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THEORIZING AFRICAN INTERNATIONAL LEGAL KNOWLEDGE PRODUCTION

How to make sense of African international law?

Extract from a 1983 interview with Richard Feynman, theoretical physicist and Noble Prize winner

How does a person answer why something happens? For example, Aunt Minnie is in a hospital. Why? Because she slipped. She went out and she slipped on the ice and broke her hip. That answer would satisfy most people. But it wouldn't satisfy someone who came from another planet and who knew nothing about things at first.

You may understand, why, when you break your hip, you go to the hospital. But someone else may wonder, how do you get to the hospital when the hip was broken? Well, because her husband, seeing that she had her hip broken, called the hospital up and they sent somebody to get her. All that is probably understood by most people. Now when you explain a 'why', you have to be in some framework that allows some things to be true, otherwise you're perpetually asking 'why'. Why did the husband call up the hospital? Because the husband is interested in his wife's welfare. However, it is not always the case that husbands are interested in their wife's welfare. For example, usually they are not, when they're drunk and when they're angry.

And so, you begin to get a very interesting understanding of the world and of all its complications. If you try to follow up on anything, you can then go deeper and deeper in various directions. If, for example, you start to ask: 'Why did she slip on the ice?' Well, then the answer can be, ice is slippery. Everybody knows that. For some, that answer would be satisfactory. So, the inquiry ends there. But if you ask, 'why is ice slippery?' That's kind of a curious question. Ice is extremely slippery. You could either say, I'm satisfied that you've answered me, ice is slippery, that explains it. Or you could go on and say why is ice slippery and then you're involved with something different. Because there aren't many things as slippery as ice. Greasy stuff, being slippery, is perhaps more understandable to many people, because that's sort of wet and slimy. But a solid, like ice, that's so slippery? In the

case of ice, they say, that when you stand on it, due to the pressure, the ice momentarily melts a little bit, so you get a sort of instantaneous water surface on which you're slipping. But then you may ask, why does this happen on ice and not on other things? Because water expands when it freezes, so the pressure tries to undo the expansion and melts it. And ice is capable of melting, but other substances contract when they're freezing. And when you push them, they're just satisfied to be solid. But then the question might be why does water expand when it freezes while another substance doesn't expand when it freezes? And on and on …

What I am trying to tell you is how difficult a 'why' question is. You have to know what it is that you're permitted to understand and allow to be understood and know and what it is you're not. You'll notice in this example that the more I ask why, the more interesting it gets. My idea is that the deeper we go, the more interesting it becomes. And we could even go further and ask why did she fall down when she slipped? Well, that has to do with gravity. This involves all the planets and everything else. Never mind. It goes on and on. Now when you ask a why question, there are many different levels. It depends on whether you're a student of physics or an ordinary person who doesn't know much about physics or if you're somebody who doesn't know anything at all.[1]

1   Legal relativity theory

As the extract above aims to demonstrate, without a framework of shared knowledge and common understandings about a few conceptual building blocks, it becomes difficult to satisfy one's curiosity, even if only momentarily. My interest in this project is to help make sense of African international law and of how it develops. However, in order to do so, I believe it necessary that a common understanding is developed of what I take for granted in this endeavor; to be explicit about my axioms. The example given by Richard Feynman shows that the extent of scientific exploration into a phenomenon is quasi-infinite. I believe that one way to circumscribe one's efforts and to manage a reader's expectations is through the greatest possible level of honesty about the assumptions adopted concerning the chosen field of exploration.

One of the key messages that will be emphasized throughout this book is the idea of relativity. Relativity is a key assumption in this work, and one of the consequences thereof is that relativity presupposes reference points with which certain relations are established. This

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1   BBC, 1983, *Fun to imagine.*

disposition may be contrasted with an approach that is more absolute, whereby certain underlying values, principles or attributes are considered as indisputable 'truths'. I differ in this approach in the sense that I consider indeterminacy a key variable in our constructions of our social realities. Accordingly, I also consider that the idea of relativity is significant in relation to the theory of knowledge proposed here, to help understand African international law.

Considering the particular ambitions of this book to theorize the knowledge production processes related to the development of African international law, I believe it is, therefore, recommendable to clarify the key tenets of my thinking about knowledge more generally. This concern follows from a sensibility to earlier critiques in and about social science concerning geographical and cultural biases in Western-dominated epistemologies. Chakrabarty's book *Provincializing Europe* famously captures the concern about epistemology in terms of how 'ordinary' social science to a large extent is encapsulated in a framework whereby 'Europe' perpetually works as a 'silent referent in historical knowledge'.[2] The criticism is voiced about the theories, categories and concepts developed over generations to understand the entirety of humanity, notwithstanding the fact that they 'have been produced in relative, and sometimes absolute, ignorance of the majority of humankind – that is, those living in non-Western cultures'.[3]

Some of the power dynamics related to knowledge production are essential components in the narrative offered here about African international law. So, for that reason, I remain persuaded that transparency about the conceptual frameworks adopted in this book may contribute to avoiding misunderstandings.

No book is without flaws. I also do not presume that the attempt at transparency in this chapter about the epistemological framework adopted in this book to make sense of African international law will render this volume absent of cultural and geographical biases. Nonetheless, the attempt at honesty (deliberately distinguished here from 'truth') may at least invite and welcome constructive criticism in terms of revealing remaining biases and blind spots in this work.

In what follows I set out what I consider to be the main theoretical underpinnings that will help answer the question of how you know

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2   D Chakrabarty *Provincializing Europe – Postcolonial thought and historical difference* (2000, Princeton University Press), 28.
3   Chakrabarty (n 2) 29.

African international law. As explained above, this framework is not and cannot be neutral or of a one-size-fits-all nature. Rather it is hoped that, through the openness in this approach, which is much rarer compared to other accounts on African international law or international law in general, that value may still be derived in terms of creating or at least sharing a viewpoint to help make sense of African international law. While this perspective is simultaneously and deliberately subjected to criticism, the expectation I hold is that at least the risk of miscommunication will be reduced.

As stated in the previous chapter, the process of Africanization of international law is understood in this book as a collective effort to imagine and organize an international legal-political project based on a continentally-defined identity. Of particular interest here is 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. In this conceptualization, I consider this process to have two main variables: the extent of continental norm-setting and the degree to which these norms are enforced through varied continental accountability mechanisms.

In this chapter I suggest an explanatory framework through which the development of African international law may be understood. Specifically, a conceptual register is set out that I believe creates a useful lens to interpret some of the key factors shaping the evolution of African international law.

In line with evolutionary science in different disciplines such as biology and psychology, I understand my interest in African international law in similar terms of trying to understand how African international law develops in relation to its context. How does it adapt? What factors undermine or help ensure its 'survival and reproduction'? The perspective focusing on 'survival and reproduction' or, in other words, African international law's evolution, is contrasted here with the idea of 'extinction' of African international law, which for now seemingly is less the case. Nonetheless, I suggest that it remains worthwhile to examine both the conditions of possibility for survival and reproduction as well as for extinction.

Building on the literature reference points charted in the previous chapter, an elementary narrative is first provided to help make sense of what I consider to be the fundamental logic underlying the history

of humanity: to improve the human condition.[4] At the same time, the various complexities underlying this drive are briefly explained as well as the methods devised to resolve certain inherent tensions within this ethos of improvement. In a few broad strokes, the struggle of human evolution is redefined in terms of a relatively new objective and that is the aspiration (in principle, at least) towards equality. Specifically, the role played by the 'state' and other regional, continental and international actors to re-imagine the human enterprise towards a commitment to achieve 'equality' is highlighted.

Brushing over some of the main strands of international legal and developmental thought and its main ambitions and sensibilities to develop an understanding of global dynamics related to human progress, I arrive at an interim conclusion that there might be a need for greater space for 'constructive criticism' in these debates, with a particular focus on possible solutions to overcome inequality and the role played by 'people' in this endeavour.

This interim conclusion is then further refined in the following parts, whereby an argument is advanced to draw more attention to 'mistakes', as productive learning tools. Holding the assumptions about the indeterminacy of the future and the relative uniqueness of the human being, a framework is provided that helps characterize the key needs of human beings and through which we can help to understand human action attempting to fulfil these needs. At the same time, it is argued that the prevalence of these needs themselves vary across time and context.

The essential point advanced in this discussion is that despite some 'relative' level of universality in terms of needs, there is a fundamental impossibility of 'universal' prescription of how to fulfil these needs. The assumption explained here is, therefore, that it is more likely to generate a consensus on what constitutes a 'failure' and how to avoid and mitigate it, rather than being able to identify what constitutes 'success'. I argue that these insights justify that a process of solution generation, or *solutionization,* aimed at avoiding or mitigating mistakes is more productive than prescribing fixed sets of positive action or, worse, trying to develop one-size-fits-all solutions.

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4   The level of truism of this overall statement is reinforced when the terms are reversed whereby the fundamental logic of human history would be 'the deterioration of the human condition'. That premise seems much less persuasive.

Once this reorientation is established towards 'troubleshooting', the argument proceeds to conceptualize what actually constitutes a mistake and how it is determined. Specifically, the theoretical tenets of 'accountability mechanisms' are explained. The focus lies here on the dimensions of expectation creation and management, reality perception and accounting for differences between the two. The understanding of these mechanics will prove essential in our understanding of the normative aspects of African international law development and the accountability procedures deployed in African international legal regimes.

In line with the book's inclination to focus on specific actors within the African international legal domain, the discussion then proceeds to develop greater clarity about questions of 'responsibility' and the method for determining 'responsibility' and its boundaries. Also, here the possible indeterminacies in identifying 'responsibilities' are underlined. However, an argument is advanced to frame 'responsibility failures' through the conceptual lens of 'hypocrisy'. The point made is that through these terms it becomes easier to identify where the real obstacles are that needed to be addressed in order to make progress.

This discussion about responsibility propels us to consider in greater detail its constituent element, the notion of 'influence'. Here the distinction is drawn between different main modes of influence: physical, rational and emotional influence. It is considered that this categorization of influence opens a window to view a broader picture of how change is brought about. It emphasizes the point that 'law', as an exemplar of the exercise of rational influence, is only one out of several forms of triggering change. This acknowledgment may help us to recognize some of the limits of generating change. It also helps to frame the necessary conditions for effectuating change through the deployment of cognitive resources, as opposed to physical or emotional resources.

This recognition allows us then to draw the link between the exercise of rational influence, which I term here 'lawfare', and the knowledge resources that are needed to exercise influence based on reason. The establishment of this relationship then prompts us to consider more extensively the nature of knowledge and the conditions for its creation. This discussion necessarily pushes us to answer questions about themes that also influence the development process of African international law. The reflections here draw in particular on ideas discussed in the

previous chapter dealing with the notion of 'co-production'. Through the lens of 'knowledge production', views are presented concerning the 'production of law', as one form of a knowledge product. These reflections here develop linkages between associated elements such as 'creativity', 'language' and 'expertise', and the power relations connecting these components of knowledge production.

With this better understanding of knowledge operations, the discussion shifts to developing a better understanding of the relationship between knowledge and decision making. The nature of decision making is accordingly deconstructed and what is found at its core is that decisions are about setting a consensus-based course for the future that is only changed if sufficient resistance is offered.

It is this insight – about the necessity of 'resistance' to change the course of history – that becomes a key framing device, which I term 'guerrilla lawfare'. Summarizing the two main components of the argument so far made about transcending the binary of 'problem solving' and 'critical theory' approaches, the argument proceeds to outline the necessity of a 'bottom-up/top-down (BUTD) approach to address the fundamental concern of *demasiado*, which refers to the idea of abundance or excess.

This debate ultimately draws us back to a more refined conceptualization of 'law' in a narrower sense, and how 'law' can be used as 'resistance tool' to change current operating systems while at the same time being a constitutive element of the system already in place.

The chapter concludes with a few reflections on how this epistemological framework can help us to develop a better understanding of the nuances of African international law and its development, which are detailed in the following chapters.

2 Redefining the struggle

Disappointment is undoubtedly the most widely shared experience in the field of development.[5]

One way of looking at humanity's history is to see it in terms of the improvement of the human condition. Although this may suggest an absolute reading of the past, it does not aim to proffer a totalizing

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5   G Rist *The History of development: From Western origins to global faith* (2014).

statement concerning any general form of improvement for *all* humans or for *all* aspects of their state of being. The reason for the absence of an absolutizing statement about the overall development of the human condition is related, first, to the multiplicity of identities constructed around human nature; second, to the diverse understandings of what is considered essential for being; and, third, to the various factors enabling and frustrating the improvement of such being.

