1

THE DEVELOPMENT OF AN AFRICAN INTERNATIONAL LAW

What does Africanization mean?

1 Made in Africa

Since 1963 there has a been a steady production of international legal instruments based on an imagined African identity. Conceptualized here as 'African international law', these international legal instruments have established various African *norms* as well as *actors* with a mandate to facilitate the making and implementation of those norms, together with different *processes* underpinning the making and implementation of those norms.

For example, more than 60 multilateral treaties (see Figure 1 Spiral of African International Treaty Law) have already been adopted referring to 'Africa' in some way in their title, either as an adjective 'African', a geographical delimitation 'in Africa' or as part of their source, the 'Organization of African Unity' (OAU)[1] and later the 'African Union' (AU).[2]

Upon closer examination, these supposedly 'African' treaties articulate a wide variety of normative, institutional and procedural

1 Established by the OAU Charter (1963), art 1: 'The High Contracting Parties do by the present Charter establish an organization to be known as the ORGANIZATION OF AFRICAN UNITY. 2. The Organization shall include the Continental African States, Madagascar and other Islands surrounding Africa.' This treaty was complemented by the General Convention on the Privileges and Immunities of the Organization of African Unity (1965) to further regulate the legal personality of the OAU.

2 Established by Constitutive Act of the African Union (2000), art 2: 'The African Union is hereby established in accordance with the provisions of this Act.' According to its art 33, this Act replaced the Charter of the Organization of African Unity and takes precedence over and supersedes any inconsistent or contrary provisions of the Treaty establishing the African Economic Community (1990). The Act was subsequently amended by the Protocol on the Amendments to the Constitutive Act of the African Union (2003).

frameworks on issues such as economic integration[3] to promote trade,[4] transport,[5] investments,[6] technical and scientific cooperation,[7] and free movement,[8] while another set of treaties are concerned with social affairs to improve access to culture,[9] sports[10] and quality medical care.[11] Yet another body of treaties explicitly relate to human rights[12] and, more specifically, are intended to enhance the protection of the dignity of women,[13] children,[14] youth,[15] the elderly,[16] persons with disabilities,[17] refugees[18] and internally-displaced persons.[19] Another

3 Treaty Establishing the African Economic Community (1991); African Union Convention on Cross-Border Cooperation (Niamey Convention) (2014); Protocol on the Establishment of the African Monetary Fund (2014).
4 Constitution of the Association of African Trade Promotion Organizations (1974); Agreement Establishing the African Continental Free Trade Area (2018).
5 African Civil Aviation Commission Constitution (AFCAC) (1969); African Maritime Transport Charter (1994); Revised Constitution of the African Civil Aviation Commission (2009); Revised African Maritime Transport Charter (2010).
6 Protocol on the African Investment Bank (2009); Statute of the African Institute for Remittances (AIR) (2018).
7 Inter-African Convention Establishing an African Technical Cooperation Programme (1975); African Charter on Statistics (2009); Statute of the African Union Commission on International Law (AUCIL) (2009); Statute of the Pan-African Intellectual Property Organization (PAIPO) (2016); Statute of the African Observatory in Science Technology and Innovation (AOSTI) (2016); Statute of the African Science Research and Innovation Council (ASRIC) (2016); Revised Statute of the Pan-African University (PAU) (2016); Statute of the African Space Agency.
8 Protocol to the Treaty Establishing the African Economic Community Relating to Free Movement of Persons, Right of Residence and Right of Establishment (2018).
9 Cultural Charter for Africa (1976); Charter for African Cultural Renaissance (2006).
10 Statute of the Africa Sports Council (2016).
11 Statute of the African CDC and its Framework of Operation (2016); Treaty for the Establishment of the African Medicines Agency (AMA) (2019).
12 African Charter on Human and Peoples' Rights (1981); Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (1998); Statute on the Establishment of Legal Aid Fund for the African Union Human Rights Organs.
13 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003) (African Women's Protocol).
14 African Charter on the Rights and Welfare of the Child (1990).
15 African Youth Charter (2006).
16 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons (2016).
17 Agreement for the Establishment of the African Rehabilitation Institute (ARI) (1985).
18 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (1969).
19 African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (2009) (Kampala Convention).

collection of treaties focus on governance issues with a particular goal to democratize[20] and decentralize[21] public authority while keeping it judicially in check[22] and free from corruption.[23] Yet another set of treaties target the environment to foster the conservation and sustainable use of natural resources[24] and to avoid and mitigate pollution[25] as well as the adverse effects of climate change.[26] Another group of treaties are centred on security[27] concerns to create safer roads,[28] seas[29] and cyber space[30] and to keep Africa free from terrorists,[31] mercenaries,[32] transnational criminals[33] and nuclear weapons.[34]

20 Protocol to the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament (2001); African Charter on Democracy, Elections and Governance (2007); Protocol to the Constitutive Act of the African Union relating to the Pan-African Parliament (2014).
21 African Charter on the Values and Principles of Decentralization, Local Governance and Local Development (2014).
22 Protocol of the Court of Justice of the African Union (2003); Protocol on the Statute of the African Court of Justice and Human Rights; Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (2014).
23 African Union Convention on Preventing and Combating Corruption (2003); African Charter on Values and Principles of Public Service and Administration (2011).
24 Phyto-Sanitary Convention for Africa (1967); African Convention on the Conservation of Nature and Natural Resources (1968); Convention for the Establishment of the African Centre for Fertilizer Development (1985); Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa (1991); Convention of the African Energy Commission (2001); Revised African Convention on the Conservation of Nature and Natural Resources (2003); Statute of the African Minerals Development Centre (2016).
25 Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa (1991).
26 Agreement for the Establishment of the African Risk Capacity (ARC) Agency (2012).
27 Protocol Relating to the Establishment of the Peace and Security Council of the African Union (2002); The African Union Non-Aggression and Common Defence Pact (2005).
28 Road Safety Charter (2016).
29 African Charter on Maritime Security and Safety and Development in Africa (Lomé Charter) (2016).
30 African Union Convention on Cyber Security and Personal Data Protection (2014).
31 OAU Convention on the Prevention and Combating of Terrorism (1999); Protocol to the OAU Convention on the Prevention and Combating of Terrorism (2004).
32 Convention for the Elimination of Mercenarism in Africa (1977).
33 Statute of the African Union Mechanism for Police Cooperation (AFRIPOL) (2017).
34 African Nuclear-Weapon-Free Zone Treaty (Pelindaba Treaty) (1996).

However, 'Africanized' treaties are not the only international legal instruments through which ambitions are acted on to create a safe, healthy and economically and socially-prosperous environment for the diverse inhabitants of this space called 'Africa'. To this can be added the plethora of decisions made each year, arguably, by the most authoritative OAU and AU institutions mandated to make decisions in name of and for Africa (see Charts 1.1-1.7). These are the OAU and later the AU Assembly of Heads of State and Government ((O)AU Assembly), the OAU Council of Ministers which became the AU Executive Council, the Central Organ of the OAU Mechanism for Conflict Prevention, Management and Resolution, which was the predecessor to the Peace and Security Council of the AU and the African Court on Human and Peoples' Rights.[35]

The Assembly is the highest policy organ of the OAU and later AU, composed of all 55 holders of the highest executive office of AU member states.[36] The Executive Council, the successor of the Council of Ministers, is the second most senior policy-making body of the AU, composed of all 55 ministers of foreign affairs.[37] The Peace and Security Council, the heir of the OAU central organ, is the principal decision-making body of the AU for the prevention, management and resolution of conflicts on the continent and is composed of 15 elected AU member states based on specific eligibility criteria, including regional balance and a minimum level of peace and security credentials.[38] Finally, the African Court on Human and Peoples' Rights (African Court) is the only operational African

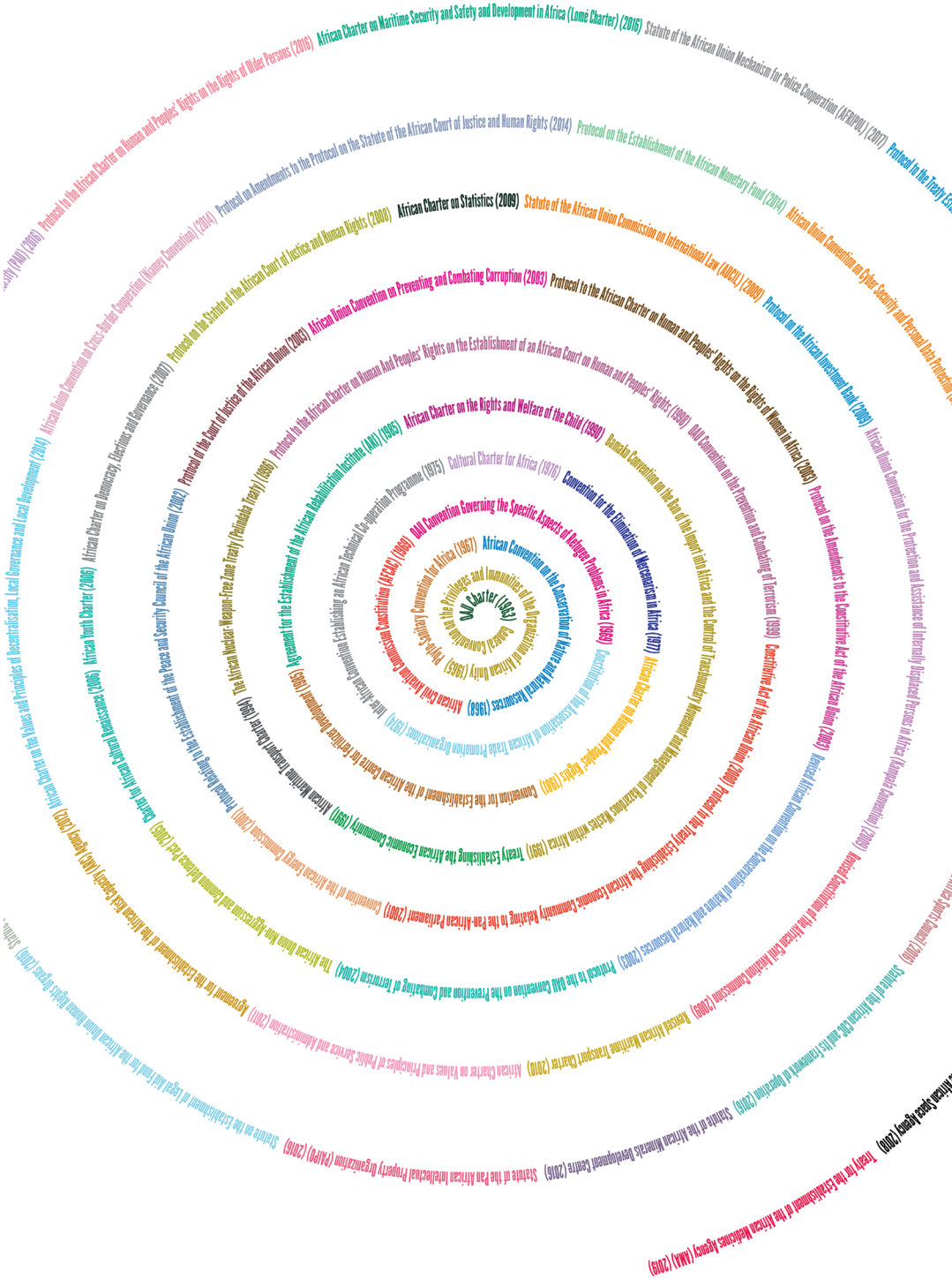
35 Other African international courts are envisaged under the AU; however, they have not yet been operationalized. This includes the African Court of Justice (2003); the African Court of Justice and Human Rights (2008; 2014) which is designed as a Court to merge the existing African human rights court together with the not yet established African Court of Justice, and the African Continental Free Trade Area Appellate Body (2019).

