1 Is there an African approach to international law? Is it even needed?

*Apollin Koagne Zouapet**

1 Introduction

In the aftermath of their independence, African states participated in and became part of the vast movement of new states that contested their submission to an international law, to which elaboration they had not contributed, and which in some cases had been an instrument of their domination by the so-called 'civilised' colonial powers.[1] In many international spheres, these states have thus invoked a right of inventory, allowing them to choose from the existing normative arsenal the rules to which they consider themselves subject and which, therefore, would be enforceable against them. Following the example of most states that gained independence in the first half of the twentieth century, African states consider that the formation of the international law in force was done without their participation, without their involvement, and was imposed upon them. Therefore, they dissociate themselves from certain principles and rules, drawn up by a small number of European powers or powers of European origin, whose 'criteriological particularism', the fruit of a dominant but not universal civilisation, they castigate.[2] They emphasise Africa's absence from the major peace conferences held in The Hague in 1899 (26 participating states, none of which were African) and 1907 (44 participating states, five of which were Asian and none African) as well as from the League of Nations, which has only four African states among its members (Egypt, Ethiopia, Liberia and the South African Union). African states also believe that the normative structures devised

* This chapter was prepared as part of a postdoctoral fellowship at the Berlin-Potsdam Research Group 'The International Rule of Law – Rise or Decline'. Some of the ideas in this contribution were further developed by the author in Working Paper 52 of the Berlin-Potsdam Research Group. See A Koagne Zouapet 'Regional approaches to international law (RAIL): Rise or decline of international law?' (2020) 52 KFG Working Paper Series. The views expressed here are those of the author and do not necessarily reflect those of the International Court of Justice or the United Nations.

1 On the *jus publicum europaeum* and the colonisation of Africa, see AA Yusuf *Pan-Africanism and international law* (2014) 57-77.

2 R Yakemtchouk *L'Afrique en droit international* (1972) 11-12.

by the European powers were lagging behind the imperatives of modern international life and called for a 'new international law'.[3]

Beyond the contestation of specific rules, African states did not question the existence of an international law that should govern their relations with other states, nor their submission to these rules. What they were contesting was the idea of a Eurocentric international law that did not take into account their specific requirements and needs, and reflected their specific interests.[4] Behind the discourse of these states, there was the underlying idea of a Third World vision, if not specifically African, of what the international legal order should be. It seemed to them essential, for example, that international law should clearly reject any colonial enterprise and allow them to fight effectively for the liberation of the continent from colonialism and racism. Without claiming an 'African international law' there was, therefore, a vision or a specific African approach to international law that justified the initiatives, positions and votes in the various international bodies, mainly in United Nations (UN) bodies.[5]

In the international law scholarship, the question has also arisen among African international lawyers who have questioned the existence of African international law in pre-colonial Africa and/or Africa's contribution to the development of international law. While the United Nations (UN) provided African governments with a platform to present their political positions, the academic world (universities, academic journals, conferences) offered a much less inviting area for African and, in general, Third World voices to be heard.[6] Nonetheless, a small number of voices did enter the conversation and were able to formulate criticism of European international law on different levels and with different strategies. Gathii divides African scholars' international legal literature on the issue into two streams: on the one hand, what he identifies as a 'contributionist' and 'weak' approach which 'is largely complimentary of the liberatory claims of principles such as self-determination as uncompromising tenets of world peace and indicators of the rejection of the colonial experience', and 'uncritically endorses the United Nations agenda in areas such as human rights and the right to development as

3 Yakemtchouk (n 2) 14-15. See also TO Elias *Africa and the development of international law* (1988) 33; Yusuf (n 1) 101-102.

4 See FC Okoye *International law and the new African states (*1972) 178.

5 For an overview of these different initiatives, see Yusuf (n 1) 103-141.

6 J von Bernstorff & Ph Dann 'The battle for international law. An introduction' in J von Bernstorff & Ph Dann (eds) *The battle for international law. South-North perspectives on the decolonisation era* (2019) 25.

having potential and being of continuing benefit to the formerly colonised countries';[7] on the other hand, the approach described as 'critical' and 'strong' that focuses on 'the claims and role of economic, political, social and cultural superiority/inferiority in the historical relationship of colonized and colonizing countries in the past and present' and expresses its 'desire for self-determination and autonomy from all form of external or neo-colonial controls'.[8] Gathii's classification has been criticised for being 'broad-brush' in its approach, implicating both the history and theory of international law, while ignoring the political and intellectual context in which these different approaches developed.[9] In any case, this African international legal scholarship shared a common desire to see Africa and African states move from the status of objects to that of true subjects and actors of international law.

Here again, as with the reactions of states in international fora, less than the claim of a re-reading of a past that is now over, it is a question for academics from young independent states to demonstrate and ensure that these states are not totally alien to international law and that they can, or more precisely must, contribute actively and effectively to the development and application of international law. Far from being only 'importers' and 'consumers' of norms, Africans and African states have a philosophy, a specific vision of international law that should be taken into account for the emergence of a truly universal international law. Yakemtchouk thus indicated in 1971 that since the African colonial heritage now belongs to the past, African states are faced with the task of building a network of specifically regional norms. By observing the practice of young states, he believes that he can detect a certain specificity peculiar to Africa which, given the constant implementation of these specific elements, will lead to the progressive consolidation of an African law.[10]

Sixty years after independence, it is questionable whether the trend observed by Yakemtchouk has been confirmed. Even though 'neither

7 JT Gathii 'International law and eurocentricity' (1998) 9 *European Journal of International Law* 189. Cf Mutua, speaking of 'minimalist assimilationists' in M Mutua 'What is TWAIL?' (2000) 94 *American Society of International Law Proceedings* 32.

8 Gathii (n 7) 187. For specific studies on the approach of the authors of each stream, see C Landauer 'Taslim Olawale Elias. From British colonial law to modern international law' in von Bernstorff & Dann (n 6) 318-340; JT Gathii 'A critical appraisal of the international legal tradition of Taslim Olawale Elias' (2008) 21 *Leiden Journal of International Law* 317-349; U Özsu 'Determining new selves. Mohammed Bedjaoui on Algeria, Western Sahara, and post-classical international law' in von Bernstorff & Dann (n 6) 341-357.

9 C Gevers 'Literal "decolonisation". Re-reading the African legal scholarship through the African novel' in von Bernstorff & Dann (n 6) 389.

10 Yakemtchouk (n 2) 11-12.

librarians nor "Google" can find a single entry for a *jus gentium africanum,* it is fair to pose the question whether there is a specific, recognizable "African international public law"'.[11] How far have the African states been successful in playing their part in the development of international law since their independence and the subsequent demands they have made? Besides this, how far do cultural factors have their influence on the attitudes of African states and scholars towards international law? Have African states succeeded in consolidating specific principles of international law in such a way as to see the emergence of a genuine African regional law? Is it possible to speak today of an African approach to international law that would be inspired by an African legal philosophy and anthropology that some researchers had already highlighted?[12] The simple fact of envisaging a reflection on an African approach/vision of international law, or even for the most daring, an 'African international law', raises fundamental questions that touch on the very ontology of international law: What does it entail? What issues, procedures and process do we have in mind when we suggest that there should be or could be an African approach to international law? In a basic way, what is the purpose of, or a need for, such an idea?

The reflection on an African approach or vision of international law cannot be carried out in abstraction of the current context and the crisis that international law is undergoing. Indeed, in recent years the spectre of fragmentation of international law has been a source of anxiety and concern for the international legal community. The anxiety and fear associated with a possible fragmentation of international law are not new and seem to be consubstantial with the very existence of the discipline.[13] Torn between the imperative of unity of a law intended to govern all the actors of international society and the calls for diversity from these actors, at least some of them, international law seems to be undergoing an existential crisis: 'It wants to be universal (but not totalitarian) and particular (but not anarchist).'[14] The field of international law looks stuck 'between the centripetal search for unity and universality and the

11 J Zollmann 'African international legal histories – international law in Africa: Perspectives and possibilities' (2018) 31 *Leiden Journal of International Law* 898.

12 See, eg, JI Lewitt 'African origins of international law: Myth or reality?' (2015) 19 *UCLA Journal of International Law and Foreign Affairs* 113-165.

13 See on the argumentative structure of the fragmentation debate in a historical perspective, A-C Martineau 'The rhetoric of fragmentation: Fear and faith in international law' (2009) 22 *Leiden Journal of International Law* 1-28.

14 Martineau (n 13) 5. See also R-J Dupuy 'Conclusions of the workshop' in R-J Dupuy (ed) *The future of international law in a multicultural world* (1984) 470; M Jorgensen 'Equilibrium and fragmentation in the international rule of law: The rising Chinese geolegal order' (2018) 20 KFG Working Paper Series 8.

centrifugal pull of national and regional differences'.[15] This existential crisis of international law is all the more incurable since its specialists perceive fragmentation only in terms of their idea of what international law is or should be. Indeed, while some are concerned that the unity of international law is being undermined in the face of divergent and (too) specialised interpretations, others, on the contrary, welcome the sign of greater pluralism which, without necessarily leading to legal relativism, would make it possible to reflect the diversity of international law. As Martineau notes, the debate on the fragmentation of international law first and foremost is a formidable rhetorical tool in the construction of an academic and political vision, the expression of faith and/or fears in and about the evolution of international law.[16]

Seen in this light, the current debate on the fragmentation of international law expresses anxiety about both the discourse on international law of certain political leaders and the centrifugal tendencies of certain special regimes and regional groupings.[17] While the UN International Law Commission (ILC) has addressed the issue, it has seemed to respond reassuringly to the threat of a possible material fragmentation of international law in the face of certain functional regimes, considering that regional approaches can only have an impact if they have a normative scope.[18] For the ILC, on the one hand, the strong presumption of the universality of international law in the legal profession limits such regional approaches and doctrines to mere convergences of interests, values and political objectives. On the other hand, regionalism can arguably be seen as a specific application of special regimes of international law.[19] Presuming and affirming the unity and universality of international law, the Commission examines regionalism solely through the prism of the hierarchy of norms and the rudimentary relationship between domestic or regional legal orders and the international legal order.[20] However, there

15 A Roberts *Is international law international?* (2012) 3.

16 Martineau (n 13) 8-9.

17 See H Kriege & G Nolte 'The international rule of law – rise or decline? Points of departure' (2016) 1 KFG Working Paper Series. See also H Krieger 'Populists governments and international law' (2019) 30 *European Journal of International Law* 971-996; CA McLachlan 'Populism, the pandemic and prospects for international law' (2000) 45 KFG Working Paper Series.

18 See Report of the Study Group of the International Law Commission (ILC), finalised by M Koskenniemi 'Fragmentation of international law: Difficulties arising from the diversification and expansion of international law' UN Doc A/CN.4/L.682, 13 April 2006.

19 Report of the ILC's Study Group (n 18) paras 103-108, paras 1999-208.

20 See for an analysis of the Report and conclusions of the ILC Study Group, A de Hoogh 'Regionalism and the unity of international law from a positivist

seems to be a need for a more open approach to the issue and not to limit it to an already agreed conception of international law. The debate on regionalism or, in the case of this reflection, on regional approaches to international law (RAIL) such as the African approach, cannot free itself from an ontological reflection on international law: The first question to be posed before asking whether regional approaches are desirable is 'desirable in relation to what'?[21] It is this preliminary question that the first part of this chapter seeks to address.

It is impossible to address in an in-depth way all the issues raised above, the answers to which alone would allow for a comprehensive approach to the question, in a contribution such as this. The present reflection, therefore, will merely raise those issues that are considered essential and that can guide a deeper consideration of the other aspects, which are also addressed in other contributions in this book. Thus, as mentioned, the first part will address the challenge of the existence of an African approach to international law. This part, which is the densest part of the study, will concern both the challenge that the African approach, such as all RAIL, can pose to international law and the challenge that the formulation of such an approach poses for Africans themselves. The second part will look specifically at the criteria for a purely African approach, and the third part will look concretely at Africa's contribution to the development and practice of international law. The analysis will focus on those international law norms arising within Africa that have created new legal concepts or elaborated on existing ones, and which have subsequently exerted influence beyond the continent.

2 The call for an African approach to international law: Contributing to the development of plural and diversified universal international law

The idea of an African approach to international law or even 'African international law' is not something entirely new and international law has other precedents. As early as 1910, Alejandro Alvarez published his book on 'American international law' calling for the recognition of norms specific to the American continent. Some time later, the American Institute of International Law proposed to examine American legal issues either in accordance with generally-accepted principles or by

perspective' in MJ Aznar & ME Footer (eds) *Select proceedings of the European Society of International Law: Regionalism and international law Valencia, 13-15 September 2012* (2015) 51-76.

21 L Fawcett 'Regionalism: From concept to contemporary practice' in Aznar & Footer (n 20) 10.

creating new principles adapted to the special needs of the American continent.[22] While this trend at the time was challenged and rejected as a danger to international law, which necessarily is one and indivisible, this has not prevented more recent claims for regional or even national approaches to international law. At the first World Meeting of Societies for International Law, organised at the initiative of the Société Française de Droit International in 2015, some 40 regional and national societies were present.[23] They will more than double their number at the second meeting in 2019 in The Hague.[24] This multiplication of national and regional learned societies of international law has been accompanied by the production of numerous scientific writings questioning and/or calling for a regional or even national approach or vision to international law.[25]

As with the 'American international law' of the early twentieth century, these claims for national and regional approaches to international law are anxiously observed by some international lawyers, whose views are well summarised by Wood. For Wood, there can be no such thing as

22 See A Alvarez *Le droit international américain. Son fondement, sa nature, d'après l'histoire diplomatique des états du nouveau monde et leur vie politique et économique* (1910) 392; W Samore 'The new international law of Alejandro Alvarez' (1958) 52 *American Journal of International Law* 41-54; JL Esquirol 'Alejandro Álvarez's Latin American Law: A question of identity' (2006) 19 *Leiden Journal of International Law* 931-956; A Becker Lorca 'International law in Latin America or Latin American international law – Rise, fall and retrieval of a tradition of legal thinking and political imagination' (2006) 47 *Harvard International Law Journal* 283-306; L Obregón 'Regionalism (re-) constructed: A short history of a "Latin American international law"' in Aznar & Footer (n 20) 25-38; JL Esquirol 'Latin America' in B Fassbender & A Peters (eds) *The Oxford handbook of the history of international law* (2012) 553-577.

