution. Often the spatial entity of sub-Saharan Africa is conflated with the whole of Africa. Africa is a varied collection of disparate states and ethno-linguistic groups whose customs, cultures and philosophies are equally disparate. Articulation of contiguous philosophy is less based on empirical evidence and more on intellectual cogitation of pre-colonial activists and contemporary diasporic thinkers whose ideas may not be universally or

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[89] Nkonko M. Kamwangamalu, "Ubuntu in South Africa: A Sociolinguistic Perspective to a Pan-African Concept", 13 *Critical Arts* (1999) 24; Elza Venter, "The Notion of Ubuntu and Communalism in African Educational Discourse", 23 *Studies in Philosophy and Education* (2004)152; Kingsley N. Okoro, "African Traditional Education: A Viable Alternative for Peace Building Process in Modern Africa", 2 *Journal of Alternative Perspectives in the Social Sciences* 146 – 147; Richard H. Bell, *Understanding African Philosophy: A Cross-Cultural Approach To Classical And Contemporary Issues* (Routledge, 2002) 36.

[90] Francis M. Deng, "Human Rights in the African Context", in K. Wiredu, (ed.), *A Companion to African Philosophy* (2004) 501.

[91] Ifeanyi A. Menkiti, "Person and Community in African Traditional Thought", 3 *African Philosophy: An Introduction* (1984) 179, 180.

[92] Menkiti (n. 91) 173; Kwame Gyekye, "The Akan Concept of a Person", 18 *International Philosophical Quarterly* (1978) 277-287; Kwame Gyekye, "African Ethics", Spring *Stanford Encyclopedia of Philosophy* (2011) no pagination; John L. Comaroff and Jean Comaroff, "On Personhood: An Anthropological Perspective from Africa, Social Identities", 7 *Journal for the Study of Race, Nation and Culture* (2001) 271; Thaddeus Metz, "Toward an African Moral Theory", 15 *Journal of Political Philosophy* (2007) 323.

[93] Gyekye, "African Ethics" (n. 92)

[94] A. G. A. Bello, "Some Methodological Controversies in African Philosophy", n K. Wiredu, (ed.), *A Companion to African Philosophy* (2004) 269

[95] M. S. Lund, *Preventing Violent Conflicts: a Strategy for Preventive Diplomacy* (Washington, D.C., United States Institute of Peace Press; 1996) 149; N.L.P. Swanstrom and M. S. Weissman, "Conflict, Conflict Prevention and Conflict Management and beyond: a Conceptual Exploration", *Concept Paper, Central Asia-Caucasus Institute and Silk Road Studies Program – A Joint Transatlantic Research and Policy Centre Uppsala University, Sweden* (2005) 11; R. Draman, "Preventing Conflicts in Africa: Reality, Empty Dream or Just Difficult?" 4 *Civil Wars* (2001) 125.

[96] Bell (n. 89) 36.

internally accepted. Internal developments in sub-Saharan Africa illustrate this, but they also illustrate the incongruity of imposed ideology.

Nevertheless, to deny agency to African communal constitutive theories based on their uncertainty and incongruence with accepted international law questions the ends of the law. The philosophy should be clarified and modified not completely discounted. To paraphrase, 'is law made for man, or man made for the law?' If Africans accept their communities as paramount and the means by which their achieve identity and legitimacy, who are we to say that constituted law cannot recognise this?

Indigenous philosophy reflects the idea that equality can be impacted upon by cultural differences.[97] Thus human rights theory is differently understood within African philosophy. The argument for the universality of human rights relies heavily on the belief that the family of humanity share common values such as dignity, respect, liberty, justice, and equality.[98] However, the different ways in which these common values play out resulted in the bifurcation of the human rights covenants into two separate instruments in 1966.[99] The influence of sub-Saharan Africa was demonstrably weak in 1966, at the time many of the African states were about six years old, with a non-residual sovereignty.[100] Had the influence of African states been stronger, there may have been a wider dispersion of influences on the human rights covenants.