First, throughout history the category of human species has been subdivided into various sub-categories, each constituting a separate social identity. These different identities have been constructed based on a variety of organizing principles such as professional occupation (hunter, gatherer, farmer, soldier, scientist, entrepreneur), class (patrician, plebeian, bourgeoisie, proletarians, elites), gender (male, female, transgender), political organization (empire, colonies, nation state, cities), economic organization (capitalism, socialism), race (black, white, brown, coloured), religion (Muslim, Christian, Hindu, Jew), and so forth.

Second, all of these social identities have been mobilized in one way or another and led to a number of effects that positively or negatively affected the state of wellbeing of the individuals constituting that group. What is essential to this understanding is that very often action is undertaken to benefit individuals' part of such constructed identity groups for the sole reason of their belonging to said groups. These inclusionary/exclusionary dynamics naturally lead to divergences of states of 'being', especially in the context of concerted efforts of dominance and submission with inbuilt modes of hierarchy. Although these identity arrangements are certainly not uniform in their deployment, the result generally has been that where someone wins, others lose. The examples are numerous: Western hegemony in terms of security and economic apparatus resulting in colonial domination and slavery; systemic racial discrimination in the form of white privilege and apartheid in relation to other skin colours; male-dominated societies leading to gender inequalities visible in unequal pay and unequal representation in positions of authority; industrial profit maximization resulting in poor labour conditions; a sense of religious superiority resulting in crusades and others types of holy wars; a sense of meritocratic entitlement resulting in a socio-economic division of the Bottom Billion and the One Percent; other forms of

socially-constructed self-importance resulting in different types of inter and intra-national wars of varying scale; and so forth.

Essentially, the biological predisposition of being human as opposed to any other species (for example, dogs, cats, monkeys, bees, turtles, whales) has often taken a back-seat position in favour of other socially-constructed categories or imagined communities.

While identity politics remain pervasive in the social, political and economic organization of the world and its fragments (continents, regions and countries) counter-narratives have been offered to deconstruct these identity politics, reveal some of the injustices of their effects and re-orient social organization based on humanity rather than on any other types of identity. Human rights discourses are some of the most emblematic examples of this enterprise. The core idea behind human rights is to provide a number of guarantees for humans to enjoy a better life without distinctions based on the categories outlined above (race, religion, class, gender, and so forth). While such humanistic ideas and programmes of intervention have not always been categorized under the 'human rights' banner, their underlying rationale generally is similar.[6] It is from this perspective that a fundamental assumption is typically proposed and sought to be realized, namely, an idea of 'equality'.

Third, this idea of realizing equal improved conditions of 'being' again is subject to a wide variety of ways of implementation. Despite an increasing consolidation of a consensus on the notion of human rights throughout recent history, especially since 1948 with the adoption of the Universal Declaration of Human Rights, a wide multiplicity persists in terms of the appropriate techniques to achieve such level of human equality.

Very often distinctions are still made concerning the primacy of some conditions of 'being' in relation to others. The hierarchization of human rights into first, second and third generation of rights is an example of such dynamics. Here, a long-standing idea was maintained and to some extent continues until today, that some human conditions, such as freedom to express oneself or the right to liberty (first generation rights), precede and are necessary requirements for the enjoyment of other factors that allow for the positive enjoyment of human life, such

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6   For a compelling intellectual history of 'human rights', see, eg, S Moyn *The last utopia: Human rights in history* (2010).

as food and health care (second generation) or a healthy and sustainable environment (third generation). This example of fragmentation of the enjoyment of equality over different constituent factors of 'being' has been subjected to extensive and well-documented critique.[7] The adoption of views that stress the indivisibility and interdependence of said rights was the result.[8] Here the argument was put forward that the collection of rights should be realized together.[9] Nevertheless, a range of different opinions remain on how to best achieve this multitude of conditions for better life in practice.

A state-centric bias towards their achievement took hold of the collective imagination to a great extent, due to human rights' construction and materialization in international treaties, constitutional frameworks and governmental policies. This understanding by no means tries to silence the important or even indispensable role of non-state actors in contributing to the identification and realization of the factors, conditions or as termed here, 'rights' of human 'being'. The crucial role of these non-state actors has been extensively documented elsewhere and includes the religious contributions to improving human condition as well as civil society *sensu lato*.[10] But what is undeniable is that with an *étatisation* over the past centuries, and especially since World War II in newly-independent states, the state took a central place in the organization and coordination of activities geared towards the fulfilment of conditions for human well-being.[11]

This fracture, as implied above, has as a result again the inevitable consequence of disparity in the enjoyment of said rights, this time across

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7   See, eg, F Viljoen *International human rights law in Africa* (2012).
8   See, eg, Vienna Declaration and Programme of Action, UN Doc A/CONF.157/23, 12 July 1993.
9   This idea, most notably, found its way into the African variant of multilateral human rights treaties, the African Charter on Human and Peoples' Rights (1981). In this document it is categorically stated in its Preamble that '[i]t is henceforth essential to pay a particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights'.
10   See M Finnemore & K Sikkink 'International norm dynamics and political change' (1998) 52 *International Organization* 887; T Risse-Kappen, SC Ropp & K Sikkink *The power of human rights: International norms and domestic change* (1999); ME Keck & K Sikkink *Activists beyond borders: Advocacy networks in international politics* (2014); O Okafor *The African human rights system, activist forces and international institutions* (2007); M Baderin *International human rights and Islamic law* (2003).
11   B Badie *The imported state: The Westernization of the political order* (2000).

state boundaries.[12] Owing to the complexity of state organization and restricted scope of internal state intervention due to a number of internal cleavages (such as ethnicity, class and political economy) disparities also unavoidably occur *within* states. In parallel to this trend of identity construction along state lines, with oft-associated markers such as nationality, official language, shared territory and cultural heritage, which remain perpetually highly contested,[13] global and increasingly regional or continental governmental programmes attempt to play a role in improving the relevant conditions for enhanced 'being'.[14] However, these *supra*-national organizations in their current forms are still entirely or mostly dependent on state structures and, therefore, are still generally denominated as *inter*national organizations.

Despite these regional, continental or global attempts at collective action toward achieving 'equality' among humans, inequality by and large remains the most accurate description of the global state of affairs. Of course, the normative question may be posed of whether such global human 'equality' is even theoretically possible. Based on the overall and growing popular consensus it appears that, regardless of its theoretical feasibility, it has become an objective worth pursuing. The vigour and method with which it is pursued is the source of most contemporary and historical debates dissipated over various intellectual disciplines, including most prominently-development studies and public international law.

I believe it to be true that from a benign perspective, all scientific disciplines generally aim at making a positive contribution to benefit humanity, or at least some of its constituent parts. However, the specific problematization of human development beyond the various identity restrictions as outlined above is largely part of the contemporary discourse within the international development sphere. This is not to say that the disciplines are hermetically sealed from other disciplines. On the contrary, these disciplines, especially development studies and

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12 See H Arendt *Origins of totalitarianism* (1976) 290-302, for a critique and warning of the adverse consequences this state-centred human rights perspective may have, including a certain form of myopia concerning human rights, whereby humans that fall outside of state-defined categories of humans may fail to receive protection otherwise designed for the benefit of all human beings.

13 B Anderson *Imagined communities: Reflections on the origin and spread of nationalism* (1983).

14 See, eg, I Bantekas & L Oette *International human rights law and practice* (2013) for a decent overview of the different international, continental and regional interventions and programmes in the domain of 'human rights'.

increasingly public international law, are precisely invoked because of their openness to include a wide spectrum of other scientific branches, including economics,[15] anthropology,[16] political science,[17] international relations,[18] architecture,[19] psychology,[20] and even, but unfortunately as of yet to a lesser extent, natural sciences.[21] In light of their openness to other disciplines, the other main reason that these two disciplines 'international law' and 'development studies' are singled out is that they to a large extent share the core objective of understanding global dynamics related to human progress.

Building on Cox's famous distinction between 'problem solving' and 'critical theory', a similar attempt is made in this book to draw a broad distinction *within* the literature on development and international law.[22]

On the one hand, the broadest and, in quantifiable ways,[23] largest literature within international law and development studies consists of attempts at problematizing factors that impair human progress and providing solutions generally within 'prevailing social and power relationships and the institutions into which they are organized, as the

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15   See, eg, J Dunoff & J Trachtman 'Economic analysis of international law' (1999) 24 *Yale Journal of International Law* 1; T Ginsburg, C Engel & A van Aken 'Symposium: Public international law and economics' (2008) *Illinois Law Review* 1.

16   See, eg, MB Dembour 'An anthropological approach to *MSS v Belgium and Greece*' in D Gonzalez-Salzberg & L Hodson (eds) *Research methods for international human rights law: Beyond the traditional paradigm* (2020) 227; M Sally Engle 'Anthropology and international law' (2006) 35 *Annual Review of Anthropology* 99; A Riles 'Introduction to the Symposium on the Anthropology of International Law' (2021) *AJIL Unbound* 268.

17   See, eg, EM Hafner-Burton, DG Victor & Y Lupu 'Political science research on international law: The state of the field' (2012) 106 *American Journal of International Law* 47.

18   See, eg, JL Dunoff & MA Pollack (eds) *Interdisciplinary perspectives on international law and international relations: The state of the art* (2012).

19   See, eg, MB McKenna 'Designing for international law: The architecture of international organizations 1922–1952' (2021) 34 *Leiden Journal of International Law* 1; R Vos & S Stolk 'Law in concrete: Institutional architecture in Brussels and The Hague' (2020) 14 *Law and Humanities* 1; D Mulugeta 'Pan-Africanism and the affective charges of the African Union building in Addis Ababa' (2021) 33 *Journal of African Cultural Studies* 521.

20   A Aken & T Broude 'The psychology of international law: An introduction' (2019) 30 *European Journal of International Law* 1225.

21   For a notable exception, see JEK Parker *Acoustic jurisprudence – Listening to the trial of Simon Bikindi* (2015).

22   RW Cox 'Social forces, states and world orders: Beyond international relations theory' (1981) 10 *Millennium – Journal of International Studies* 126.

23   'Quantifiable' is meant here in terms of the volume of publications.

given framework for action'.[24] Applied to our thinking of overcoming situations of inequality, this literature typically advances ideas about programmes of action to address particular 'sources of trouble' while obscuring other structures that can produce inequality. This literature typically addresses 'specialized areas of activity' to overcome particular conditions of inequality. Examples include writings on social, political and economic inequality.[25]

The other main form of literature Cox identifies as 'critical theory'. This approach interrogates 'the very framework of action, or problematic, which problem-solving theory accepts as its parameters'.[26] It seeks to understand how this 'prevailing order' came about and the process of change involved in them. Although the proponents of the latter form of knowledge generation generally tend to ambition a more neutral approach to certain problematics in terms of normative predisposition, in reality, as far as my reading of them is concerned, they often do instrumentalize such *de*-construction of the taken-for-granted institutions and social and power relations, for the *re*-construction of alternative frameworks. The most prominent examples in this field include 'post-development scholarship'[27] and 'international critical legal studies'.[28]

The ideological disposition shared among these two bodies of scholarship, I would argue, concerns a disenchantment about attempts to address global challenges in the world, specifically related to inequality, and the need to emphasize the problematic structures largely invisible to the actors within it. Their critique of the global state of affairs appears akin to a theological approach. In their reading of the globally held ideas concerning programmes of 'development',

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24   Cox (n 22) 128.
25   See, eg, policy literature produced by think tanks, civil society organizations and other international organizations, including, most notably, World Bank reports; see, eg, World Development Report *Governance and the law* (2017).
26   Cox (n 22) 129.
27   G Rist *The history of development: From Western origins to global faith* (2014); A Escobar *Encountering development: The making and unmaking of the Third World* (2011); J Ferguson *Global shadows: Africa in the neoliberal world order* (2006).
28   It has been pointed out before that this scholarship in many ways lacks a coherent approach; nevertheless, a canon of this scholarship is still traceable and would include writings of David Kennedy, Anthony Anghie, Martii Koskenniemi, Andrew Lang, BS Chimni, Susan Marks, Matt Craven, Upendra Baxi, B Rajagopal, Vasuki Nesiah, James Gathii, Sundhya Pahuja, Luis Eslava, Rose Parfitt, Arnulf Lorca Becker and their collaborators.

they largely describe them in terms of 'faith', 'myths', 'belief systems' or 'religion'. Accordingly, their rational and systematic study of such 'religions' and their various influences, recalls the character of the scientific branch of 'theology'.