23 http://www.sfdi.org/wp-content/uploads/2015/06/Liste-des-participants-version-finale.pdf (accessed 12 December 2020).

24 https://rencontremondiale-worldmeeting.org/societies-represented/ (accessed 12 December 2020).

25 See, among others, F Messineo 'Is there an Italian conception of international law' (2013) 2 *Cambridge Journal of International and Comparative Law* 879-905; H Xue 'Chinese contemporary perspectives on international law. History, culture and international law' (2011) 355 *Recueil des Cours* 41-234; H Ruiz Fabri 'Reflections on the necessity of regional approaches to international law through the prism of the European example: Neither yes nor no, neither black nor white' (2011) 1 *Asian Journal of International Law* 83-98; O Corten 'Existe-t-il une approche critique francophone du droit international? Réflexions à partir de l'ouvrage Théories critiques du droit international' (2013) 46 *Revue Belge de Droit International* 257-270. P Palchetti 'International law and national perspective in a time of globalisation: The persistence of a national identity in Italian scholarship of international law' (2018) 20 KFG Working Paper Series; see the different contributions on the French, German, American, Canadian and European approaches/visions/influences in Société Française pour le Droit international *Droit international et diversité des cultures juridiques/International law and diversity of legal cultures* (2008) 473.

a European, or any other regional, approach or vision of international law:[26]

> First, there is, and can only be, one system of international law in today's world. International law is universal – or it is nothing. Secondly, while there may be an infinite variety of approaches to (or visions of) international law, it is not helpful to seek to corral this rich variety into a European approach or vision, an American one (or perhaps an Anglo-American one), and other visions, somehow embracing the rest of the world.

Indeed, the question of regionalism has always been generally perceived and analysed through the prism of the unity or/and universality of international law. The idea of a universal international law governing the relations between the actors of the international society implies the existence of a certain number of rules and principles of which the validity is not suspended to the particular contingencies of this or that region. This idea is further strengthened when universal rules derive their validity from specific values, an embodiment of the 'legal conscience of mankind', the minimum from which the unity of international law develops.[27] This contribution is unlikely to deviate from this. That is why it focuses on 'African approaches to international law' and not on the idea of 'African international law'. Nevertheless, and contrary to the approach often followed, this chapter will question the very notions of unity and universality and the representations that international law scholars make of these. As rightly pointed out, whether we want it or not, in the background of such reflection always lies a play of influence. The answer very much depends on how the question is phrased and the disciplinary bias of the author.[28] An important part of the analysis, therefore, will focus on the discourse of/on international law, that is, 'acts to signify generalised; socially constructed categories of thought to which important social meanings and values are attributed. Discourses promote particular

26 M Wood 'A European vision of international law: for what purpose?' in H Ruiz Fabri, E Jouannet & V Tomkiewicz (eds) *Select proceedings of the European Society of International Law, Volume 1 2006* (2008) 152. In the same sense, for a vehement negation of a European international law, A Orakhelashvili 'The idea of European international law' (2006) 17 *European Journal of International Law* 315-347.

27 J-M Bipoun-Woum *Le droit international africain. Problèmes généraux- règlement des conflits* (1970) 11-12; E McWhinney 'Comparative international law: Regional or sectorial, inter-systemic approaches to contemporary international law' in Dupuy (n 14) 224-225; H Xue 'Meaningful dialogue through a common discourse: Law and values in a multi-polar world' (2011) 1 *Asian Journal of International Law* 13.

28 Ruiz Fabri (n 25) 84.

categories of thought and belief that guide our responses to the prevailing social environment.'[29]

The purpose of this contribution is not to contest the universal vocation of international law, nor its unity. On the contrary, it affirms that universality is consubstantial with international law, but invites further reflection on it. Such a reflection requires consideration of whether the application of international law extends to any subject concerned, whether no object is excluded and whether its objectives are achieved to the benefit of all.[30] This leads to the realisation that the universality and the unity of international law are a project, a process that is built up daily. In the words of Heselhaus, 'the assumption is that contrary to a glance at first sight, universality of international law has not come to an end. On the contrary, universality still is and in the 21st century will be a permanent and prevailing task, not only for the community of states, but for the academic legal community as well.[31]

Therefore, it is essential, in order to build a universal and unified international law, that international lawyers admit that, far from being acquired and immutably inscribed in the genes of international law, universality is a horizon, a roadmap that invites a specific methodological approach. Similarly, the unity of international law must not be dogmatically perceived in a way that is definitively irreconcilable with the pluralism to which the diversity of international society invites. The first paragraph of this part, therefore, will call for a move away from the illusion of pseudo-universality and dogmatic approach to international law towards the elaboration of a genuine universalisation of international law.

For Africans, and because of the particular history of the continent, the elaboration of an African approach is an imperative that responds to the need expressed after independence for an international law that is at the service of their development. The construction of such an African approach must be guided by an inclusive logic, ensuring the participation of Africa and Africans in the elaboration and application of international law, while avoiding the trap of a regionalist approach, which would have

29 T Evans 'International human rights law as power/knowledge' (2005) 27 *Human Rights Quaterly* 1049.

30 M Chemillier-Gendreau 'À quelles conditions l'universalité du droit international est-elle possible?' (2011) 355 *Recueil des Cours* 19; O Yasuaki 'A transcivilisational perspective on international law. Questioning prevalent cognitive frameworks in the emerging multi-polar and multi-civilisational world of the twenty-first century' (2009) 342 *Recueil des Cours* 220-221.

31 S Heselhaus 'Universality in international law in the 20th century' in T Marauhn & H Steiger (eds) *Universality and continuity in international law* (2011) 474.

the ambition to move from a Western-centred international law to an Afro-centred international law. These are the issues addressed respectively in the second and third paragraphs of this part.

2.1 Ending the illusion of a proclaimed unity and universality of international law

Although the terms 'universality' and 'unity' are sometimes used interchangeably, and despite the close interrelationship that exists between them when applied to international law, the two words nevertheless are not synonymous. As Prost explains, 'to say that law is universal is not the same thing as to say that it is one or unitary. Law can be both universal and fragmented. Similarly, a regional or local order can be perfectly unitary. There is no *a priori* or necessary connection between unity and universality.'[32] Unity always necessitates some form of connection or rapport between the constituent parts. There must exist a certain structure in the object, that is, a mutual connection between its different parts that make it possible to perceive it as a unitary whole.[33] To find unity in an immaterial thing such as international law, for example, there must exist between its constituent parts some causal link that justifies the categorical synthesis (substantial, cultural, logical).[34] Universality, on the other hand, can have two main meanings. At the most fundamental or basic level, the universality of law signifies its omnipresence: The law can be encountered everywhere at once.[35] At a second level, universality means generality; to say that international law is universal in this second sense thus is to say something about its reach and scope. 'It signals the all-inclusiveness of the international legal domain but says little about the unity of its forms or substance.'[36]

In the discourse on international law, and despite Prost's reservation on the synonymy that may exist between the unity and universality of international law,[37] the validity of one term is derived from the other. If international law is one, it is because it is elaborated inclusively and

32 M Prost *The concept of unity in public international law* (2012) 34-35.

33 Prost (n 32) 25.

34 After stressing the arbitrary and versatile nature of the establishment of the unity of immaterial things such as law, Prost indicates that unity can derive from several causes or criteria that are often subjective; Prost (n 32) 25-31.

35 Prost (n 32) 35.

36 Prost (n 32). For a broader presentation of different conceptions of universality, see also Heselhaus (n 31) 472-474; B Simma 'Universality of international law from the perspective of a practitioner' (2009) 20 *European Journal of International Law* 267-268.

37 Prost (n 32) 36-38.

universally, taking into account all the variations and contributions of the different actors involved; its universality of elaboration, therefore, gives it its unity. Its universal vocation thus is the glue that holds together the different elements and branches of international law. Here, the unity of international law allows it to define the common interests of the members of the international society despite the extreme diversity of society or issues. In turn, this unity ensures its universal application by all and for all: It is because international law does not admit variations that it must be interpreted and applied in a uniform, or at least consistent, manner. Thus, there is a 'virtuous' circle where each characteristic infinitely reinforces the other. The problem is that this understanding of the unity and universality of international law is based on a myth, a fantasy that does not reveal the reality of international law. It is the recognition and acknowledgment of this reality that justifies and underpins regional approaches such as the African approach to international law.

2.1.1 African approach as a means for the universalisation of international law

For many, if not all, international lawyers, to question the universality of international law is to question the very *raison d'être* of the discipline. Jennings said in this regard that universality is the first and essential general principle of international law that it is vital to safeguard.[38] This universality not only defines the geographical (worldwide) and personal (for all subjects of international law) scope of application of the rules of international law, but also founds the spirit and collegial feeling of the 'invisible college of international lawyers'.[39] Indeed, 'unlike any other body of lawyers, international lawyers speak the common language of a universally accepted discipline, share a common commitment to furthering the universal reign of law and the universal ideal of human dignity and keep functioning constantly across national borders'.[40] It is this commitment, this devotion of international lawyers to their field

38 R Jennings 'Universal international law in a multicultural world' in M Bros & I Brownlie (eds) *Liber amicorum for the Rt Hon Lord Wilberforce* (1987) 41. Many important notions in international law, such as *jus cogens,* obligations *erga omnes* presuppose the idea of international law with universal validity. See A Koagne Zouapet 'To be or not to be imperative: *Jus cogens* between universal vocation and regional claims' (2021) 86 *QIL, Zoom-in* 47-70.

39 O Schachter 'The invisible college of international lawyers' (1977) 72 *Northwestern University Law Review* 217-226.

40 CG Weeramantry *Universalising international law* (2004) 79. On the commitment of international lawyers to their discipline, see M Koskenniemi 'Between commitment and cynicism: Outline or a theory on international law as practice' in United Nations Office of Legal Affairs *Collection of essays by legal advisers of international organizations and practitioners in the field of international law* (1999) 497-501.

that can undoubtedly explain their idealised vision of the universality of international law. Such a dogmatic conception of universality can be problematic and even ultimately lead to the loss of this attribute by international law. As Jennings rightly points out, a universality that would be so rigid that it would not admit the possibility of regional approaches would lead to imperialist law being imposed by certain states or other fundamentalist ideologies on other subjects of international law. The postulate of universality, though logically necessary to any system of law that claims to be a true international law, may fall short of the full realisation of universality in act: It may take the form of an assumption of superior power, or superior culture or civilisation by one group of subjects (states or others) so that international law then takes the form of a legal sanction for the subjection more or less of some people to others.[41]

As Roberts acknowledges from the very first pages of her famous book, even though international law aspires to be the world's Esperanto, the reality is different from this theoretical postulate. International law, in fact, is the product of the domination of certain states and regional groups, very often Western, which, without having the monopoly to define what international law is, succeed in imposing their vision and approaches.[42] Going further, Roberts emphasises the subjectivity that lies at the heart of the 'science' of international law: 'What counts as international law depends in part on how the actors concerned construct their understandings of the field and pass them on go to the next generation.'[43] As shocking as it may seem, this assertion by Roberts nonetheless is difficult to contest. Like all the social sciences and other 'humanities', the study of international law and the formulation of the rules of international law contain a significant degree of subjectivity related to the human nature of those who study it. Unless one challenges the insurmountable subjectivity of the actors of international law (state representatives, judges, international civil servants, academics, counsel and lawyers) or deifies them by depriving them of their human weakness (if one considers that a subjective appreciation of the world is a weakness) one must admit that the alleged universality of international law is only an illusion and that all these actors appreciate norms and rules through the prism of their position, culture and/or interests. Indeed, 'international law aspires to be a universal field, but is also, and inevitably, a deeply human product'.[44] As pointed out by Koskenniemi, a court's decision or

41 Jennings (n 38) 42.

42 Roberts (n 15) 9.

43 Roberts (n 15) 2.

44 Roberts (n 15) 320. See also M al Attar 'Reframing the "universality" of international law in a globalising world' (2013) 59 *McGill Law Journal/Revue de droit de McGill* 138-139.

a lawyer's opinion is always a genuinely political act, a choice between alternatives not fully dictated by external criteria.[45]

Any answer is necessarily situated, that is, linked to the person giving it, and may therefore vary according to that person's professional situation, origin and training.[46] Concepts and principles now considered universal, such as freedom of the seas or *jus cogens*, were first theorised and proposed to address specific concerns in particular contexts.[47] There is no strictly globalist or cosmopolitical vision of international law, as Jouannet reminds us,[48] but rather an inevitable multiplicity of particular national, regional, individual and institutional visions of international law. This can be explained by the fact that all the players in the international game are conditioned by their own legal culture and not by a cosmopolitical legal culture that does not yet really exist as such. If it can be admitted that international law itself constitutes a kind of common language, an Esperanto as indicated above, this language is expressed through singular voices that continue to emerge from particular and differentiated legal cultures. This is why it is essential that every actor of international law is aware of his or her own biases and has the modesty to recognise his or her consubstantial subjectivity.

The problem then is not subjectivity in the approaches to and development of international law, but its negation. The existence of different legal cultures and perspectives is not an obstacle to the universality of international law, as long as the recognition of these differences enables bridges to be built between them. The main obstacle to the universality of international law, thus, is not the diversity of approaches, but the

45 M Koskenniemi 'What is international law for?' in MD Evans (ed) *International law* (2018) 42. See also Prost (n 32) 129; L Delabie *Approches américaines du droit international. Entre unité et diversité* (2011) 224-341; D Kennedy 'One, two, three, many legal orders: Legal pluralism and the cosmopolitan dream' (2007) 31 *New York University Review of Law and Social Change* 647-649; A Bianchi & A Saab 'Fear and international law-making: An exploratory inquiry' (2019) 32 *Leiden Journal of International Law* 351-365.

46 Ruiz Fabri (n 25) 85. See on the 'imperial ambivalences' of international law and lawyers about the exercise of power, and of the West about the rest of the world, N Berman *Passion and ambivalence: colonialism, nationalism and international law* (2011) 419-424.

47 On the notion of *mare liberum* developed by Grotius in direct response to the needs of colonial empires, see McWhinney (n 27) 223; M Craven 'Colonialism and domination' in Fassbender & Peters (n 22) 862-863. On the genesis of *jus cogens,* as exposing the 'dark sides of international law', see F Lange 'Challenging the Paris Peace Treaties, state sovereignty and Western-dominated international law – The multifaceted genesis of the *jus cogens*' (2018) 19 KFG working paper series.

