


SCHOLARLY ARTICLE

Localizing the UNGPs – An Afrocentric Approach to Interpreting Pillar II

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Abstract

This paper presents an alternative epistemic worldview of the corporate responsibility to respect human rights (CR2R) as a norm. It examines how an Afrocentric interpretation of the CR2R norm can contribute to a relational system where corporations promote human rights in African host communities. It uses an African norm – Ubuntu – to reframe and reinterpret Pillar II in Afrocentric terms. It argues that this reframing is important for three reasons. First, Ubuntu reframing increases the CR2R norm’s intelligibility in Africa because it clarifies and contextualizes the term ‘respect’ used in Pillar II. Second, reframing the CR2R norm through Ubuntu fills the ethical gap in the interpretation of the CR2R norm. Third, an Ubuntu-inspired interpretation insulates the CR2R norm from some scholars’ critique that the CR2R norm’s scope is narrow because it only encourages MNCs to avoid infringing on the human rights of others without prescribing positive obligations. This paper then examines channels through which Ubuntu can influence the CR2R norm.

Keywords: UNGPs; Ubuntu; Africa; Social norms; Business Ethics; Corporate responsibility; Congruence Theory

1. Introduction

This paper localizes the United Nations Guiding Principles on Business and Human Rights (UNGPs),¹ using an Afrocentric norm – Ubuntu. In doing so, this paper demonstrates how a localized interpretation adds to the evolving normative understanding of the UNGPs. The UNGPs contain three pillars: states’ duty to protect human rights, corporate responsibility to respect human rights, and access to remedy for victims in case of harm. The first pillar – the state duty to protect provides that states must protect their citizens against human rights abuse by third parties within their territories, including businesses.² Pillar II, which is the focus of this paper, and elaborated on in [section III](#), provides that ‘[b]usiness enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and address adverse human rights impacts with which they

¹ Human Rights Council, ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’, A/HRC/17/31 (21 March 2011).

² *Ibid.*, Principles 1–10.

are involved'.³ Pillar III provides that in cases where human rights abuses arise from business operations, victims of human rights abuse should have access to adequate remedies.⁴

To understand how the UNGPs can be localized, this paper engages with international relations scholarship on norm diffusion, especially on how global norms are reframed and re-interpreted for the benefit of local audiences through a process of localization. In doing so, it uses Pillar II of the UNGPs as an example of a global norm that promotes a corporate responsibility to respect human rights (CR2R). The dominant interpretation of the CR2R norm is that corporations have a negative responsibility not to abuse human rights but not a positive obligation to promote them. This paper argues that when the CR2R is localized in Africa and reframed through African norms, it gives birth to a congruent normative regime that prescribes both positive and negative obligations for multi-national corporations (MNCs).

To illustrate a localization process, I use an African norm – Ubuntu, succinctly and laconically expressed as 'I am because you are' and its values which include humanness, sharing, respect for human dignity, interdependence, and interconnectivity – to demonstrate how the CR2R norm can be locally reframed to produce a congruent normative regime capable of implementation in Africa. Seen through Ubuntu, a philosophy of mutual and communal care between individuals, and within the community, CR2R can be re-interpreted to make it locally relevant and to reflect sensibilities to the exploitative history of MNCs and the resulting economic under-development in Africa. This re-interpretation adds to appreciating the potentially wider normative scope of the CR2R norm than is conceivable within the dominant interpretational framework. The over-arching purpose of this exercise is twofold. First, it seeks to explore a mode of analysis through which the CR2R norm can gain local legitimacy among all actors, mainly host institutions such as policymakers, legislators, the justice system and enforcement organs, and local communities in Africa. Second, it proposes ways to re-order the economic imbalance that a dominant interpretation of the CR2R norm perpetuates in Third World countries.

This paper is divided into six sections. **Section II** examines the concept of norms and how they spread – norm diffusion. It identifies a congruence theory that explains how local actors, through a process of localization, reformulate or frame global norms to fit into prior local norms and ideas. This theory justifies interpreting the CR2R through Ubuntu to make it normatively acceptable through adaptation to elicit support from Africans. To understand the CR2R normative framework *vis-à-vis* Ubuntu, **section III** explains the dominant interpretation of CR2R in terms of its prescription that MNCs should not cause or contribute to human rights abuse. This negative responsibility of MNCs has drawn criticism from scholars who believe MNCs should also have a positive obligation to promote human rights. As a first step in the localization process to remove the CR2R weakness, **section IV** examines a social norm in Africa – Ubuntu. It describes the normative scope of Ubuntu as one that prescribes a negative and positive obligation for members of society to respect and promote the well-being of one another based on tenets of humanness, human dignity, interdependence and interconnectivity. It thus appears that CR2R's negative responsibility does not align with Ubuntu's, which encompasses both negative and positive responsibilities. Considering this incongruence, it remains difficult to see how MNCs can receive societal approval based on meeting a negative responsibility alone. To find congruence between both norms, **section V** uses the localization technique discussed in **section II** to reframe the normative contours of the CR2R norm for the benefit of local communities in Africa. It argues that this reframing

³ Ibid, Principle 11.

⁴ Ibid, Principle 25.

induces the legitimacy of MNCs' activities and fosters socio-economic development in Africa. Section VI then examines how to use existing channels – company policies, legal interpretations, and regional policy-led efforts – to operationalize an Ubuntu-based CR2R norm. The argument is that Africa has abundant channels to implement and enforce a congruent version of the CR2R that responds to the history of MNCs' human rights abuse and the socio-economic realities of the continent.

II. Norms and Their Diffusion

A norm is a 'standard of appropriate behavior for actors with a given identity'.⁵ Checkel defines norms as 'shared expectations about appropriate behavior held by a collectivity of actors'.⁶ These definitions reflect norms within a reference social group, generally referred to as social norms.⁷ For a norm to be social, it must be shared by other people and partly sustained by their approval or disapproval.⁸ Social norms perform various functions in societies. For example, they are used to 'make demands, rally support, justify action, ascribe responsibility, and assess the praiseworthy or blameworthy character of an action'.⁹ In international law, social norms provide solutions to coordination problems, reduce transaction costs, and provide a language and grammar of international politics.¹⁰ However, social norms differ from rules, legal norms or maxims.¹¹ James Fearon explains that while rules take the form 'Do X to get Y',¹² social norms take a different form: 'Good people do X'.¹³ In effect, while outcomes motivate compliance with legal norms, social norm observance is usually influenced by emotion.¹⁴

International relations scholars, including Finnemore and Sikkink, have studied how norms develop using a norm cycle theory.¹⁵ However, their account does not explain how norms spread from one place to another – norm diffusion. Amitav Acharya fills this gap by studying the causal mechanisms and processes through which norms and ideas spread.¹⁶

⁵ Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change' (1988) 52:4 *International Organization* 887, 891.

⁶ Jeffrey Checkel, 'Norms, Institutions, and National Identity in Contemporary Europe' (1999) 43:1 *International Studies Quarterly* 83.

⁷ See Gerry Mackie, Francesca Moneti, Holly Shakya and Eliane Denny, *What are Social Norms? How are they Measured?* (San Diego: UNICEF/University of California, Center on Global Justice, 2015) ('Social norm is held in place by the reciprocal expectations of the people within a reference group').

⁸ Jon Elster, 'Social Norms and Economic Theory' (1989) 3:4 *Journal of Economic Perspectives* 99, 100.

⁹ Friedrich Kratochwil, 'The Force of Prescriptions' (1984) 38:4 *International Organization* 685–686.

¹⁰ Andrew Cortell and James Davis Jr, 'Understanding the Domestic Impact of International Norms: A Research Agenda' (2000) 2:1 *International Studies Review* 65, 66.

¹¹ See Jon Elster, 'Norms of Revenge' (1990) 100:4 *Ethics* 862, 864–866.

¹² For example, Posner's definition characterizes norms in terms of rules that are obeyed for fear of punishment. He defines norms 'as rules that distinguish "desirable and undesirable behavior" and give a third party the authority to punish a person who engages in the undesirable behavior'. See Eric Posner, 'Law, Economics, and Inefficient Norms' (1996) 144:5 *University of Pennsylvania Law Review* 1697, 1699.

¹³ James Fearon, 'What is Identity (as we now use the word)?' Department of Political Science, Stanford University (November 1999), <https://web.stanford.edu/group/fearon-research/cgi-bin/wordpress/wp-content/uploads/2013/10/What-is-Identity-as-we-now-use-the-word-.pdf>

¹⁴ Elster, note 8, 100.

¹⁵ Finnemore and Sikkink, note 5.

¹⁶ Amitav Acharya, *Rethinking Power, Institutions and Ideas in World Politics: Whose IR?* (New York: Routledge, 2014) 186. See also Mona Lena Krook and Jacqui True, 'Rethinking the Life Cycles of International Norms: The United Nations and the Global Promotion of Gender Equality' (2010) 18:1 *International Journal of International Relations* 103; David Strang and Sarah Soule, 'Diffusion in Organizations and Social Movements: From Hybrid Corn to Poison Pills' (1998) 24 *Annual Review of Sociology* 265–266.