According the Locke, 'The power that every individual gave the society when he entered into it can never revert to the individuals again.'[101] However, the community level of sub-Saharan Africa ideology has no recognition of Lockean theory. In sub-Saharan Africa the 'society' or community which the individual regards as his society, to which he has given power is not the exact one recognized by the international community. The state recognized by the international community has failed in its Weberian duty but has more external legitimacy than internal. The legal philosophy it is asked to protect differs from the ideology of the individuals it has been called upon to protect. The community to whom the individual has innate allegiance – the community that personifies the individual – has no legal legitimacy to be protected or to protect.

4.2.2. Sub-Saharan Africa's Post-Colonial States

Sub-Saharan Africa Post-Colonial states have peculiar and similar characteristics due to their origin and structure. They exist as postscripts at the end of colonialism, where transitions were marked by incomplete adoption of the Westphalian nature which decolonisation merely alluded to.[102] This is compounded by internal and inflexible adherence to precolonial theories of primordial concepts of community.[103] Democracy as characterised by elections and practised by post-colonial African states involve a system of reward before election rather

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[97] M. Mutua, "The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties", 35 *Virginia Journal of International Law* (1994) 345.

[98] J. Donnelly, "Cultural Relativism and Universal Human Rights", 6 *Human Rights Quarterly* (1984) 405.

[99] Z. F. K. Arat, "Forging a Global Culture of Human Rights: Origins and Prospects of the International Bill Of Rights", 28 *Human Rights Quarterly* (2006) 428 – 430.

[100] N. L. Wallace-Bruce, "Africa and International Law - The Emergence to Statehood", (1985) 23 *The Journal of Modern African Studies* 587; C. H. Alexandrowicz, "New and Original States: The Issue of Reversion to Sovereignty", (1969) 45 *International Affairs (Royal Institute of International Affairs 1944-)* 473; R. H. Jackson, "Quasi-states, Dual Regimes, and Neoclassical Theory: International Jurisprudence and the Third World", 41 *International Organization* (1987) 541.

[101] J. Locke and P. Laslett, *Two Treatises of Government* (Cambridge; 1988) 427.

[102] Robert Fatton, "Liberal Democracy in Africa", 105 *Political Science Quarterly* (1990) 457.

[103] Peter Jones, "Human Rights, Group Rights, and Peoples' Rights", 21 *Human Rights Quarterly* (1999) 80-107.

than entry into government via election to carry out favoured policies.[104] The desire and impetus to operate liberal democracies are not evident in the populace, as sub-Saharan Africa has more patrimonial systems that seek messianic figures rather than accountable human representatives.[105] Therefore, post- independence, government and politics were dominated by a central figure at the head of a dominant party – for example, Houphouet-Boigny in Cote d'Ivoire, Nkrumah in Ghana, Diori in Niger, and Toure in Guinea.[106] The tendency towards saviour-like characters was exacerbated by the repression and domination inherent in colonisation.[107] Rather than the new sub-Saharan Africa leader 'delivering' their people, they effectively stepped into the role vacated by the colonisers with more visible effects. In response to the un-messianic nature of the politicians in government, there has been an increase in warlord politics predicated on an increase in societal ills and public dissatisfaction and alienation from government.[108]

The postcolonial state mirrors the colonial state in that its executives were intent on controlling the resources of the state. However, while colonial plunder was on the behalf of the mother state, in the case of post-colonial sub-Saharan Africa states the plunder is for personal benefit and carried out locally.[109] Furthermore, a cohesive state did not exist before independence and state wealth could not be attributed to the people. The lack of a cohesive state before and after colonisation has contributed to the current state 'failure', though a non-existent state can hardly be said to have failed. The colonies were ruled in a militaristic fashion of subjugation, a style which continued at independence.[110] The paucity of the post-colonial state can be traced to the sudden removal of the financial crutch which the colonial state provided.

International law and the personage of the international community operate on the presumption that all states have the same organic character, that is to say, there is a presumption that within all states the relationship between the state and the individual is similar. However this disregards the primacy accorded to African community. Further, this presumption attributes characteristics to the post-colonial state which is does not have and was not historically designed to attain.