36 Art 6 Constitutive Act of the African Union (2000).

37 See art 12 of the OAU Charter (1963) and art 10 of the Constitutive Act of the African Union (2000). It is possible, however, that the Council of Ministers and the Executive Council are composed of 'other ministers or authorities'.

38 Art 5 Protocol Relating to the Establishment of the Peace and Security Council of the African Union (2002).

Figure 1.1: Spiral of African international treaty law



international court[39] with a continent-wide mandate[40] and is composed of 11 judges who have to be nationals of AU members states with recognized legal expertise and who serve in their personal capacity.[41]

Each of these bodies greatly contribute to the enrichment of African international law through the body of principles, standards and rules ('norms') captured in their decisions that prescribe or prohibit certain forms of behaviour.

Furthermore, these key AU bodies also have the capacity of establishing, through their decisions, additional institutions and mechanisms ('actors') responsible for realizing the objectives of the (O)AU. These entities can refer both to highly-formalized entities such as the African Union Commission on International Law (AUCIL)[42] or the African Union Centre for Post-Conflict Reconstruction

39 There are different international courts in Africa, such as the Economic Community of West African States (ECOWAS) Court of Justice; the East African (EAC) Court of Justice; the Arab Maghreb Union (AMU) Court of Justice; the Central African Monetary Community Court of Justice; the Court of Justice for the Common Market of Eastern and Southern Africa (COMESA); the Southern African Development Community (SADC) Tribunal (currently suspended); the West African Economic and Monetary Union (WAEMU) Court of Justice; the Common Court of Justice and Arbitration for the Organization for the Harmonization of Business Law in Africa (OHADA). These international courts generally are organized around smaller groups of African states and do not aim at a continental-wide mandate. To these international courts may be added various internationalized criminal courts in Africa, whereby the judicial apparatus to adjudicate on a mostly single national question, has been fused with foreign elements, such as international funding as well as judges and registry staff with a nationality different from the judicial questions at hand. Examples include the International Criminal Tribunal for Rwanda (ICTR) and its successor, the International Residual Mechanism for Criminal Tribunals (Rwanda), the Special Court for Sierra Leone and its successor, the Residual Special Court for Sierra Leone, and the Extraordinary African Chambers within the courts of Senegal to prosecute international crimes committed in Chad.

40 Although the African Court technically has a continental-wide mandate, the recognition of its jurisdiction is dependent upon the ratification and deposit by AU member states of its founding instrument – the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (1998) – with the Chairperson of the AU Commission. As of April 2022, 33 AU states had ratified and deposited the African Court's founding Protocol. That means that 22 AU states had not yet recognized the African Court's jurisdiction. Thus, the African Court's continental jurisdiction stands only at 60% of all AU member states.

41 Art 11 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (1998).

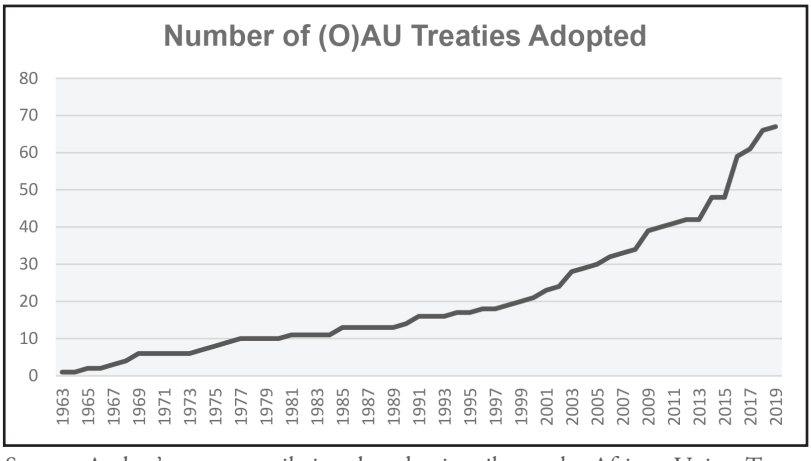
42 See the following decisions of the Assembly and Executive Council related to the set-up and operationalization of the AUCIL: EX.CL/Dec.129(V); Assembly/AU/Dec.71(IV); Assembly/AU/Dec.209(XII); and Assembly/AU/Dec.249(XIII).

and Development (AUPCRD),[43] as well as more loosely-organized mechanisms such as AU election, human rights or military observer missions or AU High-Level Panels.[44] More than 150 institutions and mechanisms have already been established with some form of a pan-African mandate or purpose (see Figure 1.2 Panorama of different AU institutions and mechanisms).

Congruent with that institution-creating capacity, these (O)AU bodies have the ability to articulate certain formalized steps ('processes'), including decision-making procedures or other organization matters, which are meant to guide the (O)AU action.[45]

In the charts below (Charts 1.1-1.7) the productivity levels of these key (O)AU bodies are visualized through a statistical sketch of the number and pace of decisions made on an annual basis. The purpose of these graphs is to permit a quantitative sense of African international law-making trends.

Chart 1.1: Number of Treaties adopted by the (O)AU (1963-2020)



Source: Author's own compilation, based primarily on the African Union Treaty website, https://au.int/en/treaties (accessed 24 November 2021)

43 See the following decisions of the Assembly and Executive Council related to the set-up and operationalization of the AUPCRD: Assembly/AU/Dec.710(XXXI); Assembly/AU/Dec.729(XXXII); Assembly/AU Dec.750 (XXXIII); and EX.CL/Dec.1073(XXXVI).

44 For a comprehensive overview of the purpose and mandate of all the different institutions established by the (O)AU, see the annually-published *African Union handbook* (2021).

45 This conceptualization of norms, actors and processes builds in part on previous work developed in M Wiebusch *Constitution building in the African Union* (2020) 33.

Figure 1.2: Panorama of different AU Institutions and Mechanisms

GOVERNANCE INSTITUTIONS AND MECHANISMS

Keywords: Decision Making – Law Making – Policy Development – Dispute Resolution

1. Assembly of Heads of State and Government (AHSG)
2. AHSG Committee of Ten Heads of State and Government on the Reform of the United Nations Security Council
3. Executive Council (EXCL)
4. EXCL Ministerial Committee on Candidatures within the International System
5. EXCL Ministerial Committee on the Challenges of Ratification Accession and Implementation of the OAU/AU Treaties
6. Specialised Technical Committees (STC)
7. STC on Justice and Legal Affairs
8. STC on Public Service, Local Government, Urban Development and Decentralization
9. Permanent Representatives Committee (PRC)
10. PRC Sub-Committee on Structural Reforms
11. PRC Sub-Committee on Rules, Standards and Credentials
12. PRC Drafting Committee
13. PRC Sub-Committee on Human Rights, Democracy and Governance
14. African Court of Justice/African Court of Justice and Human Rights
15. African Union Commission (AUC)
16. Pan-African Parliament (PAP)
17. AU Advisory Board on Corruption (AUABC)
18. African Peer Review Mechanism (APRM)
19. AU Commission on International Law (AUCIL)

ECONOMIC INSTITUTIONS AND MECHANISMS

Keywords: Investment – Finance – Trade – Budgeting – Monetary Affairs – Auditing

65. AHSG High-Level Committee on African Trade (HATC)
66. EXCL Ministerial Committee on the Scale of Assessment and Contributions
67. STC on Finance, Monetary Affairs, Economic Planning and Integration
68. STC on Trade, Industry and Minerals
69. PRC Sub-Committee on General Supervision and Coordination on Budgetary, Financial and Administrative Matters
70. PRC Sub-Committee on Audit Matters
71. PRC Sub-Committee on Economic and Trade Matters
72. PRC Sub-Committee on Budget Matters
73. African Continental Free Trade Area (AfCFTA) Secretariat
74. African Continental Free Trade Area (ACFTA) Appellate Body
75. African Investment Bank (AIB)
76. Pan African Stock Exchange (PASE)
77. African Monetary Fund (AMF)
78. African Central Bank (ACB)
79. African Economic Forum%????
80. African Union Foundation
81. African Union Board of External Auditors (AU BoEA)
82. African Institute for Remittances (AIR)
83. African Minerals Development Centre (AMDC)

SOCIAL INSTITUTIONS AND MECHANISMS

Keywords: Education – Environment – Energy – Infrastructure – Labour – Health – Population – Development – Culture – Communication – Transport – Statistics – Agriculture

20. AHSG Committee of African Heads of State and Government on Climate Change (CAHOSCC)
21. AHSG Committee of Ten Heads of State and Government Champions for Education, Science and Technology in Africa
22. AHSG African Union Development Agency (AUDA-NEPAD) Heads of State and Government Orientation Committee (HSGOC)
23. EXCL Ministerial Follow-Up Committee on the Implementation of Agenda 2063 (Ministerial Committee on Agenda 2063)
24. STC on Social Development, Labour and Employment
25. STC on Health, Population and Drug Control
26. STC on Youth, Culture and Sports
27. STC on Communication and Information Communications Technology
28. STC on Agriculture, Rural Development, Water and Environment
29. STC on Education, Science and Technology
30. STC on Transport, Transcontinental and Interregional Infrastructure, Energy and Tourism (STC-TTIIET)
31. PRC Sub-Committee on the New Partnership for Africa's Development (NEPAD)
32. PRC Policy Sub-Committee of the Special Emergency Assistance Fund for Drought and Famine Relief in Africa
33. PRC Sub-Committee on Environmental Issues
34. Economic, Social and Cultural Council (ECOSOCC)
35. African Union Development Agency (AUDA-NEPAD)
36. Pan African University (PAU)
37. African Space Agency
38. Great Museum of Africa
39. Encyclopaedia Africana Project (EAP) Secretariat
40. African Civil Aviation Commission (AFCAC)
41. AU Institute for Statistics (STATAFRIC)
42. African Training Centre on Statistics%
43. African Union Scientific, Technical and Research Commission (AU-STRC)
44. African Scientific, Research and Innovation Council (ASRIC)
45. African Observatory of Science, Technology and Innovation (AOSTI)
46. Pan African Institute for Education for Development (IPED)/African Observatory for Education
47. African Airlines Association (AFRAA)
48. African Telecommunications Union (ATU)
49. Pan African Postal Union (PAPU)
50. African Energy Commission (AFREC)
51. African Commission on Nuclear Energy (AFCONE)
52. African Union–Inter-African Bureau for Animal Resources (AU–IBAR)
53. African Union Inter-African Phytosanitary Council (AU–IAPSC)
54. Semi-Arid Food Grain Research and Development (SAFGRAD)
55. Pan African Veterinary Vaccine Centre (PANVAC)
56. Pan African Tsetse and Trypanosomiasis Eradication Campaign (PATTEC)
57. African Risk Capacity (ARC)
58. Africa Centres for Disease Control and Prevention (Africa CDC)
59. AIDS Watch Africa (AWA)
60. Centre for Linguistic and Historical Studies by Oral Tradition (CELHTO)
61. African Academy of Languages (ACALAN)
62. African Union Sport Council (AUSC)
63. African Audiovisual and Cinema Commission (AACC)
64. African Capacity Building Foundation (ACBF)