He examines a congruence theory to shed light on norm diffusion. A congruence theory investigates the role of domestic political, organizational and cultural variables in conditioning the reception of new global norms.¹⁷ This theory focuses on the domestic reception of global norms – the cultural fit (or congruence) between existing local cultural norms with an internationally developed norm.¹⁸ The hypothesis is that local audiences will be likely to accept a global norm if it culturally fits into their pre-existing local norm.

Acharya introduces concepts like localization in the process of norm congruence.¹⁹ He defines localization as ‘the active construction (through discourse, framing, grafting, and cultural selection) of foreign ideas by local actors, which results in the former developing significant congruence with local beliefs and practices’.²⁰ Localization is a systematic and dynamic process where existential compatibility between local norms and foreign norms is prioritized for norm adaptability.²¹ The prior existence of a local norm in a similar issue area as that of a foreign norm makes it easier for local actors to subject the foreign norm to some pruning, adjustments, framing and grafting to fit into a specific cultural and socio-economic context.²² In other words, without losing its attributes, the foreign norm is adapted into a cultural, local and particular context without the local community losing its identity.²³ In Bosch’s words, the end product is that ‘the foreign culture gradually blend [s] with the ancient native one so as to form a novel, harmonious entity, giving birth eventually to a higher type of civilization than that of the native community in its original state’.²⁴

Localization progresses in four stages. The first stage (pre-localization) occurs when local actors resist new external norms because of doubts about their application and utility and the fear that the norm may undermine existing local identity, beliefs and practices. The second stage (entrepreneurship and framing) occurs when local actors re-interpret a foreign external norm in a manner that brings out its value to the local audience. The third stage (grafting and pruning) occurs when both norms (local and foreign) are adjusted and reconstructed to accommodate each other, synergistically operating on a common ground for the benefit of the local audience. The last stage (amplification and ‘universalization’) occurs when new instruments and practices are established from the synergistic and mutual

¹⁷ Acharya, *ibid.* See also Thomas Risse-Kappen, ‘Ideas do not Float Freely: Transnational Coalitions, Domestic Structures, and the End of the Cold War’ (1994) 48:2 *International Organization* 185.

¹⁸ Jeffrey Checkel, ‘Norms, Institutions and National Identity in Contemporary Europe’ (1998) 43:1 *International Studies Quarterly* 87 (‘diffusion is more rapid when a cultural match exists between a systemic norm and a target country, in other words, where it resonates with historically constructed domestic norms’). See also Paul Dimaggio and Walter Powell (eds.), *The New Institutionalism in Organizational Analysis* (Chicago: University of Chicago Press, 1991) 199–201.

¹⁹ Acharya, *note 16*, 186.

²⁰ *Ibid.*, 187.

²¹ *Ibid.*, 252 (‘[L]ocalization is progressive, not regressive or static. It reshapes both existing beliefs and practices and foreign ideas in their local contexts. Localization is an evolutionary or “everyday” form of progressive norm diffusion’).

²² Kai Michael Kenkel and Felipe De Rosa, ‘Localization and Subsidiarity in Brazil’s Engagement with the Responsibility to Protect’ (2015) 7:3–4 *Global Responsibility to Protect* 325, 328.

²³ Indeed, some scholars describe the process of localization as ‘adaptation.’ See, e.g., Alastair Johnston, ‘Learning Versus Adaptation: Explaining Change in Chinese Arms Control Policy in the 1980s and 1990s’ (1996) 35 *China Journal* 27. However, Wolters distinguishes adaptation from localization. See Oliver Wolters, *History, Culture and Region in Southeast Asian Perspectives* (Ithaca: Cornell University Southeast Asia Program Publications, 1999) 56.

²⁴ Frederik David Kan Bosch, *Selected Studies in Indonesian Archaeology* (The Hague: Martinus Nijhoff, 1961) 3.

normative framework between local and foreign norms in which local influence remains dominant and visible.²⁵

Gaby Aguilar notes that localization is a ‘strategic framework for prompting the normative development of human rights from the bottom up’.²⁶ It is a process where research recognizes the local need for human rights to inspire the re-interpretation or elaboration of human rights. Koen De Feyter also notes that localization ‘implies taking human rights needs as formulated by local people (in response to the impact of economic globalization in their lives) as the starting point for both the further interpretation and elaboration of human rights norms and the development of human rights action, at all levels, ranging from domestic to global’.²⁷ Zimmermann concludes that ‘... localization is at least recognized as having the potential to produce outcomes of a more legitimate, more stable, and locally more appropriate kind’.²⁸

Against this background, it is important to illustrate the workings of a congruent theory within the business and human rights context. The next section examines the CR2R norm, especially its normative prescription that MNCs only have a negative responsibility to respect human rights and the criticisms that have trailed the norm. The ultimate aim is to make a case for a congruent normative regime that considers the adaptability of the CR2R norm to a local norm in Africa that goes beyond a negative responsibility to a positive obligation to promote human rights.

III. The Corporate Responsibility to Respect Human Rights as a Global Norm

The UNGPs embody the CR2R norm in its Pillar II. As indicated in the Introduction, the principle demands that corporations respect human rights, not because of any legal obligation but because it is a social norm.²⁹ The normative influence of the UNGPs and the UN Global Compact – the world’s largest corporate engagement platform – both promoted by John Ruggie, contributed to the evolution of the CR2R as a social norm.³⁰ Since then, the CR2R norm has been promoted by various global platforms and institutions, including the Organization for Economic Co-operation and Development (OECD),³¹ the

²⁵ Lisbeth Zimmermann, ‘Same Same or Different? Norm Diffusion Between Resistance, Compliance, and Localization in Post-Conflict States’ (2016) 17 *International Studies Perspectives* 98, 251.

²⁶ Gaby Aguilar, ‘The Local Relevance of Human Rights: A Methodological Approach’ in Koen De Feyter, Stephan Parmentier and Christiane Timmerman (eds.), *The Local Relevance of Human Rights* (Cambridge: Cambridge University Press, 2011) 109, 111.

²⁷ Koen De Feyter, ‘Localizing Human Rights’ in Wolfgang Benedek, Koen De Feyter and Fabrizio Marrella (eds.), *Economic Globalization and Human Rights* (Cambridge: Cambridge University Press, 2007) 67, 68.

²⁸ *Ibid.*, 105. She distinguishes ‘embeddedness’ from ‘reshaping’ as outcomes of localization. Reshaping is the active modification of foreign norms during translation into local norms.

²⁹ This is different from Pillar I which maps out existing states’ obligations under international human rights law. See Paul Redmond, ‘International Corporate Responsibility’ in Thomas Clarke and Douglas Branson (eds.), *The Sage Handbook of Corporate Governance* (London: Sage Publications, 2012) 585, 602 ([i]n contrast to the state duty to protect, the corporate responsibility to respect human rights does not derive directly from international law, whether in its customary form or from the terms of the treaties’). However, in cases of egregious/gross human rights abuse, corporate responsibility to respect human rights may arise from international human rights instruments and domestic laws. See John Ruggie, ‘Closing Plenary Remarks, 3rd UN Forum on Business and Human Rights’, paper presented at the UN Forum on Business and Human Rights, Geneva, Switzerland, 3 December 2014. See also Jennifer Zerk, *Corporate Liability for Gross Human Rights Abuses: Towards a Fairer and More Effective System of Domestic Law Remedies* (Geneva: The Office of the UN High Commissioner for Human Rights, 2014).

³⁰ John Ruggie, ‘The Paradox of Corporate Globalization: Disembedding and Reembedding Governing Norms’, M-RCBG Faculty Working Paper Series 2020-01 https://scholar.harvard.edu/files/john-ruggie/files/the_paradox_of_corporate_globalization.pdf.

³¹ See Organization for Economic Co-operation and Development Guidelines for Multinational Enterprises, 2011 edition (adopted 25 May 2011) ch IV.

International Bar Association (IBA),³² and the International Federation of Association Football (FIFA).³³

Unlike Pillar I, which reiterates states' obligations in international human rights law, Pillar II does not create legal liability for MNCs because legal liability issues continue to be defined by national and international law.³⁴ Pillar II only subjects corporations to the court of public opinion.³⁵ In other words, corporations are responsible for respecting human rights, not because of any binding international obligation, but because this is what society expects from them.³⁶ MNCs are rewarded with a social licence to operate if they meet this expectation.³⁷ In effect, Pillar II is based on the prevailing social norm that corporations should avoid infringing on human rights ('do no harm') in their activities.³⁸ However, this does not prevent them from undertaking other (voluntary) activities to promote human rights.