Although post-development scholars mainly are occupied with the different activities and programmes under the label 'development', several critical scholars have addressed framework structures related to other social identity categories, as outlined above. For example, the literature on race has aimed to reveal the problematic assumptions and adverse effects of racial discrimination.[29] Similar bodies of critical literature exist, for example, on gender[30] and colonialism.[31]

The main preoccupation of such studies is a concern with the enduring legacies of subjugation. They aim to reveal the lasting effects and reproductive forces of relations of dominance and submission between different social groups. The resultant categories, and particularly those made in politico-economic and geographical terms, have been labelled differently, ranging from First, Second and Third World; Developed, Developing and Underdeveloped; Core and Periphery; Global North and South; West and the Rest.

Regardless of their appellation, the shared objective has been to reveal the different factors that perpetuate these divisions, and which obstruct the formation of the conditions of possibility for global human equality.

This study shares a number of sensibilities with the above-mentioned bodies of work and yet also differs from them in one crucial aspect. In one sense, this book aims to transcend Cox's dichotomy of 'problem solving' and 'critical theory', by adopting a slightly different orientation. Like the critical theorists referred to, this work also targets the notion of inequality and the structural conditions shaping the absence of equality. But rather than adopting the perspective of equality as the

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29   See, eg, F Fanon *Black skin, white mask* (1952); D Kennedy *Sexy dressing etc: Essays on the power and politics of cultural identity* (1993) and specifically his essay on 'A cultural pluralist case for affirmative action in legal academia'.

30   For a succinct overview, see H Charlesworth 'The women question in international law' (2011) 1 *Asian Journal of International Law* 33; more generally, see CA MacKinnon 'Feminism, Marxism, method, and the state: An agenda for theory' (1982) 7 *Signs: Journal of Women in Culture and Society* 635.

31   See, eg, EW Said *Orientalism* (1979); GC Spivak 'Can the subaltern speak?' in C Nelson & L Grossberg (eds) *Marxism and the interpretation of culture* (1988) 24; M Mamdani *Citizen and subject – Contemporary Africa and the legacy of late colonialism* (1996); P Chatterjee *The nation and its fragments – Colonial and postcolonial histories* (1993).

aim of the pursuit, this study is deliberately solution-focused through its orientation towards addressing inequalities. Specifically, this study assumes the struggle *against* inequality to be a continuous and infinite endeavour. Congruently, it assumes the fight *for* equality to be impossible and inevitably biased, as explained below.

This difference in perspective has a number of important consequences. First, this approach, while having a clear sense of *direction*, it is absent of any fixed final *destination* – such as a world characterized by full and absolute equality. Instead, the focus of this perspective lies on the *journey*, the process of continual identification of 'problems' or sites of inequality, that are subjected to deliberate constructive thought and action to avoid or mitigate the endurance of these particular forms of inequality.

Second, instead of focusing on inequality as an *outcome*, this perspective takes aim at the *process* of creating states of inequality. Specifically, this means looking at the 'people' involved in creating conditions of inequality. Rather than target abstract notions such as 'institutions', 'capital' or 'legal frameworks', this approach directs its gaze on the *people* behind these social constructs. Contrary to the view held by some that 'history repeats itself', the assumption in this approach is that history does *not* repeat itself, *people* simply make the same mistakes.[32]

Third, the viewpoint adopted here does not oppose differences in treatment in any *absolute* terms. Instead, *relativity* is a key axiom of the approach outlined in this book. Accordingly, objective forms of discrimination may still be acceptably if they are adequately justified. And it is the quality of this process of reasoned justification and the underlying knowledge operations it requires that is essential for determining the acceptability of states of inequality.

In what follows, these three themes will be further elaborated.

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32   I thank Bart De Wever for this insight.

3   Solutionization

Die Philosophen haben die Welt nur verschieden interpretiert; es kommt aber darauf an, sie zu verändern.[33]

A key aspect of the approach advanced in this manuscript is to transcend the ubiquitous habit in academia to *problematize*. While this effort of framing, sometimes re-framing, and exposing different nuances of the dimensions of certain problems undoubtedly has merit, it often has as consequence that possible solutions to actually address the problem receive disproportionately less attention. It is for that reason that the approach here intends to expand the gaze of intellectuals towards a process of solution identification which naturally *encompasses* the process of problem formulation. However, the difference between the two perspectives is that the emphasis shifts from the problem to the possible solutions. In related terms, the distinction being made here is similar to that between 'criticism' and 'constructive criticism'. So essentially, the approach suggested in this book is one of 'constructive critical theory' (see Figure 2.1 Problem Solving + Critical Theory = Constructive Critical Theory).

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33   Humboldt University, Berlin – Karl Marx – 'Theses on Feuerbach No 11' (translation: *Philosophers have only interpreted the world in various ways; the point is to change it*).

*Figure 2.1   Problem Solving + Critical Theory = Constructive
            Critical Theory*
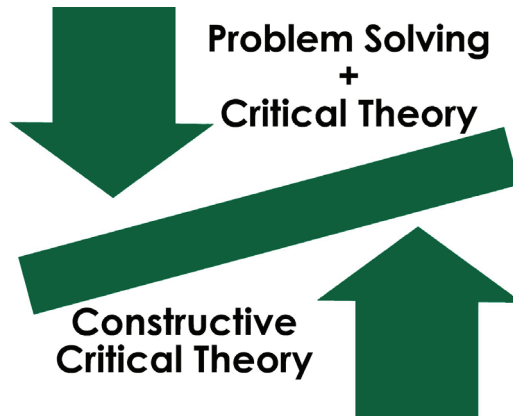
Whereas a large majority of scholars in the 'critical tradition' are poised within the intellectually meritorious, yet pragmatically rather unproductive routine of description and interpretation, the approach advanced here is consciously geared towards effectuating change.

For the avoidance of doubt, the point is not to frame these approaches as mutually exclusive. The point is to promote an expanded habit of thinking that encompasses detailed critique together with a non-exhaustive consideration of possible solutions. Furthermore, a key element to emphasize here is to recognize the *plurality* of possible solutions. Since this approach does not assume any absolutes and instead stresses context-dependability, it is believed essential to acknowledge the multitude of possible solutions which can then be judged on their merits using different evaluating principles. Subsequently and depending on the respectively favoured evaluation principles, a hierarchy can be made of preferential solutions. The point here is that the solution itself cannot necessarily be judged in terms of absolute goodness or badness, but rather the solution is evaluated in terms of achieving a pre-determined outcome.

Obviously, this approach is mentally much more taxing, as it presumes prior knowledge of the envisaged outcome and, therefore, many more mental operations and calculations are needed to develop a clearer understanding of what the desired outcome should or rather could look like. And this pre-determined outcome can be described in positive terms (to achieve a positive state) or in negative terms (to

avoid or mitigate a negative state). The proposed approach in this book is to prefer the focus on avoiding or mitigating a negative state.

The reason for this choice towards the 'negative' is based on the adopted axioms of 'indeterminacy of the future' and the 'relative uniqueness of human being'. It is assumed that any future by and large is 'indeterminate'. While it is also accepted that the nature of the future can be predicted up to a certain level and that a large part of the scientific endeavour as a whole is oriented towards elaborating principles that explain and predict patterns of behaviour, the social and material universe as a whole is vastly complex and not all rules have been formulated that explain its often-chaotic appearance. This absence of a fully-fledged understanding of social reality results in varying levels of uncertainty that may greatly shape decision-making processes.

Furthermore, the axiom of the relative uniqueness of any human and their life experience contributes to the conviction that one-size-fits-all solutions are unrealistic. What is meant here is that all human beings are considered unique due to their unique biological composition as well as their unique contextual life experience, with the former often referred to as the 'nature' aspect of life and the latter as the 'nurture' dimension.

Although a certain level of uniqueness is presumed of human life, the approach advanced here does take for granted that every human can be characterized as having a set of needs that are to be fulfilled to enjoy a satisfactory life. This understanding builds on findings in the field of evolutionary biology and psychology.[34] Drawing on some general insights from these fields, I would propose that two main needs can be identified, which can be further sub-divided into six separate groups of needs, and which this book presumes to be generally present in human beings.

At its core, the two fundamental needs considered here are 'survival' and 'reproduction'.[35] Survival is understood in its most elementary

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34   These two bodies of literature are generally concerned with the study of the adaptation processes of specifies in relation to their environment, whereby evolutionary biologists concentrate more on physiological attributes of a specie's development, while evolutionary psychologists focus more on mental variables. See, eg, C Darwin *On the origin of species by means of natural selection, or the preservation of favoured races in the struggle for life* (1859) and S Pinker *How the mind works* (1997).

35   I am grateful to Ethan Kinsey for discussing these insights with me.

form and that is to avoid succumbing to harm and ultimately death. Reproduction is taken to mean the process of ensuring the continuation of oneself through offspring, which is taken to mean a biological legacy (descendants) and/or a social legacy (transfer of ideas).

These two fundamental needs may be sub-divided into three sub-groups each, which are borrowed from Maslow's needs structure.[36] However, whereas Maslow considered these needs in some hierarchical form, specifically pyramidical, the understanding of the needs formulated here are considered without reverting to any hierarchical order. Rather, the different needs and the intensity of their materialization are presumed to be context dependent, including in relation to the needs of any specific individual as well as in relation to the development of any particular person.

Since these needs are considered here as the fundamental drivers of all human actions geared towards their fulfilment, it is worth giving a concise overview of these six different categories (see Figure 2.1 Survival and Reproduction Needs).

The first set of needs that primarily relate to the notion of 'survival' are *physiological needs*. This relates among others to access to air, water, light, food, sleep, clothing, physical exercise and shelter.

The second set refers to *safety needs*, including personal security against calamities such as war, natural disasters and violence as well as against other health-related harms such as diseases, handicaps and accidents. An indirect safety need can also be associated with financial security that can be offset by an economic crisis or unemployment, which may lead to a deterioration of the ability to meet other needs. Related to the need for safety are demands for order, stability and consistency.

The third set of needs are associated with the idea of *social belonging*. Here, ideas are referred to in connection with the need for intimacy, affection, friendship, partnership, companionship, family, community, trust, closeness, inclusion or acceptance.

Whereas these three groups are most closely allied with the notion of 'survival', the following three categories are more directly affiliated to the notion of 'reproduction' and, more specifically, the conditions to facilitate propagation.

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36   AH Maslow 'A theory of human motivation' (1943) 50 *Psychological Review* 370.

Accordingly, the fourth set of needs deal with the want of *esteem*. It relates to ideas such as respect, importance, prestige, to be understood, feelings of compassion and empathy, authenticity, appreciation and to be known. The fulfilment of this need generally creates the conditions that may favour 'reproduction'. The more successful one is considered to be, the easier the process will be to find partners to organize reproduction.

The fifth needs set is identified as one dealing with *self-actualization*. This need can generally be described in terms of fulfilling one's potential. Associated with this need are notions such as inspiration, support, opportunity, challenge, growth, discovery, sense of purpose, independence, freedom, learning, self-expression, competence, understanding and stimulation. The realization of this need helps to shape clarity about what it is one seeks to perpetuate through processes of 'reproduction' and how important such deliverance is.

The sixth group of needs relates to the idea of *self-transcendence*. It is about dedication to a goal outside the self. It concerns elements such as altruism, cooperation, contribution, hope, harmony, equality, beauty, art and creativity. The actualization of this need is most directly related to 'reproduction' in the sense that it is about one's legacy beyond oneself.

Figure 2.2: Survival and reproduction needs
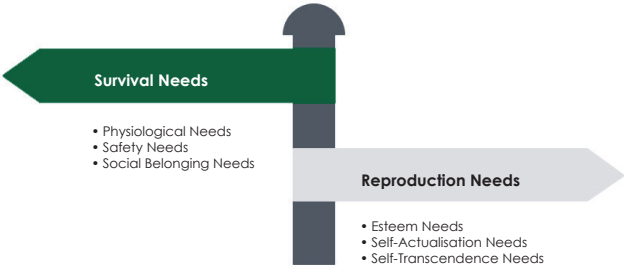
Evidently some overlap is theoretically possible between the descriptors provided and the categories to which they have been assigned. One reason for that is because language and its concepts have varying levels of fluidity. Concepts in particular can be defined and redefined in broader or more narrow ways. To some extent concepts and their labels are open-ended containers, formed inductively, and that also explains

some level of open-endedness of the six categories detailed above. The point here, however, is not to achieve the highest level of rigour in terms of distinction between the categories of needs. Instead, the point is to emphasize the existence of different needs that are experienced commonly by *all* humans, albeit to different degrees dependent on their own nature, development and environment.

So, while this study assumes a certain level of 'universality' in terms of needs, they are presumed to be relative in relation to the nature and context in which they are experienced.