SECURITY INSTITUTIONS AND MECHANISMS

Keywords: Military Operations – Conflict Mediation – Intelligence – Terrorism – Crime – Police – Cyber Security

84. AHSG High-Level Committee of Heads of State and Government on Libya
85. EXCL Open-ended Ministerial Committee on the International Criminal Court (ICC)
86. STC on Defence, Safety and Security (STCDSS)
87. Peace and Security Council (PSC)
88. PSC Committee of Experts
89. PSC Military Staff Committee
90. PSC African Union High-Level Implementation Panel (AUHIP) for Sudan and South Sudan
91. Extraordinary African Chambers (EAC)
92. African cybersecurity expert group
93. Panel of the Wise
94. Friends of the Panel of the Wise
95. Pan-African Network of the Wise (PanWise)
96. Network of African Women in Conflict Prevention and Mediation (FemWise-Africa)
97. African Union Mediation Support Unit (AU MSU)
98. Continental Early Warning System (CEWS)
99. Peace Fund
100. African Standby Force (ASF)
101. African Capacity for Immediate Response to Crises (ACIRC)
102. African Union Mission in Somalia (AMISOM)
103. African Union Technical Support Team to Gambia (AUTSTG)
104. Multinational Joint Task Force (MNJTF) against Boko Haram
105. G5 Sahel Joint Force (FC–G5S)
106. African Union Police Strategic Support Group (PSSG)
107. African Union Centre for Post-Conflict Reconstruction and Development (AUCPCRD)
108. Committee of Intelligence and Security Services of Africa (CISSA)
109. African Centre for the Study and Research on Terrorism (ACSRT)
110. African Union Mechanism for Police Cooperation (AFRIPOL)
111. Union Human Rights Observers and Military Experts Mission in Burundi*
112. African Union–United Nations Mission in Darfur (UNAMID)*
113. Regional Cooperation Initiative for the Elimination of the Lord's Resistance Army (RCI-LRA)*
114. African Union-led International Support Mission in the Central African Republic (MISCA)*
115. African Union-led International Support Mission in Mali (AFISMA)*
116. African Union Electoral and Security Assistance Mission to the Comoros (MAES)*
117. African Union Mission for Support to the Elections in Comoros (AMISEC)*
118. African Union Mission in Sudan (AMIS)*
119. African Union Mission in Burundi (AMIB)*

DIPLOMATIC INSTITUTIONS AND MECHANISMS

Keywords: Representation – Protection of Interests – Information Gathering – Relationship Building

120. PRC Sub-Committee of the Whole on Multilateral Cooperation
121. PRC Sub-Committee on Programmes and Conferences
122. PRC Sub-Committee on Headquarters and Host Agreements
123. AU Permanent Observer to the United Nations
124. AU Permanent Representative to the United Nations and World Trade Organization
125. African Union Mission in Washington, USA
126. AU Permanent Mission to the European Union (EU) and African, Caribbean and Pacific (ACP) states
127. AU Permanent Representative to the League of Arab States
128. AU Regional Delegation to Southern Africa
129. African Union Permanent Mission to China
130. African Union Liaison Office in Burundi
131. African Union Liaison Office in Central African Republic
132. African Union Liaison Office in Côte d'Ivoire
133. African Union Liaison Office in Guinea-Bissau
134. African Union Liaison Office in Kinshasa (DR Congo)
135. African Union Liaison Office in Liberia
136. African Union Liaison Office in Libya
137. African Union/Southern African Development Community (SADC) Liaison Office in Madagascar
138. African Union Mission for Mali and Sahel (MISAHEL)
139. African Union Liaison Office in N'Djamena, Chad
140. African Union Liaison Office in South Sudan
141. African Union Liaison Office in Sudan

HUMAN RIGHTS INSTITUTIONS AND MECHANISMS

Keywords: Protection and Promotion of Human and Peoples' Rights

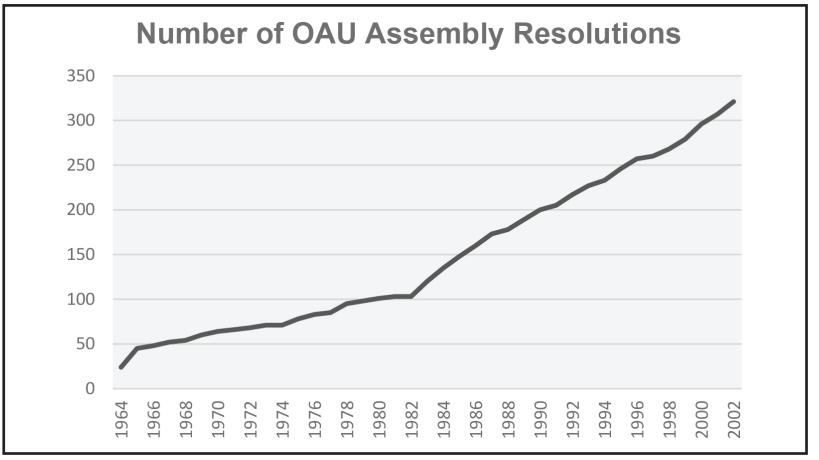
142. STC on Gender Equality and Women's Empowerment
143. STC on Migration, Refugees and Internally Displaced Persons (IDPs)
144. PRC Sub-Committee on Refugees, Returnees and Internally Displaced Persons in Africa
145. Fund for African Women (FAW)
146. African Union/International Centre for Girls' and Women's Education in Africa (AU/CIEFFA)
147. Pan African Women's Organization (PAWO)
148. African Commission on Human and Peoples' Rights (ACHPR)
149. African Court on Human and Peoples' Rights (AfCHPR)
150. African Committee of Experts on the Rights and Welfare of the Child (ACERWC)
151. Legal Aid Fund for the African Union Human Rights Organs

LEGEND

The main source for developing this panorama of AU institutions and mechanism was the AU Handbook (2021). Note that some institutions and mechanisms have already been created or foreseen by the AU, however, they have not yet been operationalized. And other institutions and mechanisms have already been closed. Those institutions and mechanisms that have closed have been marked with *. The reason for including these closed AU bodies, is to give a full overview of the institutional richness of the AU throughout its lifespan.

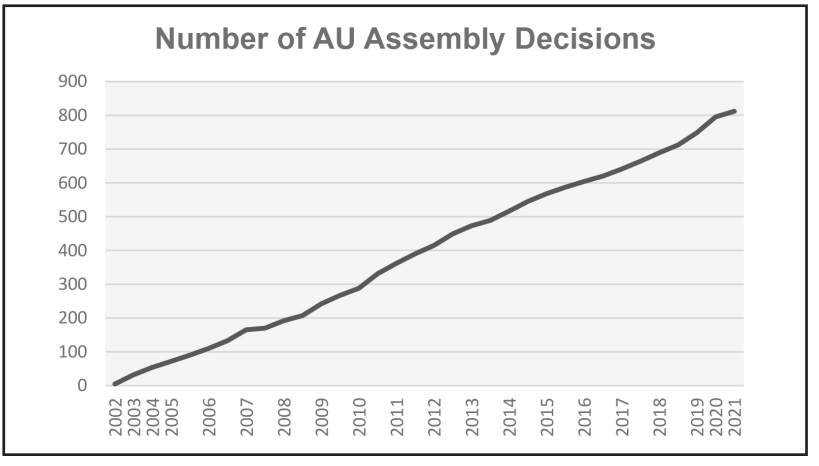
More than 150 AU institutions and mechanisms with varying levels of formalization have been identified and grouped into six loosely defined categories: governance, social, economic, security, diplomatic and human rights institutions. For each category, a number of keywords have been developed to give a sense of the category content.

Chart 1.2: Number of resolutions adopted by the OAU Assembly (1964-2002)



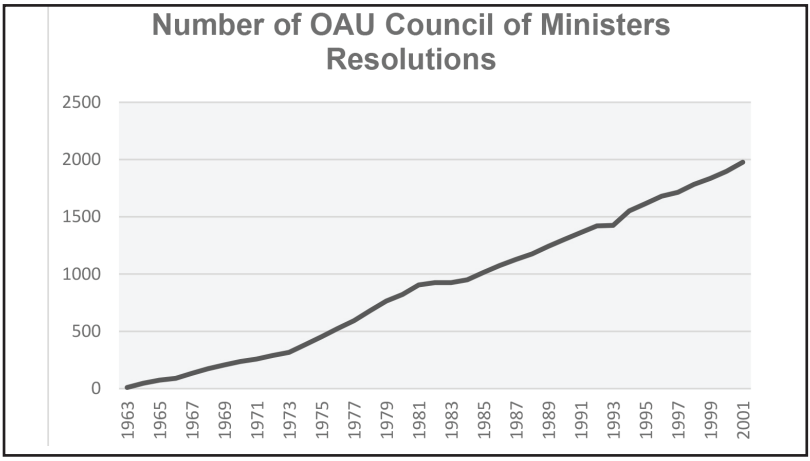
Source: Author's own compilation, based primarily on the African Union website, https://au.int/en/decisions/assembly (accessed 24 November 2021)

Chart 1.3: Number of decisions adopted by the AU Assembly (2002-2021)



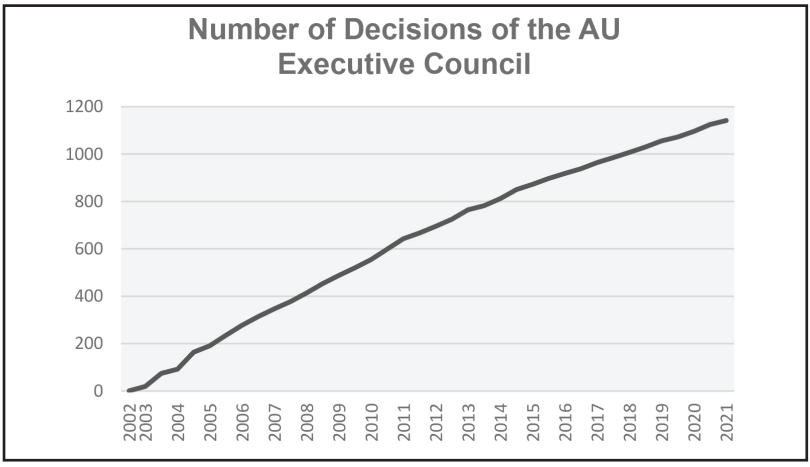
Source: Author's own compilation, based primarily on the African Union website, https://au.int/en/decisions/assembly (accessed 24 November 2021)

Chart 1.4: Number of Resolutions adopted by the OAU Council of Ministers (1963-2001)