Although independent, Pillar II complements Pillar I, which relates to states' duty to protect human rights, and Pillar III, which relates to the provision of effective remedies to those harmed by business activities. Interpreting the UNGPs as a whole, Pillars I and II contain normative elements that show the interaction between a social norm and the legal obligations of states in international law.³⁹ For example, Principle 3 of the UNGPs provides that states should provide guidance on how businesses can respect human rights and ensure that their laws do not constrain corporations from operationalizing the CR2R norm. Principles 4, 5 and 6 also prescribe that state-owned enterprises (SOEs) should respect human rights when entering into business relationships with MNCs.

These principles show that although Pillar II is a social norm, it directly influences legal norms. For example, most states' human rights due diligence (HRDD) legislation mirrors Pillar II's provisions.⁴⁰ Emerging domestic HRDD legislation demonstrates the influence of the CR2R as a social norm, being a source of, and influence on, legal norms.⁴¹ However, I heed Surya Deva's warning that '[a]lthough the UNGPs should be understood as a coherent whole and there are important interlinkages between Pillars I and II, the two pillars should not end

³² See Anna Triponel, 'Respecting Business and Human Rights: IBA's Guidance on Applying the UN Guiding Principles', *Thomson Reuters Practical Law* (11 July 2015), [https://uk.practicallaw.thomsonreuters.com/2-630-5490?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhpc=s1](https://uk.practicallaw.thomsonreuters.com/2-630-5490?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhpc=s1) (accessed 30 April 2022).

³³ See FIFA, 'Report by Harvard Expert Professor Ruggie to Support Development of FIFA's Human Rights Policies', *FIFA.com blog* (14 April 2016), www.fifa.com/who-we-are/news/report-by-harvard-expert-professor-ruggie-to-support-development-of-fi-2781111 (accessed 30 April 2022); FIFA Human Rights Advisory Board, *Third Report by the FIFA Human Rights Advisory Board* (Lausanne: FIFA, 2019), <https://resources.fifa.com/image/upload/third-report-by-the-fifa-human-rights-advisory-board.pdf?cloudid=sxdtbmx6wczrmwlk9rcr>

³⁴ Surya Deva, *Regulating Corporate Human Rights Violations: Humanizing Business* (Oxford: Routledge Press, 2012) 111.

³⁵ *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, John Ruggie, Human Rights Council, 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises', UN Doc A/HRC/8/5 (7 April 2008), para 54.

³⁶ Human Rights Council, 'Business and Human Rights: Towards Operationalizing the "Protect, Respect, and Remedy" Framework', A/HRC/11/13 (22 April 2009).

³⁷ *Ibid.*

³⁸ Ruggie Report, note 35, para 24.

³⁹ See Karin Buhmann, 'Neglecting the Proactive Aspect of Human Rights Due Diligence? A Critical Appraisal of the EU's Non-Financial Reporting Directive as a Pillar One Avenue for Promoting Pillar Two Action' (2018) 3:1 *Business and Human Rights Journal* 23.

⁴⁰ See, e.g., Corporate Duty of Vigilance for Parent and Instructing Companies, Law No. 2017-399 (France); Modern Slavery Act 2018-150 (Australia); Child Labour Duty of Care Act 2019 (The Netherlands).

⁴¹ Surya Deva, 'The UN Guiding Principles' Orbit and Other Regulatory Regimes in the Business and Human Rights Universe: Managing the Interface' (2021) 6:2 *Business and Human Rights Journal* 336, 339.

up becoming one'.⁴² Therefore, this paper focuses on the social normative aspects of the CR2R norm.

Notwithstanding the CR2R norm's global acceptance and uptake, it has been criticized by some scholars that its scope is not broad enough, as it only prescribes a negative responsibility for corporations to prevent human rights abuse through their actions or relationships with third parties. For example, David Bilchitz argues that the CR2R norm should also include a positive obligation to fulfil human rights – that is, to contribute to the realization of fundamental human rights.⁴³ He argues that the failure of the UN Special Representative of the Secretary-General (SRSG) to express the CR2R norm in positive terms makes the UNGPs' framework 'fundamentally incomplete'.⁴⁴ Other scholars, like Florian Wettstein,⁴⁵ Denis Arnold⁴⁶ and Wesley Cragg,⁴⁷ maintain the same position. Wettstein argues that MNCs should not merely have a 'minimalist' obligation not to infringe on human rights. They should have obligations to take proactive and positive steps toward protecting and realizing human rights.⁴⁸ Arnold also says that the content of the CR2R norm is vague because it does not fully set out the rights of MNCs in cases where state laws do not protect human rights.⁴⁹ He thinks that the tripartite pillars of the UNGPs should be modified to include MNCs' obligation to promote basic rights. In Cragg's view, the CR2R norm is intellectually unpersuasive because it is not based on any moral or ethical foundation.⁵⁰ Instead, it appeals to the self-interest of MNCs. According to him, MNCs should fulfil human rights not because of their self-interest but because of the intrinsic moral and ethical value of doing so.

These critiques have a common theme: the CR2R norm lacks an ethical and moral foundation to compel MNCs to prevent abuse and promote human rights. On this count, Deva insists that MNCs should 'comply with basic moral and legal norms of society in which they operate, for not doing so will lead to chaos and instability'.⁵¹ Thus, it is evident that given the CR2R norm in its current formulation, MNCs bear no positive obligation to promote human rights as part of their exploitation of resources in host communities. Given this, I propose to utilize the Ubuntu concept to integrate the requisite ethical focus and obligation into the CR2R norm. In other words, I believe it is possible to achieve congruence between CR2R and Ubuntu in a way that makes the norms mutually reinforcing. This interpretative exercise can yield dividends that give teeth to CR2R to impel the desired responsible conduct in MNCs' economic activities across Africa.

⁴² Deva, note 41, 341.

⁴³ David Bilchitz, 'The Ruggie Framework: An Adequate Rubric for Corporate Human Rights Obligations?' (2010) 7:12 *International Journal on Human Rights* 198, 200.

⁴⁴ Ibid, 211. But see Nien-hê Hsieh, 'Should Business Have Human Rights Obligations?' (2015) 14:2 *Journal of Human Rights* 218 (he argues that MNCs do not have a moral obligation to promote human rights). See also John Bishop, 'The Limits of Corporate Human Rights Obligations and the Rights of For-Profit Corporations' (2012) 22:1 *Business Ethics Quarterly* 119 ('Corporations have no obligation to ensure a society in which human rights are fulfilled').

⁴⁵ Florian Wettstein, 'CSR and the Debate on Business and Human Rights: Bridging the Great Divide' (2012) 22:4 *Business Ethics Quarterly* 739.

⁴⁶ Denis Arnold, 'Transnational Corporations and the Duty to Respect Basic Human Rights' (2010) 20:3 *Business Ethics Quarterly* 371.

⁴⁷ Wesley Cragg, 'Ethics, Enlightened Self-Interest, and the Corporate Responsibility to Respect Human Rights: A Critical Look at the Justificatory Foundations of the UN Framework' (2012) 22:1 *Business Ethics Quarterly* 9.

⁴⁸ Wettstein, note 45, 740.

⁴⁹ Arnold, note 46, 384–386. Arnold's account is similar to Henry Shue's. See Henry Shue, *Basic Rights: Subsistence, Affluence, and US Foreign Policy*, 2nd edn. (Princeton: Princeton University Press, 1996).

⁵⁰ Cragg, note 47, 10.

⁵¹ Surya Deva, *Regulating Corporate Human Rights Violations Humanizing Business*, 1st edn (London: Routledge, 2012) 146.

The next section examines the normative implications of Ubuntu, especially its positive and negative prescriptions for human rights. As stated in section II, when considered through the prism of norm localization, a global norm, through its adaptation to a local norm, produces legitimate, more stable, and locally more appropriate norms. Given the dominant, ‘minimalist’ interpretation of the CR2R norm, I offer Ubuntu as a complementary normative framework to produce a locally more appropriate interpretation of the CR2R that considers the circumstances of poverty, illiteracy and hunger under which MNCs operate in Africa.

IV. The African Norm of Ubuntu

Ubuntu is a pan-African philosophy that emphasizes being human through other people – relationality.⁵² It is aptly reflected in the phrase, ‘I am because of who we all are’, or ‘I am human because I belong, I participate, I share’.⁵³ These translate into a popular Zulu saying, ‘Umuntu ngumuntu ngabantu’.⁵⁴ Ubuntu rests on such core values as humanness, caring for human beings, sharing, respect for human beings, respect for human dignity and human life, compassion, hospitality, interdependence, interconnectivity, and communalism.⁵⁵ These values reflect themes that include respect for persons, community, personhood and morality.⁵⁶ Regardless of social status, gender or race, persons are recognized, valued, and accepted for their own sake.⁵⁷ This is because a person is the cornerstone of a community.⁵⁸ Therefore, anything that undermines, hurts, threatens and destroys human beings is not accommodated in the Ubuntu worldview because community and personhood are intricately intertwined. If one person maltreats or disrespects another, other members of society can intervene or remind the perpetrator of the victim’s dignity and the necessity to uphold the value of a human being.⁵⁹

Ubuntu is expressed differently in African languages because its etymological root is found in African proverbs.⁶⁰ Nkonko Kamwangamalu, using a sociolinguistic approach, found that the Ubuntu concept is reflected in the lore of communities in various African countries. These include Gimuntu (giKwese, Angola); Bomoto (iBobangi, Congo); Umundu (Kikuya, Kenya); Vumuntu (ShiTsonga, Mozambique); and Bunmuntu (kiSukuma, Tanzania).⁶¹ The concept is also expressed as Ubunwe (Kinyarwanda, Rwanda); Hunwe (Shona, Zimbabwe); umoja (Swahili, Kenya, Tanzania and Zanzibar); ubawananyina (Bemba, Zambia); pamodzi (Malawi); al takafol al egtma’ ey (Arabic, Egypt, Libya, Morocco, Tunisia, Sudan, Algeria); Ku tchew (Cameroon);⁶² igwebuike (Igbo, Nigeria); Agbasowo la

⁵² Maree Lovemore and Jenny Mbigi, *Ubuntu: The Spirit of African Transformation Management* (Johannesburg: Knowledge Resources, 1995) 2.