This point is essential because it reveals the impossibility of universal prescription of how to fulfil these needs. The assumption made here is that the ability to devise plans and programmes on how to meet those needs and achieve 'a happy life' is impossible due to the diversity of human nature and the continuous fluctuation or transience of the context in which humans experience life. Rather, the supposition made in this approach is the more readily-available consensus on what constitutes an 'unhappy life' and how to avoid or mitigate it.

These axioms of the indeterminacy of the future, taken together with the relative uniqueness of the human being, leads us towards a more productive process of solution generation (*solutionization*) oriented towards avoiding or mitigating mistakes rather than prescribing fixed sets of positive action.

It is worth emphasizing that the purpose here is not to frame every single action as a 'negative' action and as a consequence overly infuse all action language with a negative oriented vocabulary, such as refrain, resist, eradicate, stop, discontinue, end, diminish, abate, and so on. Rather, the aim here is to advocate a mindset that evades overly deterministic instructions on appropriate behaviour as an *end goal*, for such an end goal is relative to each individual and their context. Instead, the approach advanced here seeks to offer guidance on how to avoid making mistakes, as the end goal, and whereby the ultimate purpose of the action is left open-ended and relative to the uniqueness of the specific needs of each individual and their shifting context.

While the previous discussion for some may be characterized as being rather esoteric, one of the most practical examples that can be offered to illustrate the approach outlined above, is the recourse to a 'checklist'. This tool, used in a variety of disciplines such as medicine when preparing an operation, in aviation when preparing a flight and in all sorts of inspectional services, or even in daily life as a 'to-do' list to

enhance personal productivity, essentializes the philosophy of avoiding or mitigating mistakes. The mentality behind this tool – a checklist – is an essential part of ensuring constructive accountability, which is the next major building block of this theory.

4 Hypocrisy

> The greatest trick the Devil ever pulled was convincing the world he didn't exist.[37]

Having set the stage about the process-oriented approach towards error avoidance or mitigation, we will continue with a discussion of what actually constitutes a 'mistake' and how it is determined.

4.1 Mistake

It will become a well-rehearsed refrain in this book, but any understanding of a mistake will be assumed here in relative terms. This means that a mistake can only be identified in relation to a particular expectation and is the result of any deviation with that expectation, experienced in negative terms. The point to emphasize here is that inconsistency of reality with an expectation can either be experienced positively or negatively. Accordingly, inconsistency is not inherently good or bad, whereas a mistake per definition is a negatively-imbued concept, as it constitutes a negatively-experienced inconsistency with an expectation.

This is not to say that a comparison made between reality and an expectation that was initially perceived to be a mistake cannot later be reformulated as a 'blessing in disguise'. This means that prior comparisons can be reframed to fit the broader understanding of the consequences of the earlier actions. This possibility of reformulation underlines again the relativity of the notion of 'mistake'.

Nonetheless, building on this important semantic discussion, it is crucial to emphasize the essential meaning of a mistake and that is the negatively perceived incongruence between reality and expectations.

It is also this relationship between reality and expectations that is central to the understanding of the notion of 'accountability'. At its core, accountability is the assessment of the distance between expectations and reality.

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37   Roger '"Verbal" Kint – "The usual suspects"' (1995).

Accordingly, there are at least three core operations involved in accountability procedures. First, there is the action to create and shape expectations. Second, there is the action that constitutes reality. Third, there is the action to measure and compare these two actions and to 'account' for their similarities and differences (see Figure 2.3 Accountability Framework).

What that means is that, first, there needs to be an articulation about certain beliefs or assumptions about the future (= expectations). In the present particular ideas are formed about what is expected to happen in the future. These ideas are shaped through a variety of factors, but typically they are based on some sort of extrapolation of a pattern or trend presumed to have been established in the past. Depending on the level of consolidation of that pattern, it will be possible to speak of a certain 'norm' being formulated. The quality of the understanding of the patterns of the past will typically translate into the quality of predicting the future, measured by the comparison of belief or assumption about the future and the actual experience of reality.

To experience reality then, what is needed are adequate tools for experiencing. In science, such spaces for observation, practice or experimentation are typically designated as 'laboratories'. In an analogous manner, what is frequently deployed in laboratories are tools to enhance our innate 'senses' to experience, whether through sight, hearing, touch, taste or smell. Generally, however, the focus tends to be on enhanced seeing, whether through microscopes or telescopes, leading to related aphorisms of 'seeing is believing'. The point is that tools are needed to allow perception of reality and that these acts of perceptions are made more explicit through their demarcation in specifically-designated spaces for perception, such as laboratories.

This then is the third step, namely, the act of measuring distances between preformed ideas about the future and their (in)congruence with what is established in the present and trying to account for these similarities and differences.

Following such accountability procedures, it will be possible to establish the level of consistency and inconsistency between expectations and reality. However, the consistency or inconsistency itself cannot *a priori* be subjected to any value judgment without reference to a set of ulterior goals or objectives that may serve as a beacon to determine whether any action led *to* the accomplishment of those goals or made the accomplishment of those goals *more* likely.

Conversely, if any action led to the irreversible failure in achieving an objective or made the accomplishment *less* likely, it is possible to pronounce a value judgment in terms of a mistake.

Now that we have clarified to some extent the process of calculating a mistake, we need to address more carefully the inherent issue of assigning 'responsibility' for mistakes.

The axis of responsibility presumed in this treatise is considered in direct relation to the sphere of influence. In line with stoic philosophies,[38] it is taken for granted here that anything beyond the sphere of influence of an individual is beyond the sphere of their responsibility.

Nonetheless, it should be noted that the sphere of influence is a fluid concept and can vary across subject-matter and time. For example, influence may have been available in the past, even if only latently, which could have altered subsequent events if that influence would have been wielded differently. Therefore, a person may be considered responsible for prior action if that action or inaction, as the case may be, could have led to foreseeable consequences, knowable at the time. If, however, the consequences of the (in)action were neither foreseeable nor realistically knowable at the time, then that person did not necessarily have the ability to influence the outcome and accordingly does not hold responsibility for the outcome.

It is this notion of 'responsibility' that is a core theme in this book, and which brings us to further discuss the contours of this concept.

4.2   Responsibility

In the understanding outlined above, the idea of 'responsibility', conveyed as the 'ability to influence', may be considered as having a rather large purview. Accordingly, it is not surprising that various mechanisms have been devised to limit one's or others' influence and, accordingly, their responsibility. Jurisdictional boundaries are one such example where the power to influence has been restrained by explicitly circumscribing one's scope of influence, either materially, temporally, spatially or personally. Another example are situations when parties are not able to fulfil their contractual obligations due to extraneous events, characterized as *force majeure* or an 'act of god'. In these circumstances

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38   See, eg, M Aurelius *Meditations (*2006); R Holiday *The obstacle is the way* (2014).

it is presumed that due to the situational circumstances the respective party was not able to wield the influence in the agreed upon way and, accordingly, is absolved from the responsibility corresponding to the restraints on his ability.

While this understanding of responsibility in relation to influence can concern mundane matters such as an agreement about the sale of apples, including the commitments made to deliver apples and provide payment thereof, it can also relate to weightier commitments made, such as the transnational commitment to address inequality.

It is in this context where it is possible to identify the influence of persons to fulfil their commitment of alleviating inequality and their corresponding responsibility to do so. It is also possible in this context to account for the extent to which persons violate their responsibility in addressing inequality, measured by the distance between their ability to influence a situation to reduce inequality (expectations) and their actual action in achieving the said reduction (reality). This understanding has important consequences, because it brings to the attention the fact that the extent of the sphere of influence to address inequality translates directly to the scope of responsibility to do so.

4.3   Able and/or willing

In an ideal world reality always matches expectations. However, experience shows us that often there is a discrepancy between expectation and reality. And if this inconsistency is experienced in negative terms, then we have called this a 'mistake'. The question remains of how to make sense of this experience in terms of responsibility.

Here, a distinction is made between two forms of incongruences between commitments and actual behavior. First of all, somebody's failure to meet a commitment is not considered problematic *per se*. If someone was 'willing' yet not 'able' to meet the commitment, then that person does not have any responsibility about the failure to meet the commitment.

However, if one is 'able' yet not 'willing' to meet a commitment, then that person remains 'responsible' for the commitment and any desistence from fulfilling the commitment can be characterized as being 'hypocritical'. In other words, if a gap is established between one's ability to influence a situation leading to the accomplishment of a previously-made commitment or making the accomplishment of those commitments more likely and one's actual behaviour in wielding the

said influence is contrary to those objectives, then such a discrepancy can be described as a 'hypocrisy'.

To the misfortune of the world and its inhabitants, such situations of hypocrisy are pervasive. To find examples of hypocrisy it is advised to start by searching for 'commitments'. One of the most evident places to find catalogues of commitments across the greatest number of individuals is within international treaties that codified these commitments. It then becomes a matter of establishing the ability of those people wishing the treaty's jurisdiction to influence the situation to achieve the commitments made in the treaty. Once that ability is established, then all excess ability (corresponding to responsibility) beyond willingness can be characterized as hypocrisies.

It is here that we can establish a number of international legal hypocrisies, such as the failure to treat smaller states equal to more powerful states, despite the commitment towards sovereign equality;[39] the failure to respect the independence and autonomy of a foreign nation despite the commitment to respect the right of self-determination;[40] or the failure to respect environmental standards despite the commitment to do so.[41]

This understanding of hypocrisy can also be translated into other key societal domains, such as corruption and tax evasion. Corruption essentially is about appropriating something one does not have a right to. Here too, a corrupt person acts in a way contrary to certain expectations and ultimately contravening an earlier made commitment about what has been socially accepted as right or wrong. The fact that this mistake takes place 'willingly', in the sense that the person willingly does not want to live up to the expectations despite his ability to do so, meaning without adequate justification, constitutes a form of 'hypocrisy'.

39   See H Charlesworth 'International legal encounters with democracy' (2017) 8 *Global Policy* 34; G Simpson 'Imagined consent: Democratic liberalism in international legal theory' (1994) *Australian Year Book of International Law* 103.

40   See, eg, S Pahuja *Decolonising international law – Development, economic growth and the politics of universality* (2011); A Orford *International authority and the responsibility to protect* (2011).

41   See, eg, PM Dupuy & JE Viñuales *International environmental law* (2018).

Similarly, tax evasion or other forms of fraud, such as electoral fraud[42] or constitutional fraud,[43] are also about appropriating something to which one does not have a right, except that the only difference is that the resources that have been appropriated are those that actually should have been relinquished. But overall, the story remains the same since a tax evader, election rigger or constitution manipulator acts in a way contrary to certain expectations and ultimately contravenes an earlier-made commitment about what has been socially accepted as right or wrong.

There are two key lessons to draw from the discussion above. First, it tried to clarify that a failure to meet a commitment is not the main source of evil in the world, since some of these failures can be justified. Rather, what is considered here as the villain in this story is the ability to meet a commitment but not the willingness or, in other words, hypocrisy is considered the main fiend. It is this form of evil – hypocrisy – that this book takes an issue with, in particular in relation to the commitment to combat inequality. More specifically the book tries to reveal the Devil's greatest trick, namely, convincing the world that he does not exist. Formulated differently, the aim of this book is to uncover the actual responsibility of those people committed to fighting inequality and reveal the hypocrisy of those in their failure to honour their commitments to address inequality, despite their ability to do so. However, this objective is not formulated in terms of chastising people who shy away from their responsibility. Rather, in line with the constructive approach in this book, the aim is to activate the latent responsibility of the people or as more eloquently pronounced by Thomas Sankara, this book is aimed at *responsabiliser le peuple*.

Second, the discussion above forces us to carefully consider the extent of one's influence. More specifically, it is important to know where the boundaries lie of one's influence and how these contours of influence are produced, since it is the scope of this influence that will determine responsibility and, accordingly, the extent of hypocrisy in the event of a discrepancy between expectations and behaviour leading to the frustration of fulfilling certain commitments. This dynamic, therefore, highlights the importance of the 'process of justification'.

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42   See, eg, N Cheeseman & B Klaas *How to rig an election* (2018).
43   See, eg, M Wiebusch & C Murray 'Presidential term limits and the African Union' Special supplementary issue: The African Charter on Democracy, Elections and Governance (2019) 10 *Journal of African Law* 131.

Justification is meant here in the sense of explaining the limits of one's influence to fulfil a certain commitment. One reason why justification is described in terms of a process is because, like any process, there are rules and principles that govern the sequence of actions needed to achieve a desired result or, as the case may be, obtain a sufficient consensus about what is an acceptable justification for limiting one's influence and, accordingly, one's responsibility. The point is that some acts of justification may be acceptable for some and not for others, and that in some cases such a consensus about an acceptable justification may be found in some contexts and not in others. So, while there is relativity in justification, this relativity also is not absolute.