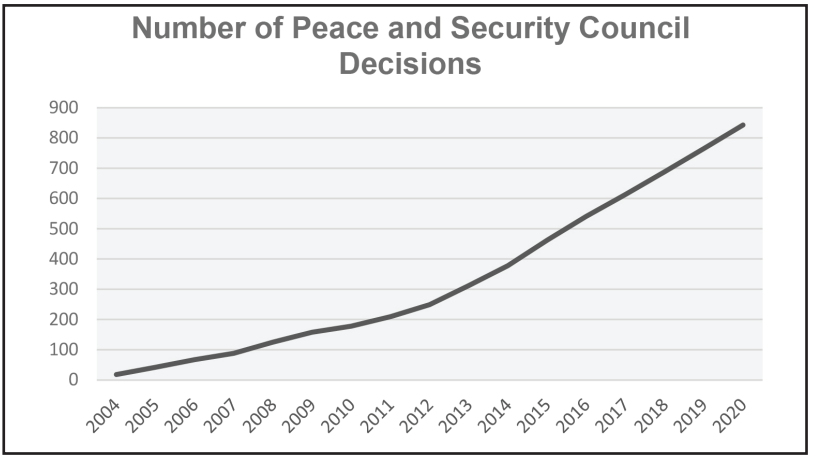
Source: Author's own compilation, based primarily on the African Union website, https://au.int/en/decisions/council (accessed 24 November 2021)

Chart 1.5: Number of decisions adopted by the AU Executive Council (2002-2021)



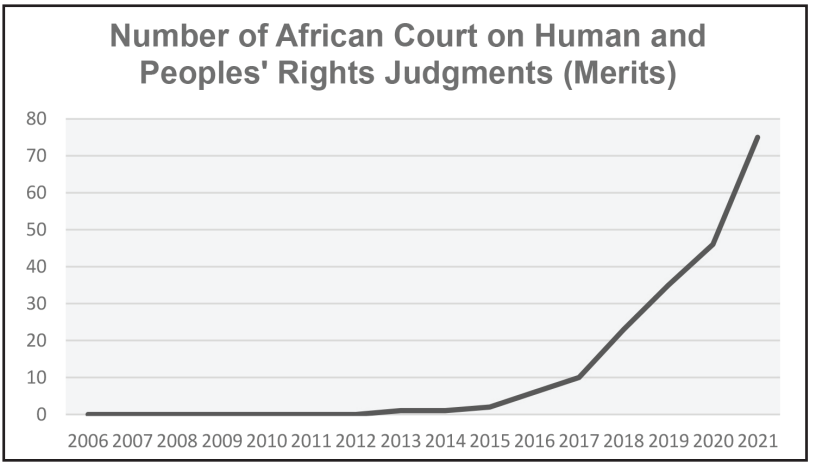
Source: Author's own compilation, based primarily on the African Union website, https://au.int/en/decisions/council (accessed 24 November 2021)

Chart 1.6: Number of decisions adopted by the Peace and Security Council (2004-2020)



Source: Author's own compilation, based primarily on the African Union website, https://www.peaceau.org/en/resource (accessed 24 November 2021)

Chart 1.7: Number of judgments (Merits) adopted by the African Court on Human and Peoples' Rights (2006-2020)



Source: Author's own compilation, based primarily on the African Court's website, https://www.african-court.org/cpmt/ (accessed 24 November 2021)

Although this swift overview of some key African international legal trends is limited and, admittedly, partial, it does hopefully evoke an image that over the past half a century there has been an increasingly greater 'supply' of African international law.

The main question addressed in this book is how to make sense of this international law 'made in Africa'. What explains this growing 'supply' of African international law, in response to what 'demand'?

This book sets out to theorize this process of Africanization of international law that is understood here as a collective effort to imagine and organize an international legal-political project based on a continentally-defined identity. Specifically, the book explains the process through which the legal-political arrangements based on an African identity increasingly structure and become part of international law making and implementation in Africa. This includes explaining how the Africanization process relates both to the extent of continental norm setting by the AU, as principal agent responsible for 'African solutions to African problems', and to the degree to which the AU enforces these norms through varied continental accountability mechanisms. The book considers the different modalities through which the idea of Africa shapes, is shaped by and is embedded in international law making and implementation.

2 African solutions to African problems

One of the main maxims underlying the ideological discourse of the Organization of African Unity (OAU) and later the African Union (AU) is to develop 'African solutions to African problems'. This *cri de guerre* has been interpreted to reflect 'the need for greater African responsibility and autonomy in developing indigenous solutions and capacities'.[46]

It is this preoccupation of the (O)AU that interested me: to see how the continental organization goes about *Africanizing* processes of 'problematization' and 'solutionization'. Specifically, the objective of this book is to elaborate a framework that sets out a way of thinking about the construction and transformation of international legal agendas to provide solutions to problems that presume, appropriate and produce a degree of 'Africanness'.

46 Press Release AU, No 066/2011.

The following research questions will guide this process: First, what is it that sponsors of initiatives to promote African international legal solutions imagine will be achieved? To answer this question, it is necessary to investigate what exactly it is that the AU is promoting in relation to problems defined *how*. What is to be remedied? Who benefits? Who loses?

Second, from where do they draw their inspiration? What kind of creativity underlies these problem-solving approaches? What assumptions are made as to the transferability of (international) legal ideas, models and practices? If the technologies used supposedly are the end results of an Africanization process, rather than examples of a transplantation ethos, what are the conditions that allow for this process to occur?

Third, how are these African international legal developments organized and institutionalized? Here, the focus not only is on the formal norm setting of the AU, but also, and perhaps more importantly, to analyze how these norms are implemented and what kind of knowledge production is associated with these processes.

3 The invention of Africa

From the level of conviction with which this aphorism of 'African solutions to African problems' is deployed in politico-legal discourses, one might easily assume that there is a presupposed fullness of objectives, identities and institutions that determine the African way of dealing with situations, and that everybody who engages with Africa does so from a perspective knowing where and what Africa is, that it is possible to identify what Africa has to offer, what Africa's needs are and that all of these may be addressed through different forms of action and policies.

Instead, I argue along a line of scholarship that states that 'Africa' is just an abstract idea.[47] That there is no general all-encompassing conceptualization, let alone a collectively agreed-upon definition that captures Africa as a whole and all its different dimensions. Africa has always been the fabrication of some sort, constructed by numerous

47 VY Mudimbe *The invention of Africa: Gnosis, philosophy, and the order of knowledge* (1988); VY Mudimbe *The idea of Africa* (1994); A Mbembe *On the post-colony* (2001); J Ferguson *Global shadows: Africa in the neoliberal world order* (2006); RJ Reid *A history of modern Africa: 1800 to the present* (2008).

different actors and for various different reasons. Historically, 'Africa' did not exist, except as part of the European imagination.[48] Europeans holding a more extensive geographical vision than Africans were able to construct a particular notion of Africa based on physical borders through exploration and cartography. Afterwards, throughout a variety of activities – travelling, trade, missionary work and, particularly, military conquest – distinctive discourses were created that all contributed to the generation of particular forms of knowledge about this abstract idea of Africa. As a result, Africa as a whole became objectified with a number of important consequences. Africa came to be seen as an object that could be shaped, reshaped, improved, modernized, made democratic, and so forth.

What I am interested in is exactly this productive process where Africa emerged as a knowable and, if necessary, moldable object. What were the conditions for generating particular forms of knowledge about Africa? In other words, I do not wish to start my inquiry by at the outset defining a particular notion of Africa, look into what kind of policies are bestowed on it, to then further analyze these policies. Rather, I want to analyze these different policies and view how they have produced a particular idea of Africa. In this sense I will assume the a priori non-existence of Africa as an entity to then look into the conditions that made the production of Africa possible.

I suggest that these interrogations into the discourses about Africa and their associated knowledge-making activities of the AU are important as they permit the unearthing of the production of a particular image of Africa. Accordingly, by exploring the relationship between how the AU has been invoked to imagine and project a vision of Africa, it becomes possible to establish how it is simultaneously shaping its own identity as a producer and implementer of knowledge. It reveals the tensions that exist between the AU's presumptions of an established African identity necessary to legitimate its knowledge-making practices, and the process whereby merely engaging in the production of knowledge, instruments and vocabularies, the AU already participates in constructing Africa's emerging political, social, economic and legal order.

48 Reid (n 47) 151.

4 Cartography of African international law

However, where does one begin to make sense of African international law? To launch this exploration, I borrow from the idea of cartography, which relates to the art and science of making maps. The essential components of map making are a *delimitation* of the object to be mapped and its purpose, including by *eliminating* traits of the mapped object that are not relevant to the map's purpose; a *reduction* of the complexity of the characteristics of the object that will be modelled; and a *representation* of the terrain in such a way as to enhance the usability of the map by its reader.

Accordingly, one starting point to develop some bearings about this project is to map out some of the great strands of literature that – in one way or another – problematize the promotion of international legal solutions 'made in Africa'.

I would argue that the development of African international law is taking place against a backdrop of at least three different, but related, practical and theoretical agendas, one being a literature on regional integration that seeks to identify the forces and dynamics of different modes of political, economic, legal and social integration and the role that international institutions might play,[49] with the related erosion of national public authority as a consequence of globalizing and regionalizing trends or tendencies.[50]

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49 See the burgeoning literature on regional integration, including, most notably, EB Haas *The uniting of Europe: Political, social and economic forces, 1950-57* (1968); J Weiler *The Constitution of Europe: 'Do the new clothes have an emperor?' and other essays on European integration* (1999); PJ Katzenstein *A world of regions: Asia and Europe in the American imperium* (2005); ED Mansfield & HV Milner *The political economy of regionalism* (1997); D Bach *Regionalisation in Africa: Integration and disintegration* (1999); O Dabène *The politics of regional integration in Latin America: Theoretical and comparative explorations* (2009).

50 See M Loughlin & P Dobner (eds) *The twilight of constitutionalism?* (2010); JL Dunoff & JP Trachtman *Ruling the world?: Constitutionalism, international law, and global governance* (2009); C Schwöbel *Global constitutionalism in international legal perspective* (2011); E de Wet 'The international constitutional order' (2006) 55 *International and Comparative Law Quarterly* 51; A Stone Sweet 'On the constitutionalisation of the convention: The European Court of Human Rights as a constitutional court' (2009) 80 *Revue trimestrielle des droits de l'homme* 923; A von Bogdandy and others '*Ius constitutionale commune en América Latina*: A regional approach to transformative constitutionalism' (2016) *MPIL Research Paper Series*; B Fassbender *The United Nations Charter as the constitution of the international community* (2009); DZ Cass *The constitutionalization of the World Trade Organization: Legitimacy, democracy, and community in the international trading system* (2005); JP Trachtman 'The

Another would be the ever-growing literature on the theorization of the generic 'rule of law' promotion that has occupied a variety of different actors and agencies over the past half-century[51] and which increasingly encompasses the study of the role of international institutions as co-constitutors of international rule of law regimes.[52]

The third would be the critical interpellation of the colonial and imperial legacies[53] in international legal regimes[54] and their enduring generation of systemic inequalities with corresponding calls for 'decolonization' and claims for greater 'ownership' of the production and governance of resources that are subjected to international legal regulation.[55]

With these essential literature bearings in mind, I will elaborate on three related sets of ideas that I believe will help develop a better understanding of the dynamics underlying this phenomenon of Africanization of international law.

The first set of ideas underpins my interests in seeing how African international legal governance is made practical. Here inspiration is found in Foucault's work on the analysis of government.[56] Foucault in his work provides exactly for this flexible set of analytical tools and

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constitutions of the WTO' (2006) 17 *European Journal of International Law* 623.

51 See S Humphreys *Theatre of the rule of law: Transnational legal intervention in theory and practice* (2012).

52 See K Alter *The new terrain of international law: Courts, politics, rights* (2014); S Chesterman 'An international rule of law?' (2008) 56 *American Journal of Comparative Law* 331; J Goldstein and others 'Introduction: Legalization and world politics' (2000) 54 *International Organization* 385.