⁵³ Ibid.

⁵⁴ See Jacob Mugumbate and Andrew Nyanguru, ‘Exploring African Philosophy: The Value of Ubuntu in Social Work’ (2013) 3:1 *African Journal of Social Work* 82, 84.

⁵⁵ Nkonko Kamwangamalu, ‘Ubuntu in South Africa: A Sociolinguistic Perspective to a Pan-African Concept’ (1999) 13:2 *Critical Arts* 24, 26.

⁵⁶ Mluleki Mnyaka and Mokgethi Motlhabi, ‘The African Concept of Ubuntu/Botho and its Socio-Moral Significance’ (2005) 3:2 *Black Theology* 215, 219.

⁵⁷ Ibid.

⁵⁸ Steve Biko, *I Write What I Like* (London: The Bowerdean Press, 1978) 46.

⁵⁹ Mnyaka and Motlhabi, note 56, 219.

⁶⁰ See Kamwangamalu, note 56. See also generally Chielozona Eze, *Justice and Human Rights in the African Imagination: We, too, are Humans* (New York: Routledge, 2021). Indeed, Chinua Achebe notes that ‘proverbs are the palm oil with which words are eaten. See Chinua Achebe, *Things Fall Apart* (London: William Heinemann, 1958) 6.

⁶¹ Kamwangamalu, note 56, 25.

⁶² See Benvolent Chigara, ‘The Humwe Principle: A Social Ordering Grundnorm for Zimbabwe and Africa?’ in Robert Home (ed.), *Essays in African Land Law* (Pretoria: Pretoria University Law Press, 2011) 113.

fin soya (Yoruba, Nigeria).⁶³ Contrary to the argument that Ubuntu originated from a traditional small-scale culture that bears no or little resemblance to contemporary African society,⁶⁴ these expansive literary interpretations of the norm show that the concept of Ubuntu finds expression in almost all African languages. They also demonstrate that the application of Ubuntu is not limited to Southern Africa.

Essentially identical to the practical implications of CR2R, Ubuntu has social and economic influence in Africa because it seeks to prevent economic relations that produce harmful poverty by depriving others of the essential means of survival.⁶⁵ It regards such essential means of survival, like land and labour, as universal communal resources that must be accessible to all community members.⁶⁶ Vilikazi refers to Ubuntuism as the foremost priority in all conduct.⁶⁷ According to him,

the value, dignity, safety, welfare, health, beauty, love, and development of the human being and respect for the human being are to come first, and should be promoted to the first rank before all other considerations, particularly, in our time, before economic, financial, and political factors are taken into consideration.⁶⁸

Contrary to the argument that Ubuntu is vague and incapable of providing a publicly justifiable rationale for decisions,⁶⁹ Ubuntu is a social norm promoting normative values that influence constitutional and human rights interpretations in some countries.⁷⁰ For example, the landmark case of *S v Makwanyane* in South Africa reinforces it as such.⁷¹ The South African Constitutional Court declared capital punishment unconstitutional, among other grounds, because of its lack of compassion, respect for dignity, and solidarity. The Court noted that South African society must reflect Ubuntu values, and as capital punishment does not reflect them, it ought to be abolished.⁷² Also, in *Barkhuizen v Napier*, the same Court, per Ngcobo J, held that Ubuntu influences South African public policy.⁷³ The Constitutional Court further recognizes Ubuntu as a standard to uphold in dealing with foreigners.⁷⁴ South African Courts have also linked Ubuntu to restorative justice and Truth

⁶³ Princess Omovrigho Idialu, 'The Eradication of Toxic Wastes and Pollutants in Ogoni Land: An Igwebuikwe Approach' (2019) 2:2 *Nnadiabube Journal of Social Sciences* 75, 76.

⁶⁴ Ima Kroeze, 'Doing Things with Values II: The Case of Ubuntu' (2002) 13:2 *Stellenbosch Law Review* 252.

⁶⁵ Peter Nwipikeni, 'Ubuntu and the Modern Society' (2018) 37:3 *South African Journal of Philosophy* 322, 327.

⁶⁶ Thaddeus Metz, 'Towards an African Moral Theory' (2007) 15:3 *Journal of Political Philosophy* 321.

⁶⁷ Herbert Vilikazi, 'The Roots of Ubuntu/Botho', paper presented at the Secretariat for Multilateral Cooperation in Southern Africa (SECOSAF) Seminar, Johannesburg, South Africa, 1991.

⁶⁸ *Ibid*, 70.

⁶⁹ Eusebius McKaiser, 'Public Morality: Is there Sense in Looking for a Unique Definition of Ubuntu?', *Business Day Newspaper* (2 November 2009), (He argues that Ubuntu 'is a terribly opaque notion not fit as a normative moral principle that can guide our actions, let alone be a transparent and substantive basis for legal adjudication'.)

⁷⁰ See generally Drucilla Cornell, Roger Berkowitz and Kenneth Michael Panfilio (eds.), *Ubuntu and the Law: African Ideals and Post Apartheid Jurisprudence* (New York: Fordham University Press, 2012); Serges Djouyou Kamga, 'Cultural Values as a Source of Law: Emerging Trends of Ubuntu Jurisprudence in South Africa' (2018) 18:2 *African Human Rights Law Journal* 625, 646. See also Drucilla Cornell and Nyoko Muvangua (eds.), *Ubuntu and the Law: African Ideals and Post Apartheid Jurisprudence* (Fordham: Fordham University Press, 2012) 1.

⁷¹ *S v Makwanyane and Mchunu* (1995) 3 SA 391 (CC). See also *MEC for Education: Kwazulu-Natal v Pillay* (2008) 1 SA 474 (CC); *Joseph v City of Johannesburg* (2010) 4 SA 55 (CC); *Koyabe v Minister for Home Affairs (Lawyers for Human Rights as Amicus Curiae)* (2014) SA 327 (CC). See also Mvuselelo Ngcoya, *Ubuntu: Globalization, Accommodation and Contestation in South Africa* (Washington DC: American University Digital Research Archive, 2009).

⁷² *S v Makwanyane*, *ibid*, para 131.

⁷³ *Barkhuizen v Napier* (2007) ZACC 5, para 51.

⁷⁴ *Port Elizabeth Municipality v Various Occupiers* (2005) 1 SA 217 (CC), para 37.

and Reconciliation practices.⁷⁵ In a restorative justice context, Ubuntu emphasizes virtues that include forgiveness, reconciliation and truthfulness.⁷⁶

Beyond the judicial landscape in South Africa, Ubuntu has been judicially recognized and asserted in other African jurisdictions.⁷⁷ For example, the Uganda High Court in *Solvatori Abuki v Attorney General* confirmed the application of Ubuntu to communities in Uganda.⁷⁸ The Court noted that the concept of Ubuntu is not confined to South Africa or any other group, as all communities in Uganda embrace Ubuntu. Also, the Lesotho High Court in *Mokoena v Mokoena*⁷⁹ referred to Ubuntu in a case where the applicants sought to dispossess the widow of their deceased brother of the land he left behind under Lesotho's customary law of succession. Emphasizing the importance of fostering solidarity and respect for human dignity, the Court held that:

[t]he widow has a customary law right to expect her late husband's relatives to protect her and the property that her husband left her with ... It is contrary to Basotho culture, good conscience and a sense of what is right in the African sense – that applicant should be attempting to deprive the widow of her house and arable lands (masimo). It is not botho or Ubuntu to dispossess a widow.⁸⁰

These decisions demonstrate that Ubuntu is an important norm in ordering social relationships in Africa. They also show that the influence of Ubuntu is not waning in the 21st century, as some scholars suggest.⁸¹

Although some scholars argue that Ubuntu values are not unique and encourage collectivism at the expense of individual freedom,⁸² other scholars have clarified the scope of Ubuntu through relational ethics.⁸³ For example, Thaddeus Metz argues that relationally, Ubuntu gives primacy to actions that honour and support friendly relationships.⁸⁴ Although Metz acknowledges that other western ethical philosophies require individuals to care for

⁷⁵ Chuma Himonga, Max Taylor and Anne Pope, 'Reflections on Judicial Views of Ubuntu' (2013) 16:5 *Potchefstroom Electronic Law Journal* 372, 377. See also Adeoye Akinola and Ufo Uzodike, 'Ubuntu and the Quest for Conflict Resolution in Africa' (2018) 49:2 *Journal of Black Studies* 91.