48 E Jouannet 'Les visions française et américaine du droit international: cultures juridiques et droit international' in Société Française pour le Droit international (n 25) 43-44.

hegemonic will of certain operators of international law to claim that their approach, their vision is universal since it is objective, and/or necessary for the good of humanity. This gives them an excuse to cling to their beliefs and convictions, refusing any debate, confident that they are necessarily right and others are wrong. This actually reveals a kind of contempt and condescension for others: 'Respect for others includes the recognition that they are equally capable of carrying their own burdens of judgment and that in doing so they might well reach conclusions different from our own.'[49] It is necessary, writes Ruiz Fabri, to realise the ambivalence of the reference to the universal as, since the latter has no voice of its own to express itself, it is constantly susceptible to subjective appropriations, possibly suspicious of ulterior motives, and the suspicion of imperialist temptation can never be dismissed. She rightly warns Europe and European academics against this temptation, but this applies to all international lawyers and all regions of the world.[50]

Indeed, the 'European subjectivity has traditionally been presented and has often been received as universal objectivity'.[51] In the field of the history of international law, periodisation is based on a division that corresponds primarily to a Western-centred approach falsely presented as objective. This distortion is reflected in an over-emphasis on European authors and practice, and an under-emphasis on, or even an omission of, non-European experiences.[52] Similarly, in the field of identification

49 E Voyiakis 'International law and the objective of value' (2009) 22 *Leiden Journal of International Law* 57.

50 Ruiz Fabri (n 25) 95. In the same vein, see M Koskenniemi 'International law in Europe: Between tradition and renewal' (2005) 16 *European Journal of International Law* 115. Another author harshly castigates 'ces "juristes impérialistes", si bien intentionnés, "fiers de leur mission et surs de leurs pouvoirs"'. W Capeller 'Droits infligés et "chantiers du survivances": De quel lieu parle-t-on?' in W Capeller & T Kitamura (eds) *Une introduction aux cultures juridiques non occidentales* (1998) 29. On the risk of instrumentalising the universal and the general interest, see also P Wrange 'Is there a general interest *hors la loi*?' in Ruiz Fabri et al (n 26) 279-292.

51 al Attar (n 44) 127. Capeller denounces a 'shamelessly pretentious' European production of legal studies; Capeller (n 50) 13. See also M Chiba 'Droit non-occidental' in Capeller & Kitamura (n 50) 44; M Bennouna 'Droit international et diversité culturelle' in United Nations *International law on the eve of the twenty-first century. Views from the International Law Commission* (1997) 81; PhC Jesup 'Non-universal international law' (1973) 12 *Columbia Journal of Transnational Law* 415-429; M Mutua 'What is TWAIL?' (2000) 94 *American Society of International Law Proceedings* 37; A Bradford & EA Posner 'Universal exceptionalism in international law' (2011) 52 *Harvard International Law Journal* 6; K Gorobets 'The unity of international law: An exercise in metaphorical thinking' 15-16, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3599840 (accessed 22 December 2020).

52 See O Diggelmann 'The periodisation of the history of international law' in Fassbender & Peters (n 22) 1000-1001; A Becker Lorca 'Eurocentrism in the history of international law' in Fassbender & Peters (n 22) 1034-1057; BS Chimni 'The past,

of customary law, both national and international jurisdictions, learned societies and authors tend to rely almost exclusively on the practice or case law of a handful of mainly Western states and English-language and sometimes French-language sources. As a result, the practice of non-Western states, as well as that of non-Anglophone/Francophone sources, is often omitted, or insufficiently considered in the analysis.[53] The problem, once again, is not the non-exhaustiveness or selectivity of the data collected, but the willingness to present these results as objectives and reflecting universally-accepted or elaborated international law.

By endowing it with a proclaimed rather than a constructed universality, international lawyers have made international law 'a weapon of choice, an instrument of assertion, a strategic stake' in the eyes of states, who think they can use it to defend any position.[54] This irremediably leads to a crisis of universality. Fashionable concepts such as 'international community' help to convey the erroneous idea that such a community, very embryonic and still (very slowly) being built, already exists, and contribute to this 'race for universality'; a tool at the service of the dominant rhetoric to conceal its domination under the guise of pluralism in order to make it better accepted, and above all to make it unquestionable, on pain of the protester passing as anti-humanist.[55] Universality is not and could not mean an unalterable truth, legal principles and rules enacted by a cultural or social group as being imposed on the whole of international society because these principles and rules would carry, in the opinion of those who enact and defend them, unquestionable universal values.

present and future of international law: A critical Third World approach' (2007) 8 *Melbourne Journal of International Law* 499-516; H Steiger 'Universality and continuity in international public law' in Marauhn & Steiger (n 31) 13-43; RP Anand 'Universality of international law: An Asian perspective' in Marauhn & Steiger (n 31) 87-105. A Becker Lorca 'Universal international law: Nineteenth-century histories of imposition and appropriation' (2010) 51 *Harvard International Law Journal* 475-552.

53 Of course, this may be linked to the accessibility and availability of documents from countries, particularly in the south. However, it is important to emphasise that the digital divide, far from being an excuse and/or justification, is part of the problem. See A Roberts & S Sivakumaran 'The theory and reality of the sources of international law' in MD Evans *International law* (2018) 105-16; A Boyle & C Chinkin *The making of international law* (2007) 28-29; K Linos 'Methodological guidance. How to develop comparative international law case studies' in A Roberts et al (eds) *Comparative international law* (2018) 37; Roberts (n 15) 270-278.

54 E Jouannet 'What is the use of international law? International law as a twenty-first century guardian of welfare' in Fabri et al (n 26) 55; CG Weeramantry 'International law and the developing world: A millennial analysis' (2000) 41 *Harvard International Law Journal* 278-279.

55 R Charvin '"Communauté" internationale ou empires oligarchiques'(2019) 69 *Droits* 15-16.

Rather than maintaining a dogmatic approach to the alleged universality of international law, it probably is appropriate to move away from this illusion and adopt a more fruitful approach to the universalisation of international law. Universality of international law 'does not mean uniformity but rather richness of variety and diversity'.[56] This is probably why Delmas-Marty invites lawyers to write 'universalism' in the plural. Not a plural of majesty, but a plural of modesty, as universalism, as soon as it is invoked in the legal field, seems to fluctuate between reason and faith, demonstration and revelation.[57] As the eminent author points out, it no doubt would be more accurate to speak of a 'process of universalisation'.[58] This universalisation, and thus the progressive construction of the universality of international law, requires 'to adopt an ethos of justice (*meaning*) – parity of participation – and then to establish rules (machinery) that facilitate popular and democratic engagement'.[59] This presupposes upstream the recognition by each of the actors of the inevitable subjectivity of their discourse and vision and, therefore, the need for greater humility in their pretension to enact the universal. Such an approach could shield international lawyers from the dismay they feel at the tension that exists between a fantasised universality and a reality that denies it. Thus, recognising the necessary diversity of cultures and the irreducible subjectivity of one's approach can be positive and serve the cause of the universality of international law as long as it allows one to distance oneself from one's own 'evidences', to be attentive to the different cultural contexts in which international law can be apprehended and, thus, to better understand differences in interpretation and application. Indeed, immanent subjectivity of the actors and operators of international law does not constitute an obstacle to the construction of universal international law, if one accepts the inter-subjective nature of this quest.[60] Recognising such an approach will make it possible to perceive RAIL, such as the African approach, not as a challenge to the universality

56 Jennings (n 38) 42 ; A Yusuf 'Diversity of legal traditions and international law: Keynote address' (2013) 2 *Cambridge Journal of International Law* 683; VS Vereshchetin 'Cultural and ideological pluralism and international law: Revisited 20 years on' in S Yee & J-Y Morin (eds) *Multiculturalism and international law: Essays in honour of Edward McWhinney* (2009) 127; Bennouna (n 51) 80; B Donnelly-Lazarov 'Natural law and the possibility of universal normative foundations' in H Ruiz Fabri, R Wolfrum & J Gogolin (eds) *Select proceedings of the European Society of International Law, volume 2 2008* (2010) 235-266.

57 M Delmas-Marty *Les forces imaginantes du droit. Le relatif et l'universel* (2004) 26.

58 Delmas-Marty (n 57) 54.

59 al Attar (n 44) 99.

60 Voyiakis (n 49) 76. Contrary to what Green has written, who saw regional and political groupings as the end of all hope for universal international law. LC Green 'Is there a universal international law today?' (1985) 23 *Canadian Yearbook of International Law* 32.

of international law from a logic of competitive points of view, but as constructive contributions in a collective approach to the development of consensual and universal international law. The same approach must be followed concerning the unity of international law.

2.1.2 African approach as a building block for a democratised international law: Unitas multiplex

As hinted earlier, many studies have iteratively underlined the danger posed to international law by regional or national approaches. For its proponents, by highlighting the differences between visions of international law, RAIL can weaken and undermine the unity and even the very existence of international law. An excessive focus on regional particularities would lead to obscure the 'general' international law and the values it carries.[61] As with universality, these fears and apprehensions essentially are dictated by international lawyers' representation of the unity of international law. The unity of international law is perceived as meaning uniformity, total homogeneity in the interpretation and application of the rule of international law. As with universality, there sometimes is a dogmatic approach to defining the unity of international law that corresponds to a certain representation of what international law should be, rather than what it is; 'a somewhat compulsive, almost obsessive concern'.[62]

The idea of a united or single international law that would fall prey to centrifugal tendencies resists little examination of reality: There are no periods during which international law was homogeneously conceived either one way or another.[63] International law, as Prost recalls, essentially is a special or regional, even local phenomenon. Conventional norms, which make up a large part of the norms of international law, are proof of this division of law into special regimes, binding several or a few actors, with real risks of confrontation and normative inconsistencies. There are very few universal treaties covering all the subjects (even if limited to states) of international society. Even assuming that such universal treaties are multiplying, they do not signify a unity of international law: There 'is still the possibility of conflict between legal universals, that is, incompatibilities or even antinomies between the rationality, teleology

61 For a presentation of these arguments, see A Roberts et al 'Conceptualising comparative international law' in Roberts et al (n 53) 27-28; PB Stephan 'Comparative international law, foreign relations law, and fragmentation: Can the centre hold?' in Roberts et al (n 53) 62.

62 Prost (n 32) 192.

63 Martineau (n 13) 3.

rights and obligations of universal regimes'.[64] While international law certainly is unique, because it is, it is not in the sense of uniformity, of a whole so homogeneous corpus that any variation or any particular approaches, such as the African approach to international law or any other RAIL, would call it into question. Opposing the unity of international law to pluralism and diversity is more a question of political interpretation than the interpretation of a legal principle, a normative choice based on a political option taken upstream: 'un alibi pseudo-scientifique à une position politique, position qui pourrait servir à des fins avec lesquelles la théorie même ne serait pas d'accord'.[65]

Multiculturalism and pluralism are part of the DNA of international law. The emergence of international law, its very *raison d'*être, is in itself a 'tribute to multiculturalism'.[66] The role of international, among others, is to represent and reconcile heterogeneity where it is legitimate to do so.[67] This corresponds to what one sociologist has called 'pluralism of equality'.[68] It is because sovereign states were aware of their differences and their divergences that they decided to put in place a body of rules to govern their relations and interactions with one another. If these differences of views and approaches were to disappear, international law as it stands today would disappear, because it would have been transformed into the internal (imperial) law of a super-federation of all the world's states. It is difficult to move, in the name of an idealistic vision, so abruptly from diversity to unity which would mean uniformity. Secreted for a pluralist and diverse society, international law must not only respond to this diversity but must also reflect it.

64 Prost thus cites the case of the GATT and certain agreements relating to the environment, such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), as an illustration. Prost (n 32) 36-38. See also A Nollkaemper 'Inside or out: Two types of international legal pluralism' in J Klabbers & T Piiparinen (eds) *Normative pluralism and international law, exploring global governance* (2013) 111-115, Gorobets (n 51) 11.

65 P Sack 'Le droit: perspectives occidentales, perspectives non occidentales' in Capeller & Kitamura (n 50) 57. M Koskenniemi 'The fate of public international law: Between technique and politics' (2007) 70 *The Modern Law Review* 24-25. Gorobets evokes the representations of constellations in the sky. The stars are linked together according to an image that corresponds to a familiar image, which is not the same for everyone, but above all masks the fact that in reality the stars are not linked in this way. Gorobets (n 51) 15-17.

66 M Rama-Moutaldo 'Universalism and particularism in the creation process of international law' in Yee & Morin (n 56) 130. See on law as a system of legal relations, P Allott 'The concept of international law' (1999) 10 *European Journal of International Law* 36-37.

67 Donnelly-Lazarov (n 56) 255.

68 See H Sanson 'Le point de vue du sociologue: modèles de coexistence dans la différence de cultures' in Dupuy (n 14) 62-64.

As noticed, most people would probably agree that diversity of culture not only is an inevitable fact but that it also benefits and enriches humankind. Indeed, a uniform world would not only be dull but would also stagnate as history shows us; societies that tried to impose uniformity of thought and behaviour sooner or later collapsed. Pluralism and diversity, therefore, are as important for international law as biodiversity is for humanity.[69] Following the beautiful Bedjaoui formula, 'le vrai esprit international ... voit dans les nations civilisées autant de facettes d'un même cristal, chacune réfléchissant à sa manière la lumière civilisatrice et chacune devenant une part nécessaire et intégrale d'une pierre précieuse'.[70] RAIL, therefore, are the tool to maintain pluralism and diversity by offering the possibility of new ideas and visions that allow international law to constantly renew itself and fulfil its functions in international society. RAIL, as the African approach, allow pluralism to enrich international law by emphasising the second meaning of the word, that of a 'general suspicion of a notion of "the truth"'. Pluralism, of which RAIL are one of the vectors, opposes value monism, hegemonic and suppressive discourses that use and misuse the notion of truth and universality as a pretext to dominate and subjugate alternative world views.[71] This is not necessarily antinomic to unity. Thus, the emergence of an African approach to international law does not appear as a threat to international law, but rather as an instrument for its refinement and enrichment.