53 See GC Spivak 'Can the subaltern speak?' in C Nelson & L Grossberg (eds) *Marxism and the interpretation of culture* (1988) 24; A Mbembe *On the postcolony* (2001).

54 See A Antony *Imperialism, sovereignty and the making of international law* (2007); V Nesiah 'The ambitions and traumas of transitional governance – Expelling colonialism, replicating colonialism' in E de Groof & M Wiebusch (eds) *International law and transitional governance – Critical perspectives* (2020) 139; N Negm 'Diverse perspectives on the impact of colonialism in international law: The case of the Chagos archipelago' (2019) 113 *ASIL Proceedings* 68.

55 See S Pahuja *Decolonizing international law – Development, economic growth and the politics of universality* (2011) and CA Odinkalu 'Re-examining Third World approaches to decolonizing international law (TWAIL)' (2022) 46 *Fletcher Forum of World Affairs* 157.

56 The tenets of this thinking stem from Foucault's lecture series on governmentality and bio-politics at the Collège de France between 1975 and 1979. M Foucault *Society must be defended: Lectures at the Collège de France, 1975-76* (2004); M Foucault *Security, territory, population: Lectures at the Collège de France* (2009); M Foucault *The birth of biopolitics: Lectures at the Collège de France, 1978-1979* (2010).

concepts to think about regimes of practices. The perspective adopted here, therefore, is not to merely understand African international legal governance arrangements as a set of institutions or in terms of certain ideologies that underpin it. Accordingly, the book does not take a similar approach to that of Udombana,[57] Akokpari and others,[58] Yusuf and Ouguergouz,[59] Amao,[60] Tchikaya,[61] Gueldich[62] or Viljoen,[63] who largely limited their studies to a critical analysis of the international legal governance architecture of the AU in terms of its institutions and norms. I also do not simply attempt to explain the AU project with reference to the (competing) ideologies that have informed the African integration narrative, such as the studies conducted by Tieku,[64] Biswaro,[65] Yusuf[66] and Adogahme,[67] in which, for example, the theoretical tenets underpinning pan-Africanism are used to explain the push for regional integration. Rather, building on these studies, I want to go beyond these analyses and consider the various practices of African international governance, their histories, ambitions and effects.

The second and related line of thought, which was instructive for my understanding of African international legal governance and the various forms of knowledge employed in the associated programmes and techniques of continental government, concerns the idea of co-

57 NJ Udombana 'The institutional structures of the African Union: A legal analysis' (2002) 33 *California Western International Law Journal* 1; NJ Udombana 'A harmony or a cacophony? The music of integration in the African Union Treaty and the New Partnership for Africa's Development' (2002) 13 *Indiana International and Comparative Law Review* 185.

58 J Akokpari, A Ndinga-Muvumba & T Murithi T (eds) *The African Union and its institutions* (2008).

59 AA Yusuf & F Ouguergouz (eds) *The African Union legal and institutional framework: A manual on the pan-African organization* (2012).

60 F Amao *African Union law – The emergence of a sui generis legal order* (2019).

61 B Tchikaya *Droit de l'Union africaine: Principes, institutions et jurisprudence* (2014).

62 H Gueldich *Droit, pratique et réforme institutionnelle de l'Union africaine* (2019).

63 F Viljoen *International human rights law in Africa* (2012).

64 TK Tieku 'Explaining the clash and accommodation of interests of major actors in the creation of the African Union' (2004) 103 *African Affairs* 249.

65 JM Biswaro *The quest for regional integration in the twenty first century: Rhetoric versus reality: A comparative study* (2012).

66 AA Yusuf *Pan-Africanism and international law* (2014).

67 P Adogamhe 'Pan-Africanism revisited: Vision and reality of African unity and development' (2008) 2 *African Review of Integration* 1.

production.[68] This refers to the notion that the way in which we know and understand the world we live in is intimately tied to the different means of how we intervene in that world. Knowledge is both the result of the social world, as well as it is constitutive of it.

The third interrelated body of intellectual resources upon which this book draws are the insights developed in the field broadly described as 'law and development'. Similar to a large majority of writers in this domain, the book generally adopts a functionalist perspective of African international law, instead of a more value-oriented or hierarchical understanding of law. Sharing the assumption with legal realists that law is conceived of as 'a means to social ends and not as an end in itself', as well as the understanding that law is continuously in flux and that law needs to be evaluated for its effects, this study focuses also on the practice of African international law rather than merely analyzing its rules and precepts.[69] However, instead of discussing African international legal developments in terms of 'Africa and international law' (emphasis added), whereby 'contributions' by Africa to a supposedly permeable general international law regime can be identified, measured and celebrated,[70] this book adopts a more critical approach towards African international law. While not strictly captured in either categories of Gathii's famous dichotomy to describe African international legal scholarship in terms of 'contributionism' or 'critical theorists', this book does share more assumptions with critical approaches to African international law, particularly in the sense of focusing 'on the manner in which modern international law continues [to some extent] the legacy of colonial disempowerment while providing spaces for resistance and reform'.[71]

68 S Jasanoff (ed) *States of knowledge: The co-production of science and social order* (2006).

69 KN Llewellyn 'Some realism about realism: Responding to Dean Pound' (1931) 44 *Harvard Law Review* 1235-1237.

70 See TO Elias *Africa and the development of international law* (1988); T Maluwa *International law in post-colonial Africa* (1999); J Levitt (ed) *Africa: Mapping new boundaries in international law* (2008); 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* 327. For a slightly more pessimistic and critical account, see D Tladi 'Representation, inequality, marginalization, and international law-making: The case of the International Court of Justice and the International Law Commission' (2022) 7 *UC Irvine Journal of International, Transnational and Comparative Law* 60.

71 J Gathii 'Africa and the history of international law' in B Fassbender and others (eds) *The Oxford handbook of the history of international law* (2012) 407.

In what follows, these three groups of core ideas are further refined so as to draw a more sophisticated map to guide us in creating a better understanding of why and how African international law develops.

4.1 Analytics of continental government

To develop any analytical detail of the continental legal programmes of the AU, I believe it is important to first take a step back and to think about African governance more broadly. Foucault and his work provide for an interesting *modus operandi* for thinking about governance in a way that allows us to examine the operation of government and particularly governmental practices that are sometimes taken for granted and not always open to questioning by its practitioners.[72]

Increasingly, governance occurs beyond the nation state. The space above, between and across the system of states is becoming occupied and reconfigured by different actors, structures, institutions, agendas and mechanisms. Although this is not a new phenomenon, the process nevertheless is intensifying. Stewart has famously and aptly compared the image of the current interwovenness of international and national legal regimes to an abstract expressionist painting by Jackson Pollock.[73]

Jackson Pollock, No 5 (1948)

72 M Dean *Governmentality: Power and rule in modern society* (1999) 16.

73 RB Stewart 'The global regulatory challenge to the US administrative law' (2004-2005) 37 *New York University Journal of International Law and Politics* 703.

Whether or not these developments follow from processes associated with modernization, globalization or another pushing factor, it is clear that this evolution deserves further scrutiny.

In this context, it may be noted that 'regions' are continually and increasingly being envisaged as the appropriate level for governance. As has been argued by Hettne and Soderbaum, 'the region is just the 'right' level, because the nation-state ... is "obsolete" and the global is "premature"'.[74] Regionalism, as a catch-all term for engagement with the region, is the subject of an extensive amount of academic literature.[75] What used to be a field mostly dominated by American scholarship, focusing primarily on Europe,[76] emerged as a field of study from many different, interdisciplinary, comparative and integrative perspectives varying in spatial focus.[77] Although theorization of the African regional processes generally has been limited, there has been a substantive increase in attention given to the developments happening at the regional level. [78] Nevertheless, the field of governance on the

74 'Frederik Söderbaum on the waning state, conceptualizing the region and Europe as a global actor' *Theory Talks* 3.

75 See B Hettne, L van Langenhove & M Farrell (eds) *Global politics of regionalism: Theory and practice* (2005); L van Langenhove *Building regions. The regionalization of the world order* (2011); B Hettne 'Beyond the "new" regionalism' (2005) 10 *New Political Economy* 543-571; F Söderbaum & TM Shaw *Theories of new regionalism: A Palgrave reader* (2003); F Laursen *Comparative regional integration: Theoretical perspectives* (2003).

76 For a good overview of European integration theory, see B Rosamond *Theories of European integration* (2000); A Wiener & T Diez *European integration theory* (2009).

77 See W Mattli *The logic of regional integration Europe and beyond* (1999); A Acharya & AI Johnston *Crafting cooperation: Regional international institutions in comparative perspective* (2007); O Dabène *The politics of regional integration in Latin America: Theoretical and comparative explorations* (2009); HL Tan 'Intergovernmental yet dynamically expansive: Concordance legalization as an alternative regional trading arrangement in ASEAN and beyond' (2022) 33 *European Journal of International Law* 341; S Amako and others (eds) *Regional integration in East Asia: Theoretical and historical perspectives* (2013); P de Lombaerde and others 'The problem of comparison in comparative regionalism' (2010) 36 *Review of International Studies* 731.

78 See D Bach *Regionalisation in Africa: Integration and disintegration* (1999); J Akokpari, A Ndinga-Muvumba & T Murithi (eds) *The African Union and its institutions* (2008) 4; M Welz *Integrating Africa: Decolonization's legacies, sovereignty and the African Union* (2013); RK Edozie *The African Union's Africa: New pan-African initiatives in global governance* (2014); TK Tieku *Governing Africa: 3D analysis of the African Union's performance* (2017); JB Bashi *Regional developmentalism through international law – Establishing an African economic community* (2018).

African continental level so far has not been analyzed in relation to a critical history of the arts of government.[79]

As indicated before, a de-naturalized perspective of Africa is adopted in this book. In contrast with the majority of studies conducted on Africa and the AU, in particular, where Africa is presumed to exist within its known quantitative and qualitative parameters, or where Africa is accepted as a (natural) given, this book departed from this assumption. Instead, the aim is to investigate the different ways in which Africa became a knowable and governable space. Accordingly, one of the objectives of this book is to explore the geography of African international law, whereby the relationships between geographical spaces and the people that inhabit them are explored and, in this context, specifically as they relate to devising international legal strategies and programmes to help govern this spatial configuration. To achieve this objective, the focus in this study is to investigate the rationalities and technologies involved in African governance. In line with governmentality studies, this entails interrogating the different frameworks for thinking about problems and their solutions. How was 'Africa' called into question? It demands an exploration in the changing ways authorities, experts, and critics reflect on *how* to govern. It is not about asking what happened and why, which would be the most obvious historical form of questioning. Instead, questions take the form of what the AU wanted to happen, in relation to problems defined *how*, in pursuit of what objectives, and through what strategies, programmes and techniques. An analysis of government in this perspective requires us to see government as a problematizing activity.[80] It directs us 'to examine the different and particular contexts in which governing is called into question, in which actors and agents of all sorts must pose the question of how to govern'.[81] 'How' questions are particularly relevant because they lead to an analysis of government in terms of its regimes and practices. It makes it necessary to establish what is needed for a particular regime of government, that is the conditions for governing. This does not only refer to the empirical practices of

79 Haahr & Walters have undertaken a fascinating study of the EU as a field of governmentality, which on many accounts has been inspirational to my thinking about Africa. See JH Haahr & W Walters *Governing Europe: Discourse, governmentality and European integration* (2012).