⁷⁶ Mofihli Teleki and Serges Djoyou Kamga, 'Recognizing the Value of the African Indigenous Knowledge System: The Case of Ubuntu and Restorative Justice' in Samuel Ojo Oloruntoba, Adeshina Afolayan and Olajumoke Yacob-Haliso (eds.), *Indigenous Knowledge Systems and Development in Africa* (London: Palgrave Macmillan, 2020) 303. See also Jacob Meiring, 'Ubuntu and the Body: A Perspective from Theological Anthropology as Embodied Sensing' (2015) 36:2 *Verbum et Ecclesia* 1, 2.

⁷⁷ Indeed, some scholars describe Ubuntu as a meta norm similar to the English notion of equity which gives voice to something distinctively African, especially on issues of social justice. See generally TW Bennett, 'Ubuntu: An African Equity' (2011) 14:4 *Potchefstroom Electronic Law Journal* 30, 41.

⁷⁸ *Solvatori Abuki v Attorney General* [1997] UGCC 5. In this case, the court held that Uganda's Witchcraft Act is unconstitutional because its application produces inhumane and degrading results.

⁷⁹ *Mokoena v Mokoena* [2007] LSHC 14 (CIV/APN/216/2005).

⁸⁰ *Ibid.*

⁸¹ Anthony Oyowe, 'Strange Bedfellows: Rethinking Ubuntu and Human Rights in South Africa' (2013) 13:1 *African Human Rights Law Journal* 103, 124.

⁸² See, e.g., Penny Enslin and Kai Horsthemke, 'Can Ubuntu Provide a Model for Citizenship Education in African Democracies' (2004) 40:4 *Comparative Education* 545 (they argue that Ubuntu is not unique in its application and that most of its values are universally applied). Ethna Swartz and Rae Davies, 'Ubuntu – The Spirit of African Transformation Management – A Review' (1997) 18:6 *Leadership & Organization Development Journal* 290, 293 (they refer to the sacrifice of the individual self for the collective will as the shadow or negative side of Ubuntu).

⁸³ See generally Thaddeus Metz, *A Relational Moral Theory: African Ethics in and Beyond the Continent* (Oxford: Oxford University Press, 2022); Philip Ogochukwu Ujomudike 'Ubuntu Ethics' in Henk ten Have (ed.), *Encyclopedia of Global Bioethics* (Cham, Switzerland: Springer, 2016).

⁸⁴ Thaddeus Metz, 'The Western Ethic of Care or an Afro-Communitarian Ethic? Specifying the Right Relational Morality' (2013) 9:1 *Journal of Global Ethics* 77.

one another (ethics of care), he distinguishes them from Ubuntu. This is because notions of 'identity' and 'solidarity' are important in the construct of Ubuntu relational ethics. Metz argues that a western 'ethics of care' only incorporates elements of solidarity and not identity. While solidarity entails the willingness to help and care for others, identity entails sharing a way of life with others. Sharing identity means that individuals recognize themselves as part of a group and refer to themselves as (part of) a 'we' and not merely as an 'I'.⁸⁵ To share an identity with others means engaging in cooperative endeavours without fear of punishment or a feeling of compulsion.

Therefore, on one end of the spectrum, Ubuntu relational ethics, unlike western liberal ideas of individualism and autonomy that rely on individuals' intrinsic (internal) worth,⁸⁶ focus on interpersonal relationships sustained by communitarian values, ultimately defining personhood.⁸⁷ On the other side of the spectrum, Ubuntu ethics differs from ethics of care because of its emphasis on shared identity.⁸⁸ Metz summarizes the normative expectation under Ubuntu relational ethics as follows: 'an action is right just insofar as it is a way of living harmoniously or prizing communal relationships, ones in which people identify with each other and exhibit solidarity with one another; otherwise, an action is wrong'.⁸⁹

Ubuntu also bears a mark on human rights and constitutional law scholarship besides its legal and ethical construct. For example, Ubuntu is used to justify a constitutional interpretation of the human right to water in Namibia.⁹⁰ Ndjodi Ndeunyema argues that courts must purposively interpret the Namibian constitution to solve the water scarcity problems in Namibia, although this right is not included in the Namibian constitution. Using Ubuntu, he contends that the right to water could be implied by interpreting the right to life as stated in Article 6 of the Namibian constitution.⁹¹ In Ndeunyema's view, African normative values animate the foundational principles of the Namibian constitution. Therefore, a purposive interpretation of the constitution will include considerations of Ubuntu requiring the state to provide water to fulfil an aspect of its socio-economic obligations to its citizens.⁹² In effect, Ndeunyema claims that the right to water is, impliedly, a socio-economic dimension of the right to life via Ubuntu. He suggests that Ubuntu is part of African customary law,⁹³ thus highlighting its normative influence on interpreting human rights and constitutional rights in Namibia (and clearly, elsewhere in Africa).

A summary of the key features of Ubuntu as a norm informs the following conclusions. First, Ubuntu speaks to human dignity as worthy of recognition towards individuals. Also, it abhors the economic deprivation and exploitation of individuals and communities. Similarly, it encourages cooperation to enhance mutual benefit in the utilization of economic resources of land and labour. Furthermore, its prescriptive nature as a relationship ethic emphasizes identity and solidarity, not merely caring for others. From a legal standpoint, Ubuntu has

⁸⁵ Ibid, 85 (one who has a sense of belonging or a feeling of togetherness).

⁸⁶ Ifanyi Menkiti, 'Person and Community in African Traditional Thought', in RA Wright (ed.), *African Philosophy: An Introduction* (Lanham: University Press of America) 171, 172. ('[a] crucial distinction this exists between the African view of man and the view of man found in Western thought: in the African view, it is the community which defines the person as person, not some isolated, static quality of rationality, will, or memory').

⁸⁷ Ibid.

⁸⁸ Thaddeus Metz, 'An African Theory of Moral Status: A Relational Alternative to Individualism and Holism' (2012) 15:3 *Ethical Theory and Moral Practice* 387, 396.

⁸⁹ Thaddeus Metz, 'African and Western Moral Theories in a Bioethical Context' (2010) 10:1 *Developing World Bioethics* 49, 51.

⁹⁰ See generally Ndjodi Ndeunyema, *Re-invigorating Ubuntu Through Water: A Human Right to Water under the Namibian Constitution* (Pretoria: Pretoria University Press, 2021).

⁹¹ Constitution of Namibia (as amended by the Namibian Constitution Third Amendment Act 8 of 2014).

⁹² Ndeunyema, note 90, 62.

⁹³ Ibid, 67.

become an implicit source of law for interpreting and applying the generality of public legislation in various African states. In particular, it has begun to assume the status of a ‘grundnorm’ for validating both expressed and implied rules germane to the recognition, interpretation and enforcement of human rights.

Between the analysis of CR2R in [section III](#) and Ubuntu in [section IV](#), it is evident that CR2R imposes a baseline precatory responsibility of ‘do no harm’ observance left to the decision of the individual corporate actor. In contrast, Ubuntu carries inherent compelling power and, thus, demands both positive and negative obligations of ‘do no harm’ and ‘do good’ from individuals. Consequently, regarding the need to achieve an effective regime of corporate regulation in Africa that accounts for the history of MNCs’ exploitation and resulting economic impoverishment in the continent, the global CR2R norm must, by the necessity of normative force and legitimacy, become congruent with Ubuntu. This does not only facilitate MNCs’ acceptance in African communities through a grant of social licence, but it also facilitates socio-economic development through the cooperation of local communities and MNCs. In this way, CR2R, as a global norm, is localized in its operation through a seamless adaption via the vehicle of Ubuntu. This reframing of CR2R is the subject of the next section.

V. Localizing the CR2R Norm – A Reframing Exercise

It is important first to concede that finding an exact Ubuntu vocabulary in the CR2R norm is almost impossible.⁹⁴ However, understanding that both the CR2R norm and Ubuntu seek to influence social conduct, this congruence can be established between both norms to benefit local African communities.⁹⁵ In sum, a localized CR2R combines the predominant negative responsibility that CR2R imposes with the positive obligations more explicitly stated and implied in the normative concept of Ubuntu.

According to Johann Broodryk, in Ubuntu terms, ‘respect’ for human rights is associated with ideas like commitment, dignity and care.⁹⁶ He emphasizes that ‘respect’ is the central theme in the Ubuntu worldview, and it governs relationships at every level of society because human existence depends on mutual goodwill and acceptance.⁹⁷ The relational explanation Broodryk offers implies, in terms of human rights founded in Ubuntu, that there is an obligation and commitment to care about others’ quality of life.