Max Weber defined a state as an entity that successfully claims a 'monopoly of the legitimate use of physical force.'[111] Locke posited that society was created for the protection of the natural law of right to life, liberty, and property.[112] Consequently, the state has the use of force for the purpose of, among other things, the protection of human rights, pursuing the welfare of its citizens and the maintenance of public order. Therefore, when intuitively Weberian states fail their Lockean function, the sovereignty of those states becomes conditional and such states are termed as failed. Kofi Annan described the state in sub-Saharan Africa (the classic failed state) as having 'insufficient accountability of leaders, lack of transparency in regimes, inadequate checks and balances, non-adherence to the rule of

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[104] Staffan I. Lindberg, "'It's Our Time to" Chop': Do Elections in Africa Feed Neo-Patrimonialism rather than Counter-Act It?" 10 *Democratization* (2003) 127.

[105] Fatton (n. 102) 458.

[106] K. Post, *The New States of West Africa* (Penguin; 1968) 96; Daniel Chirot, "The Debacle in Cote d'Ivoire", 17 *Journal of Democracy* (2006) 65 – 66.

[107] Fatton (n. 102) 458.

[108] I. K. Souare, *Civil Wars and Coups d'État in West Africa: An Attempt to Understand the Roots and Prescribe Possible Solutions* (University Press of America; 2006) 43

[109] Souare (n. 108) 22; E. O. Isichei, *History of West Africa Since 1800* (Africana Publishing Company; 1977) 303, 309; Mgbeoji (n. 52) 858.

[110] Mgbeoji (n. 52) 858.

[111] Max Weber, *Politics as a Vocation* (Fortress Press; 1965).

[112] Locke (n. 101) 323.

law, absence of peaceful means to change or replace leadership, or lack of respect for human rights,…'[113]

Colonialism is a result of a departure from natural law and a fruit of nineteenth century positivism which was characterised by a quest for formal sovereignty and 'civilised' states.[114] This resulted in autocratic regimes which practice an extreme form of positivism due to the departure of morality and altruism from international law and increasing national self-interest. Insertion of altruistic ends into self-interested autocracy results in the current tension between individual, innate community, state and international community.

Sub-Saharan Africa inherited boundaries and structures that do not take cognisance of any internal ideologies or groupings, they therefore achieved sovereignty as states by default, exhibiting a weak and unconsolidated nature, without substantial statehood, cultural and political communion and marked by unusual levels of internal competition for resources and control of the state.[115] But some of the constituent communities that exist have a very strong sense of belonging to their own group. The uncertain mix of international and domestic in the formation of sub-Saharan Africa renders it susceptible to human rights violations;[116] it also misaligns the demarcation between internal and external, clouding the responsibilities of the individual, the community, the state and the international community. The internal differentiation between the ruling class and the people has ensured that the ruling class will support norms in the international sphere which will perpetuate them in government, while the people in their communal groupings resort to violence to achieve a measure of Lockean security.[117] The rise of terrorism has also become entrenched in parts of sub-Saharan Africa such as Nigeria and Kenya as a means – albeit misguided – to reclaim community in the innate sense of the word. The Nigerian government is notably fighting insurgency in the South and the North at present. The non-state actors in both arenas of conflict question the legitimacy of the Nigerian state and their own enforced allegiance to the state.

According to Kreijen,[118] state attainment in sub-Saharan African was achieved by a 'legal trick' which involved the abandonment of 'effectiveness'. Therefore, according to this theory, sub-Saharan African states were recognized outside the classic method of state creation. This has led to inefficient statehood.[119] The lack of effectiveness that Kreijen adduced to sub-Saharan states is exhibited by the fact that the central government's authority is weak and doubtful; government is ineffectual and riddled with corruption; and there is segmentation of the community and society into various publics into which political allegiance is divided.[120] Nevertheless, the international community recognises African states as legitimate and sovereign, on the basis of nothing else but recognition; the international community ensures territorial integrity, economic viability and democracy, therefore, the state exists.[121]

Because the political culture in Africa is neo-patrimonial in nature; the government is seen as a source of personal enrichment and not national development; national development

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[113] K. A. Annan, "The Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa" *Report of the UN Secretary-General*, A/68/220–S/2013/475, April 1998, para 12.