80 N Rose & P Miller 'Political power beyond the state: Problematics of government' (1992) 43 *British Journal of Sociology* 181.

81 M Dean *Governmentality: Power and rule in modern society* (1999) 27.

government, but it also requires an understanding of how governing needs to be thought.[82] What specific forms of knowledge and expertise are required? But also, what kind of language and vocabulary is used?

To analyze government in light of its technologies is of particular relevance for this research, because it pushes us to consider the emergence and diffusion of these technologies. It demands an exploration into the specific historical circumstances, including the political, economic, social and cultural conditions that led to the creation or adoption of these technologies. Taking the contemporary agenda of the AU to promote international legal solutions on the continent as an exemplar of a governmental technology, this study aims to investigate how the AU considers the role of law within the broader process of African governance. The emphasis on technologies when thinking about the field of African governance enables me to lay bare the practices of government and allows for a critical reflection of the 'thought' involved in these practices which generally is not amenable to be understood from within its own perspective. This perspective, therefore, is essential in developing a framework to understand how exactly the Africanization of international law takes place.

It is worth emphasising here that the scope of the investigation is restricted to the African *continental* level. It does not consider possible fragments of African international law development, such as West African, East African or Southern African international legal regime creation, under the aegis of, for example, the Economic Community of West African States (ECOWAS), the East African Community (EAC) or the Southern African Development Community (SADC), respectively. My interest lies in *continental* norm setting and accountability mechanisms based on a constructed 'continental' identity. Therefore, sub-African international legal arrangements fall outside the scope of this study. Of course, I appreciate that African international law does not operate in isolation of other regional forms of sub-African international law. Moreover, the various African regional economic communities (RECs), eight of which are officially recognised by the AU, have repeatedly been acknowledged as the building blocks of the continental integration process, including, therefore, continental *legal* integration processes.[83] Nonetheless, these

82 Dean (n 81) 28-29.

83 See, eg, the Treaty Establishing the African Economic Community (1991), AU Constitutive Act (2000), and the Protocol on Relations between the African Union and the Regional Economic Communities (2007).

regional organizations and their legal governance regimes are excluded from this analysis.

It is notable that much of the literature does not make this distinction; which is regrettable since the relationship between the regional and continental level of governance remains largely under-problematized.[84] Instead, the common terminology is still centred on the 'region', as seen in the literature on regional integration, regionalism, or comparative regionalism. However, with Morocco re-joining in 2017, the AU now has pan-continental membership. And given the increasing interaction and tensions between continental organizations with regional organizations on different continents operating in the same domain, I would even argue that there is a need for a different conceptual lens based on the idea of the continental-regional governance nexus.[85] So, wherever this distinction is relevant, I deploy the term 'continental organization' instead.

This choice of not focusing on regional components of Africa also explains in part why I opted to focus on the term 'African international law', rather than 'African regional law'. However, the reason why I did not opt to limit the terminology to 'African Union (AU) law' is because I found the latter too restrictive. I consider AU law to be a neologism that only captures more recent varieties of African international legal developments, and conceptually exclude older variants, such as OAU law making or possible alternatives of African international law making outside the institutional framework of the (O)AU.[86] Therefore, to

84 Some noteworthy exceptions include RF Oppong 'The African Union, the African Economic Community and Africa's regional economic communities: Untangling a complex web' (2010) 18 *African Journal of International and Comparative Law* 92; J Akokpari & S Ancas 'The African Union and regional economic communities – A partnership for peace and security?' in T Murithi (ed) *Handbook of Africa's international relations* (2013); K Striebinger *Coordination between the African Union and the regional economic communities* (2016).

85 See, eg, T Legler & M Wiebusch 'Protecting democracy in Africa and the Americas: The continental-regional governance nexus' paper presented at the expert seminar 'The 10th Anniversary of the African Charter on Democracy, Elections and Governance', Antwerp, 2-3 October 2017.

86 Although other attempts at establishing pan-African organizations have been made, only the OAU and later the AU have succeeded in any analytically significant way. One example is the 'African and Malagasy Union' (1961-1985), but even this organization had a predisposition towards Francophone African states maintaining and developing close relations with France as formal colonial power. For an overview of other proposals for pan-continental African organizations, see K Walraven *Dreams of power – The role of the Organization of African Unity in the politics of Africa 1963 – 1993* (1999) which traced an

cater to alternative developments of international legal enterprises that centre on 'Africa', I found the methodological choice of using 'African international law' more flexible and open-ended.

For the avoidance of doubt and as already indicated above, it also perhaps is significant to underline that while the core question of this book is 'what is African about African international law', my methodology is not one where I aim to establish some sort of 'Africanness' of certain contemporary legal developments by identifying a number of legal idiosyncrasies in relation to a more 'general', 'global' or 'universal' international law,[87] or in relation to other continental variants of international law, such as 'European international law',[88] 'Latin American international law'[89] or 'Asian international law'.[90] Rather, my comparator is the *absence* of an idea to manage resources in Africa through international law and the growing *presence* of international legal regulation of relationships and resources management to govern this space called Africa. Correspondingly, this book is envisaged as a call for (self)evaluation of this intensifying international legal regime to govern Africa. In other words, in this book I argue that African international law can be fruitfully compared not with other global legal developments or legal developments on other continents, but rather *in* time and *with* itself.

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intellectual history of the competing design ideas leading eventually to the OAU.

87 For examples of this type of interesting scholarship, see 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* 327; F Viljoen *International human rights law in Africa* (2012); F Viljoen, H Sipalla & F Adegalu (eds) *Exploring African approaches to international law – Essays in honour of Kéba Mbaye* (2022); B Fagbayibo *African approaches to international law* (2021).

88 See, eg, A Orakhelashvili 'The idea of European international law' (2006) 17 *European Journal of International Law* 315 (who actually argues *against* the notion of an 'European international law').

89 See, eg, 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; A Chehtman, A Huneeus & S Puig 'Introduction to the Symposium on Latin American International Law' (2022) 116/Unbound *American Journal of International Law* 292.

90 See, eg, JE Alvarez *Is there an 'Asian' perspective on international law?* (2021); BS Chimni 'Is there an Asian approach to international law? Questions, theses and reflections' (2008) 14 *Asian Yearbook of International Law* 249; M Sornarajah 'Asian international law: Where is it now?' (2008) 14 *Asian Yearbook of International Law* 265.

4.2 Co-production of African governance and knowledge

As the aim of this research is to understand how African international legal agendas and practices develop, the book, therefore, explores how the rationales regarding the development of African international law emerge; how these rationales are articulated into programmes of intervention; and how these constitute a complex system of mechanisms, knowledges, strategies, techniques and procedures that give effect to the ambitions of this African international law project.

Accordingly, an important part of the deliberations in this volume about the Africanization processes of the AU concerns the knowledge that is implicated in such processes. Following from this realization of the pressing need to pay attention to the epistemology of African international law, the usefulness of the concept of co-production is explored in thinking about how knowledge is taken up in practices of government and how it affects the making of identities, institutions and discourses more generally. The fundamental claim that undergirds co-production as an analytical framework relates to the idea that science and society are produced together. Knowledge and its material embodiments are both simultaneously products and producers of the social order in which they are embedded.[91] This analysis is valuable because it pushes me to think about 'how knowledge-making is incorporated into practices [of governance], and in reverse, how practices of governance influence the making and use of knowledge'.[92]

In analyzing the ways in which the AU negotiates what kinds of knowledge are considered useful and how the AU then organizes and frames this knowledge by, among others, devising indicators, standardizing methods and developing specific vocabularies, it will be possible to see what kind of 'imagined community' emerges.[93] By attending to the dynamics of knowledge production at the level of the AU, this research performs a critical role in scrutinizing the expression of power in places that the literature on the AU tends to neglect, since power is seen here as relational to knowledge. Knowledge produces different kinds of power but equally power frames and organizes knowledge.

91 S Jasanoff (ed) *States of knowledge: The co-production of science and social order* (2006) 2.
92 Jasanoff (n 91) 3.
93 I borrow that term here from the magistral work of B Anderson *Imagined communities: Reflections on the origin and spread of nationalism* (1983).

When thinking about the process of developing African international law, I believe it is necessary that one must not only consider the institutions, models and practices that give effect to these processes, but also the philosophies, mentalities, and the different ways of creating methods, categories, problems and solutions that relate to these ambitions.[94] It is out of this concern that the problematizations and solutionizations, that provide the background of the AU's interventions, are front and centre in this book. Through an examination of these processes of framing the problem and devising appropriate solutions it will be possible to make the mentalities and the different forms of reason behind these African international legal strategies emerge. To do so, key discursive fields are analyzed within which these problems and solutions are delineated and given significance, using some of the tools developed in discourse scholarship.[95]

'Discourses' are taken here to mean those 'practices that systematically form the objects of which they speak'.[96] In analyzing discourses, one must consider various empirical raw materials as discursive forms. This includes (but is not restricted to) a linguistic as well as a non-linguistic set of information: speeches, reports, historical events, norms, policies, ideas, organizations and even institutions.[97] Discourse analysis treats all of the above as texts or writing that constitute the archive, that is, as discursive forms that can be analyzed as systems of signification or productivity.[98] These two systems feed back into my thinking about the idea of co-production. To study the structures of signification means to analyze the different ways in which language practices construct and provide the world knowledge about social reality. It is to unearth the meaning given to (material) forms of knowledge. An analysis of the discursive field of developing African international law allows us to reveal the systems of thought through which the AU posed and specified the problems of governing, but also the systems of

94 D Nelken & J Feest *Adapting legal cultures* (2001) 22.
95 J Milliken 'The study of discourse in international relations: A critique of research and methods' (1999) 5 *European Journal of International Relations* 225; DR Howarth *Discourse* (2000).
96 M Foucault *The archaeology of knowledge, and the discourse on language* (1982) 49.
97 DR Howarth, AJ Norval & Y Stavrakakis *Discourse theory and political analysis: Identities, hegemonies and social change* (2000) 6.
98 Milliken (n 95) 229.

action through which they pursued to give effects to their continental governmental ambitions.[99]

To analyze the productivity of discourses is to pay attention to how discourses produce the social world. This perspective looks into how subjects are defined and how they are authorized to speak and act, but also considers who or what is excluded as an authoritative source of narration or action. It attends to the denaturalization of dominant forms of knowledge and aims to critically investigate the practices that these knowledge systems enable.[100] It leads us to study the different mechanisms through which the AU acts to address perceived problems.

Importantly, an analysis of the mechanisms through which power is exercised involves the establishment of how governing is made visible. These can be embodied in techniques of calculation, benchmarks, indicators and standards such as governance indicators incorporated in the African Peer Review Mechanism's questionnaires and reports or the indicators of the Mo Ibrahim Index of African Governance, but also in the standardization of trainings and the instilling of professional habits and specialized vocabularies. For instance, the fact that the international regime is ever more conceptualized in liberal constitutional terms,[101] or that the 'rule of law' has become part and parcel of AU decision makers' vocabularies is significant from a discourse analysis point of view.