Thaddeus Metz affirms this deduction from Broodryk’s relational viewpoint by emphasizing that dignity, the foundation of most human rights claims, commands respect.⁹⁸ He is clear that the concept of dignity in Ubuntu transcends the Kantian philosophy’s meaning of dignity, which treats human beings as autonomous.⁹⁹ Instead, the basis of human dignity in Ubuntu is communality – human beings’ capacity to form communal relationships

⁹⁴ Yvonne Mokgoro, ‘Ubuntu and the Law in South Africa’ (1998) 1:1 *Potchefstroom Electronic Law Journal* 1–3.

⁹⁵ This argument assumes that those who most benefit from the governance gap that Ruggie identifies are MNCs in the Global North. See Florian Wettstein, ‘Normativity, Ethics and the UN Guiding Principles on Business and Human Rights: A Critical Assessment’ (2015) 14:2 *Journal of Human Rights* 162, 151. It is important to acknowledge that even in the Global North, there are dissenting voices of the Indigenous Peoples against imperial dominance and exclusion. See Sara Seck, ‘Relational Law and the Reimagining of Tools for Environmental and Climate Justice’ (2019) 31:1 *Canadian Journal of Women and the Law* 151, 176.

⁹⁶ Johann Broodryk, *Ubuntu: Life Lessons from Africa* (Indiana: Ubuntu School of Philosophy, 2002) 32.

⁹⁷ *Ibid.*

⁹⁸ See generally Thaddeus 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* 306 [‘African Values and Human Rights’]; Thaddeus Metz, ‘Dignity in the Ubuntu Tradition’, in Marcus Düwell, Jens Braarvig, Roger Brownsword, and Dietmar Mieth (eds.), *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives* (Cambridge: Cambridge Press, 2015) 310.

⁹⁹ *Ibid.*, 312 [‘Dignity in Ubuntu Tradition’].

through identification and display of concrete acts of solidarity that ensure mutual benefit at interpersonal and community levels.¹⁰⁰ Consequently, human rights abuses, including slavery and forced labour, convert persons capable of being friendly into those that treat others as a means to an end, such as gaining power or wealth for themselves. Those subjected to such inhumane treatments are induced to hate and harbour ill will, all of which destroy the capacity for communal relationships.¹⁰¹

In essence, the Ubuntu concept of respect entails empowering others to encourage them to actualize their capacity to create relationships and act in solidarity. Providing food, education, housing and health care are some examples Metz cites as empowerment forms.¹⁰² These examples show that the definition of respect entails the promotion of human flourishing that contributes to socio-economic development in society. Metz classifies these actions as fulfilling positive rights because they require aiding deprived persons to fulfil the pillars of Ubuntu, which include communality and solidarity.¹⁰³

Therefore, it raises the question, what would a congruent CR2R and Ubuntu norm look like when reframed in the business and human rights context? The answer lies in the localization of the CR2R norm. An Ubuntu-inspired CR2R norm would stipulate that community members should help and defend one another in cases where anyone's capacity to form communal relationships is threatened or abused.¹⁰⁴ Under this notion of the CR2R, MNCs will be required to avoid business practices that promote slavery (as it prevents people from forming communal relationships) and to promote socio-economic conditions that protect people from vulnerability to slavery. This implies responsibility and commitment, which carry positive and negative obligations.¹⁰⁵ Conscientious pursuit of this imprimatur would ensure that the profits of MNCs would also be used to the benefit of local communities by providing basic human necessities.¹⁰⁶ It would also reduce the inhumane exploitation of African markets by MNCs and commit them to support tangible individual welfare as part of the local community welfare.¹⁰⁷

Localized this way via Ubuntu, the UNGPs' concept of respect is, arguably, rescued from its current 'confusing' and 'deeply flawed' status, as critics claim.¹⁰⁸ Also, it prevents capital flight from the Global South to the Global North, which is a contributor to under-development in

¹⁰⁰ Ibid, 315–316.

¹⁰¹ Ibid.

¹⁰² Ibid.

¹⁰³ Metz, *note 98*, 309. He notes that solidarity means 'roughly enjoying a sense of togetherness and engaging in cooperative projects'.

¹⁰⁴ Mnyaka and Motlhabi, *note 56*, 219, 227–228.

¹⁰⁵ This is incongruent with the CR2R norm. Lopez notes that the term 'responsibility' as used in Pillar II does not denote commitment. See Carlos Lopez, 'The Ruggie Process: From Legal Obligations to Corporate Social Responsibility' in David Bilchitz and Surya Deva (eds.), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge: Cambridge University Press, 2013) 59, 68 ('... the "term responsibility" is clearly different from "commitment" or similar words which require a voluntary act').

¹⁰⁶ Rita Kiki Edozie, *Pan Africa Rising: The Cultural Political Economy of Nigeria's Afri-Capitalism and South Africa's Business* (London: Palgrave Macmillan, 2017) 79, 80.

¹⁰⁷ Ibid, 81.

¹⁰⁸ Surya Deva, 'Protect, Respect and Remedy: A Critique of the SRSG's Framework for Business and Human Rights', in Karin Buhmann, Lynn Roseberry and Mette Morsing (eds.), *Corporate Social and Human Rights Responsibilities: Global Legal and Management Perspectives* (London: Palgrave Macmillan, 2011) 108, 121. See further critique, Surya Deva, 'Treating Human Rights Lightly: A Critique of the Consensus Rhetoric and the Language Employed by the Guiding Principles', in Surya Deva and David Bilchitz (eds.), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect* (Cambridge: Cambridge University Press, 2013) 78, 91–95. Carlos Lopez makes a similar argument. He argues that Pillar II has no normative or theoretical appeal. See Lopez, *note 105*, 66.

Africa.¹⁰⁹ The UNGPs may have unwittingly legitimized capital flight because the CR2R norm's baseline expectation impliedly means MNCs should not abuse human rights, but they can transfer wealth to home countries without any commitment to share with local communities. Therefore, giving CR2R this relational orientation impels MNCs to commit to promoting the socio-economic development of local communities ravaged by mass poverty, unemployment, illiteracy, hunger, marginalization, and the general lack of basic human survival resources.¹¹⁰

My argument is not, by this, to impose an Ubuntu interpretation of CR2R on MNCs outside Africa. Instead, I argue that those operating on the continent accept and live by the principle of identifying with their host communities and societies regarding their economic welfare, including respect for their human dignity.¹¹¹ MNCs should see themselves as part of the African social groups that operate as the facilitators of economic profits within host communities.¹¹² In summary, combining the normative prescriptions of CR2R of negative responsibility with an Ubuntu frame of positive obligations impels MNCs to apply themselves actively to socio-economic development in their host African states and communities. In this sense, the otherwise discretionary CR2R norm could carry some traction to compel positive outcomes for African local communities.

What remains to be considered is how this novel normative orientation for CR2R can take root within Africa as an ethic of conduct that can be applied via judicial interpretation, corporate policies, and regional policy implementation. Section VI, next, considers the potential utilization of these avenues and channels to this end. To be clear, these channels are not exhaustive. Instead, they represent Ruggie's belief that the BHR governance framework requires a smart mix of regulatory and voluntary approaches, 'which do not by themselves create new legally binding obligations but derive normative force through their endorsement by states and support from other key stakeholders, including business itself'.¹¹³

VI. Operationalizing a Congruent Ubuntu-CR2R norm

The localization of the CR2R norm, as explained above in section V, highlights the need to understand and appreciate relevant features of the socio-cultural context in which MNCs operate.¹¹⁴ The goal must be to balance profit maximization and socio-economic development.¹¹⁵ The channels through which this congruent obligation fostered by Ubuntu and the CR2R norm can be operationalized are discussed under the three headings I list below: company-led efforts, legal interpretations, and regional policy implementation.

¹⁰⁹ Léonce Ndikumana, 'Capital Flight from Africa and Development Inequality: Domestic and Global Dimensions', paper presented at the Conference of The Institute for New Economic Thinking (INET), Paris, 10 April 2015.

¹¹⁰ Julius Ihonvbere, 'Underdevelopment and Human Rights Violations in Africa' in Shepherd & Anikpo (eds.), *Emerging Human Rights: The African Political Economy Context* (New York: Greenwood Press, 1990) 64.

¹¹¹ Metz, note 98, 310 ['African Values and Human Rights'].

¹¹² See James Ogude, 'Introduction', in James Ogude, (ed.), *Ubuntu and the Reconstitution of Community* (Indiana: Indiana University Press, 2019) 1, 3.

¹¹³ John Ruggie, 'The Social Construction of the UN Guiding Principles on Business and Human Rights', John F Kennedy School of Government, Harvard University Working Paper No. RWP17-030 (2017), <https://www.hks.harvard.edu/publications/social-construction-un-guiding-principles-business-human-rights>

¹¹⁴ See Geert Hofstede, 'The Business of International Business is Culture' (1994) 3:1 *International Business Review* 1. Unfortunately, corporations more often than not fail to recognize the need to balance the cultural complexity between home and host states. This results in tagging the host state's culture or morality as inferior to the home state. See Christopher Michaelson, 'Revisiting the Global Business Ethics Question' (2010) 20:2 *Business Ethics Quarterly* 237, 247.