[114] A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press; 2005) 35, 52-53; 84-87.

[115] P. Kaarsholm, "States of Failure, Societies in Collapse?" in P. Kaarsholm, (ed.), *Violence, Political Culture and Development in Africa* (2006) 4.

[116] G. Kreijen, *State Failure, Sovereignty and Effectiveness: Legal Lessons from the Decolonization of Sub-Saharan Africa* (Martinus Nijhoff Publishers; 2004) 252.

[117] *Ibid.*

[118] *Ibid.* 148.

[119] *Ibid.* 162.

[120] Jackson (n. 100) 526-527.

[121] Herbst (n. 22) 131.

remains the function of the community and is restricted to communal or ethno-linguistic development.[122] Thus achieving democratization in sub-Saharan Africa, especially through regular elections, ignores the social and political nature of the constituent communities and the ideologies of the people of sub-Saharan Africa.[123] Therefore state failure is endemic, inherent and systemic due to the nature of sub-Saharan Africa states, rather than specific events.[124]

4.2.3. African Philosophies of Personhood and Community

Sub-Saharan African ideals of community not only rely on the actual existence of community, but on a sense of community. An integral part of any community is the feeling of cohering.[125] The lack of a sense of community in the international community will result in lack of political will and inertia, which is evident in reaction to crises in Rwanda, DRC, Darfur and the response to Ebola in 2014. The alternative would be to rely on self-interest for cohesion, thus, the international community's sense of involvement in the Ebola crisis was not ignited until people outside sub-Saharan Africa became infected with the virus.

Faced with these factors – peculiar personhood and imperfect statehood – Post-Colonial sub-Saharan African states lack both the cohesion to achieve liberal democracy and the organisation and homogeneity of objectives to create free market economies. Thus the relationship of sub-Saharan Africa with an exclusive international community can be seen as an unconscious continuation of the *mission civilisatrice,* a persistently failed undertaking to make Africa more European.[126] For example, in colonial Natal in South Africa, African marriage practices were proscribed in favour of European ones.[127] Historically and contemporaneously, international narratives of actions in Africa have obscured the reality of European brutalism, support for oppressive regimes and the imposition of disadvantageous economic policies.[128] The danger of alterity in the conception of the international community is the notional dehumanisation of populations, their ideologies, beliefs and practices.[129] Nevertheless, the current incarnation of the mission is believed to be shorn of racial overtones.[130] With no outright divorce from the *mission civilisatrice* the 'savages' to be tamed will always regard the taming mechanism with suspicion. Cultural chauvinism, however, is not a counterpoint to cultural relativism. The term used depends on the amount of power and influence of the other; powerful states and collectives are said to be culturally chauvinistic, while less power attracts calls for relativism. Both concepts play into a false paradigm of history as a 'linear, unidirectional progression' from savage to civil.[131]

Nevertheless, various 'non-Western' states such as China are increasing in influence on the international sphere, despite not being strictly democratic nor having free market economies. It has been suggested that the insistence on democracy and free market

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[122] Ian Taylor and Paul D. Williams, "Political Culture, State Elites and Regional Security in West Africa", 26 *Journal of Contemporary African Studies* (2008) 143, 146.

[123] Fatton (n. 102).

[124] Herbst (n. 22) 125.

[125] Simma and Paulus (n. 3)276

[126] Martti Koskenniemi, "Comments on Chapters 1 and 2' in M. Byers and G. Nolte (eds.), *United States Hegemony and the Foundations of International Law* (2003) 94; Roland Paris, "International Peacebuilding and the 'Mission Civilisatrice'", 28 *Review Of International Studies* (2002) 638, 651.

[127] Jeremy Martens, "'Civilised Domesticity', Race and European Attempts to Regulate African Marriage Practices in Colonial Natal, 1868–1875", 14 *The History of the Family* (2009) 343.

[128] Paris (n. 126) 651; Mgbeoji (n. 52) 856, 858.

[129] Mgbeoji (n. 52) 856

[130] Paris (n. 126) 652.