Therefore, it is of crucial importance to better understand these processes of justification, including their rules and underlying principles, despite their sometimes shifting nature, because the lack of adequate justification may create enormous liabilities, desirous to none.

Figure 2.3: Accountability Framework
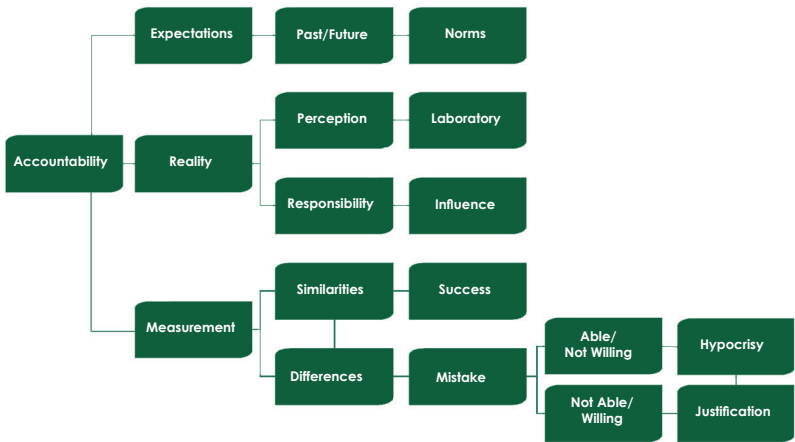
5   *A luta continua*

A luta continua[44]

The story told so far concerned the search for constructive solutions to mistakes. Mistakes have been clarified to mean the difference between expectations and reality that led to the failure to achieve an objective. And to address mistakes, it has been argued to be essential to know who bears responsibility for them, so their behaviour may be altered to avoid or mitigate these mistakes in the future. This responsibility has been defined in terms of the extent of influence that may be wielded to shape reality. The scope of influence has been claimed to be adjustable based on the quantity and quality of the justification provided to reduce the influence of those persons in achieving the goals they have committed to. And mistakes that are considered unjustifiable have been determined 'hypocrisies' and which have been called the cardinal sin to be avoided and mitigated. We continue this discussion by developing a better understanding of what constitutes 'influence' in the first place. What is the nature and origin of influence, and how does it expand and shrink?

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44   Eduardo Mondlane – Frelimo rallying cry (translation: '*the struggle continues*')
      © Picture by Emmanuel De Groof at the South African Constitutional court,
      taken in February 2019.

Figure 2.4: Influence Framework

5.1 Influence

Influence is thought of here in terms of the ability to cause change. Change, in turn, is considered an alteration of a particular state, resulting in a difference between the original state and the subsequent state following the exercise of influence (see Figure 2.4 Influence Framework).

Change is viewed here in two ways, namely, positive or negative change. Positive change implies that a level of attraction is created from one state towards a more favoured state. Someone is drawn to the more favourable alternative. Correspondingly, there is a directional shift away from the original state that is considered implicitly less favoured. If the change is considered towards a better state, then by definition the thing from which you are moving away is worse. Positive

change frequently is associated with such vocabularies as 'persuasion', 'incentives' and the 'carrot'.

Negative change means that there is a directional shift explicitly away from a perceived more favourable state. There is an understanding that the state in which one currently is will be negatively affected. Negative change's vocabulary register includes terms such as 'coercion', 'sanctions' and the 'stick'.

The degree of 'influence' is expressed in terms of 'power'. This means that a greater ability to influence or cause change signifies greater power. Limited or no ability to influence or cause changes is expressed as having limited power or being powerless.

Furthermore, influence is considered here as relational, *between* humans. This means that discussions of material influence alone, such as those found in natural science disciplines concerning the influence of physical particles on each other are beyond the scope of this book. This is not to say that materiality is irrelevant. On the contrary, the material world may be essential in facilitating or limiting the exercise of influence between humans. But it is that relationship – *between humans* – that is essential. It is assumed here that without any form of a relationship, no influence is possible, whereas it is through a human connection that influence becomes possible.

Furthermore, influence is understood here to have three main modes. One mode relates to physical influence; the second mode relates to rational influence; and the third mode relates to emotional influence.

Physical influence is taken to mean having the material resources needed to compel others. The key element is the physicality in exercising influence. This may involve the deployment of one's own physical strength through their body or through the deployment of additional external material resources such as weapons or tools.

Rational influence refers to the cognitive resources used to persuade others. It concerns processes of reasoning. What is essential about this mode of influence is the ability to *explain* why something was, is or ought to be.

Emotional influence, then, follows from the use of emotional resources to mobilize others. This particular mode is most difficult to define as it is beyond or besides 'reason'. Therefore, for our purposes, it will be defined as modes of modes of influence that are not physical, meaning that materiality is not a determinate factor for the influence,

nor are they rational, meaning that the influence is experienced but it cannot be fully explained.

5.2 Every action has a reaction

Assuming the veracity of the core principle of Newton's Third Law that any action has a reaction,[45] we become aware that any form of influence will lead to a form of conflict. A point of tension where forces clash. However, this tension caused by the exercise of influence and its resulting force of resistance, is not considered necessarily as something undesirable, instead it is something natural. What is key here is how that conflict is resolved. The point being not to eliminate conflict, which is impossible, but to re-channel it through different means.

So, contrary to alternative views where absence of conflict is considered to be the desirable good, here perpetual conflict is assumed or, in other words, the struggle is endless and therefore continues – *a luta continua*. And the claim advanced here is to focus our gaze more intensely on the methodology used to continuously and constructively resolve conflict.

The assumption is that there are more and less productive forms of resolving conflict. Less productive forms of conflict resolution include methods that lack overall effectiveness (they miss their mark or any resolution is relatively short-lived) and lack efficiency (they are resource intensive with limited return on investments). More productive forms of conflict resolution evidently are the opposite. They provide actual and more sustainable solutions to conflicts that may or may not be resource intensive to be fabricated, but their return on investments is worthwhile.

Summarized, I mean to say that conflict is inevitable, but violence is optional (Figure 2.5). And with violence I mean any behaviour that results in hurt, damage or injury, which could be singular to one party or mutual to all parties in the conflict. Violence – and not conflict – in its material, rational or emotional form is considered here to be in need of mitigation and avoidance. And this may mean avoiding bodily harm or damage to own's personal or collective property. But

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45 The more complete idea found in *Philosophiæ Naturalis Principia Mathematica* (1687) is that 'for every action, there is an equal and opposite reaction'. However, the nuances of this law concerning the size and direction of the reaction are not essential for this point and, therefore, will be left aside for now.

it may also refer to preventing the destruction of knowledge resources or shrinking the space for reason to thrive. Or it may mean averting or diminishing harm to one's feelings.

But to understand how these different types of violence may be averted, we first need a better understanding of how the different modes of influences are exercised.

Figure 2.5: Conflict is inevitable, violence is optional
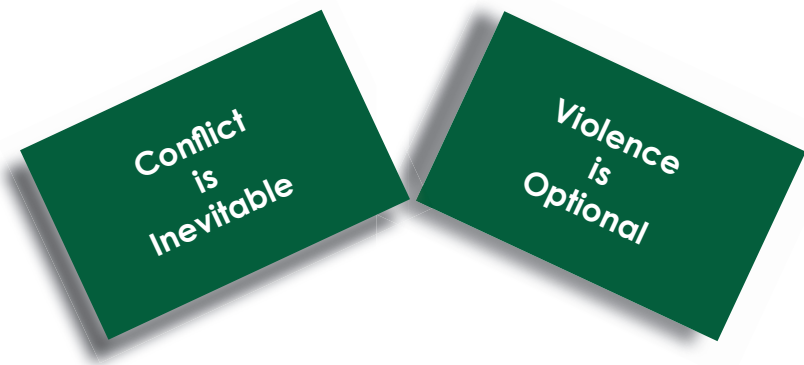
5.3   Warfare, lawfare and artfare

In human affairs the exercise of the three modes of influence is obviously not mutually exclusive. However, there has been a non-linear historical propensity towards favouring rational influence over brute physical influence and unpredictable emotional influence.[46]

I term the processes of exercising influence through these three different modes, as *warfare* (physical influence), *lawfare* (rational influence) and *artfare* (emotional influence).

Evidently, each of these processes comes in a variety of shapes and levels of intensity. However, what separates these processes are the underlying types of influence that are exerted.

At its extreme, w*arfare* brings to the imagination different forms of armed conflict, terrorist attacks, slavery in the sense of treating fellow

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46   In the West, for example, one of the key phases in this evolution has been described through the onset of the Age of Reason or the Age of Enlightenment. For a comprehensive and marvelous intellectual history of this period, see JI Israel *Radical enlightenment: Philosophy and the making of modernity 1650-1750* (2001).

humans as beasts subjugated through physical force. However, it may also have positive connotations such as the medical treatment of the sick; for example, surgery, has the same elementary elements of a knife fight, but it takes place within a wholly different context, and it is this context that matters.

Whereas *artfare* recalls images of emotional manipulation through addressing the passions and raw emotions of people; incensing them to act propelled by inexplicable forces such as love, hate and faith.

Finally, as to *lawfare*, images may be conjured of logical expositions, scientific treatises on a subject detailing different nuances of an idea and catalogues of arguments in favour of one or another position.

While this is only a very rough sketch of the boundaries of the different processes of exercising influence, in reality, I assert that practically all attempts at wielding influence consist of a mixture of these three processes, to different degrees.

For example, even in an armed conflict – the prototype of *warfare* – processes of reasoning are deployed, such as in developing *tactics* and *strategies* to most effectively and efficiently exert physical force. Likewise, emotions are usually instrumentalized as motivational tools to enter the battlefield, such a *love* for the homeland which is alleged to be in need of protection and a social constructed *hatred* for the enemy that needs to be defeated.

Similarly, in works of art, which often have a sense of materiality (marble, canvas, paint, film, music instruments) there are some rules and principles that can be identified to anticipate possible emotional effects of the work of art. For example, an artist can generally know in advance through which operations they can invoke a particular range of emotions. A screenplay writer usually knows beforehand whether they are writing a comedy, triggering joyful feelings, or a thriller, aimed at creating suspense. Or a musician can generally plan the range of emotions they anticipate to evoke through a score of music.

And finally, rational discourse found in the scientific enterprise and other arenas of reasoned decision making (or at least where reasoned decision making is expected) such as in laboratories, political assemblies, shareholder meetings and court rooms, will usually also rely on some forms of materiality, including paper, ink or computers, as conduits of their argumentation. And even in these supposedly scientific environments, emotions will often be invoked, to lend support to their arguments to influence decisions, for example,

through compelling storytelling or aesthetically-pleasing presentations of arguments through power point, neat report writing or socially conformist 'good impressions'.

The point here is that the different modes of influence are typically not clinically separable. What is key, however, is the awareness of their difference in operation. For example, it is this awareness that may help one to identify when a decision ceases to be made based on reasoned, explicable and objective arguments and instead is made mostly based on subjective emotional and often implicit instincts, which is what constitutes a 'bias'. This distinction is crucial in areas of decision making that are fundamentally presumed to aspire to emotional exclusion, such as in the scientific endeavour and law making.

Again, it is not assumed here that the exclusion of emotions is possible from science and law making. Rather, the point of emphasis is that it has been accepted that emotions *should* be excluded from these processes and that it is better to be transparent about the degree of their remaining presence.

This is what this book is partially about, elucidating some of the undesirable forces and biases that may inadvertently and stealthily (for some at least) influence decision-making processes, including in the international legal arena.

In this book the focus will primarily be on the type of influence exercised by reason (*lawfare*), whereas the other two types of influence – physical and emotional –to a large extent will take a place in the backseat. However, references will be made to such alternative forms of influences, where relevant and especially when they have undesirous effect on decision making. But this book first and foremost targets the cognitive variables that shape decision-making processes.

For that reason, it is crucial to illuminate some of the key principles that are adopted here about 'knowledge' and its 'means of production', that are expected to underlie rational decision-making processes.

5.4 Knowledge production

The 'pure' universe of even the 'purest' science is a social field like any other, with its distribution of power and its monopolies, its struggles and strategies, interests and profits.[47]

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47   P Bourdieu 'The specificity of the scientific field and the social conditions of the progress of reason' (1975) 14 *Social Science Information* 19.

It is presumed here that *all* knowledge is fundamentally *inductive* and *comparative*. This position has different implications that need further explanation.

First, concerning the inductive character of knowledge, what is meant is that knowledge is created in the first place through perception. A series of events or incidents are perceived in a 'bottom-up' fashion to create knowledge products such as ideas or concepts.