¹¹⁵ See generally Steve Ouma Akoth, 'Africa and the Corporate Citizenship Agenda', paper presented at the Kenya Committee on ISO 2006, 1 May 2006.

Company-Led Efforts

Principle 16 of the UNGPs, which relates to the operational activities of MNCs, provides that MNCs should express their commitment to respect human rights through a policy statement. This provision allows MNCs to include context-specific human rights commitments that address their host communities' concerns. Thus, as argued in this paper, Principle 16 offers an avenue for MNCs to express commitment to Ubuntu values in the various aspects of their activities as they affect human rights, the environment, and the socio-economic impacts and implications of their operations for their host communities.¹¹⁶ When MNCs conscientiously embed Ubuntu in their operational policies, they set themselves on the path to obtaining meaningful social licences from host communities in Africa. In sum, MNCs' CR2R statements within an Ubuntu framework would demonstrate their resolve to coexist amicably with their African host communities as partners in their socio-economic activities in these communities.¹¹⁷

In relation to achieving the foregoing, a commitment to HRDD cannot be over-emphasized in an Ubuntu-influenced interpretation of the CR2R norm. To be clear, I am not proposing that companies should do more than what the HRDD framework under the CR2R norm suggests. Instead, they should commit to HRDD standards by paying attention to socio-cultural and economic differences in host communities.¹¹⁸ This stance would ensure that MNCs operating in Africa can objectively assess and adopt unbiased attitudes regarding people's rights, values, beliefs and property.¹¹⁹ This commitment would ensure that they identify potential problems of socio-cultural clashes in their relations with their host communities. For example, in a study of the relationships of four MNCs with a local community in South Africa, it was discovered that the MNCs who partnered with the local community according to Ubuntu values integrated better with society than those with no such relationship or those who paid lip service.¹²⁰

Traditionally, MNCs use due diligence in business transactions involving mergers and acquisitions (M&A).¹²¹ This is because merging two companies with different organizational cultures can generate internal rancour within the new company – a 'we' versus 'they' relationship.¹²² The notion and process of merging two companies can be extrapolated to the relationship between host communities and MNCs. It stands to reason, therefore, that

¹¹⁶ Jacqueline Church, 'Sustainable Development and the Culture of Ubuntu' (2012) 45:3 *De Jure* 511; Aïda Terblanché-Greeff, 'Ubuntu and Environmental Ethics: The West Can Learn from Africa When Faced with Climate Change' in Matthew Chemhuru (ed.), *African Environmental Ethics* (Geneva: Springer, 2019) 93.

¹¹⁷ See Gedeon Joshua Rossouw, 'Business Ethics and Corporate Governance in Africa' (2005) 44:1 *Business & Society* 94, 98.

¹¹⁸ This is what Oyeniyi Abe described as integrating a rights-based approach to developmental projects. See Oyeniyi Abe, *Implementing Business and Human Rights Norms in Africa: Law and Policy Interventions* (Cambridge: Cambridge University Press, 2022), ch 5.

¹¹⁹ Poovan Nengendhri, 'The Impact of the Social Values of Ubuntu on Team Effectiveness', University of Stellenbosch, MA Thesis (March 2006), <https://scholar.sun.ac.za/handle/10019.1/2292> ('[r]espect is one of the foundations on which the African culture is built and therefore it determines the life of an African'). See also Nien-hê Hsieh, 'Corporate Moral Agency, Positive Duties, and Purpose' in Eric Orts and Craig Smith (eds.), *The Moral Responsibility of Firms* (Oxford: Oxford University Press, 2017).

¹²⁰ See generally, Hlanganani Mnguni, Thandeka Sabela, Mfundo Mandla Masuku, and Rachel Nishimwe-Niyimbanira, 'Through the Lens of Ubuntu: The Value of Partnerships and Corporate Social Responsibility Towards Community Development in the City of uMhlathuze, South Africa' (2021) 69:1 *Journal of Social Science* 1.

¹²¹ See generally Daniel Denison and Ia Ko, 'Cultural Due Diligence in Mergers and Acquisitions' (2016) 15 *Advances in Mergers and Acquisitions* 53.

¹²² Mario Pezzillo Iacono, 'Cultural Due Diligence as A Proactive Strategy of Organisational Change: An Empirical Analysis', Piazza Bovio Working Paper Series 12/2011, (2011) Piazza Bovio Working Series No. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2115444

MNCs must consider how best to integrate into host communities to prevent living in a relationship of ostracism with them.¹²³ This paper demonstrates that one way to do this is through the congruence approach. This will foster harmonious co-existence between MNCs and host communities in Africa.

Legal Interpretations

The essence of my preceding discussion of the judicial recognition of the Ubuntu concept in South Africa, Uganda and Lesotho, is that to ignore its tenets in socio-cultural relations constitutes a justiciable cause of action. This disposition is growing in various jurisdictions.¹²⁴ Similarly, litigants before the Economic Community of West African States (ECOWAS) Court of Justice and the African Court on Human and Peoples' Rights increasingly rely on Ubuntu for human rights claims (right to life).¹²⁵ Indeed, Ruggie agrees that non-compliance with the CR2R norm can make MNCs subject to the sanction of adverse public opinion or, in some cases, subject to a legal suit.¹²⁶ Apart from securing MNCs' compliance with the CR2R norm in terms of its community mandates, the developing Ubuntu jurisprudence offers another means by which African courts can interpret the CR2R norm in Africa.¹²⁷

The normative influence of Ubuntu on CR2R as a source of law and its promotion via strategic litigation can also be advanced in terms of its human rights protection and promotion implications through relevant provisions under the *African Charter on Human and Peoples' Rights* (The African Charter).¹²⁸ The African Charter is said to synthesize universal and African elements that balance the application of traditional African principles and modern principles of international law.¹²⁹ The Charter exemplifies a congruent theory's practical workings because it combines the African tradition of communalism with international human rights norms.¹³⁰ In other words, rather than an outright rejection of universal human rights norms, the Charter contextualizes (localizes) them to suit the circumstances and sensibilities of Africans.¹³¹

Through the Charter, an Ubuntu-influenced CR2R norm can be interpreted as a localized instrument. Unlike most human rights instruments that only impose civil and political obligations,¹³² the Charter prescribes correlative rights and duties regarding social,

¹²³ Indeed, Scherer, Palazzo and Matten note that 'TNCs operate in a complex environment with heterogeneous, often contradictory legal and social demands. By itself, this statement implies that whatever the TNCs home country (the United States or China, for example), there will be cultural adaptation challenges to doing business wherever the host country may be (China or the United States, for example)'. See Andreas Georg Scherer, Guido Palazzo and Dirk Matten, 'Introduction to the Special Issue: Globalization as a Challenge for Business Responsibilities' (2009) 19:3 *Business Ethics Quarterly* 327, 328.

¹²⁴ Kamga, note 70, 627.

¹²⁵ See *Linda Gomez v The Federal Republic of Gambia* [unreported] Suit No: ECW/CCJ/APP/18/1. See also *Michelot Yogogombaye v Senegal* (2009) 1 AfCLR 1.

¹²⁶ Ruggie Report, note 35, para 54.

¹²⁷ See generally Rosaline English, 'Ubuntu: The Quest for an African Jurisprudence' (1996) 12:4 *South African Journal on Human Rights* 641. See also Mirna Adjami, 'African Courts, International Law, and Comparative Case Law: Chimera or Emerging Human Rights Jurisprudence?' (2002) 24:1 *Michigan Journal of International Law* 103.

¹²⁸ African (Banjul) Charter on Human and Peoples' Rights OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (adopted 27 June 1981, entered into force 21 October 1986).

¹²⁹ Nsongurua Udombana, 'Between Promise and Performance: Revisiting States' Obligations under the African Human Rights Charter' (2004) 40:1 *Stanford Journal of International Law* 105, 110.

¹³⁰ Thaddeus Metz, 'African Values, Human Rights and Group Rights: A Philosophical Foundation for the Banjul Charter' in Oche Onazi (ed.), *African Legal Theory and Contemporary Problems: Critical Essays* (London: Springer, 2014) 131.

¹³¹ Eva Brems, *Universality and Diversity* (The Hague: Martinus Nijhoff, 2001) 93, 94.