2.2 African approach, active participation in the construction of an inclusive and multi-cultural international law

Regional approaches to international law appear to be tools for legitimising international law to make it truly universal, in the face of a legal field that has long been European and Western-centred. Such an approach is necessary for Africa to be able to assert itself as an actor in international relations. The pan-Africanist ideal can only move from a simple project to a concrete reality if it allows the various fields of international life (economy, politics, law) to define their own approaches adapted to the realities and needs of the continent. Specifically, an African approach to international

69 R Müllerson 'From E unum pluribus to E pluribus unum in the journey from an African village to a global village' in Yee & Morin (n 56) 34. See also E McWhinney *The International Court of Justice and the Western tradition of international law* (1987) 20-21. This idea would also correspond to Kant's cosmopolitanism. J Almqvist 'Coping with multilateralism through cosmopolitan law' in Ruiz Fabri et al (n 56) 103.

70 M Bedjaoui *Fonction politique internationale et influences nationales,* quoted by M Forteau 'L'idée d'une culture internationale du droit international et les Nations Unies' in Société Française pour le Droit International (n 25) 367.

71 T Piiparinen 'Exploring the methodology of normative pluralism in global age' in Klabbers & Piiparinen (n 64) 55.

law would enable the African continent, among others, to participate in the definition of universal values that permeate international law; to avoid new imperialism under the guise of new 'missions of civilisation' as in the past; and, finally, to be a driving force for standards with a universal vocation. This paragraph will briefly address each of these elements, which alone can make it possible to overcome the current Eurocentrism of international law and move from the *jus europaeum* to a true *jus universalis*.[72]

2.2.1 African approach, contribution to the definition of universal values

All law, including international law, necessarily reflects the aspirations, representations, and values of a society. The law thus has an inherent political dimension, in that it is a tool at the service of a model that a given community wishes to achieve. It is this model and the values it embodies that allow the law to adapt to new circumstances by indicating the direction in which practices and institutions should evolve.[73] The values defended and promoted must, therefore, be the compass for adapting international law to the changes in international society, and in certain hypotheses to indicate the desired evolutions of this society. Moreover, the values at the heart of international law are also critical in establishing its universality: They must reflect a 'universal culture' or at least be relevant to all cultures, 'because international law is sure to be ignored if it is not culturally relevant'.[74] The difficulty in international law is that the determination of values has almost always been univocal and unilateral, in defiance of the multiculturalism and pluralism that must permeate a truly universal international law. Some cultures or civilisations believe that they have a messianic mission to indicate the direction of history and progress to the whole of humanity. The feeling of cultural superiority and values that dominated the colonial period still seems to persist in the norm-making process of international law, despite the significant changes in international relations over the past 60 years. Within this logic, 'history is a linear, unidirectional progression with the superior and scientific Western civilisation leading and paving the way for others to follow'.[75]

72 These ideas are presented and developed in more detail in A Koagne Zouapet 'Regional approaches to international law (RAIL): Rise or decline of international law?' (2020) 52 KFG Working Paper Series.

73 See in the same vein I Scobbie 'A view of Delft: Some thoughts about thinking about international law' in Evans (n 53) 56.

74 AG Koroma 'International law and multiculturalism' in Yee & Morin (n 56) 81. In the same vein, Jouannet (n 54) 81.

75 D Slater *Contesting occidental vision of the global: The geopolitics of theory and North-South relations,* quoted by M Mutua 'Savages, victims, and saviours: The metaphor of human rights' (2001) 42 *Harvard International Law Journal* 201 fn 2. See also R Sacco 'Les problèmes d'unification du droit' in L Vogel (ed) *Unifier le droit: le rêve impossible?* (2001)

Müllerson's warning must be borne in mind in any debate on the values that should underpin international law: '[B]oth the desire to lead separate and distinct lives as well as attempts to impose one's own understanding of the true and the good to others are both fraught with existential danger.'[76] Therefore, it is important to avoid 'cultural proselytism' under the guise of international law and values that it is supposed to protect or that should be enshrined in it. It should also always be borne in mind that the 'validity of a cultural norm is a local truth, and judgment or evaluation of that truth by a norm from an external culture is extremely problematic, if not altogether an invalid exercise'.[77] This is all the more necessary since what has been termed 'cultural chauvinism'[78] is not unique to Western culture and is found in all cultures and civilisations. Proof of this can be found in the numerous works and publications on national or regional visions of international law, each of which claims to defend universal values and virtues useful for peace and stability in international relations.[79] Because they all consider themselves superior and are convinced that the values they defend are best able to ensure the well-being of mankind in the representation they make of it, all cultures see themselves as 'civilised' and perceived cultures with contrary or different practices and beliefs as 'barbaric'. Under the prism of 'civilised self and barbaric others', a clash of civilisations seems inevitable, with each culture converting and saving the others, each convinced that its values are the salvation and future of humanity: International law must be universal, but according to 'our universality'. To emerge from this inescapable confrontation and to give international law its role in pacifying international relations, it is important to place pluralism and diversity at the heart of the universality with which this law is endowed; a universality that does not mean similarity, nor unanimity or absence of contradictions and discord.[80]

RAIL as an African approach can facilitate the identification and understanding of the values and perceptions of other groups and break

12. Numerous studies have been devoted to the 'mission of civilisation' and the role of international law in basing colonisation on this idea. See, among others, S Drescher & P Finkelman 'Slavery' in Fassbender & Peters (n 22) 890-916; L Obregón 'The civilised and the uncivilised' in Fassbender & Peters (n 22) 917-939.

76 Müllerson (n 69) 58.

77 Mutua (n 75) 220. See also MCW Pinto 'What's wrong with international law?' in C Ryngaert, EJ Molenaar & S Nouwen (eds) *What's wrong with international law? Liber amicorum AHA Soons* (2015) 381; Capeller (n 50) 17.

78 I Mgbeoji 'The civilised self and the barbaric other: Imperial delusions of order and the challenges of human security' in R Falk, B Rajagopal & J Stevens (eds) *International law and the Third World. Reshaping justice* (2008) 152. See also Sanson (n 68) 64.

79 See references at n 25.

80 R-J Dupuy 'Introduction of the subject' in Dupuy (n 14) 29.

out of the 'in-between' decried by Roberts. Because they are convinced of the universality of the values they promote and defend, international lawyers do not bother to check that these values are shared by other regions of the world, projecting an inaccurate or insufficiently nuanced account of state practice and giving the mistaken impression that the featured approach is universally adopted or relatively uncontroversial.[81] Facilitating a comparative approach from the perspective of identifying universalist intersections, African approaches and other RAIL can be useful in identifying shared values and capturing the slightest variations and nuances that are sources of disagreement and thus help foster dialogue. This implies breaking away from the narrow view of law simply as a means of implementing values. The opposite dynamic is possible, and international law, through RAIL, can contribute to the construction and securing of universal values.[82] The comparison made possible by RAIL can lead not only to the harmonisation of points of view but also to the acceptance of differences, allowing a better understanding of the choices to be made together.

2.2.2 African approach, guard against imperial international law

'Western people have a tendency to think that colonialism is something which occurred in the eighteenth and nineteenth centuries and is now over. The rest of the world doesn't see things quite the same way.'[83] For many populations and human groups in Africa and around the world, the memory of colonisation and the role of international law in legitimising it are too vivid for them to believe without reservation the former colonial powers when they claim that they have changed and proclaim a new, more intrusive conception of law based on values presented as universal. Seen from Africa, the Arab world, Asia or Latin America, explains Vedrine, it looks a lot like Jules Ferry's 'duty to civilise' or Kipling's 'burden of the white man'.[84] This still is a world in which 'one's chance of getting nabbed for committing a "universal crime" varies with the inverse

81 Roberts (n 15) 179.

82 On this specific 'content-related' function of law, see D Burchardt 'The functions of law and their challenges: The differentiated functionality of international law' (2018) 17 KFG Working Paper Series 7-8.

83 HP Glenn *Legal traditions of the world* (2014) 272. See also G Abi-Saab 'The Third World and the future of the international legal order' (1973) 79 *Revue Egyptienne de Droit International* 31-32; B Chimni 'Third World approaches to international law: A manifesto' (2006) 8 *International Comparative Law Review* 3. Cf Tomuschat stating that 'colonialism is a word of the past. It does not afflict the contemporary world.' C Tomuschat 'Asia and international law: Common ground and regional diversity' (2011) 1 *Asian Journal of International Law* 221.

84 H Vedrine 'A quoi sert le droit international?' in Ruiz Fabri et al (n 26) 102.

square of the distance from London to Brussels'.[85] The former colonised cannot reasonably be blamed for being distrustful and cautious with an international law that sometimes has been the tool of their enslavement and subjugation.[86]

This is the only way in which to understand, for example, the attachment of states in certain regions of the world, precisely those that have experienced colonisation, to a concept that seems obsolete for others, namely, that of sovereignty. Outside of states and the framework of Western academics, sovereignty, and the institutions that are perceived as attached to it, such as immunities, are still seen as necessary to preserve a freshly and hard-won independence.[87] To overcome the trap of strict voluntarism, which confines the development of international law to almost unanimity of states, and above all minimise the risk that 'nations of power and influence use their special position to browbeat, coax or bribe the less influential members of the world community to support their point of view',[88] African approach and others RAIL offer the possibility of opening an inclusive debate in regional blocs so that the visions of all regions of the world can be adequately represented. For these human groups, there is neither 'good' nor 'benign' imperialism.

Indeed, part of the discourse on international law consists in reducing international law to a face-to-face confrontation between great powers, between ideological blocs that all claim to show the rest of the world the way forward. Critical articles on the dangers of the Chinese conception of international law, US instrumentalism, Russian selectivity, or rigid European formalism are published to justify the accuracy of their own

85 D Kennedy 'One, two, three, many legal orders: Legal pluralism and the cosmopolitan dream' (2007) 31 *New York University Review of Law and Social Change* 642.

86 An excellent overview of the use of international law for and against the liberation struggle of these peoples is presented in von Bernstorff & Dann (n 6). See also IJ Gassama 'International law, colonialism, and the African' in M Shanguhyia & T Falola (eds) *The Palgrave handbook of colonial and postcolonial history* (2018) 564-565.

87 See, among others, A Koagne Zouapet 'Too hard-won to be wasted … Sovereignty, immunities and values: A (sub-Saharan) African perspective' in R Bismuth et al (eds) *Sovereign immunity under pressure. Norms, values and interests* (2022) 77-105; A Koagne Zouapet *Les immunités juridiques dans l'ordre juridique international. Le prisme de la constance* (2020) 123-125, 341-347; Bipoun-Woum (n 27) 145-146; Abi-Saab (n 83) 39-45; SP Sinha 'Perspective of the newly independent states on the binding quality of international law' in FE Snyder & S Sathirathai (eds) *Third World attitudes toward international law* (1987) 28; DP Fidler 'Revolt against or from within the West? TWAIL, the developing world, and the future direction of international law' (2003) *Chinese Journal of International Law* 39-40.

88 Weeramantry (n 40) 419.

vision.[89] One reserves the right to make a plea for the weeds in the name of methodological rigour to support the positions of one's bloc[90] while decrying imperialism in the approach of others when they dare to defend a law that is considered vile or 'scandalous'.[91] We are all busy denouncing the biases of others while carefully avoiding indicating from which position we are talking and thus our biases. When one finally concedes that the approach advocated in fact results in imposing its values and conceptions on others, one immediately adds that this imperialism is benign, justified, and differs from what one decries in others, because it is the bearer of universal values necessary for the well-being and happiness of mankind.[92] In these discourses and confrontations of visions all assuming a messianic role, Africa and the rest of the world seem to be limited to the role of docile disciples, at best faithful apostles, having to simply choose between the options presented, between the imperialism best suited to them.

RAIL appear to be a means of freeing oneself from the law of imperialism and imperial law denounced by Laghmani,[93] an opportunity for the 'eternally colonised' to indicate a 'third way', to participate in the elaboration of international law, and the establishment of international institutions more adapted to their interests and political choices. In

89 See Société Française pour le Droit International (n 25), where the diversity of legal cultures in international law is examined in a face-to-face confrontation between Europe and the United States. J Pauwelyn 'Europe, America and the "unity" of international law' (2006) 103 *Duke Law School Legal Studies Paper*, where the author believes that the future of international law depends on a face-to-face meeting between the United States and Europe, ensuring that 'the American and European model is one of the greatest challenges for us international lawyers in the 21st century'. A von Bogdandy & S Dellavalle 'Universalism and particularism as paradigms of international law' (2008) 3 *International Law and Justice Working Papers*, conceive their task as providing a critical standpoint from which to understand and assess the positions held by international lawyers, but also as supporting 'intercultural dialogue on international law'. However, this intercultural dialogue in the article is limited to an analysis of the ideas of European and American international lawyers.

90 A Pellet 'Le "bon" droit et l'ivraie- Plaidoyer pour l'ivraie (Remarques sur quelques problèmes de méthode en droit international du développement)' in *Mélanges Charles Chaumont. Le droit des peuples à disposer d'eux-mêmes* (1984) 465-493.

91 A Pellet 'Values and power relations: The "disillusionment" of international law?' (2019) 34 KFG Working Paper Series 6, 8.

92 For an account of this strategy of 'good' imperialism', see B Delcourt 'International law and the European Union. The liberal imperialism doctrine as a normative framework for the Union's foreign policy' in Ruiz Fabri et al (n 26) 190-202; Berman (n 46) 415-418 430; C Ryngaert 'Whither territoriality? The European Union's use of territoriality to set norms with universal effects' in Ryngaert et al (n 77) 442-447. For these defences of national and regional approaches that are considered to carry a universal law, see Coulée (n 25) 13.