While these knowledge products are not necessarily constructed in universal terms, in the sense that they are valid forever and for all, they do nonetheless translate into working operating principles. This means that to some degree we accept these outcomes of pattern recognition to be relatively true and derive functionality from it.

It is this process of accepting certain ideas or concepts to be true that allows us to engage in subsequent 'deductive' reasoning. This deductive or 'top-down' reasoning and the 'action' that follows from it then also starts to form part of our constructed social reality and what we assume to be is true.

This idea of initial inductive reasoning to then be followed by deductive reasoning has been described by others in slightly different, yet similar ways, such as Bourdieu through his idea of 'doxa'[48] or Foucault through his research on ideas that have been 'naturalized',[49] and many others that preceded and succeeded them. In essence, what these intelligentsia attempt to do is to describe the history and cultural career of certain concepts or ideas by analyzing and tracing the inductive process of creating these concepts and ideas, that then to some degree become taken-for-granted, so they may study the effects of this 'essentialization' through the analysis of the deductive processes by means of which these concepts and ideas gain force and impact.

An awareness of this mental process is key to developing an understanding of how law works as well. In essence, law is a knowledge product like other social constructs and concepts, regardless of whether we are talking about the laws of physics or the laws to govern man devised by august institutions such as parliaments, constitutional assemblies, ministries or even judicial bodies.

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48   P Bourdieu *Outline of a theory of practice* (1977).
49   M Foucault *The birth of the clinic – An archaeology of medical perception* (1963); M Foucault *Discipline and punish – The birth of the prison* (1975); M Foucault *Madness and civilization – A history of insanity in the age of reason* (1961).

In its bare simplicity, the inductive process consists of identifying patterns of behaviour that are considered desirable and in need of prescription, or undesirable and in need of proscription. The result of that process, and depending on whether those who identify the patterns of (un)desirable behaviour wield sufficient power, is that these inductively-created concepts, in this example 'norms', will become 'naturalized' to some degree. This means that these norms, enshrined in legal documents going by different names, such as 'codes', 'acts', 'orders', 'constitutions', 'treaties', 'judgments', and so on, will be taken for granted by some and be what is considered '*normal*' (that is, typical, standard, not abnormal), and become the source for further deductive reasoning and which will shape further decision making and action.

While an astute and transdisciplinary observer may possibly remark here that laws of physics operate differently than laws of man, as they are not 'normative' in the sense that they prescribe or forbid behaviour, they simply describe and explain the patterns of the physical world. There supposedly is no human choice in crafting laws of physics. This perceptive observer would certainly be right. However, the point made about the process of developing man's law and its underlying inductive/deductive operations, remains valid to laws of physics as well, because they follow the same steps: one, inductive recognition of certain patterns (of physical behaviour); two, stabilization of the meaning of these patterns (develop laws of physics); and three, deduce other ideas and action (conduct experiments and devise alternative forms of application).

And like the laws of man, these laws of physics are also not a-historical or absolute, despite their claim to these qualifications. Instead, they also originate from those who wield sufficient power to super-impose their interpretation and formulation of the laws of the natural world.[50] Furthermore, the laws of science have time and again proven to be imperfect formulations in attendance of alternative or complementarity laws, which underscores once more their relativity rather than their universality. Accordingly, it could be concluded that in one way or another all scientific knowledge is transitional, or in other words, scientific knowledge is made up of interim forms of knowledge.

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50 For a brilliant exposition of science/power dialectics, see the work of B Latour *We have never been modern* (1991).

The two examples above underscore how this inductive/deductive method or bottom-up/top-down (BUTD) approach is a fundamental way of understanding how knowledge (in all its forms, including legal and scientific knowledge) is devised and multiplied. However, to better explain the multiplication process of knowledge, it is necessary to further clarify the 'comparative' character of knowledge.

Figure 2.6: Components of knowledge production processes
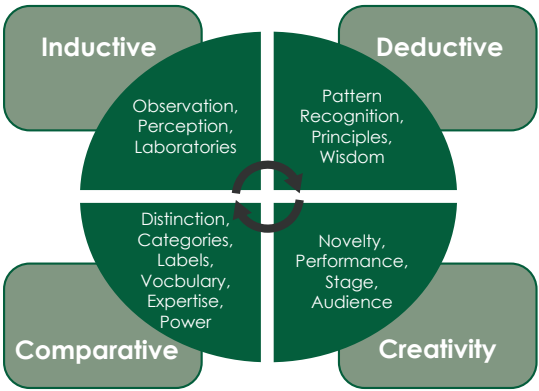
All knowledge is considered here as being comparative in the sense that it is through comparison that we know something is *new* or that something is *different*. This idea is again connected to the idea of 'relativity', highlighted throughout this book. In essence, what it means is that all knowledge and the production of new knowledge is only possible in relation to what was known before. This previous or older knowledge is a necessary condition to establish something new. And this knowledge production cannot be done in a vacuum, there is a level of performativity needed. I will use an example of the academic world and an example from the art world to illustrate this point.

One of the main sites of knowledge production of course is the academic community, institutionalized through universities and research centres with as favoured modes of knowledge production, storage and dissemination: books and journals, both containing brief written summaries of the thoughts of the members of this community ('book chapters' and 'journal articles').

One of the most fundamental principles underlying the ethos of this community is its commitment to 'creativity' or, in other words, to making something that is new. It is for that reason that the important

criterion for admitting someone's thought into these monuments of the academic enterprise, is the quality of their *novel* contribution to the continuous debate among the members of the community. The value and extent of this 'contribution' typically is measured both by the producer and the consumer of the product. The producer makes their case about the nature and scope of the *originality* by first offering a description of the present state of knowledge, usually characterized as a 'literature review'. Thereafter, they explain for the consumer of knowledge what 'new' thing they have thought of that is of value to the community.

Another related common practice in this community is that the producer of knowledge welcomes others to further validate the importance of the subject-matter the author has been thinking about, by concluding the exposition of their 'creation' by charting out other fields where 'new' related knowledge may be mined (that is, 'further research' or 'unaddressed research questions').

Another illustration of the reverence this community attributes to 'originality' is their deep contempt of 'fraudulent originality'. In academia, one of, if not *the* capital sin, is the act of deliberately passing something off as 'original' while it is not new nor their *own creation* at all! This transgression is also known as 'plagiarism'.

Similarly, in the art world, a premium is put on originality and creativity. However, like in the academic world, originality is not always expected in radical shifts and, therefore, 'schools of thought' or 'styles' (for example, impressionism, classicism, rap, funk, new wave, film noir, realism, cubism, romanticism) tend to emerge as imposed categories to group marginal spurts of originality within larger streams of originality.

Nonetheless, art is an expression of creativity that, per definition, follows from a creation or making something that did not exist before and, therefore, is novel. However, while a creation as in constituting something new, such as a material object (sculpture, painting), a story (captured in a book or film) or a sound pattern (music), is a 'necessary' condition, it is not a 'sufficient' condition, to constitute 'art' or reflect 'originality'. An additional condition needs to be a fulfilled and that condition relates to 'performativity'.

As mentioned above, these displays of 'creativity', whether in the academic or art world, necessitate acts of performance. Meaning that

they require an audience and a stage. Creativity does not stand on its own.

An audience is required to acknowledge the novelty, even if it is only the audience of one, which could be limited to the creator. And a stage is needed to reveal a level of intentionality behind the desire of creating something original. Or, in other words, there is a need for a space specifically designated or reserved for the performance. This stage and the intention behind it are essential to draw the boundary with the audience. Without a stage the performance cannot be perceived, as it remains indistinguishable in the gaze of the audience. Therefore, intentionality is a *condition of possibility* for creativity. Without it, creativity is not possible.

But the presence of intentionality also does not establish creativity either. The additional mandatory ingredient is the authority bestowed by the respective community to *distinguish* between that which was in prior existence and that which is 'new'. This authority can belong to the 'author' or it can belong to someone else, such as a 'critic', who then performs the act of distinction and, thereby, co-creates the originality.

Because ultimately, due to continuously shifting historical, geographical and sociological circumstances, each and every situation, item or behaviour is unique in some way. However, their uniqueness largely goes undetected. It is only through 'acts of distinction' which allows different categories to be created. And it is in this act of creating categories and making distinctions where there lies power; power to frame how people think through the concepts devised by others, who grouped meaning under a certain label. As Wittgenstein famously declared, 'the limits of my language are the limits of my world'.[51] Accordingly, it is through the richness of vocabulary that a richness of experience is created. And the poverty of vocabulary and the commensurate poverty in ability to distinguish difference, which limits one's world.

This is not to say that having a rich vocabulary means having power. Instead, it is the ability to create a vocabulary and a language through which that vocabulary is deployed which *reflects* power. The ability to 'name' things in a way that they become part of common parlance within a larger group and subtly shape how we think, is what reflects

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51   L Wittgenstein *Tractatus Logico-Philosophicus* (1921).

genuine power, and which can be mutually constitutive of gaining more power.

Closely related to this point is the question of 'expertise'. Expertise is defined here in terms of the ability to 'nuance' or the capacity to identify differences or shades of a certain phenomenon. With this ability comes power, power to see what other non-experts do not see. However, expertise cannot be equated with power. Because an expert may be aware of the nuances of a phenomenon and accordingly possess a rich vocabulary, however, that does not mean that the expert automatically can impose their vocabulary and language on others. That only comes with the power to structure the conversation. Evidently, experts may play an important role in making proposals about how to frame the conversation, through contributions in setting the agenda setting for decision making[52] and in framing the context in which decisions are made,[53] through important background work, such as writing position papers and presenting draft documents. However, the real power remains with those that consolidate the framework of discussions and impress the conceptual vocabulary.

In these processes of creating additional knowledge through acts of distinctions, what actually is being done is identifying new elements that are compared with elements that are formerly known and then being put in some relational structure. It is here where we conclude that all knowledge is both inductive and comparative.

It is the quantity and quality of the processes of induction and comparison that influence the speed and value of knowledge production processes. The larger the scope of observation and the ability to collect vast amounts of information and the greater the aptitude to make relevant distinctions among these masses of information and establish relationships among these organized categories of information, the higher the quality and usefulness of the knowledge resulting from these operations. Conversely, a narrow scope of observation and minimal ability to gather information as well as a limited competence to make relevant distinctions among the batches of information and establish clear and valid relationships among these poorly-organized categories

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52 A Chayes, A Handler Chayes & RB Mitchell 'Managing compliance: A comparative perspective' in B Weiss & H Jacobson (eds) *Engaging countries: Strengthening compliance with international environmental accords* (1998) 60.

53 D Kennedy *A world of struggle: How power, law, and expertise shape global political economy* (2016) 7.

of information, will lead to lower quality and inadequate knowledge (see 2.7 Determinants of the Quality of Knowledge Production).

These factors in turn automatically determine the variability in quality of 'developing' and 'learning'. To develop infers change of state. Something that has developed by definition no longer is what it was before. 'Develop', 'developing', 'development' are amoral terms, in the sense that they do not necessarily imbue judgment in terms of good *or* bad, right *or* wrong. Development can be good *or* bad, positive *or* negative. However, the ability to develop can be correlated with the quality of knowledge production processes. Higher quality of knowledge production processes may lead to a wider variety of options and opportunities which may be used towards greater change or development. Inversely, lower quality of knowledge production processes reduces the spectrum of options and opportunities, as they are not made easily visible and, consequently, reduces the probability of greater change or development.

Similarly, 'learning' is defined by the addition of knowledge to an existing body of knowledge. Prerequisites of learning are the stabilization of a degree of understanding which is supplemented with additional understanding. The capacity of learning is greatly influenced by the quality of knowledge production. The more information that can be gathered and put into a framework, the more learning that can take place. However, learning is not exactly the same as knowledge production. Knowledge production is the technical process which leads to an output of more knowledge, which may then lead to 'learning' if there is a net increase in knowledge. That means that the additional knowledge is available without having lost knowledge through other means. This is another key observation about knowledge and, which is of significant importance to our discussion, that knowledge can also be lost. 'Knowledge' is not a stable artefact that can only be enhanced. Instead, it can also deteriorate. Associated terms used to describe this process include 'forgetting', 'amnesia' or 'memory loss'.

The consequence to draw from this is that in order to 'learn' by enhancing knowledge through further knowledge production, it is also key to avoid or mitigate loss of knowledge through amnesia.