By attending to these mechanisms and problematizing the different labels, indicators, models and standards, it becomes possible to surface the 'micro-physics of power'.[102] Furthermore, all these indicators and other practices of virilization contribute to the establishment of a specific African identity. This is even made explicit in one of the policy statements of the AU on governance and democracy where they call for attention to the consolidation of 'appropriate African owned and driven indicators, standards and benchmarks in compliance with shared values norms and standards'.[103] The importance of these mechanisms

99 N Rose & P Miller 'Political power beyond the state: Problematics of government' (1992) 43 *British Journal of Sociology* 177.

100 Milliken (n 95) 236.

101 D Kennedy & JE Stiglitz (eds) *Law and economics with Chinese characteristics: Institutions for promoting development in the twenty-first century* (2013) 65.

102 M Foucault & D Macey *Society must be defended: Lectures at the Collège de France, 1975-76* (2004).

103 African Union High Level Consultation on Governance and Democracy in Africa: Trends, Challenges and Prospects Dakar, Senegal 28-30 November 2012, Outcome Statement 11-12.

is that they construct a space of specifically African problems. The assumptions that underlie these policies are that it is significant and natural to think of these problems as common African problems and their solutions as common solutions, and that these solutions must be developed in an African framework building upon experiences and knowledges of AU actors.

4.3 African international law and development

To make sense of the African international legal enterprise, it is also relevant to briefly reflect on the broader legal context and developments in which these initiatives can be situated, framed and understood. Specifically, the scholarship and policies that focus on the role of law as a key factor in producing societal changes may help provide for understanding of the increasing interest in translating international legal strategies into a regional setting.

From one perspective it may be claimed that the AU[104] is actively participating in a growing global industry promoting the rule of law.[105] During the past decades billions of dollars were invested in theoretical and practical agendas related to rule of law reform in Central and Eastern Europe, Latin America, Asia and Africa. This massive policy agenda associated with the 'law and development' movement can be understood as a dedicated programme of promoting law as a tool to foster economic, political and social development.[106]

104 See GM Wachira 'The role of the African Union in strengthening the rule of law and constitutional order in Africa' in R Cordenillo & K Sample (eds) *Rule of law and constitution building: The role of regional organizations* (2014) 9; CR Majinge 'The United Nations, the African Union and the rule of law in Southern Sudan' PhD thesis, London School of Economics, 2013.

105 For insights into recent academic literature on rule of law promotion, see S Humphreys *Theatre of the rule of law: Transnational legal intervention in theory and practice* (2012); T Carothers *Promoting the rule of law abroad: In search of knowledge* (2006); KW Dam *The law-growth nexus the rule of law and economic development* (2006); DM Trubek & A Santos (eds) *The new law and economic development: A critical appraisal* (2006).

106 DM Trubek 'Law and development 50 years on' (2012) SSRN Scholarly Paper 2. For some, the conceptualization of development is centred around the notion of economic development, focusing on economic growth. Others adopt a broader understanding of development more closely linked with the attainment of social goals such as respect for human rights, gender equality and distributive justice more generally. See KK Davis & MJ Trebilcock 'The relationship between law and development: Optimists versus skeptics' (2008) 56 *American Journal of Comparative Law* 898-899.

The development of this industry has a long pedigree.[107] One of its most important precursors includes the rule of law reform during late colonialism.[108] Especially in an African context, the technique of legal transplantation has left an important legacy.[109] Colonial authorities, in an attempt to secure their interests and acting under a self-imposed civilization mandate, engaged in the pervasive importation of legal systems and norms to foster economic and political objectives. The wholesale transposition of law and legal models during the colonial period had numerous social, political and economic consequences, including the provision of the basic structures of the administrative, legal and political systems of most contemporary African states.

In the early 1960s considerable academic interest arose, together with great funding opportunities and support from governments and international development agencies for systematic legal reform projects as a means for development. Caught in the tide of optimism about the role of law to produce necessary economic, political and social change, from which the theoretical and ideological tenets were drawn on modernization theory, governments and international institutions heavily invested in promoting legal technologies and institutional structures as a means for development.

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107 For a broad account of the (intellectual) history of the law and development movement, see D Kennedy 'Three globalizations of legal thought: 1850-2000' in Trubek & Santos (n 105) 19; P McAuslan 'In the beginning was the law ... an Intellectual Odyssey' (2004) *The Practice of Law and Development: Socio-Legal Approaches*; D Kennedy 'Law and development economics: Towards a new alliance' in Kennedy & Stiglitz (n 101) 19; BZ Tamanaha 'The lessons of law-and-development studies' (1995) 89 *American Journal of International Law* 470-486.

108 For an account of the law reform under colonial influence, see, eg, K Mann & RL Roberts *Law in colonial Africa* (1991). For additional references to literature on colonial administration and the role of law during colonialism, see Humphreys (n 105) 109; JH Merryman 'Comparative law and social change: On the origins, style, decline and revival of the law and development movement' (1977) 25 *American Journal of Comparative Law* 468. For a post-colonial perspective on international legal norms and agendas diffused through international institutions and their interaction with domestic systems, see Third World Approaches to International Law (TWAIL). For an overview of this field, see J Gathii 'The promise of international law: A Third World view' (2020) Grotius lecture presented at the 2020 Virtual Annual Meeting of the American Society of International Law, which includes a comprehensive TWAIL bibliography from 1996 to 2019 as an appendix (copy on file with author).

109 W Menski *Comparative law in a global context: The legal systems of Asia and Africa* (2006); CM Fombad 'Fostering a constructive intra-African legal dialogue in post-colonial Africa' (2022) 66 *Journal of African Law* 1.

During the 1970s, interest in the law reform industry faded and succumbed to a deep pessimism prompted by the failure to effectively enhance most developing countries' state of development. Many of the reasons that were claimed to have led to the failure of the law and development movement and which ultimately led to the decline of interest and assistance in the field of legal reform, had to do with naivete and ethnocentricity.[110]

First, the proponents seemingly misunderstood how the legal reform would interact with the targeted countries and state power.[111] Accordingly, it was contested whether the legal reform agents were able to identify and implement appropriate reform.[112] The most critical voices even challenged the basic assumptions of the industry by calling into question whether there *is* a causal relation between law and development at all.[113]

Second, the arguments raised concerning the ethnocentric bias embedded in the law and development models related to the distinct contrast between the envisaged legal systems and the reality of developing countries. In light of the divergence between the conditions existent in the targeted countries and those in the developed world, it was claimed that legal reform could not have the intended effects. These disparate conditions include the existing social structures, degree of participation in the making of rules and their internalization, and the legal culture with particular reference to the role of the judiciary within the legal system.[114] The ethnocentricity of the model was also reflected by top-down approach the movement adopted, underscoring the centrality of the state and its primordial role in prompting legal and social change. Customary law and traditional (informal) legal institutions, thus, were ignored or at most viewed as an obstacle.[115]

The 1980s and onwards, however, witnessed the emergence of new ideas and perspectives about the role of law. The law and development movement was overtaken in name by a generic rule of law agenda. Once again substantial resources were dedicated to the reform of legal

110 DM Trubek & M Galanter 'Scholars in self-estrangement: Some reflections on the crisis of law and development studies in the United States' (1974) *Wisconsin Law Review* 1080.
111 Y Dezalay & B Garth *The internationalization of palace wars: Lawyers, economists, and the contest to transform Latin American states* (2002) 4.
112 Davis & Trebilcock (n 106) 917.
113 As above.
114 Trubek & Galanter (n 110) 1080-1081.
115 Kennedy & Stiglitz (n 101) 28.

institutions in developing countries. The turn in perspectives included a renewed interest for the subject from economists, associated with the New Institutional Economics perspective.[116] This scholarship underlines the importance of the design and functioning of institutions, both private and public, and the access to these as the critical factors that determine a country's development prospects.[117]

The body of work laid the foundations for the growing consensus that institutions – including legal institutions – do matter.[118] With this insight, the academic debate moved from its earlier skepticism about the assumptions underlying the legal reform enterprise, that is, whether law has an impact on development, to determine how legal institutions can play a role and what role these might be.

The 'problem of knowledge' in current academic research thus continues to address the questions of how change in the system occurs and what kind of system should be in place.[119] Notwithstanding that many and costly activities are continually undertaken under the banner of rule of law promotion, the underpinnings of this industry still lack rigorous theorization and empirical validation. The growing efforts to fill in this gap in knowledge demonstrates that the criticism related to the naivete of the earlier law and development movement at least is (attempted to be) addressed.

What then can be determined about the ethnocentric challenges to the legal reform agenda? One of the results of this criticism was the movement to study 'law in context'.[120] Increasingly, attention was being paid to the social, political and cultural context in which legal institutions operate. The extent of this field of study remained initially rather limited, but is developing significantly. It is increasingly recognized that the local context should be considered when developing institutions or planning legal reform. This understanding

116 North DC *Institutions, institutional change, and economic performance* (1990); D Acemoglu, JA Robinson & S Johnson 'The colonial origins of comparative development: An empirical investigation' (2001) *American Economic Review* 1369.

117 Davis & Trebilcock (n 106) 902.

118 KW Dam *The law-growth nexus the rule of law and economic development* (2006).

119 The term 'problem of knowledge' emanates from T Carothers *Promoting the rule of law abroad: In search of knowledge* (2006).

120 WL Twining *Law in context: Enlarging a discipline* (1997); D Nelken *Beyond law in context: Developing a sociological understanding of law* (2009); B Garth & J Sterling 'From legal realism to law and society: Reshaping law for the last stages of the social activist state' (1998) 32 *Law and Society Review* 409-472.

exceeded the mere realization that local context is important and led to the cognizance that local actors with their local knowledge should be involved in the design of legal reform.

In this respect, it has been argued for a proper role for 'insiders'.[121] These realizations reveal a promising field of study and will most likely have far-reaching policy implications. This examination of the current state of the literature leads us to the expanding research on the Africanization of developmental technologies, including legal reform. That is, the study of the adoption of international rule of law agendas and their translation into regional or, more specifically, continental practices. It is in this context that this research is situated to critically examine the rationale of this project. What are the underlying assumptions in these processes of customizing international legal strategies? What exactly is being Africanized? What is imagined to be achieved? What are the world views of the actors involved?

5 So what?

Having outlined some of the main coordinates of the field explored in this book, I will conclude this chapter by making a few preliminary observations and suggestions on how and why this research may be of interest to wider audiences in international legal scholarship.

Overall, the book is constructed as a three-step argument to explain the meaning of African international law and its development. The first step highlights the significance of the contemporary use of 'law' as a main mode of influence in structuring society. Step two reveals the salience of Africa's international legal experience and contemplates the organization of African international law as a border-transcending solidarity project. Step three explores the mechanisms to ensure the utility of African international law.

In essence, this book is about making sense of the mutable role of law in organizing our transient world. And to start making sense of the world, one must begin by clarifying a series of axioms about world views and the relative indeterminacy of human nature that influences the different products of human imagination, including 'law'. Based on these core tenets, it will be possible to offer at least one way of understanding the natural conflicts that ensue from the

121 Davis & Trebilcock (n 106) 945-946.

human enterprise aimed at co-existence *with* each other and *within* its particular surroundings.

Accordingly, it should be made clear that such a project of world interpretation, and of identifying how law as one particular force influences the world, can be approached from at least three angles.