93 S Laghmani 'L'ambivalence du renouveau du *jus gentium*' in Ruiz Fabri et al (n 26) 209-218.

short, African approaches offer resistance to imperial international law by substituting 'professed universal objectivity with actual organic subjectivity'.[94]

2.2.3 African approach, tool of democratisation of the centres of impetus and formulation of proposals

The democratisation movement of which RAIL are the bearer also touches on the agenda of international law, that is, the questions to which international law must provide an answer at a given time. It should be stressed that this agenda has so far been driven solely by the interests and concerns of one part of international society. Primarily a few states dictate how the world order should be and what issues need to be placed on the international law agenda. Indeed, 'what becomes a "crisis" in the world and will involve the political energy and resources of the international system is determined in a thoroughly Western-dominated process'.[95] If the rules of international law are mainly drawn up in a context of fear and to reassure people against them,[96] it very often is Western fears. An illustration of this state of affairs is the current 'crisis' in arbitration, which has led to debates on possible reforms. For a long time, the complaints and protests of Africa countries and other from the south, then the main importers of investments and, therefore, defenders in arbitration proceedings, were inaudible drowned out by the litany of lauders of a system represented as necessary to protect investments. It was not until the countries of the north, faced with these procedures and their national public opinions were moved by opaque procedures, with possible conflicts of interest of the actors, and clearly with an asserted pro-investor bias, that the reform process that the Third World states were calling for was initiated. The flaws and errors of the system pointed out for 50 years by Third World countries and considered irrelevant suddenly took on the character of a crisis requiring immediate action.[97]

94 al Attar (n 44) 123.

95 Koskenniemi (n 45) 34. See also I Ziemele 'Legitimacy of the vision: Central and Eastern Europe' in Ruiz Fabri et al (n 26) 145. This does not prevent certain concepts and notions of international law from having their origin in non-Western regional claims. See notably Rama-Moutaldo (n 66) 150; Yusuf (n 1) 136-155).

96 A Bianchi & A Saab 'Fear and international law-making: An exploratory inquiry' (2019) 32 *Leiden Journal of International Law* 353-354.

97 See M Sornarajah 'The battle continues. Rebuilding empire through internationalisation of state contracts' in Von Bernstorff & Dann (n 6) 174-197; AA Shalakany 'Arbitration and the Third World: A plea for reassessing bias under the spectre of neoliberalism' (2000) 41 *Harvard International Law Journal* 427-429; S Chesterman 'Asia's ambivalence about international law and institutions: Past, present and futures' (2016) 27 *European Journal of International Law* 975-976.

Such a confiscation of the international law agenda is partly due to the illusion of the universality and unity of international law, which in fact leads to the concerns of Western countries, the main places where international law has been formulated and discussed so far, being considered as those of the whole planet. RAIL, including the African approach, challenge this illusion by establishing several centres of impetus and proposals for international law. They allow attention to be paid equally to all regions of the world, avoiding the use of unity as a screen to marginalise the crises of others while universalising their own. It is a question, as Chimni wrote, of giving the same interest to the suffering of human beings whoever and wherever they are, a universal empathy that does not distinguish according to place and origin of suffering and can recognise in the face of the suffering Other, his/her own face.[98]

This consideration of extra-Western dynamics and the admission of a non-Western impulse is necessary not to complete the gaps and incompleteness of the Western approach, but as justified by itself. Ideas put forward by Africa and other regions of the world, to be retained, need not be subject to the condition that the *jus europaeum* does not already contain them or could lead to them. The unity of international law cannot mean setting the European approach as a model for assessing the relevance of an idea or proposal. Indeed, the creation of international law no longer is 'the prerogative of countries bearing the cultural heritage of the West but the common task of all members of the international community'.[99] Africa and other regional approaches should thus make it possible to reverse this burden of proof on non-Western proposals, but also to avoid one of the most dangerous aspects of the hegemony which is 'the ideological certainty it conveys, neutralising human imagination and creativity'.[100]

3 The need for a vigorously open African approach, not a regionalist approach

While the development of an African approach to international law is justified and explained by the need to progressively develop a truly universal

98 BS Chimni 'A just world under law: A view from the south' (2007) 22 *American University International Law Review* 216.

99 Anand (n 52) 103. In the same vein, M Baharvand 'Contribution of the Asian-African Legal Consultative Organisation to the codification and progressive development of international law' (2015) 2 *Journal of the African Union Commission on International Law* 291.

100 al Attar (n 44) 119. See also K Fortin 'How to cope with diversity while preserving unity in customary international law? Some insights from international humanitarian law' (2018) 23 *Journal of Conflict and Security* 358.

international law, this purpose also defines the framework and perspective within which this approach should be thought. The African approach must, then, be an approach within the framework of international law that must not give in to the temptation to retreat into a supposed African own identity. It should remain a means to an end, that is, to develop an inclusive language of international law. Second, this approach must be truly regional, that is, it must reflect a regional consensus and not serve as a framework for the expression of local hegemony or nationalism under the pretext of a model that should inspire the region. Finally, an African regional approach cannot be limited to inter-state dialogue but must be inclusive to take into account all the actors of the 'African community', including non-state actors.

African approach and all RAIL should not be used to reinforce diametrically opposed antagonisms and visions of international law or lead to regionalist or nationalist visions of international law. These regionalist and nationalist approaches, inscribed in an imperialist logic, tend to reject the common model, and want to unilaterally impose their model as the only relevant one. Such approaches, far from enriching international law, lead to a profound indeterminacy of the very principles of international law.[101] Having an African approach to international law does not in any way mean engaging in a kind of ideological proselytism, aimed at convincing people of the rightness of this approach, or even imposing it. Rather, 'it means acknowledging in a pluralist – or realist – way that there may not be just one universal way of understanding and applying international law'.[102]

The challenge and relevance of RAIL thus lie in their ability to develop a regional vision without being self-centred, avoiding being locked into an 'international legal ghetto'. An African approach is neither 'particularism' nor a form of 'group unilateralism'. It should not aim at a form of self-exclusion of a group of subjects from international law but aims at defending identity and common interests in a universal environment whose cosmopolitanism reinforces. There is, therefore, no question of creating an 'autarkic parallel order' or an 'international legal ghetto'.[103] African approach requests an ethical research position that highlights the significance of avoiding exaggerations, glossing over or erasure

101 Jouannet (n 48) 44-45.

102 Roberts (n 15) 22.

103 This follows from the definition of regionalism. See A Remiro Brotons 'Commentaire sur Peyro et Pureza' in Aznar & Footer (n 20) 167; M Kamto 'La codification du droit international en Afrique: méthode et défis' (2015) 2 *Journal of the African Union Commission on International Law* 268.

of uncomfortable truths.[104] It is about knowledge, not commitment: 'Knowledge relies on the speaker's ability to support one beliefs with evidence that, when laid out, will convince everyone sharing the speaker's concept of evidence and the rational argument of the truth thus validated. No emotional attachment to such a truth is needed.'[105] In the discourse of all actors, this requires a real effort to convince their interlocutors of the correctness and relevance of the solutions of 'their' system if they are convinced of it, but also the humility and hindsight necessary to listen to what others have to propose without *a priori* or prejudices, admitting that they may be right.

Similarly, any strategy that would lead to an approach being seen as discredited because it served imperialist purposes in the past would weaken international law rather than strengthen it. The logic of any RAIL should not be to replace one centre with another in the development and application of international law. One cannot, therefore, ask for the pre-eminence of one approach simply because 'the centre of gravity is clearly shifting towards Asia' or the 'relative economic decline [of the United States] accompanied by the collapse of its moral authority'.[106] Beyond the fact that RAIL aim to contribute to the construction of a true universality of democratically elaborated and applied international law, the logic of 'each in turn' would lead to a competition for the control of international law, reduced to being a mere instrument in the hands of the powerful of the moment.

In the same way, it is necessary to get out of the extreme susceptibility of certain international lawyers from the south, decried by Yasuaki, that leads them to consider and consequently reject any Western idea or proposal as bearing the seeds of imperialism.[107] The exactions and abuses suffered in the past are not enough to validate any reform proposal, nor do they totally discredit a region of the world in formulating universally valid principles. African approach and other RAIL must neither allow for the giving of undue weight and importance to a region of the world or some countries in the international legal order nor on the contrary push for the disqualification of a region in the proposal of norms or values simply because they originate from a region or a group in international society. The method to be followed in the elaboration and defence of each regional

104 B Fagbayibo 'Some thoughts on centring pan-African epistemic in the teaching of public international law in African universities' (2019) 21 *International Community Law Review* 188.

105 Koskenniemi (n 40) 499.

106 Chesterman (n 97) 966.

107 See Yasuaki (n 30) 111.

approach must be the 'hospitality' that Immanuel Kant recommended in the elaboration of his cosmopolitan law. It is simply a question of not considering foreign and different approaches as hostile and negating his vision, but simply a contribution to the 'growth of culture and men's gradual progress toward greater agreement regarding their principles' which could 'lead to mutual understanding and peace'.[108] Different approaches do not inevitably mean opposition and conflict between them.

In the other direction, an African approach to international law cannot be used as a pretext for extreme cultural relativism that would lead to a denial of the universality of human rights or the existence of *jus cogens* norms in international law such as the prohibition of torture. It certainly is a question of bringing new perspectives and new conceptions to international law where necessary but in accordance with accepted methodological canons. This is only possible if the African operators of international law, without losing sight of the tensions and interests that run through it, bear in mind that it first and foremost is a question of drawing up a single, universal law for an international community under construction. This means in concrete terms, that 'the promotion of a particular political doctrine in this context should not be ignorant of the prospects of some "common ground" across differing international legal communities on the "reasonableness" of the concepts and principles it sets forth'.[109] Pluralism, which is advocated here through the RAIL, of which the African approach is a part, is an approach that aims to consolidate universal values, define a common basis for the protection of men and women in all countries and not lead to the nihilism of any universal value. Donnely-Lazarov's plea for allowing a 'room for error' for each interlocutor in this debate, and above all tolerance for contrary opinions and convictions is to be supported.[110]

RAIL, including African approach, can only serve the pluralism and diversity of international law while preserving its unity if they are developed under the paradigm of their own 'incompleteness' (*incomplétude* in French).[111] This is a recognition by each approach of its own biases, its shortcomings and, above all, its inability to develop universal international law on its own. It is a weakness that is recognised and assumed, which

108 I Kant *To perpetual peace. A philosophy sketch* (1983) para 367. On this 'hospitality' as a tool of multiculturalism in international law, see Almqvist (n 69) 102-105.

109 Almqvist (n 69) 96.

110 This tolerance, she writes, 'ask us to accept that it may be appropriate to respect autonomy even when the opportunity for human fulfilment is not as advanced in one context than in another'. Donnelly-Lazarov (n 56) 263; using the concept of 'charity', see also Voyiakis (n 49) 77-78.

111 The concept is borrowed from Delmas-Marty (n 57) 396.

is salutary and fruitful because it keeps international law free from dogmatism and facilitates the search for solutions. This incompleteness of each regional approach means flexibility, openness and creativity and, therefore, can guide international lawyers in the search for adequate and universal solutions.

Taking into account diversity and plurality is also a requirement in the identification and expression of regional approaches. African approach can only be relevant and useful for the definition of truly universal and universally-accepted international law if it is itself representative of the dynamics and practices of Africa. This, therefore, requires upstream reflection on the real or supposed plurality of national or other groups' approaches and, in one way or another, a comparative approach. It is essential to elucidate who is or would be the author, where, when and how it would manifest itself.[112] It will then become possible for the promoters of the African approach to ask themselves 'why such an approach is or should be necessary, by analysing what its objectives and purposes are or should be. All these questions also require critical assessment of the existing approach in order to determine whether it needs to be modified, replaced, completed, etc.'[113] It is a question for the promoters of the African approach to defining the delicate duality that must distinguish all RAIL: what unites internally to enable a common vision to be defined; and what distinguishes externally to make this approach specific. This means building a regional coherence.[114] This is not an easy exercise that must be carried out with great rigour.[115] It is imperative in all cases to avoid a nationalist approach which, in fact, would result in transforming African approach into a field for the exercise of the imperialism of regional power. This requires modesty and the ability to get out of the trap of generalisation and analytical shortcuts. It also invites one to get out of the trap of a nationalist approach consisting of justifying and praising the decisions of one's state while criticising or ignoring the contrary decisions of other nations.[116] Only a comparative approach in good faith and without *a priori* should make it possible to move from national to the

112 Ruiz Fabri (n 25) 88-89.

113 Ruiz Fabri (n 25) 89.

114 Ruiz Fabri (n 25) 93-94. On, eg, the lack of regional coherence for a truly Asian approach to international law, see Chesterman (n 97) 960-961.

115 On an illustration of those difficulties, see Messineo (n 25) 903-904.

116 See on what is considered to be a weakness of international lawyers, L Oppenheim 'The science of international law: Its task and method' (1908) 2 *American Journal of International Law* 340-341. On the danger of such practice breaking down the international law system, see WW Burke-White 'Power shifts in international law: Structural realignment and substantive pluralism' (2015) 56 *Harvard International Law Journal* 78.

regional level, without prejudice of comparisons between the later and the universal level.[117]

Finally, for such an approach to be truly African and inclusive, it undoubtedly is necessary for it to recognise that the 'African community' is not limited to states and, therefore, the definition of an African vision cannot be limited to inter-state dialogue. It therefore is imperative in the process of defining this regional approach to examine 'the structures, the components of the region' and to ask 'who are, in Africa, the international actors qualified to produce rules of international law and take charge of its implementation. One important aspect to study should be to ask who are the actors who might be in a position to influence decisions: whether the peoples, the NGOs, or the transnational firms.'[118] An African approach to international law has to have a high degree of legitimacy both among all African states as well as non-sates actors.

4 The challenge of identifying an African approach to international law

The essential question that lies at the forefront of all attempts to identify a national or regional approach to international law can be summarised in one sentence: Do there exist at all something such as an 'African legal tradition' which could form the basis and inspiration for an African approach to international law? While this question should probably be answered in the affirmative by virtue of the aphorism *ubi societas ibi jus*, which assumes that every society necessarily has a particular law, there remains the challenge of identifying the particularities and characteristics of an African legal tradition that is both common to the African space and specific in order to enable it to form the basis of a distinctively African vision. Embedded in this question is a series of other questions that need to be answered by going back, to a certain extent, to the starting point. Thus, one preliminary step for the definition of an African approach to international law would be to specify who is or could be its author, as well as where, when and how this approach would appear.[119] These questions reveal a particular complexity for a continent with a particular history such as Africa, several times colonised, torn between various legal cultures and whose very reality as a single Africa may be questioned. The definition of

117 PF Gonidec 'Towards a treatise of African international law' (1997) 9 *African Journal of International and Comparative Law* 820; Ruiz Fabri (n 25) 88.

118 Gonidec (n 117) 809. See also AO Adede 'Africa in international law: Key issues of the second millennium and likely trends in the third millennium' (2000) 10 *Transnational Law and Contemporary Problems* 368.