[131] Mgbeoji (n. 52) 857; Alice Lee and Karl Pearson, "Mathematical Contributions to the Theory of Evolution. On the Relative Variation and Correlation in Civilised and Uncivilised Races", 61 *Proceedings of the Royal Society of London* (1897) 354; Martens (127) 344 – 345.

economies is a way by which the previous influence of the US and Europe can be maintained, thus the influence of the UN varies depending on the region in question.[132]

5. Defining the International Community through African Eyes

The notion of the international community is predicated on individuals constituting states and states constituting the international community.[133] Thus, as understood by Western society, communities are constituted from the bottom up making them more defensible,[134] while sub-Saharan African communities are said to be constituted top-down removing the question of defensibility, one monolith hardly needs protection from another monolith. These ontological differences have had no impact on the way in which democracy is prescribed, translated and transferred to sub-Saharan Africa. The understanding of personhood and community in sub-Saharan African philosophy means that the rights-holder and primary constituent of society is the community. The rights of the individual are the rights of the community and the rights of the community are the rights of the individual.[135] If one person starves, the community starves; if one person is a torturer, the community feels the shame. In liberal democratic jurisprudence, while some group rights are available, transferring all human rights to the community would be contrary to the individualistic intent of human rights. Two conflicting views of society arise here, the first is that the individual moulds society to their own needs and interests;[136] while the African view is that society and its beliefs determine the nature of the individual; this relationship becomes, out of necessity, extremely cyclical. As understood, African understanding of community is incongruent with the international human rights law framework. Extrapolating an African approach to the international community allows for a more cohesive view of the international community. Furthermore, communal structures in Africa take on some of the duties of government without any legitimacy outside the artificial state boundaries; a large part of the attainment of ESC rights is community-driven.[137] Sovereign territorial control sometimes resides more in the communal structures than government.[138] The example of Somalia and the non-recognition of Somaliland shows that external legitimacy and recognition carries more weight internationally than internal effectiveness.[139]

The result of African understanding of community is that the operation of democracy will always fall short of the accepted norm; yet any modification of democracy and free market economy will be resisted by the international community.[140] Counterintuitively, this permits abuse of liberal democracy by sub-Saharan African leaders, as the pure application of an African ideology of community in governance will strip them of their power, but an outward show of liberal democracy with establish their political influence. The international community is thus complicit in human rights abuses in sub-Saharan Africa resulting from institutional failure. Political participation in sub-Saharan Africa is linked to communality, this ensures the entrenchment of ethnic politics, even though liberal democracy wishes to

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[132] Lucas Jr (n. 26) 129.
[133] Addis (n. 7) 145.
[134] *Ibid.,* 156.
[135] John Murungi, "The Question of an African Jurisprudence: Some Hermeneutic Reflections", in K. Wiredu, (ed.), *A Companion to African Philosophy* (2004) 524.
[136] Joseph Raz, *The Morality Of Freedom* (Oxford University Press, 1986) 174.
[137] Herbst (n. 22) 136 – 137.
[138] *Ibid.,* 139, 140.
[139] *Ibid.,* 140.
[140] Ake (n. 83) 242.

deemphasize the relevance of ethnicity in politics.[141] As long as liberal democracy in sub-Saharan Africa follows strict rules of regular elections, political parties and popular participation, it will remain ineffective and be unable to ensure governance that can protect human rights. Liberal democracy as generally accepted disregards the existence of strong ethnic divides that cross state boundaries, which are the norm in sub-Saharan Africa. The adoption of liberal democracy by sub-Saharan Africa to appease the 'international community' grants the government of sub-Saharan Africa access to the exclusive club, but denies the people of sub-Saharan Africa admission. Nevertheless, allowing African governments to adopt an 'African' style of government will most likely lead to an abuse of power, and so limits have to be placed on leaders' powers externally; governments cannot pick and choose which limits they will accept. The problem with the articulation international human rights law is that the voices of ordinary people have been ignored. The international community claims to be speaking on their behalf, but they cannot speak what they have not heard. African governments claim to be speaking on behalf of their people, but it is in governments' self-interest to misconstrue what their people are saying. The debate therefore, ignores the people that need it and become largely academic.