¹³² See generally Makau wa Mutua, 'The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties Evaluation of the Language of Duties' (1995) 35:2 *Virginia Journal of International Law* 339.

economic and cultural matters for states and individuals (including corporations).¹³³ In addition, the Charter charges states and individuals to promote communal relationships in African societies.¹³⁴ The duties that individuals bear in relation to their community members are contained in Chapter II of the Charter. Articles 27–29 highlight the individual's duty to place his physical and intellectual abilities at the service of society and to have regard for the rights of others.¹³⁵ They also refer to an individual's duty to preserve and strengthen positive African values in his relations with other members of society and to promote society's moral well-being.¹³⁶

The Charter's provisions give normative recognition to an intertwining set of social relationships where all members, including corporations, must contribute meaningfully to socio-economic development across Africa. Indeed, the African Union Working Group noted that corporations and individuals have the same obligations under Articles 27–29 of the Charter.¹³⁷ Interpreting Article 27, the Working Group concluded that MNCs' obligations under the Charter have a 'clear legislative basis'. This is because Africans 'do not see [MNCs] as legal artifacts but focus on human beings who preside over organizational activities ...'.¹³⁸ From this premise, it stands to reason that litigants, civil society and advocacy groups can ground claims on African values, like Ubuntu, to argue that MNCs bear positive obligations to promote human rights. By framing claims in this manner, these actors would be acting as local agents in reframing and localizing the normative scope of CR2R in terms of its observance, implementation and enforcement in Africa.

Regional Policy Efforts

African policy efforts can also play an important role in operationalizing the CR2R norm through an Ubuntu lens.¹³⁹ In particular, the proposed African Union (AU) Policy on Business and Human Rights, which aims to make businesses more responsive to human rights,¹⁴⁰ is an essential contribution to the African business and human rights discourse. This policy document, an African Union soft law, offers another opportunity to push forward the localization of the CR2R norm, as advocated in this paper. First, the AU policy provides an

¹³³ See Olufemi Amao, 'The African Regional Human Rights System and Multinational Corporations: Strengthening Host State Responsibility for the Control of Multinational Corporations' (2008) 12:5 *International Journal of Human Rights* 761, 765.

¹³⁴ The Preamble to the Charter provides that '[i]t is henceforth essential to pay particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.'

¹³⁵ *African Charter*, note 128, 9.

¹³⁶ *Ibid.*

¹³⁷ African Commission Working Group on Extractive Industries, Environment and Human Rights in Africa, 'Advisory note to the African group in Geneva on the legally binding instrument to regulate in international human rights law, the activities of transnational corporations and other business enterprises (legally binding instrument)', <https://www.achpr.org/news/viewdetail?id=206> (accessed 14 June 2022).

¹³⁸ See Esinath Ndiweni, 'Towards a Theoretical Framework of Corporate Governance: Perspectives from Southern Africa' in Mathew Tsamenyi and Shahzad Uddin (eds.), *Corporate Governance in Less Developed and Emerging Economies* (UK: JAI Press, 2008) 349.

¹³⁹ See Nora Götzmann and Claire Methven O'Brien, *Business and Human Rights: A Guidebook for National Human Rights Institutions Regional Supplement 1: African Regional Frameworks and Standards on Business and Human Rights* (Geneva and Copenhagen: International Coordinating Committee of National Human Rights Institutions (ICC) and Danish Institute for Human Rights (DIHR), 2013).

¹⁴⁰ Ololade Bamidele, 'AU Set on Making African Businesses More Responsive to Human Rights', *Premium Times* (24 March 2017), www.premiumtimesng.com/business/business-news/227098-au-set-making-african-businesses-responsive-human-rights.html (accessed 29 December 2020).

opportunity to consult with local African communities on how to fashion socio-economic relationships with MNCs operating in Africa for mutual benefit. Furthermore, it is expected that the document would probably define what respect for human rights means to host African communities and how MNCs can meet societal expectations as major socio-economic actors in their host communities.¹⁴¹

Second, the AU policy has the potential to interpret the CR2R norm to include Ubuntu-informed positive obligations. It could move the CR2R norm from ‘do no harm’ to ‘do good’ in Africa. This is not the first time a policy document from the AU has made such a recommendation. Article 24 of the Draft Pan-African Investment Code already provides that investors must comply with human rights and business ethics principles by supporting and taking steps to protect internationally recognized human rights and ensuring the equitable distribution of wealth derived from their investments.¹⁴² The AU Policy on business and human rights could finally be formulated like the Pan-African Investment Code. Doing so would localize the normative scope of an emergent CR2R norm.

Another policy document from Africa that recognizes and explicitly builds on an Ubuntu value are South Africa’s King Reports on corporate governance.¹⁴³ The *King IV Code*, the latest version published in 2016, expressly states that:

[t]his idea of interdependency between organizations and society is supported by the African concept of Ubuntu or Botho ... Ubuntu and Botho imply that there should be a common purpose to all human endeavours (including corporate endeavours), which is based on service to humanity. As a logical consequence of this interdependency, one person benefits by serving another. This is also true for a juristic person, which benefits itself by serving its own society of internal and external stakeholders, as well as the broader society.¹⁴⁴

The *King IV Code* is not restricted to listed companies. It also applies to unlisted entities as well as family and state/foreign-owned companies whose shares are not traded widely. The Code is described as ‘a homegrown solution by Africans for Africans’, and Ubuntu is described as the ‘philosophical golden thread that binds the content of the Code’.¹⁴⁵ Drawing from this template, corporate governance policies or legislation in African countries can be a means to incorporate Ubuntu values to shape corporate regulation in Africa, especially regarding human rights protection and responsible corporate management.¹⁴⁶

¹⁴¹ Indeed, the European Networks of Indigenous Peoples produced a report similar to the AU policy document. Therefore, the AU will not be revolutionizing the business and human rights space if it creates a similar framework. See Johannes Rohr and José Aylwin, *Business and Human Rights: Interpreting the UN Guiding Principles for Indigenous Peoples* (Berlin: European Networks of Indigenous Peoples, 2014). To be clear, the process for the AU Policy document is still ongoing. It is not clear whether local communities will be involved in the drafting stage. At its Working Committee meeting in 2017, there were 50 participants comprising representatives of the African Union (AU) member states, Regional Economic Commissions (RECs), National Human Rights Commissions, Businesses, the media and civil society. See Bamidele, *ibid*.

¹⁴² African Union Commission, Economic Affairs Department, ‘Draft Pan-African Investment Code’, (December 2016), https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf (accessed 7 June 2021).

¹⁴³ Andrew West, ‘The Ethics of Corporate Governance: A (South) African Perspective’ (2009) 51:1 *International Journal of Law and Management* 10, 12.

¹⁴⁴ Institute of Directors of Southern Africa, *King IV Report on Corporate Governance for South Africa 2016* (Johannesburg: Institute of Directors of Southern Africa, 2016).

¹⁴⁵ See International Finance Corporation, *What We Learned About Corporate Governance and Code Development in Sub-Saharan Africa* (Washington, DC: International Finance Corporation Report, 2018).

¹⁴⁶ See International Corporate Governance Network, ‘Human Rights through a Corporate Governance Lens’ (April 2015), www.icgn.org/sites/default/files/202105/1.%20Human%20rights%20through%20a%20corporate%20governance%20lens.pdf (accessed 15 June 2022).

In sum, Ubuntu holds the potential of an efficacious tool for socio-economic transformation that MNCs, local communities and African regional bodies can collaboratively explore to improve the normative scope and obligatory imprimatur of the CR2R norm. The ultimate framework must remain focused on strong business ethics to minimize the negative impacts of business practices, enhance MNCs' potential to live by human rights standards, promote social justice, and share the resulting benefits with local communities as co-habitants of the lands whose resources support the economic outputs. To enhance its prospect of gaining legitimacy and influence over corporate conduct in Africa, the CR2R norm must be localized and moored to the socio-cultural languages of the people. For Africa, that language is embedded within Ubuntu.

VII. Conclusion

Utilizing the international relations theory of norm diffusion, I have shown that the concept of Ubuntu is an appropriate vehicle for localizing and supporting the CR2R norm to protect and promote human rights in the course of MNCs' exploration in African host communities. It was iterated that the appropriateness of Ubuntu for this exercise stems from its encapsulation of values that express the need for cooperative commitment from individuals, communities and legal entities to work together in using the fruits of their endeavours to uphold human dignity, relate in acknowledgment of interdependence, interconnectivity, and communalism, and respect for human rights. As such, Ubuntu and the CR2R norm are similar in two ways. First, Ubuntu, like the CR2R norm, prescribes normative conduct for corporate behaviour. Second, Ubuntu, like the CR2R norm, recognizes the interconnectivity between corporations and the society in which they operate. However, Ubuntu goes beyond the CR2R norm's baseline expectation to 'do no harm'. Therefore, an Ubuntu-influenced interpretation of the CR2R norm helps to fill the positive obligation vacuum presently lacking in the CR2R norm interpretation for the benefit of Africans. It also provides a legitimate normative platform to implement the CR2R norm in Africa. This way, MNCs are brought into the regime of relational ethics that defines and directs socio-economic inter-relationships in the communities where their investment activities occur. The hope is that under this regime, Africans can be better respected as humans whose dignity is equal to that of humans elsewhere, and whose need for the basics of food, shelter and clothing can be more adequately responded to by those who have better means to exploit their natural and other resources than they can marshal.

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