119 See Ruiz Fabri (n 25) 89; S Oeter (n 25) 29.

an African approach will therefore have to resolve upstream the question of 'Africanness' itself. Having set out the terms of this question in the first paragraph, this part will examine in the second paragraph the specific issue of African international lawyers whose training and research are still far from meeting the requirements and necessities of an African approach to international law.

4.1 Which Africa? Which Africanness?

To define what an African approach is, one must first determine what Africa is, and this is not as easy a task as it may seem. Geographically, despite relative geographical continuity (leaving aside Madagascar and other islands attached to countries on the continent) the existence of internal and parallel subdivisions can raise doubts about apparent unity. Thus, for example, the category 'Middle East and Maghreb' in certain political divisions can legitimately raise questions about the connection between the positions of a Maghreb state and an undeniably African vision. In the same way, it is difficult to state with certainty that an African, Francophone, Muslim and Shari'a-applying state, when expressing a vision of international law, bases it on its African identity as defined within the framework of the African Union, Francophone as discussed within the Organisation Internationale de la Francophonie, or inspired by a common position defined at the Organisation for Islamic Cooperation, limiting the assessment criterion to the international organisations of which it is a member. The solution proposed by Bipoun-Woum in 1970 solves this problem only imperfectly. He suggests perceiving the region not under the institutional prism, but from the angle of a contract of which the *raison d'être* is the safeguarding of a peaceful order between peoples, and the existence between the contracting states of a particular reason (political, economic, or historical interest in coming together).[120] By placing the will of states at the centre of the definition of African regionalism, Bipoun-Woum thus succeeds in affirming the existence of an African approach to international law common to the states of the African continent based on the affirmation by them of 'a single Africa composed of a mosaic of races, religions, languages and civilisations forming an African personality of its own'.[121] Africanness thus appears as an identity that is not given but constructed.

120 Bipoun-Woum (n 27) 17-18. See also PF Gonidec 'Towards a "treatise of African international law"' (1997) 9 *African Journal of International and Comparative Law* 807-808. Cf Wolfgang Graf Vitzthum 'Quelle est l'identité de l'Europe?' in I Buffard et al (eds) *International law between universalism and fragmentation. Fetschrift in honour of Gerhard Hafner* (2008) 1069-1070.

121 Statement by the Libyan delegate to the Sixth Committee of the United Nations General Assembly on Africa's representation in the ILC (author translation) quoted by Bipoun-Woum (n 27) 38.

The definition of a regional approach or vision presupposes upstream a set of shared values or at least a common legal tradition which the proponents of this approach would seek to promote in international society. However, the question of the existence of an African legal tradition is itself very complex due to the colonial history of the continent and its extreme diversity. A tradition in fact is closely linked to that of identity and the relations between different peoples. It involves a certain extension from the past to the present and the transmission of information deemed essential from generation to generation.[122] The challenge is to find this common information base that is shared by all African socio-cultural groups, even with some variations. Huntington, for example, who considers religion to be a central element in the definition of a civilisation, is not totally convinced of the existence of a religion, or a common African spiritual substratum founding an 'African civilisation', which he says is only 'possible' near other clearly-identified civilisations (Sinic/Chinese, Japanese, Hindu, Islamic, Orthodox, Western and Latin American).[123]

Speaking of an African legal tradition, therefore, is particularly complicated, first because it is necessary to identify the different 'chthonic' traditions,[124] pre-existing before colonisation, which continue to govern the life of certain communities; and, second, to see the interactions that they may have had with the law inherited from colonisation, very often adopted by the state, before embarking on the perilous task of comparing some 50 countries, all distinct from the others. As a result of the many colonial enterprises of which they were victims, African countries belong to many legal traditions, sometimes several within the same state, which makes it particularly difficult for any comparative enterprise to define an African approach. Moreover, in some countries, the process of harmonising the so-called modern law inherited from colonisation and the local rights to which communities are attached is far from complete. In some countries there indeed are, what Glenn calls *pays légal*, that is, the legal tradition of the state inherited from colonisation (common law, civil law) which is distinct and distant 'from the mass of people, who look,

122 See Glenn (n 83) 12-14.

123 SP Huntington *The clash of civilisation and the remaking of world order* (1998) 44-47. Huntington's doubt is all the more open to critique because he is talking about civilisation and not culture. If 'culture' can be applied to the narrowest human groupings to which 'civilisation' would not be appropriate, the latter is much broader and represents the broadest moral or spiritual unity to which a society and, more generally, a group of societies, can be attached. If culture can refer to a segment of civilisation, civilisations are, according to Huntington's own formula, the largest 'we'. See Y Ben Achour *Le rôle des civilisations dans le système international (droit et relations internationales)* (2003) 1-2.

124 On the chthonic legal traditions, see Glenn (n 83) 62-86.

absent a viable alternative, to old ways of sustenance'.[125] This makes the task particularly arduous for any comparatist who would prefer to deal with laws in 'terms of a limited member of families, defined by reference to the different vocabularies, hierarchies of sources and methods built on different philosophical, political or economic principles so as to achieve different models of society'.[126] This has led some to conclude that it is impossible to identify a specifically African legal culture.[127] However, this position is not unanimous and other authors, while acknowledging the extreme diversity of cultures in a continent divided into a multitude of communities, have identified a common background to these laws either in opposition to Western legal cultures[128] or by trying to identify common features of the different cultures by finding a 'meaning in itself' and not in a Western-centric approach.[129]

The easier and simplest approach seems to be the one proposed by Jouannet for a European vision. While stressing that neither the Europe under construction, nor the European Union (EU), nor shared currents of thought and values can prevent the persistence of different cultural, linguistic and national contexts in which particular visions are rooted, she points out that there is a possibility of harmonising, without unification, the different traditions around a partly common legal culture.[130] For a geographical area that is still weakly integrated at the continental level, such as Africa, it is a matter of working towards a political rapprochement of visions within or under the auspices of pan-African organisations such as the AU. As has been written on the question of the existence of an African health law, the existence of regional international organisations with legal competences as well as the legally-affirmed desire for a convergence of national legal systems does indeed justify the existence of a common vision, a shared approach to international law, at least on certain issues.[131]

125 Glenn (n 83) 86. In the same vein, see R David *Les grands systèmes de droit contemporains* (2002) 23; Chiba (n 51) 39-41.

126 Bing Bing Jia 'Multiculturalism and the development of the system of international criminal law' in Yee & Morin (n 56) 683.

127 S Roberts 'Culture juridique africaine. Nature de l'ordre juridique en Afrique' in Capeller & Kitamura (n 50) 179.

128 David (n 125) 441-454. See also the stimulating critical analysis of the use of this approach by K M'Baye in P Sack 'Le droit: perspectives occidentales, perspectives non occidentales' in Capeller & Kitamura (n 50) 45-57.

129 Chiba (n 51) 248-249.

130 Jouannet (n 48) 46-47.

131 M Bélanger 'Existe-t-il un droit africain de la santé?' in D Darbon & J du Bois de Gaudusson (eds) *La création du droit en Afrique* (1997) 361-362.

As with the development of universal law, the existence of this diversity of legal cultures and different perspectives does not prevent from thinking about the bridges that can exist between them and the points of convergence that make it possible to define a specific African vision and approach to international law. Seen from this perspective, the increasing participation of the AU in conferences for the negotiation of international agreements, or even in judicial proceedings, may be a sign of the development of this, even minimal, African approach to international law which therefore confuses itself with 'African public law'. To this, of course, must be added the agreements, treaties, resolutions, and other normative texts adopted within the AU which may be indicative of a certain pan-African vision of international law (see below 5).[132] As for the EU, the reality and the degree of an African approach or vision to international law are tightly linked to the desired degree of integration of the continent.[133]

The progressive jurisdictionalisation of intra-African relations with existing and future courts at both regional and sub-regional levels should gradually enable this African approach to be strengthened, as is the case with the Court of Justice of the EU, not because these judges will develop a separate vision of international law, but because they will strengthen this 'integrated approach' which is intimately linked to the structure of the specific legal order in question.[134] This 'institutional' African approach to international law, therefore, is not the result of a 'social determinism', but of a 'collective free will', crystallised by common political and judicial institutions set up in a consensual manner by states.[135] This institutional approach makes it possible to understand the 'complex essence' of the African approach to international law: According to the Bipoun-Woum formula, it draws elements of 'feeling' a little from culture, a little from history (solidarity and memory of common domination) and elements of 'reason' from economic necessity. It thus is at the 'crossroads of past, present and future' of modern Africa as imagined by the common African institutions.[136] In this sense, 'Africanness' as the basis of the African approach to international law can be identified with a 'militant will' of which the theoretical foundation has not yet been fully developed but

132 On the choice of a pan-African rather than an African vision, see Yusuf (n 1) 13.

133 See Ruiz Fabri (n 25) 92.

134 L Burgorgue-Larsen 'Existe-t-il une "approche européenne" du droit international? Eléments de réponse à partir de la jurisprudence de la Cour de justice des communautés européennes' in Société Française pour le Droit International (n 25) 276.

135 See Ph Weckel & A Rainaud 'Union européenne et développement d'une culture européenne de droit international' in Société Française pour le Droit International (n 25) 298.

136 Bipoun-Woum (n 27) 31.

which is expressed in terms of awareness, particularly of the needs of its integral development which conditions its social future.[137]

The debate on Africanness is particularly complex for international lawyers. At what point can a publicist, within the meaning of article 38 of the Statute of the International Court of Justice (ICJ), be considered 'African' and considered in an African approach to international law? Is it because of the topics covered? Or is it in consideration of the passport? This second option should be ruled out immediately. Indeed, there is no reason, unless an unacceptable atavism or heredity is claimed, why the promotion and development of an African approach to international law should be the exclusive prerogative of the natives of Africa.[138] Why and how would a Sierra Leonean who has done all his or her studies in Great Britain be better at conveying an African vision of international law than an Australian who has devoted most of his or her research to the application of the African Charter on Human and Peoples' Rights (African Charter)? As with all other regional approaches, it is not enough to have a passport to have the correlative regional approach; it is not even necessary to have one from the region concerned to espouse and promote a RAIL. In fact, it is not impossible that, as in other parts of the world and even in some countries, there are as many approaches to international law as there are international lawyers with African passports, whether they are based in Africa or outside the continent. However, this diversity has not prevented the identification elsewhere of a certain school that dominates the training of international lawyers and the discourse of academics.[139] The question therefore is whether there is an African school of international law that can provide the basis and then popularise an African approach to international law.

4.2 An 'extroverted' international law of 'globalised' international lawyers

In the aftermath of independence, many African international lawyers, like many others from the Third World, took part in the 'battle for international law' by insisting that the African vision and interests be taken into account in a very Eurocentric international law. Taslim Olawale Elias, Mohamed Bedjaoui, UO Umozurike, Georges Abi-Saab and Francis Dieng, to name but a few of the best known, have each in their own way and despite their different approaches, advocated a profound change in the international

137 Bipoun-Woum (n 27) 46. This idea is inspired by Nkrumah's 'consciencism'. K Nkrumah *Consciencism: Philosophy and ideology for decolonisation* (1964) 122.

138 Ruiz Fabri (n 25) 90.

139 See Messineo (n 25) 904-905.

legal order and how international law is developed or applied.[140] While there is no doubt that these precursors played a fundamental role in the diversification of international law and sowed the seeds for the conceptual and methodological development of an African approach to international law, one can legitimately question the preservation of their theoretical and ideological heritage. It undoubtedly is difficult to make an assessment here of the evolution of African international legal thinking over the last 60 years. However, a quick overview reveals that one of the main challenges for the development of a true African approach to international law remains the outward orientation, or even a Westernisation of the study, practice and research of international law in Africa and by Africans.

As far as the study and teaching of international law are concerned, these are still dominated in Africa by a massive importation of concepts and knowledge. This is due, first, as Roberts has well demonstrated, to the strong emigration of African students to 'Western knowledge centres'. While a significant proportion of African international law students are trained in their home countries, a considerable and very important fringe, especially those who have the ambition to write doctoral theses, precious sesame to become teachers in their own countries, choose to continue their studies in the West. Except for South Africa, which attracts students mainly from Southern Africa, the future African doctors mainly favour Great Britain and the United States for the English-speaking population, and France for the French-speaking population.[141] However, as Roberts wrote, in these universities, studies and research are exclusively Western-centric or even a resolutely national-centric approach in the case of the United States, with practically little space given to African practice and discourse in international law.[142] If asked the question that Roberts proposes to any international lawyer, 'whose international law is it',[143] a straightforward answer would be that they study and teach 'Western international law'.

In the second place, the situation is no different for those who are trained and study on the continent. The research and teaching of international law are conducted in a totally outward-looking manner, also focusing on Western practice and visions conveyed by the textbooks of Western

140 See notably Bernstoff & Dann (n 6) 25-28; Gevers (n 9) 383-403; A Brunner 'Acquired rights and state succession. The rise and fall of the Third World in the International Law Commission' in Bernstoff & Dann (n 6) 124-140; Landauer (n 8) 318-340; Özsu (n 8) 341-357.

141 Roberts (n 15) 53-58.

142 Roberts (n 15) 62-68.

143 Roberts (n 15) xiv.

authors that are mainly used there. The result is that, despite the difference in location or passports, the international lawyers who are trained or teach in Africa have a predominantly Western-centric approach to international law. Thus, the maintenance of a Western-centric discourse of international law is not always unilaterally imposed but is co-authored.[144] The curriculum in many African universities remains 'steeped in Eurocentric canons and does little to disrupt the hegemonic assumptions that place European thinkers at the heart of the development of international law', neither does it attempt to provide a critical discussion around 'important epistemologies that emerged from diplomatic interactions between and among pre-colonial African empires'.[145] In addition, the consideration of works such as Third World Approach to International Law (TWAIL), New Approaches to International Law (NAIL) or Feminist Approaches to International Law (FtAIL) 'which have exposed the non-neutral underpinnings of international law, remain marginal or non-existent'.[146] This lack of educational diversity affects the sources and approaches that African scholars use when identifying and analysing international law, both in regional and international jurisdictions. As written, teaching international law without including the national and regional perspective, at the end of the day, is problematic from a practical point of view and contributes to students' lack of realistic sense of the impact or relevance of international law.[147]

This 'denationalised' and 'deregionalised' approach to international law is justified by the appropriation by African international lawyers of the myth of the universality and unity of international law mentioned above. It is this belief in a falsely universal law, in addition to the Western-centric training mentioned above, that generally explains the rarity of an African approach in international jurisdictions,[148] and the normative borrowings,

144 See Fagbayibo (n 104) 171-172, 182-183; K-G Lee 'The "reception" of European international law in China, Japan and Korea: A comparative and critical perspective' in Marauhn & Krieger (n 31) 437-438; Yasuaki (n 30) 219; Capeller (n 50) 18.