This point is particularly salient, because it is exactly these processes of amnesia that contribute to hiding the contested trajectories and contingencies leading to particular forms of taken-for-granted concepts and ideas. Importantly, power dynamics are equally present here in

terms of deciding what will be remembered and what will be ignored and, therefore, often forgotten. One key example concerns the choices made in deciding what information to store in 'archives'. Trouillot famously identifies in his book *Silencing of the past – The power and the production of history,* the different steps in the production of history at which silences occur: the 'moment of fact creation, moment of fact assembly, moment of fact retrieval, and the moment of retrospective significance'.[54] Foucault, similarly, deconstructs the power dynamics of historiography, claiming that 'history is the discourse of power'.[55] Particularly, in post-colonial studies there is a great sensibility towards questions of who speaks and who is silenced.[56] All of these elements are significant because they relate not only to the idea that 'might makes right' but also that 'might makes history'. In line with that thought, ideas such as 'victor's justice' resonate with how victors of particular struggles self-authorize what will be remembered and what will be ignored and, often as a consequence, forgotten. Similarly, in the legal field, where law tends to be a product of those in control, forgetting the contested nature in terms of the difficult political and economic choices made as part of the history of particular laws,[57] might be an important source of structural biases and blind spots. Therefore, it is suggested here to pay particular attention to the politics and processes of amnesia and their underlying and associated power dynamics.

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54   MR Trouillot *Silencing the past: Power and the production of history* (1997) 26.
55   M Foucault *Society must be defended: Lectures at the Collège de France, 1975-76* (2004) 68.
56   See, eg, Spivak (n 31) 24.
57   D Kennedy 'The "rule of law" as development' in J Hatchard & A Perry-Kessaris (eds) *Law and development: Facing complexity in the 21st century* (2003).

Figure 2.7: Determinants of the quality of knowledge production

Low Quality Knowledge Production	High Quality Knowledge Production
Narrow scope of observation	Large scope of observation
Minimal ability to gather information	Significant ability to gather information
Limited competence to make distinctions between information	Considerable competence to make distinctions between information
Limited competence to establish relationships between information	Considerable competence to establish relationships between information

In sum, it is claimed here that it the quality of *laboratories*, as scientific sites for inductive observation, and the level of *wisdom*, defined as the degree of understanding of the principles and rules governing knowledge production, that will have a bearing on the scope of influence one can wield in rational decision-making processes. But this then begs the questions: What are decisions and how are they made?

5.5 Decision making

At their core, decisions are about trade-offs concerning different possible futures. It has been said that while history can be rewritten, the past is fixed. In contrast, the future is open, contingent and dependent on a variable confluence of factors. Therefore, instead of imagining one singular linear future, what we need to realize is that different actions and different contextual elements in various possible combinations may lead to different possible futures.[58]

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58 E De Groof & M Wiebusch 'The future(s) of international law and transitional governance' in E De Groof & M Wiebusch (eds) *International law and transitional governance – Critical perspectives* (2020) 154.

Decisions, therefore, are part of this process of creating the future. Theoretically a decision relies on one's imagination about different options, however concrete or abstract those options are imagined. But explicitly or implicitly calculations are made about the future. And the act of making a decision means choosing one possible future over another, hence the earlier reference to trade-offs.

In essence, decisions are about setting a particular course of the future and they derive their force from the extent to which a particular course of the future remains unchanged. The moment another actor or event changes the course of the future, the force of the first decision diminishes proportionate to the shift in direction. For example, a decision to allow abortions will have full force as long as persons comply with that rule and do not change the course of that decision. If, however, restrictions are increasingly put on the initial decision, for example, abortions are still allowed, but an additional decision narrows the scope of the permissibility of abortions and limits them only to the first trimester, then the force of the initial decision is diminishing in proportion to the first decision. And if a subsequent decision is made and complied with, that abortions are not allowed, then the initial decision has lost total force in shaping the future of pregnant women who want to have an abortion.

Figure 2.8: Decision Cycle
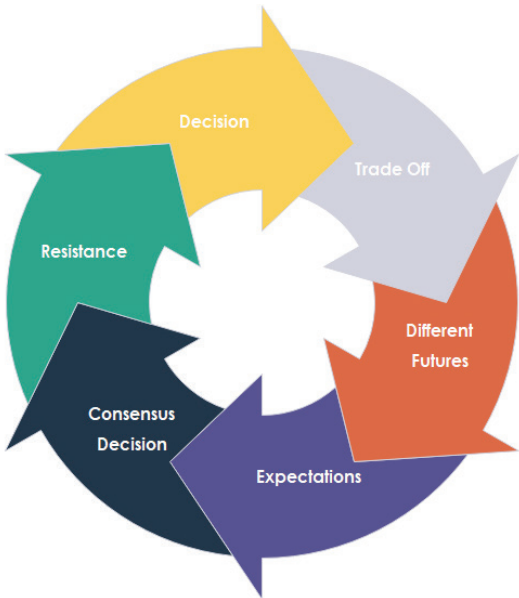
Once this point is understood, about decisions and their direction-setting nature of the future, it needs to be emphasized that decisions are always made by people. Of course, these people may be operating in some kind of institutional context, like a bureaucratic department, a parliamentary body, a court of law, a committee meeting, and so on. But if you excavate deeply enough, you will find that one person made a decision. That singular decision in choosing one option over any other might be shared with others who then reveal that they had already come to the same decision or that they were unaware of the decision and became persuaded of the particular choice and refrain from resisting it. These revelations or persuasions then lead to an accumulation of people in support of one pathway of the future.

From this position it becomes possible to show that each 'group decision' in fact is a 'consensus decision' that is defined as an amalgamation of individual decisions that are insufficiently opposed. And the key element to note here is the lack of sufficient resistance. This resistance can materialize in different forms. For example, the resistance can be numerical, meaning that the number of individuals in favour of a position is larger (majority position) than that of a smaller group (minority position) that oppose a certain choice. However, the resistance can also manifest itself through strength, for example, the course of action proposed by many can be opposed by few, who have superior means to halt or limit the change of direction.

Regardless of the levels of quantitative or qualitative resistance, what matters for our discussion is that we appreciate that any future is based on a consensus view that lacks sufficient resistance. And that the future is underpinned by a series of decisions. From this perspective we can then see that any type of political, legal, economic or social system is constituted based on a collective of consensus decisions that were insufficiently opposed.

So, what is proposed here is that to change the course of a system sufficient resistance is needed. And this is what I term a 'guerrilla' approach, in reference to the name used to describe insurgents that take part in a resistance movement against the conventional authority.

6 Guerrilla lawfare

Il existe une chose plus puissante que toutes les armées du monde, c'est une idée dont l'heure est venue.[59]

Earlier on, a promise was made that the approach advanced in this book transcends the binary proposed by Cox concerning 'problem solving' (within the system) and 'critical theory' (to interrogate the system). This promise is intended to be kept through an approach that I term *guerrilla lawfare,* whereby methodologies are proposed to 'solve the problem which is the system'.

The story embarked on so far has led us to develop an argument that requires us to focus on inadequacies that should be continuously improved on (problem solving). And the narration has also led us to a better understanding what systems are at their core: insufficiently opposed collectives of consensus decisions that chart one possible future out of many (critical theory). The next step in our story then is to identify how these two notions can be merged.

Throughout, the book shed light on two perspectives: bottom-up and top-down. Yet, it is believed that the perspective needed is not one that focuses on either of them, but rather, the focus should lie on the balancing act between these two extremes.

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59   Victor Hugo (translation: *There is one thing stronger than all the armies in the world, and that is an idea whose time has come*). *The choice of this illustration was inspired by the practice of members of the influential Polish trade union 'Solidarność' (Solidarity), who would pin actual resistors (like in the image here) on the lapels of their jackets and coats, to signal their involvement in the resistance movement against the authoritarian communist regime in Poland in the 1980s.*

In Spanish there is an elegant term to denote pejoratively – per definition – the idea of 'too much', which is *demasiado*. Fundamentally, wealth or riches is about having *too many* resources. This means that resources are accumulated (or inherited) in such a way that a surplus is created above and beyond one's needs. In large parts of the world this striving for wealth has become a *raison d'être* or, at least, some type of *leitmotif* to steer the directions of different activities.

Far rarer seems to be the deliberate search for determining *a priori* *what* is 'enough' and *why*, and establishing *how* to attain and maintain it. This is unfortunate, because the inevitable consequence of an objective to strive for wealth or surplus or ever more is that it practically and for all intents and purposes becomes a pipedream. Because if the target is set at achieving something beyond one's needs, per definition there is no way of achieving the set objective, because the capacity for desire *beyond needs* is infinite. While it has been admitted in this book that the journey is more important than the destination, it is also conceded here that opting for a fallacious destination can lead to a pittance of a journey.

This mini-exposé of the risks involved in pursuit of indeterminate wealth is important because it makes us alert to the need for the balancing act and relativity of developing ambitions. It is argued here that rather than setting top-down objectives to be followed *by* the masses, and instead of an unabridged *laissez-faire of* the masses from the bottom upwards in attendance of collective action, the claim proposed here is to organize a dialectic, or a constructive conversation, if you will, between these two extremities.

But rather than seeing them as two equal opposing forces that would lead to *stasis* if directed straight at each other, these two forces should be seen and accepted as being synergetic whereby they *reinforce* each other rather than *cancel* each other out. Therefore, the *modus operandi* in navigating the exertion of these two forces requires a delicate skills set to identify opportunities in continuously emerging new challenges that can benefit from a dual approach between *bottom-up* encouragement and *top-down* instruction.

This bottom-up/top-down (BUTD) approach is also what lies at the heart of the *guerrilla lawfare* methodologies. The fundamental tenet of guerrilla lawfare is a restlessness. It is about a continuous and consistent desire to deploy resources to tackle what constitutes the dominant order. While the consistency does not have to translate

into equal intensity over long periods of time, instead the consistency concerns the relentlessness in persisting to change the conventional order.

The way that the BUTD approach plays out here is that a tension, a necessary tension, is created between the asymmetry of the dominant and conventional authority that is being challenged and resisted by an irregular movement. If either force was absent, it would also lead to *stasis*. If the orthodox went unopposed by heterodox forces, change would not be possible. If the heterodox had no orthodox to challenge, it would *ipso facto* make it the orthodox. Therefore, it is through this continuous tension and struggle that progress *can* be achieved. So, it is a necessary condition, but it is not a *sufficient* condition.

The question then arises as to what these counter-movements are for. What prompts a resistance struggle and to what effect? Generally, it is clear that some form of discontent about the *status quo* triggers a small sub-set of the respective population to appreciate the need for change.[60] There is a raw sense of unfairness, unjustness or some other feeling that something is not right. *Il y a quelque chose qui cloche*.

This *malaise* at first is still more emotional, as it has not yet been filtered through rational thought that can explain and justify why the *status quo* is unacceptable or, to use a different and more charged term, the *status quo* is considered 'illegitimate'. This process of rationally challenging the system *en vigeur* can only materialize after the identification of some ulterior norms or principles held to be sacrosanct above and beyond the principles and norms that *de facto* underpin the challenged system. The emphasis on *de facto* is important here because, as I have explained above, there might be a commitment gap between the principles claimed to be held by a system and the actual reality of living by those principles. Therefore, a *de jure* commitment to certain principles is inadequate and attentiveness is needed to the lived realities.

Once those supra-principles have been identified by the discontented, then the accounting process can commence of comparing reality with the expectations generated through the interpretation of those principles. And the differences between the two may subsequently be earmarked. It is the level of acute and accumulative awareness of these

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60   In fact, the use of the diminutive word 'guerrilla' emphasizes the difference in numbers and resources between the guerrilla contingent and the formal structures of the state or dominant system against which resistance is offered.

three components – commitment to supra-principles, understanding of lived reality and appreciation of the gap between them – that will fuel the determination of those set to change the system.

It is argued here that it is the level of articulation of this disenchantment and the mobilization of resources to change the system or the *status quo*, through processes that primarily rely on mental faculties, rather than physical force or emotional coercion, that constitutes *guerrilla lawfare*.

Figure 2.9: Demasiado
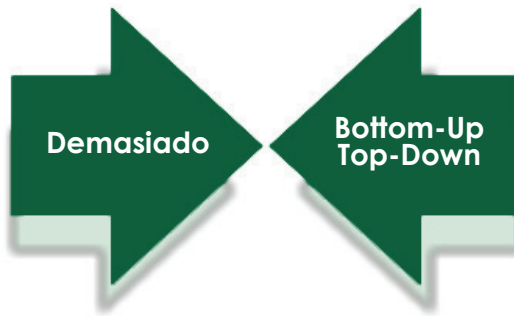
While we have already developed an understanding of *lawfare* as a mode of influence using cognitive capacities, a more comprehensive account of law itself is still lacking and how it specifically ties to the notion of *guerrilla lawfare*.

In line with the *functionalist/constructivist* approach adopted in this book, whereby law is considered a tool to shape the social world and simultaneously be shaped by it, it is found inadequate to merely adopt a unidimensional conceptual understanding of law.