Nevertheless, non-Western states and in particular African states have moved certain narratives forward, such as anti-colonialism, anti-apartheid/racialism and global equality.[142] These narratives, however, do not attract the same traction, attention or credence as purely Eurocentric concepts such as Westphalianism, civil and political rights, liberal democracy and free market economy. Liberal democracy protects individual autonomy;[143] African traditional philosophy is focused on the preservation of its community and its customs.[144] Thus despite its best intentions, African observation of democracy is pervaded by the primacy of the community over the individual. This affects the inclusion of sub-Saharan African states in the international community. It skews observance of international law in favour of ESC rights over civil and political rights to the detriment of African populations.[145]

The use of the word 'community' is meant to indicate shared values and identity founded on mutual rights, duties and obligations; a stronger sense of communality and commonality than 'system' or 'society'.[146] Despite the fact that African philosophy supports the type of communal nature that the international community aspires to, without academic intervention the nature of postcolonial African states will of necessity exclude them and their philosophies from the core formation of international community.

The African understanding of community has some peculiar characteristics that could prove instructive to the constitution of the international community. However, this largely depends on which definition of international community is ascribed to the elusive entity. Any attempt to limit the international community on the basis of democracy (shared moral/political values) or free market economy (shared financial interests) will exclude sub-Saharan African ideology and de-internationalise the international community.

Theoretically, the African understanding of community helps in explaining how states can constitute international community and how international community can constitute states. Communal being cannot be divorced from communal actions. Western understanding of community is based on the fictional presumption of shared values and complete individual autonomy.[147] These shared values rarely result in shared action unless shared interests are at

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[141] Ake (n. 83) 243, 244.
[142] Fassbender (n. 74) 56.
[143] Buchan (n. 41) 14.
[144] Menkiti (n. 91) 171 – 180.
[145] Ake (n. 83) 241.
[146] Buzan and A. N. A. Gonzalez-Pelaez (n. 2) 33.
[147] Menon (n. 2) 236 – 237.

stake.[148] This is exhibited in continuing multilateral military action in the Middle-East and inaction or delayed reaction to Ebola in West Africa. In African philosophy, responsibility is shared and reciprocal. Therefore, we are all equally responsible for each other's' welfare – the individual, the community and the state. These concepts are tangentially evident in UN-supported concepts – human rights, Responsibility to Protect (R2P), human security – but the international system through the international community lacks the ideology to carry these visions. Conceptualising African ideology within international political thought can make the international community more effective.

The nature of African states need to be directly addressed. Attempting to make them more viable by prescribing democracy ignores the facts on the ground. The direction of accountability in African states differs from that in a functioning democracy and is different from the notion of accountability in African philosophy.[149] In functional democracies vertical accountability is based on the use of public resources and the ability of the government to make public policies that benefit the people, rather than, as is evident in contemporary African states, an exchange of personal benefit and favour.[150] Conversely, African philosophies promote individual accountability to a monolithic community evincing a cyclic direction of accountability where both the government and the governed form part of a community and exist individually within society. This is the way in which the international community is meant to work.

6. Possible Consequences of Continual Exclusion of Sub-Saharan African States

Based on the foregoing, sub-Saharan Africa is faced with a few possibilities. It could either succumb to the pressures of disintegration and state failure that could lead to an implosion on a scale of which would have devastating and far-reaching effects. Intractable state failure in sub-Saharan Africa suggests the inevitable dissolution of some states.[151] Or sub-Saharan Africa could forge its own identity or 'sub-international community' whose ideology has no traction within the mainstream understanding of international law. A third possibility of sub-Saharan Africa Post-Colonial states living up to the idyll of 'Westernisation' or 'civilisation' by becoming textbook market economies or liberal democracies is unlikely, despite conservatism in international law prescribing this as the only option.[152] Neither is the post-colonial ideal of a reversion to precolonial groupings any more likely as those ties have been severed or diluted. Even if the aversion to the removal of colonial national boundaries can be overcome,[153] precolonial sub-Saharan Africa no longer exists. The people of Africa are a complex hybrid of today and yesterday, the future and the past. This is notwithstanding the fact that colonial boundaries are largely incongruent and do not reflect the demarcation of ideologies that spill over boundaries. African internal conflicts thus have more in common with international armed conflicts, save for arbitrary lines on the ground that hold together perennially warring factions in false brotherhood.