145 Fagbayibo (n 104) 172.

146 As above.

147 Roberts (n 15) 155; Fagbayibo (n 104) 182.

148 A study of the legal concepts used in ICJ decisions tends to reveal that judges use references to them that systematically refer to principles originating in Western legal spaces despite the progressive enlargement of the Court to include judges from the Third World. S Ouechtati 'L'hétérogénéité dans la justice internationale. Le cas de la Cour internationale de justice' in Ruiz Fabri et al (n 56) 426-427. In the same vein, KT Gaubatz & M MacArthur 'How international is "international" law?' (2001) 22 *Michigan Journal of International Law* 261. For an interesting study on legal culture as a problem at the International Criminal Court, see also C Reveillere 'Quelle place pour la critique à la Cour pénale internationale? Analyse grammaticale de ce qui fait la force d'une institution faible' (2020) 105 *Droit et Société* 293-297. On the Western hegemony

or even abusive mimicry within African regional jurisdictions. The strong presence of the jurisprudence of other human rights protection bodies, in particular the European Court of Human Rights (ECtHR), which is so redundant in the jurisprudence of the African human rights judge that one can legitimately be concerned about the loss of the African system's specificities, has been criticised. While one can understand the refusal to lock oneself into a register of cultural particularism which explains the use of exogenous sources, one can be more dubious in the face of this unbridled quest by African judges for the legitimisation of their decisions in the jurisprudence of other institutions.[149] In research, this tendency is accentuated by the 'discursive policies' of international law, which are defined by a region of the world on its own values and visions.

Indeed, each discipline is governed by rules of formation that control the production of discourse and define its order of truth, its domain of validity, normativity and actuality.[150] It is these rules and policies that constitute 'the syntax and the grammar of the discipline, the rules of language that every proposition or statement must reactivate to be accepted as valid, comprehensible or respectable (that is, to be "within the true")'.[151] International law is no exception to the rule, and any international lawyer, to be recognised as a member of the community, must necessarily refer to concepts, objects and ideas recognised by the community, use the concepts in a manner deemed appropriate, reflect on themes perceived as falling within the field of international law, and adhere to a certain aesthetic of argument as well as the formal requirements of their presentation. It is only by submitting to this rigorous protocol that one's subject matter will be able to access the 'scientificity' that allows his or her peers to assess the 'truthfulness' or 'falsity' of his or her positions. No one can claim access to or claim to be part of the 'invisible college' unless he or she submits to these rules, which set the parameters for the production, dissemination

of training of judges, see A Marissal 'Cultures juridiques et internationalisation des élites du droit. Le cas de la Cour internationale de Justice' (2020) 105 *Droit et Société* 355.

149 A Koagne Zouapet 'L'activisme judiciaire supranational en Afrique. Une tentative de systématisation' (2020) 28 *African Journal of International and Comparative Law* 38-42. See also AD Olinga 'Les emprunts normatifs de la Commission africaine des droits de l'homme et des peuples aux systèmes européen et interaméricain de garantie des droits de l'homme' (2005) 62 *Revue Trimestrielle des Droits de l'Homme* 499-537; AD Olinga *'L'influence de la jurisprudence de Strasbourg sur l'interprétation de la Charte africaine par la Cour africaine des droits de l'homme et des peuples' in Mélanges en l'honneur de Frédéric Sudre, Les droits de l'homme à la croisée des droits* (2018) 525-536.

150 Prost (n 32) 151.

151 As above.

and validation of juridical discourse in international law.[152] This is the case in practically all scientific fields. The problem in international law is that these protocols and standards have been defined unilaterally by one part of the world, for a 'science' that is international in scope and is applied and controlled for the most part by the members of the dominant legal cultures that have defined these discursive policies.

This control is carried out through the places where knowledge is produced and validated, which are overwhelmingly dominated by Westerners. Norms and standards are defined on the basis of a duopoly of the civil law and common law legal cultures. The most reputable publishing houses, which consequently give a halo of scientific credibility to publications, are practically all based in European countries with mainly Western collection directors and editorial board members, or academics based in Western universities. The same is true of academics' journals, which are dominated by Western academics and practitioners. Roberts points out that the Western dominance on these editorial boards will in all likelihood result in the normalisation of certain Western perspectives. Comparable Western dominance does not characterise the editorial boards of international law journals in other parts of the world, such as African international law journals, which for the most part feature a high proportion of Western-based academics in their editorial boards.[153] Moreover, most of these African journals are published by European publishers. Thus, African scholars that are compelled by institutional requirements (for any promotion, academic responsibility, funding of research projects) to publish in 'leading international journals' have 'to conform to Eurocentric canons if they want their articles published'.[154]

To convince editorial boards of the 'scientificity' of their position and to be in line with 'the truth' of international law, African scholars, especially those who do not have enough notoriety to allow themselves a certain amount of recklessness, must take care to present their arguments 'through the works and ideas of the "great" English and German scholars'. Short quotations of those masters are then 'embellished' with more precise contents of a "second echelon" of scholarship, usually occupied by Spanish authors'.[155] Peer review, even anonymous, obliges every writer of

152 Prost (n 32) 153.

153 Roberts (n 15) 109-110. See the criticisms and confusion of a librarian, LL Jacques 'What's wrong with international law scholarship: Gaps in international legal literature' (2008) 35 *Syracuse Journal of International Law and Commerce* 172-173.

154 B Fagbayibo 'A critical approach to international legal education in Africa: Some pivotal considerations' (2019) 12 *Third World Approaches of International Law Review Reflections* 4.

155 Becker Lorca (n 22) 289.

an article to find a balance between the original ideas they may have and the obligation to express themselves in the forms and vocabulary accepted by the 'orthodoxy' of the discipline. Therefore, it is necessary, to ensure a true universality of international law, on the one hand for these journals to diversify their editorial and scientific committees in order to enable the dissemination of 'alternative truths' to the dominant ones; on the other hand for Africans and all those interested in an African approach,[156] both to develop an African vision and to equip themselves with the tools (journal, publishing house, collection from established publishers) to disseminate it.

One essential factor to keep in mind in the teaching of international law is that 'what counts as international law depends in part on how the actors concerned construct their understandings of the field and pass them on to the next generation'.[157] It is the great responsibility of African international lawyers to contribute to the enrichment of international law by using traditions, learning and wisdom from Africa. A truly African approach requires a process through which teachers and researchers provide students with the opportunity to study the world and its people, concepts and history from an African world view. This, as Fagbayibo underlines, does not imply that the contribution of other civilisations should be expunged from the syllabus or encouragement of positioning African civilisation as superior to others, but rather an exercise that aims to widen the knowledge base of students by dispelling the 'myth of universalism'.[158] The need and modalities for developing an African approach to the teaching, practice and research of international law are the same as those already outlined some 40 years ago:[159]

> We must give attention to the teaching of international law in Africa. In so doing we must direct our focus on new perspectives and conceptions and examine in detail African aspirations and practice and their relationship to the totality of international law and relations remembering always that the target is a system not only for Africa but for the whole world.

156 African international lawyers and academics can undoubtedly draw inspiration in this respect from the strategy of their Latin American colleagues during the 19th century to develop and popularise an American approach to international law. See Becker Lorca (n 52) 482-483.

157 Roberts (n 15) 2.

158 Fagbayibo (n 104) 185.

159 TA Aguda 'The dynamics of international law and the need for an African approach' in K Ginther & W Benedek (eds) *New perspectives and conceptions of international law. An Afro-European dialogue* (1983) 8-11. See also K Ginther 'New perspectives and conceptions of international law: Introductory remarks' in Ginther & Benedek (above) 1-7; K Ginther 'The teaching of international law under a developmental aspect: The relevance of African cases and materials' 216-224; 'Concluding and press statement' 241-243.

5 The progressive emergence of an African vision of international law

When examining the vision of international law developed so far by African states, it is clear that, from the moment they accede to international sovereignty, it is tainted by political elements that are manifest both in its elaboration process and in its modes of expression. This has been explained by the youth of these states: Any birth of a state, any territorial mutation, is a matter of history and remains indissolubly linked to political factors; the more recent it is, the more politics conditions and taints the legal and the process of law making bears the mark of it.[160] The progressive formulation of the African approach to international law thus bears the imprint of the major problems that agitate the political life of the Continent and that preoccupy its leaders: yesterday apartheid, decolonisation or state contracts; today unconstitutional changes of government, the repression of international crimes or economic development. On each of these points, the African approach is marked by the adoption of two categories of norms highlighted by Yusuf: first, a category of truly innovative and original norms that are specific to Africa; and, second, a category of norms adopted as a complement to the universal framework, whose gaps they aim to fill, broaden the scope of application or take account of regional specificities in their implementation in Africa.[161]

Beyond the complexity and intertwining of the situations, another categorisation is possible, not exclusively that of Yusuf, which underlines the two complementary dynamics that may be identified, one intra-regional and the other, which can be described as 'external', concerning relations with other countries in the world. One of the characteristic features that can be identified in each of these dynamics is an affirmed desire for protection enshrined in the African vision. At the intra-regional level, this involves the progressive development of a framework for the protection of populations and communities, including against the state. The protection of the human person and the establishment/preservation of a framework that can facilitate this protection sum up the spirit of this African regional law, despite the fluctuations that can be observed. In relations with the outside world, protection becomes self-protection. Sixty years after independence, the trend highlighted by Bipoun-Woum is confirmed: Africa, freshly emancipated from the colonial yoke, is reluctant

160 Yakemtchouk (n 2) 12.

161 Yusuf (n 1) 185. See also PF Gonidec 'Existe-t-il un droit international africain ?' (1993) 5 *African Journal of International and Comparative Law* 249.

to provide itself with a new protector, whatever the motives.[162] This ambivalent protection does not go without a certain tension sometimes between the desire for self-protection against the outside world and the desire to protect the populations within it, when, for example, it is the state apparatus that is responsible for serious human rights violations. This part will try to brush very succinctly these two movements.

5.1 An intra-African law of solidarity and protection

This African intra-regional law corresponds to what has been referred to as 'public law of Africa'. It is not a law distinct from international law, from which it has no claim to be distinct, but a regional legal system which 'is designed to cater to the specific needs and aspirations of the peoples of Africa and to regulate relations among Africa states in such a manner as to contribute to their unity and solidarity in conformity with the ideals of pan-Africanism'.[163] This definition is similar to that proposed for 'American international law'.[164] Despite its primary function, which is to regulate relations between African states or to govern other intra-regional relations, this regional international law or public law of Africa nevertheless remains international law and has a vocation for universality. Indeed, 'in view of the rules and principles of this regional public law, it cannot be denied that they may give rise to international legal norms of much wider application, thus enriching universal international law'.[165] By crystallising the practice and *opinio juris* of the 50 or so African states brought together within the AU, these AU instruments are therefore an important element to be taken into account not only in the identification of customary law, but also in any reflection on the development of international law in that they necessarily convey the vision of these states of international law in a specific field.

The logic of promoting African solidarity and protecting this regional law was instilled from the very beginning of its elaboration. Indeed, grouped within the Organisation of African Unity (OAU), the young African states have placed at the heart of the action of this international organisation and their mobilisation, the promotion of African unity, the decolonisation of African territories still under foreign domination, and the improvement of the living conditions of African populations.[166] Article 3 of the OAU Charter, for example, required of African states 'absolute

162 Bipoun-Woum (n 27) 6.

163 Yusuf (n 1) 18.

164 See Green (n 60) 10.

165 Yusuf (n 1) 19.

166 See Preamble, OAU Charter, 25 May 1963.

dedication to the total emancipation of the African territories which are still dependent' and 'affirmation of a policy of non-alignment with regard to all blocs'. The same logic of solidarity, independence and protection of the rights of the populations can be found in articles 3 and 4 of the Constitutive Act of the AU, which set out respectively the objectives of the Organisation and the principles that should guide its action.

Going beyond the inter-state and sovereignist approach of the OAU Charter, the Constitutive Act of the AU reflects an evolution towards a more anthropocentric approach to international law, at least in the intra-regional framework with a stronger affirmation of the protection of the dignity of the human person living in Africa and of African peoples. Thus, as the African Commission on Human and Peoples' Rights (African Commission) has affirmed, the rights of peoples in Africa are not only protected against external aggression, oppression or colonisation, but also against internal abuses that may be committed by the state.[167] As a sign of this new impetus for a more protective law for people, including against their government, article 4 of the AU Constitutive Act sets out new principles that constitute a rejection of the OAU's sacrosanct principle of non-interference in internal affairs. These include the prohibition of unconstitutional changes of government; participation by African peoples in the activities of the organisation; condemnation and rejection of impunity and political assassination; respect for democratic principles and good governance; the right of the Union to intervene in a member state in respect of grave circumstances, namely, war crimes, genocide and crimes against humanity; the right of member states to request intervention from the Union in order to restore peace and security; the promotion of social justice to ensure balanced economic development; and the promotion of self-reliance within the framework of the Union.

To these important innovations set out in the AU Constitutive Act and reinforced by numerous specific texts, one must add the strengthening of the penal framework against crimes considered the most serious, again with new proposals. Thus, Africa has not only established the first regional court with jurisdiction in criminal matters but has also expanded the list of international crimes. The future African Court of Justice, Human and Peoples' Rights will have jurisdiction not only for the four 'classic' international crimes of genocide, crimes against humanity, war crimes and crimes of aggression, but also for ten other crimes: the crimes of unconstitutional change of government, piracy, terrorism, mercenaryism, corruption, money laundering, trafficking in persons, trafficking in drugs,

167 *Sudan Human Rights Organisation & Another v Sudan* (2009) AHRLR 153 (ACHPR 2009) para 222.

trafficking in hazardous wastes and illicit exploitation of natural resources (article 38A of the Statute of the African Court of Justice and Human and Peoples' Rights).