Figure 2.10: Three-dimensional (3D) approach to law
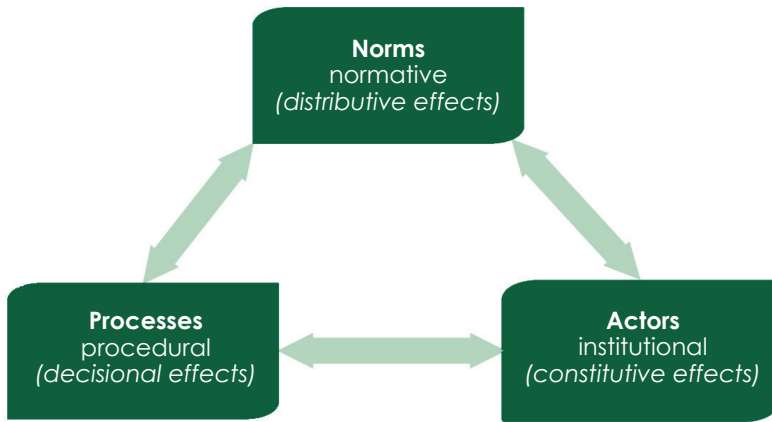
Instead, a three-dimensional (3D) approach to law is suggested to cater to three key purposes of law. Specifically, law is understood in a triple capacity as having a *normative* role (with *distributive* effects), an *institutional* role (with *constitutive* effects) and a *procedural* role (with *decisional* effects).

First of all, in reference to its *normative* function, law is understood in terms of the different principles, standards and rules (or 'norms') that prescribe or prohibit certain forms of behaviour. These norms are *distributive* in effect because they allocate roles and resources.

The *institutional* function of law refers to the capacity of *constituting* a social identity and framework around a group of people that share a mandate and resources to foster the realization of certain norms. These institutional entities can be highly formalized bodies as well as more loosely-organized mechanisms ('actors').

The *procedural* function of law refers to the steps that influence how *decisions* are made and the constraints that limit the form and substance of decisions ('processes').

Furthermore, 'law', at least in my conception of it, may also be understood as a 'social field'.[61] What this draws our attention to is that law alone has limited significance; rather, law draws its force from the system within which it is embedded, through the actors who deploy

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61   P Bourdieu 'The force of law: Toward a sociology of the juridical field' (1987) 38 *Hastings Law Journal* 836-837.

legal language, including vocabulary and reference points, to frame their arguments and actions to call for change or actually effectuate change.[62] It is the quality of drawing on that language and the thought operations related to it that enhance the authority of law as a tool for engineering change.

It is worth repeating that law is in this book considered an amoral instrument. Law itself is considered neither good nor bad, neither right nor wrong. Rather, it is an instrument like any other, that can be deployed in the service of achieving some objective. The quality of those objectives can be evaluated in reference to some sort of a moral framework with evaluative principles (that tend to be highly contested) allowing delivery of some sort of moral judgment. Law as a tool can also be evaluated in terms of its ability, for example, in terms of its efficiency and effectiveness in achieving certain pre-determined objectives. However, I consider the idea of law itself to be beyond moralistic judgment.

It is true that many practices that are now discredited by consensus were buttressed by a legal regime. Think of, for example, apartheid, slavery and colonialism. However, that does not mean that law inherently is evil. This point becomes more obvious when we consider how law underpins certain ideas around which a consensus (not unanimity) has formed with more positive connotations, such as human rights, transparency and equality initiatives. Accordingly, law can advance inclusion as much as it can advance exclusion; it can legitimize as well as delegitimize practices; it can be used as a tool for oppression as well as for emancipation.

This tension about how law can be used by oppressors as well as by oppressed reinforces the view that law should be seen and evaluated as 'means' rather than 'ends'.

Given the complexity of the world and the diversity of those that inhabit it, I also appreciate that these views on law may not be universally shared. Undoubtedly, other people will be of the view that law in and of itself might be right (or wrong) and worth reinforcing (or dismantling). I simply do not share this view. I remain persuaded that this approach of legitimizing law for law's sake might have a higher chance of clouding the political and economic choices in

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62   This idea is in line with Bourdieu's suggestion that the social authority of law does not lie primarily in the law itself but in the multiple investments in law from non-legal sectors and actors. See Bourdieu (n 61) 836-837.

instrumentalizing ideas of advancing law for law's sake. This approach accordingly might become susceptible to criticism about superficiality and power struggles that are conveniently hidden.

Accordingly, my preference lies with more transparency about the instrumental feature of law, exposition of the ends to be achieved and open declarations about what the role of law is in achieving those goals.

It is also advanced that by adopting such a teleological view of law, in the sense of analyzing what its purpose is, more clarity can be gained about the ideals held by those that operationalize law. From this perspective, it then becomes easier or, at least analytically, more meaningful to establish how and why law develops, which is a key objective of this book, albeit to establish, in particular, how and why African international law develops.

From this agnostic view of law, it then becomes possible to tease out the tension of how law is both part of the system that is opposed and used as a tool to change the same system. It is this duality of law that I find particularly interesting.

It is in this context that I wish to shed more light on the resistance techniques within the legal (social) field, that I term *guerrilla lawfare*.[63]

Guerrilla lawfare is imagined here in the sense of smaller groups of legal practitioners, including lawyers, judges, human rights defenders, legal officers, legal academics of other legal experts using legal tactics, including strategic litigation, legal education, public mobilization and translation of 'minority' politics interests into legal claims advanced on political platforms, to fight and undermine hegemonic legal structures.

I suggest that this lens offers particularly interesting insights to understand how and why law is mobilized in pursuit of different purposes and to advance particular world views.

Accepting that the use of law is only one of many possible tools to advance worldviews, it then also becomes possible to accept the relativity of law. From this perspective we can then pay more attention to the internal operations in deploying law. For example, we

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63   For examples of other scholars that have considered law in terms of a resistance tool, see, eg, C Heyns 'A "struggle approach" to human rights' in C Heyns & K Stefiszyn (eds) *Human rights, peace and justice in Africa: A reader* (2006) 15; L Eslava & S Pahuja 'Between resistance and reform: TWAIL and the universality of international law' (2011) 3 *Trade, Law and Development* 103; B Rajagopal *International law from below development, social movements and Third World resistance* (2003); OC Okafor 'Poverty, agency and resistance in the future of international law: An African perspective' (2006) 27 *Third World Quarterly* 799.

can dig deeper into the necessary translations that need to be made, reformulating particular claims and desires into relation to particular legal objectives. Building on the knowledge production framework we developed above; we can then see how crucial it is for those using law to make comparative moves and developing legal analogies whereby desires are expressed in terms of and in pursuit of legal goals.

Exploring the use of law also makes us attentive to its advantages and disadvantages in relation to the accountability framework explained above. For example, we made clear that for accountability to take place, there needs to be a stabilization of expectations that are then verified with reality. Law is exactly such a manifestation of stabilization of expectations. Law, and especially through its written form, in certain situations can reduce uncertainty and enhance predictability. However, I must be quick to add that this is not always the case. Despite that for some this objective of reduced ambiguity is a goal of law, law can also be the source of ambiguity. For example, constitutional law and international treaty law are two branches of law notorious for their ambiguity. Typically, this is explained by invoking the necessity to reach a broad consensus, deliberately vague terminology is used to allow the various stakeholders the leeway to read into the vague terms whatever it is that they want to read into. The development of narrower definitions and, therefore, narrower demarcations of these terms are then left to other institutional mechanisms, such as dispute settlement bodies or actors implementing the commitments enshrined in these texts. It is often in these forums that these same interpretive battles are fought again. This once more reveals how politics are part and parcel of legal developments in their constitutive and operational sense.

Returning to our 3D understanding of law – norms, actors and processes – I suggest that these three components set out a framework to understand how law operates and develops. These elements – in explicit or implicit form – are also what underpin each system. Therefore, to counteract a system, it is necessary to undermine at least one of these elements. It is not even needed to challenge all elements at the same time. For example, through the use of the existing procedures, it could be possible to challenges the norms in place. A common example is the use of strategic public litigation to challenge

the normative framework of a state.[64] Alternatively, it could be possible to instrumentalize particular norms to change certain procedures, such as referencing international democratic norms to lobby for the change voting procedures in elections.[65] Another option is for institutions to mobilize support for the development of new norms, such as through the codification and progressive development of international law mandate of the United Nations International Law Commission (ILC)[66] and the African Union Commission on International Law (AUCIL).[67]

In short, there are various options to generate a change through the sustained exercise of counter-power to the system in place.

Crucial for the argument being developed here is that in a system that in part pivoted away from its foundation centred on 'might makes right', opportunities are created to use similar resistance techniques familiar in the terrain of conventional warfare and guerrilla warfare and to transplant these into to the domain of lawfare. Especially, systems that champion concepts such as the rule of law and human rights are more susceptible to pressure from below by legal resistance techniques.

Conversely, systems that by and large are still driven by the core motive of 'might makes right' offer much fewer opportunities to exercise pressure through rational argumentation schemes. Not that rational argumentation is completely devoid of merit in such systems, but their expected return on investment is much more limited and will necessitate much more sustained pressure.[68]

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64 See, eg, H Duffy *Strategic human rights litigation: Understanding and maximising impact* (2018).
65 See, eg, J Kelley 'Assessing the complex evolution of norms: The rise of international election monitoring' (2008) 62 *International Organization* 221.
66 See, eg, United Nations (ed) *Seventy years of the International Law Commission: Drawing a balance for the future* (2021).
67 See, eg, B Tchikaya 'Les Orientations Doctrinales de la Commission de l'Union Africaine sur le Droit International' (2017) 30 *Rev. Quebecoise de Droit Int'l* 113; A Kilangi 'The African Union Commission on International Law (AUCIL): An elaboration of its mandate and functions of codification and progressive development of international law' (2013) 1 *AUCIL Journal of International Law* 1; CR Majinge 'Progressive development of the laws of the African Union: Examining the potential contribution of the African Union Commission on International Law' (2010) 35 *South African Yearbook of International Law* 1.
68 See, eg, M Wiebusch and others 'The African Charter on Democracy, Elections and Governance: Past, present and future' Special supplementary issue: The African Charter on Democracy, Elections and Governance (2019) 10 *Journal of African Law* 36; M Kahler 'Conclusion: The causes of and consequences of legalization' (2000) 54 *International Organization* 675.

7   So what?

This chapter set out to develop a more sophisticated framework about how to make sense of African international law and the various principles and conditions underpinning its development. This set of precepts was elaborated in more general terms. However, as we will see in the following chapters, the general framing device offered here has a number of advantages that until now have not been adequately captured in the literature aiming to enhance our understanding of African international law.

The ideas advanced in this chapter, and which to a large extent build on the literature mapped out in chapter one, have as benefit that they draw our attention to the instability of absolute knowledge claims concerning African international legal developments. While it is duly acknowledged in this book that the lens put forward here also merely is one out of many possible ways of making sense of African international law, and that not only are different and concurrent visions possible, the insights provided earlier on by Richard Feynman make us attentive to the varying levels of depth in the different approaches to understand African international law.

Elements that tend to be poorly understood in a majority of the literature on the African Union (AU) include some of the underlying tensions, blind spots and power dynamics concerning knowledge creation and utilization processes within the AU. Similarly, more fundamental explanations of the conditions shaping decision-making procedures within the African international legal governance regimes have also received only limited attention. The framework presented in this chapter does not only offer a more elementary understanding of the development of African international law in general, but it also permits a more nuanced interrogation and challenging of assumptions behind different governmental agendas of the AU. Its focus on people as a decision makers, driven by particular context-dependent sets of needs, provides the key tools to map the consciousness of the variety of actors that work in and through the field of African international law.

Furthermore, the context sensitivity of the approach here draws the focus on the possibility of alternative and richer historical narratives of the African international legal terrain. For example, the principles outlined concerning the inductive and comparative nature of knowledge production provides some of the vital tools to help expose biases and myths about African international law and its

operationalization that have been forgotten or ignored in mainstream scholarly accounts and in the practices of individuals working in the AU field. The emphasis put on the possibility to excavate earlier information points preceding their grouping into categories and labels can be a source of empowerment in terms of deconstructing prevailing systems that are considered unfavourable. The idea of empowerment follows from the realization that various norms and practices are not to be taken as given, but rather as products of distinct interactions that have their own idiosyncratic histories. This idea, together with the proposed expansion of the gaze towards the future, while building on more detailed knowledge of the past, all the while focusing on specific 'mistakes', equally creates opportunities to uncover unintended consequences of African international law programmes and policies. But at the same time, it also opens space to imagine new frames of thought for further innovation, critique and action.