States in Africa have submitted themselves to various sub-regional mechanisms to uphold a sub-Saharan African model of community. This idea of communal reciprocity informed the inclusion of duties into to the African Charter of Human and Peoples' Rights

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[148] Burke-White (n. 5) 38.
[149] Lindberg (n. 104) 123, 124.
[150] *Ibid*.
[151] Herbst (n. 22) 139.
[152] *Ibid.,* 126.
[153] *Ibid.,* 131.

(ACHPR).[154] This was a way in which the Organisation of African Unity (OAU), and its spiritual successor the African Union (AU), wished to breathe life into the primacy of cultural community and family in African jurisprudence. Notwithstanding the good intentions behind the idea, the problem of the imperfect state – the primary duty-bearer – was unaddressed by the Charter and renders the duties-rights paradigm ineffectual. Also unaddressed is the incongruence of the duties in a system of international law that does not recognise the nature of African communities. This has caused the AU's formulation of duties to either be criticised or dismissed.[155]

Sub-Saharan African sub-regional mechanisms may serve as a source of customary 'regional' international law or customary regional supranational law.[156] International law allows for rules to exist which only a group of states are obligated to observe,[157] especially in the case where they show their intention to be bound by way of signing a treaty or joining a sub-regional organisation with an agreed constitution, this would amount to binding custom. Regional custom becomes more relevant as the splinters in the fabric of the international community become more apparent. The argument that custom and shared values are the basis for international law and the foundation of the international community suggest that sub-Saharan Africa may exist in an isolated African international community whose rules differ from that of the wider international community. Apart from the economic spheres of international law, most of international law is largely ineffective.[158] At present, international authority and influence is waning because internationalism is not robust but mostly consists of rhetoric.[159] The insistence on shared values takes no notice of international custom that is truly international, resulting in humanitarian intervention that is motivated by national self-interest and is multi-lateral only and not international.

One sees in sub-Saharan Africa the characteristics prescribed by Schimmelfennig for the evolution of the international community. There is a high level of economic interaction; ECOWAS, the Intergovernmental Authority on Development (IGAD), and the Southern African Development Community (SADC), among others are concerned with economic integration. Historically, there was a high-level of trade on the north-south axis of Africa as well as a lower level of trade along the east-west axis.[160] This and the introduction of initiatives such as the ECOWAS passport – which allows unimpeded travel by all citizens of ECOWAS states through the sub-region[161] – is evidence of high interaction density in the area. Furthermore, conflicts in the region tend to spill over borders. States need to contain conflict to ensure their security; due to the relative economic weakness of these states, this

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[154] Mainly Articles 28 and 29.

[155] Olivier De Schutter, *International Human Rights Law: Cases, Materials, Commentary* (Cambridge University Press, 2010) 29; Magnus Killander, "African Human Rights Law in Theory and Practice", in Sarah Joseph and Adam McBeth (eds.), *Research Handbook On International Human Rights Law,* (Edward Elgar; 2010).

[156] ECOWAS recognises itself as a supranational body Article 34 of the ECOWAS Conflict Prevention Framework Regulation

[157] M. N. Shaw, *International Law* (Cambridge University Press; 5th ed., 2003) 87; The International Court of Justice adjudicated on regional custom in a number of cases - the *Asylum Case (Colombia V Peru)*; I.C. J. Reports 1950, p. 266, the *Anglo-Norwegian Fisheries case (United Kingdom V Norway)* [1951] ICJ 3, the *Right of Passage Case (Portugal V. India)* [1960] ICJ Reports 6 and *North Sea Continental Shelf case (Federal Republic of Germany v Denmark and v Netherlands)* [1969] ICJ Reports 3.

[158] Lucas Jr (n. 26) 139.

[159] *Ibid.,* 130.

[160] K. B. C Onwubiko, *School Certificate History of West Africa: AD 1000 – 1800* (Africana-Fep Publishers; 1985) 106-110, 112-113.