The strong symbol of this new African approach to international law at the regional level undoubtedly remains the AU's right of intervention enshrined in article 4 (h) of the Constitutive Act, which makes it the only international organisation with the statutory right to intervene in a member state in grave circumstances arising from war crimes, genocide and crimes against humanity. Beyond the affirmation of the overcoming of the rigid intergovernmentalism of the OAU symbolised by non-interference in the internal affairs of states, the consecration of this right of intervention marks a real paradigm shift in the African vision of the international legal order, or at least in Africa, the importance of which is not only symbolic. Yusuf thus highlights four important legal consequences that are significant for the identification of an African approach to international law and which it seems useful to reiterate here. First, by conferring such a right on the pan-African organisation in the event of serious crimes, African states appear to have resolved the tension that may have existed between sovereignty values-based and the human rights values-based in favour of the latter. Sovereignty can no longer be used as a cloak in Africa to commit such crimes with impunity. Second, the right conferred on the AU is not subject in the Constitutive Act to prior authorisation by the UN Council. The AU has the necessary powers to assess the grounds for possible intervention. 'As the AU continues to develop African public law rules on intervention, it will become more difficult, both legally and politically, for outside powers to block an African solution to African problems in the Security Council.'[168] Third, this principle has an impact on the relationship between the AU and the Security Council and establishes a new relationship in the maintenance of peace and security as well as in the field of humanitarian intervention. Fourth, and finally, with this explicit recognition of the right to intervene on humanitarian grounds, African states are enshrining in positive law a norm that has hitherto been proposed and debated only on moral and ethical grounds.[169]

The other principle, symbolic of this African vision of international law, undoubtedly is the prohibition of unconstitutional changes of government, which is the manifestation of taking into consideration the social and political context to develop regional law. Indeed, one of the

168 Yusuf (n 1) 191.

169 Yusuf (n 1)191-192. See also R Cole 'Africa's approach to international law: Aspects of the political and economic denominators' (2010) 18 *African Yearbook of International Law* 292-298.

most significant developments in constitutional and international law in Africa since independence has been the occurrence of a series of *coups d'état* and other forms of unconstitutional changes of government. Given the negative impact of internal crises linked to political competition on human rights, development efforts and the facilitation of the most serious crimes, African regional law has gradually given a central place to issues of governance, democracy and good public administration and has given impetus to governance reform processes within African states. Thus, for example, the African Charter on Democracy, Elections and Governance adopted in 2007 establishes that accession to power through non-democratic means no longer is a matter of domestic jurisdiction but a situation that triggers the adoption of certain measures or sanctions by the AU. These provisions have not gone unheeded, and the AU has already imposed sanctions upon some states due to changes in their leadership following *coups d'état*.[170] Gradually, therefore, the AU succeeded in overcoming the criticism levelled at the OAU for making conventions that were nothing more than projective constructions based on an ideal law that was essentially forward-looking, a law that gave an imaginary representation of reality and was intended to mask concrete situations.[171]

This desire for better protection of the human person in Africa and, therefore, the adoption of a more anthropocentric approach to international law at the regional level, does not prevent African states from being wary of and reserved for similar initiatives coming from organisations they consider foreign.

5.2 An 'external' international law of resistance and liberation

A certain resistance to existing international law is part of the DNA of the African vision of international law. As noted above, Africans did not hesitate, as soon as they gained independence and had the opportunity to make their voice heard on the international scene, to decry international law made without their knowledge and which very often served to subjugate and dominate them (see 2.2 above). This informed participation in the non-aligned movement, or the positions adopted at the first conference of independent African states in Accra in April 1958. These actions were all guided by a logic of emancipation and the will to be heard and respected as

170 See, among others, Communiqué of the African Union Peace and Security Council (AUPSC), 9 December 2010, AU Doc.PSC/PR/COMM.1(CCLII); Communiqué AUPSC, 17 March 2010, AU Doc.PSC/PR/COMM.(CCXXI); Communiqué of the AUPSC, 19 February 2010, AU Doc.PSC/PR/COMM.2(CCXVI).

171 Gonidec (n 161) 255-256.

fully-fledged actors in international society.[172] The rejection and resistance approaches were applied to those norms of international law supporting and legitimising colonial enterprise and imperialism in Africa. This legacy of the past strongly permeates the African approach to international law, which gives a very special place to sovereignty, established as a categorical and quasi-absolute imperative. The principles that African states attach to it, such as the equality of states, territorial integrity, self-determination of peoples and non-intervention, thus occupy a central place in their vision of what the international legal order should be. With the emphasis on sovereignty and institutions as immunities, African states, like many other developing countries, aim to use the existing international law to craft a more pluralistic, tolerant international system where new 'missions of civilisation' in the name of certain values will not lead to unilateral military or judicial actions against them. They thus emphasise the exclusivity of territorial jurisdiction and consider that a state is only bound by rules to which it has expressly consented, either through the conclusion of a treaty or by formally recognising the international validity of a customary rule.[173]

According to Yakemtchouk, this restrictive attitude can be explained by psychological factors. Independence and sovereignty, considered the supreme objective during the hard years of liberation and conquered sometimes at a heavy cost of blood and human life, are precious goods that must be kept intact and whole, and which cannot be renounced without betraying the memory of the martyrs sacrificed.[174] To this must be added the aforementioned past instrumentalisation of international law and the fear of alienation of decision-making power. Africans are aware of the vulnerability of their young states, and of the fact that their political independence is not sufficient to ensure their real independence from former colonial and other hegemonic powers of international society.[175] International law indeed is not just an instrument of social regulation. It is used by states, according to their interests and as the case may be, as an object for promoting and transforming the world politically, economically, socially or to fight against what they consider to be inequalities. In this perspective, it has become a new mode for the exercise of power since it requires putting in place specific regulatory techniques and practices.[176]

172 See Yusuf (n 1) 95-97. See also Bipoun-Woum (n 27) 66-71.

173 Yakemtchouk (n 2) 18-19. For an account of the strategy and means of this resistance within the United Nations, see Yusuf (n 1)102-141.

174 Yakemtchouk (n 2) 19. In the same vein, see Cole (n 169) 292.

175 Yakemtchouk (n 2) 19.

176 Jouannet (n 54) 57. See also Burchardt (n 82) 11-13; Jorgensen (n 7) 19-24.

If this reality is admitted, it is possible to understand, without necessarily justifying it, some (not all) of the attitudes and positions of African countries as 'an effort to have their normative experiences better reflected in international law destined to regulate [them]. To use a Hegelian expression, [they are] carrying out [their] own "struggle for recognition".'[177] This willingness to oppose in order to be recognised is clearly expressed in the oppositions of the OAU/AU to the Security Council both during the sanctions against Libya at the beginning of the 1990s, and the referral of situations concerning serving heads of state to the International Criminal Court (ICC). Beyond the divergence of approach, the pan-African organisation criticised the Security Council for ignoring its proposals in favour of the interests of Council members.[178] This is what has been called 'regionalism with a universalist character' constituted as an attempt by its members to free themselves from imperialism. It does not aim at distancing itself from international society but, on the contrary, at claiming the equal sovereignty of its different members to be able to participate fully in it.[179] The same logic can be found in the regional initiative for the codification of international law.[180]

This 'international law of resistance' manifests itself in particular through the elaboration within the African regional framework of legal instruments which, although limited *ratione loci* to Africa, clearly have foreign partners as their addressees and therefore affect relations with them. These instruments thus enable African states either to insist on and enshrine positions defended during the negotiation of universal instruments and which would have been discarded, or to initiate the reform of a universal legal framework that they contest. Thus, the conventions and legal instruments adopted in Africa very often constitute an expression of the position of African states towards a corresponding norm of international law. This is the case when the African rule lays

177 Lee (n 144) 442. See also Burke-White (n 116) 3; Ben Achour (n 123) 157-158.

178 See Tshibangu Kalala 'La décision de l'OUA de ne plus respecter les sanctions décrétées par l'ONU contre la Libye: désobéissance civile des États africains à l'égard de l'ONU' (1999) 2 *Revue Belge de Droit international* 545-576; M Kamto 'L'"affaire Al Bashir" et les relations de l'Afrique avec la Cour pénale internationale', in *Liber Amicorum Raymond Ranjeva. L'Afrique et le droit international: variations sur l'organisation internationale* (2013) 147-170; O Corten 'L'Union Africaine, une organisation régionale susceptible de s'émanciper de l'autorité du Conseil de sécurité? *Opinio juris* et pratique récente des Etats' in Aznar & Footer (n 20) 203-218. See more generally on opposition in international law, I Ley 'Opposition in international law – Alternatively and revisibility as elements of a legitimacy concept for public international law' (2015) 28 *Leiden Journal of International Law* 717-742.

179 M Forteau 'Commentaire sur de Hoogh et Pullkowski' in Aznar & Footer (n 20) 89.

180 M Kamto 'La codification du droit international en Afrique: méthode et défis' (2015) 2 *Journal of the African Union Commission on International Law* 256.

down a general principle or when, having a special purpose, it results from the modification of an old rule, very often laid down by European powers, and hitherto considered 'customary'.[181]

One example is the broad definition of the term 'refugees' in the OAU Refugee Convention compared to that of the 1951 UN Convention. According to Yusuf, this broad definition is a direct response to the specific problems faced by African states at that time. During that period, some African countries were occasionally subjected to aggression due to their support for liberation movements. Thus, the reference to 'external aggression, occupation and foreign domination' was designed to both freedom fighters and their supporters. In short, the deliberate decision on the part of the drafters of the African Convention to omit several elements of the refugee in the 1951 Convention effectively broadens the class of persons who could qualify for refugee status under the African Refugee Convention.[182]

The most symbolic example of this African approach undoubtedly is the Bamako Convention on the ban of the import into Africa and the control of transboundary movement and management of hazardous wastes within Africa. The Bamako Convention was elaborated as a direct response to gaps in the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal that were considered prejudicial to the interests of African states concerning the definition, import and dumping of hazardous waste, the liability regime applicable to violators of rules prohibiting the former, and the scientific standard used to determine a breach of such rules.[183] Taking into account the situation of African states and in particular the danger of importing these hazardous wastes, the Bamako Convention enshrines the positions defended by African states and not included in the Basel Convention, in particular a longer list of hazardous wastes, the inclusion of radioactive waste in the scope of the Convention, broader rules for unlimited liability, and the enshrinement of a strict precautionary principle to be applied by states. Significantly, the Bamako Convention establishes an absolute ban on the importation of all hazardous waste into Africa from states that are not parties to the Convention. Thus, only intra-African trade in hazardous waste is permitted under the Convention, while the Basel Convention

181 Bipoun-Woum (n 27) 131.

182 Yusuf (n 1) 222-224; T Maluwa 'Reassessing aspects of the contribution of African states to the development of international law through African regional multilateral treaties' (2020) 41 *Michigan Journal of International Law* 341-345.

183 Yusuf (n 1) 245.

only prohibits the import of hazardous waste to the state parties that have prohibited the import of such wastes.[184]

The Pan-African Investment Code (PAIC) is another illustration of this African approach to international law of resistance against an international investment law that so far seems to protect foreign multinationals to the detriment of national interests. Reflecting this rejection of an unbalanced legal framework in favour of foreign investors, the PAIC requires that investments are now only protected if they truly contribute to the sustainable development of host African countries instrument. PAIC thus is an African tuning and recalibrating of international investment law with innovations as direct obligations on investors, for example, or the specific exceptions to the Most Favourable Nation and National Treatment standards, or the complete omission of a Fair and Equitable Treatment standard.[185]

As indicated at the beginning of this part, these African regional approaches, at the same time as constituting a challenge to the existing legal order, are also an invitation, proposals for the evolution of international law in a direction that seems, at least to its initiators, the way forward. Indeed, at the very least, these contributions signify the emergence of a regional approach of international law. However, although these rules and principles often are only applicable among the African state parties to the particular treaties, they have the capacity to make an impact on future developments in international law outside the African regional context. That is why these are only proposals, the future if which will depend on both the counter-narratives and norm contestations opposing these emerging norms, and to the non-implementation of some of the norms by the norms creators themselves, as this might signify a certain ambivalence or caution.[186] Whether, therefore, it is a question of developing a purely inter-regional law or, on the contrary, a regional law aiming to have an impact beyond the strictly African framework, it is always a contribution to the development of international law, of which the African approach undeniably is a part.

6 Conclusion

For Africans, the development of a regional approach represents much more than an instrument of resistance and a contribution to the enrichment of the universal legal heritage. It is also a framework for the expression of

184 Yusuf (n 1) 246-248.

185 See the analysis of Mbengue & Schacherer (n 53) 549-569.

186 Maluwa (n 181) 411.

the 'African personality' once denied, today if not contested, at least still ignored by some. In this context the definition of a regional approach appears, as the means to continue the struggle engaged in the aftermath of independence, that of ensuring that Africa is no stranger to international law, of which it remains convinced in spite of everything that it is the only guarantee of peaceful cooperation between peoples and civilisations.[187]

This African vision of international law is still essentially formulated by states, mainly within the framework of regional organisations, and is still struggling to materialise in the teaching, research and practice of international lawyers. Therefore, it is necessary for the latter and, in particular, academics, to carry out an in-depth reflection on the requirements of an approach to international law, considering both the necessary unity of the continent and its diversity, in order to advance both the development of international law in Africa by including social needs and the development of a truly universal law bearing African values and interests. The first step would already be the elaboration of a genuine treatise on international law in Africa, which would explore in particular the African philosophy of international law, the practice of African states and organisations, the modes of production of international law in Africa, the places, and fields of public law in Africa.[188]

It is true that research on these issues in Africa remains handicapped by the difficult access to jurisprudence, the practice of African states and even the preparatory work for conventions adopted on the continent. Regrettably, the establishment of the International Law Commission of the AU has not resulted in greater popularisation of African practice in international law. Africa's absence in international law textbooks and international judicial decisions is also the result of this lack of a compendium providing access to the practice of both African states and international organisations. Beyond this essential work of collecting and popularising African practice, the International Law Commission of the AU should work more actively on teaching and researching in international law in Africa. This means working closely with the continent's academic institutions in defining training curricula adapted to the African vision, identifying priority research areas, and supporting research. It is only by developing a clear African approach to international law that African international lawyers, African states and organisations will be able to fully participate in the development of truly universal international law, applicable to the international community of which they are full members.

187 Bipoun-Woum (n 27) 25-26.

188 For proposals on the content of such a treatise, see Gonidec (n 117) 807-821.