First, a bottom-up approach can be adopted to seek generality from the particularistic; to start as local as possible to understand the modes of mutual influence of law on human behaviour, to then gradually compare and extrapolate on an increasingly larger scale until you reach a global level.

Second, a global or top-down view can be adopted of the influence of law on society as a whole and for which the gaze is then increasingly narrowed to understand and justify the most local manifestation of law shaping human conduct.

Alternatively, the point of analysis can be vexed on a proverbial middle ground where these two vectors of analysis meet. At this level of analytics, attention is paid not so much to the direction of organizing the world through law on a continuously greater scale or by replicating a global legal ethos at the local level, but rather the axe of analysis falls on the tensions involved in such translation processes.

Whereas the two prior approaches are more of an absolute nature, the third perspective is one that is deliberately relative in terms of the two ends of the spectrum. It is argued here that this 'third way' approach, while not innocent of its own limitations, still has more advantages than otherwise. In fact, instead of having the relativity of the investigative endeavour as a weak spot, it becomes the foundation of the research enterprise. For example, in the *bottom-up* approach, one may wonder, from which locality do you start extrapolating law's influence on a global level and how and by whom is that choice made and justified?

Conversely, in the mold of the *top-down* approach, one may inquire: to which locality is the global role of law shrunk and how is this decided? These absolute methodological choices cannot but have relative research results as an outcome. In approaching the matter from the middle, however, the methodological choices admittedly are relative, but the research results are destined to be absolute; not absolute in terms of providing final answers valid forever and for all, but absolute in confirming the undeniability of relative (not absolute) indeterminacy of law's influence on the world.

Translating the above into terms more familiar to international lawyers, it means that studies that have tried to explain and sometimes justify the extrapolation of particular legal dynamics from the local to the international (*bottom-up* approach),make themselves vulnerable to geographical criticism. In these lines, there is a long-standing orthodox international legal tradition that assumes that the international law that developed throughout the last four centuries or so has a claim at a global scope, despite its distinctive parochial origins in Europe.

In some sense, the level of authority of this international law waxed and waned together with the authority of the international governmental regimes underpinning it, including imperial and associated colonial structures as well as post-Cold War US global hegemony.

However, what this international law definitely was not, was the produce of some transversal community that collectively developed a broad social contract to govern the global space and those who inhabit it in an 'equitable and just' manner. It is this absence of communal endeavour that is criticized by international critical legal traditions and post-colonial theories alike, that lament the Eurocentric bias in international law.[122] For some, international law as it persists today by and large remains the continuation of the legal structures and ideas inherent in the international governmental regime of imperialism.[123]

Others are either ignorant of or in denial about these claims concerning the geographical bias of the nature and development of international law. They hold on to the notion that international law, if not in its nature, then in its purpose, does contain some virtues worthy of trickling down and transfusing the way in which ordinary conduct between individuals and peoples is or *should* be organized (*top-down* approach). Noble as these intentions may be, the pertinent criticism offered to these views usually is pronounced through historical expositions to reveal the cultural biases underpinning these moral values and the process of their naturalization and concurrent amnesia about their origins. The conclusion of these historical excavations usually results in the exposition of the socio-political and economic

122 J Gathii 'International law and eurocentricity' (1998) 9 *European Journal of International Law* 184.

123 A Anghie *Imperialism, sovereignty and the making of international law* (2007); V Nesiah 'The ambitions and traumas of transitional governance – Expelling colonialism, replicating colonialism' in E de Groof & M Wiebusch (eds) *International law and transitional governance – Critical perspectives* (2020) 139.

contingencies that led to the acceptance of some moral virtues and the rejection of others. Through the exposure of the a-historical nature of their supposed common ground, these critics undermine the legitimacy of the subsequent derivational processes.

Both these approaches to international law – *bottom-up* and *top-down* – have led to equally interesting counter-movements. The first, where international law is considered some form of second-hand local law, has sprouted a compelling counter-field of study to compare international law geographically (the 'turn to *comparative international law*').[124] Starting with the question whether international law in fact is international, intellectuals are asking questions about the similarities and differences of the origins of international law in different geographical localities and about how international law may operate differently in different geographical contexts.

The second approach, where international law is contemplated through more universalistic conceptions of its moral foundations worthy of dispersion, has triggered a fascinating countermovement to study the history and genealogy of these maxims and the processes of their fabrication (the '*turn to history in international law*').[125]

It is these sensibilities, both from their orthodox position as well as their heterodox response, that are combined in the approach adopted in this book. Considering that we live in a world that occupies all sides, any effort to make sense of this world will need to account for both movements. And while the approach adopted in this book may not provide clarity on the destination of these different movements, it may contain advice for more favourable direction or, at any rate, how to avoid less favourable directions of the movement.

Through this two-by-two matrix of considering (and accepting) the tensions between *bottom-up* and *top-down* international legal approaches, as well as the adoption of a comparative lens of international law in both spatial and temporal terms, this book will attempt to make sense of the ever-changing world and the ever-changing role played

124 See, eg, A Roberts and others (eds) *Comparative international law* (2018) and A Roberts *Is international law international?* (2017).

125 See, eg, M Craven 'Theorising the turn to history in international law' in A Orford & F Hoffman (eds) *The Oxford handbook of the theory of international law* (2016) 21; M Koskenniemi 'Expanding histories of international law' (2016) 56 *American Journal of Legal History* 104; R Parfitt *The process of international legal reproduction: Historiography, inequality, resistance* (2019); A Becker Lorca *Mestizo international law – A global intellectual history 1842-1933* (2014); A Orford *International law and the politics of history* (2021).

by law in this mutually-dependent evolution. And while this account hopefully contributes to ancient efforts of world interpretation, it also attempts to contribute to deliberate attempts by those bent on changing its course. To achieve the latter, the book expounds on the conditions to constructively intervene in the world and offers arguments for the necessity of shifting the emphasis of outward comparisons of the 'self' with 'others', to more sophisticated inward comparisons of the 'self' with the 'older self' and the potential 'future self'.

Translated again into more colloquial international legal terms, what is meant here is that, beyond the interpretation of the nature and purposes of international law, the account in this book also offers insights into how international law can be instrumentalized to affect the world. In this perspective, the argument put forward is that more respect could be paid to the highest judge one is accountable to, namely the 'self'. Therefore, it is argued that more attention could be paid to the actual practices and mentalities of self-improvement of international law by the community that shapes it, that is, international lawyers. Furthermore, it is presumed here that imagining a better future necessitates a qualified statement about the state of affairs of the present. To bridge this gap between 'the present' and 'a better future,' inspiration generally is found in developments in the past. This scrutiny of history allows the identification of factors and processes that produce a transition from one *status quo into* another. Crucially, this identification of two states of affairs (present and future) depends on a measurement exercise of making some variables visible and obscuring others. The intervention of the AU to improve the state of governance of the resources of the African continent through international legal solutions is no exception to this *modus operandi*. Accordingly, to improve the quality of international legal governance according to the terms outlined in the AU's international legal apparatus, adequate measurements of the state of African international legal governance are and will remain crucial. If the African international legal instruments are to effectively serve their purpose and contribute to realizing improvements of the living conditions of 'African people', then the implementation and impact of these instruments needs to be closely scrutinized, at least that is, if one aims to verify that the African

international legal commitments are being upheld and progressively realized.[126]

That being said, this account does not have the pretense to offer global conclusions in any direct way. Rather, as outlined in the prologue, the target audience is narrower and addressed to the African contingent of international lawyers. While broader conclusions from the reflections offered here may be drawn upwards to the global scale, sideways to other regions or continents, or downwards to smaller geographical areas within Africa, it is not the primary ambition of this book to impose or even offer such conclusions.

On the contrary, a central theme developed in this work is that, in a wordplay on Abraham Lincoln's Gettysburg address, development of a people, requires 'knowledge of the people, by the people and for the people'.

The claims in this book are made in a circumscribed manner, focused on the African continent. And within this scope, the assertion made here concerns the importance of drawing greater attention to self-reflection and improvement, and the conditions necessary for this dual mandate.

In the second chapter, 'theorizing African international legal knowledge production', the book continues with some vital theoretical developments to expose the axioms underlying this approach. This exercise forms part of the first critical step of the triple argument: to discuss the nature and purpose of law in the world – not through a description of law in a classical sense *within* the discipline, but rather through a *transdisciplinary* account of how to make sense of 'law' in the first place.

What appears to be inadequately understood in the African international legal discipline, and on which this chapter aims to shed light, are the fundamental assumptions concerning the role of science, including legal science, in shaping and (re)making the world as a social reality. This chapter lays bare some of the essential material and mental operations needed to understand and effectuate change, any change. One of the central claims advanced in this chapter concerns the utility of adopting an approach that is centred on avoiding and

126 These ideas about 'imagining a better future' build in part on previous work developed in M Wiebusch and others 'The African Charter on Democracy, Elections and Governance: Trends, challenges and perspectives' (2020) 54 *Africa Spectrum* 100.

mitigating mistakes. Congruent with some particular philosophies of science, most notably, the Popperian idea of 'falsification',[127] this chapter argues in favour of the value of mistakes as essential learning tools. More generally, this chapter offers a framework to understand modes of influence and their underlying principles. These insights are considered of particular value in this treatise on African international law, as the insights drawn from understanding 'influence' and the role knowledge plays in these dynamics of engineering change, help us to understand the conditions under which African international law is transformed.

Subsequently, in the third chapter, 'a geography of African international law', the book deals with the question of how to make sense of 'African' approaches to international law. This chapter explores the idea that 'context shapes content'.[128] In our attempt to understand the mechanics behind African international law and its variability, it is claimed here that the underlying rationales behind these governmental technologies and their inherent choices need to be better understood. Specifically, it is suggested that the varying forms and scope of 'problematization' and 'solutionization' need to be fleshed out, in order to make sense of how the African international legal apparatus is constructed to address the concerns and needs articulated by the political actors who have been delegated or who have assumed responsibility to think and act in name of 'Africa'. One particular terrain has been selected to unravel the particular thought operations behind the development of African international legal solutions in response to problems defined as common to the continent. This area of exploration concerns the enduring legacies of domination and exploitation under labels such as colonialism and, later, neo-colonialism, and the international legal responses developed to these challenges.

While chapters 2 and 3 provide the fundamental framework to *interpret* African international law, the fourth chapter provides the essentialist framework to understand how African international law actually *operates*. This chapter on 'African international legal governance laboratories' accentuates the institutional and procedural variables that affect African international legal operations and their knowledge production facilities that underpin them. Specifically, this chapter

127 K Popper *The logic of scientific discovery* (1934).
128 R Mullen *How context shapes content* (2012).

aims to enhance the scope and precision of our knowledge concerning the application of African international law. Drawing on the insights developed in chapter 2, a holistic framework is crafted to assess the performance of African international law and practice. A series of nuanced indicators are identified that may be used to verify whether or not the manufactured African international legal tools are having their desired effects. These sets of African international legal performance indicators are innovative in the sense that thus far in the literature, only limited attention has been paid to the actual operations involved in measuring the nature and scope of the implementation of African international instruments. It therefore is likely that this performance framework contributes to the understanding by African international legal practitioners and scholars about how African international law makes a difference, evolves and reifies African identities in the process.

In the final and concluding chapter, 'The frontiers of African international law', reflections are offered about the possible futures of African international law. Specifically, the chapter identifies a number of opportunities and opportunity costs involved in the possible paths of African international law development.