[161] Decision A/Dec.2/7/85 Of The Authority Of Heads Of State And Government Of The Economic Community Of West African States Relating To The Establishment Of ECOWAS Travel Certificate For Member States http://www.comm.ecowas.int/sec/index.php?id=adec020785&lang=en (last accessed on 16th of December 2014)

security is easier in cooperation and by peaceful means. These factors provide a non-humanitarian motive for humanitarian ends. All these features exemplify the shared values and interests of African states. Because the purpose of the community is to amalgamate varying individual interests for the benefit of the community,[162] adopting the African approach to the creation of the international community is intuitively appropriate. African philosophy puts the community first and combines values and interests as the tool with which all the components of the community work for the advancement of community and therefore, each other.

7. Conclusion

There is an increasingly obvious realisation that states with inherently weak architecture are unable to exhibit the functions of a sovereign state. The UN has contemplated a situation where sovereignty and responsibility will revert to the international community when a state is unable to perform its sovereign duty. Since the international community is tenuous at best, this solution is tenuous, its premises are at variance with the rationale of equal sovereignty.[163] Thus any call for international and joint action suffers from the general lack of cohesion in the international system, and an inherent lack of legitimate authority. This is evident in the promotion of human rights, environmental protection and the fight against terrorism.

While the international community is definitely more than the sum of its constituent parts,[164] unanimity in the system which would solidify its status as a cohesive unit and grant it distinct legal personality and capacity to act, would only be achieved when and if values are actually shared and not imposed. Lack of cohesion, opens up the dominant actors to de-legitimation of their actions and serves, in some cases, as a means to avoid action altogether.[165] Issues that are of particular interest to sub-Saharan Africa are kept off the international agenda until they become important to the rest of the world. The 2014 Ebola crisis is a case in point. Conceptualising the international community should take into consideration a realistic picture of the global value system which is a combination of shared and disparate values as well as a good measure of antagonism.[166]

The nature of the international system is such that international activity will crystallise in organisations such as the UN, however the dominance of actors will differ with the variance of several factors on the international scene: the nature and site of required action, military and economic might and national self-interest among others. It is suggested that a viable international community should be a 'context-dependent, problem-driven configuration.'[167] The usage of the term should be avoided without a relevant context, research should also take a holistic view of the international system that may or may not be evolving into the international community.[168] The viability of this construction of international community will depend on the strictures that policy makers place on the formation of the international community and the flexibility of academic research in its willingness to explore alternative ways to articulate international life.

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[162] Villalpando (n. 47) 392.
[163] Herbst (n. 22) 144.
[164] Fassbender (n. 74) 177.
[165] de Guevara and Kühn (n. 54) 142 – 143.
[166] *Ibid.,* 144.
[167] Peltonen (n. 3) 16 – 17.
[168] Ellis (n. 2) 24.

In determining the future and present role of African states, neither their precolonial ideologies nor postcolonial origins can be disregarded.[169] Those origins form a vital illustration of interaction within the international system, without this evidence of interaction our vision of the international system is incomplete. More and accurate interdisciplinary research is needed and urged. Currently, most research is done from a Western perspective, thereby reinforcing Western ideas as shared values.[170] Any suggestion against this approach is impaired by oppressive regimes who purport to be furthering the ends of 'traditional African values.' Nevertheless, the effectiveness of the international system and the possibility of the international community cannot be achieved without taking into account sub-Saharan Africa and its unique situation and perspectives. Narratives from Africa, such as the ideology of community, should be taken into account. Research should be collaborative across continents. African researchers should be proactive,[171] and non-African researchers should not exclude African narratives.[172] Researchers need to acknowledge that their objectivity can only be assured by the recognition of their subjectivity.

The international community should strengthen its communal aspects, which consists of people and not states. States are not as valuable as people. Without communal (global populace) cohesion, the global community will not become international. International law, therefore, should have as its goal, absolute truth, absolute equality and absolute justice, regardless of ideological origins.

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[169] Mgbeoji (n. 52) 864.
[170] de Guevara and Kühn (n. 54) 148.
[171] Herbst (n. 22) 140.
[172] *Ibid.,* 133.