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A GEOGRAPHY OF AFRICAN INTERNATIONAL LAW

Why does African international law matter?

On exactitude in science, Jorge Luis Borges, Collected Fictions, translated by Andrew Hurley

> In that Empire, the Art of Cartography attained such Perfection that the map of a single Province occupied the entirety of a City, and the map of the Empire, the entirety of a Province. In time, those Unconscionable Maps no longer satisfied, and the Cartographers Guilds struck a Map of the Empire whose size was that of the Empire, and which coincided point for point with it. The following Generations, who were not so fond of the Study of Cartography as their Forebears had been, saw that that vast Map was Useless, and not without some Pitilessness was it, that they delivered it up to the Inclemencies of Sun and Winters. In the Deserts of the West, still today, there are Tattered Ruins of that Map, inhabited by Animals and Beggars; in all the Land there is no other Relic of the Disciplines of Geography.
>
> Suarez Miranda, Viajes devarones prudentes,
>
> Libro IV, Cap. XLV, Lerida, 1658

1 International legal geography

> From the labyrinth beyond time and space, [the artist] seeks his way out to a clearing.[1]

Geography generally concerns the

> study of places and the relationships between people and their environments. Geographers explore both the physical properties of Earth's surface and the human societies spread across it. They also examine how human culture interacts with the natural environment and the way that locations and places can have an impact on people. Geography seeks to understand where

1 Marcel Duchamp.

> things are found, why they are there, and how they develop and change over time.[2]

In this chapter a geographical approach is adopted to study the terrain of African international law and those who occupy it.

Building on the frameworks elaborated in the previous chapters, the point of this book is not just to study the surface of African international law, or in other words its topography, which may include analyzing specific African treaties, institutional features or noteworthy decisions of African legal actors, or even performing a detailed exegesis of important texts written by eminent African jurists. Rather, the greater ambition in this book is to reveal the visible as well as some of the invisible operations in the construction of African international law. Accordingly, this chapter intends to pose questions and offer answers about the ecosystem of African international law and its background.

In a nutshell, this chapter seeks to address the question of why African international law came about in the first place. This question is addressed in a few steps. First, the different methods used to imagine a common legal-political project based on a constructed social reality, with a fabricated common history and an invented destiny in unity, are considered. This discussion sheds light on the 'means and ends' of African international law. Specifically, it looks at some of the main 'problems' identified to be in need of an African international legal 'solution'.

As the short story of Borges elucidates, the quality of maps should not necessarily be assessed in terms of their comprehensiveness and detail. Similarly, it is readily admitted that the charting of the African international legal terrain in this chapter will be restricted to a few key theoretical and practical agendas influencing the development of African international law.

2 Decolonization

> When the solution to a problem starts to crumble, should it not be asked whether it was wrongly posed in the first place?[3]

2 https://www.nationalgeographic.org/education/what-is-geography/ (accessed 2 December 2021).

3 Gilbert Rist *The history of development: From Western origins to global faith* (2014) 239.

A preoccupation of political actors, understood here as persons concerned with the welfare of the community they are embedded in and that act upon those concerns, has invariably centred on resistance to subjugation by a dominating force, experienced in negative terms. Plausibly, this history of resistance is as old as the history of domination and oppression itself. As explained in the previous chapter, every action, including human action, is likely to have a counteraction, creating some form of tension. The way the said tension is resolved generally follows a battle of attrition. Whoever holds out the longest, whether it is the force of oppression or the counterforce of resistance, will eventually cancel the other out.

These general remarks about power and counterpower may prove useful to understand how these dynamics play out in more recent history such as, for example, in terms of oppression in the context of colonialism and even neo-colonialism, and the ensuing resistance to decolonize. In this part we will explore a little bit deeper this context of colonialism and neo-colonialism, which, arguably, has been one of the most important subjects of problematization by those actors aiming to construct a common sense of African identity.

The prominence of colonialism as a problem to be collectively addressed through international legal solutions can readily be detected in the Charter of the Organization of African Unity (OAU). This document can be considered the birth certificate of the OAU, with its different corresponding attributes such as the listing of the parents ('We, the Heads of African States and Governments'), date of birth ('25th day of May, 1963'), place of birth ('City of Addis Ababa, Ethiopia') and other key identifying characteristics ('Purposes', 'Principles', and so forth) as well as its constitutive organs ('Institutions', 'Assembly', 'Council', and so forth). In no uncertain terms, this document reveals the main pre-occupation of the political actors at the time, namely, the objective of emancipation and to set out the necessary conditions to achieve freedom from control by exogenous powers.

Through the lens of *solutionization*, we can identify how these political actors framed certain problems and outlined their imagined solutions, to create a shared identity and destiny on a continental scale. From the Preamble, for example, we can deduce the constructed 'solutions' in terms of the 'necessary conditions' that were thought of as prerequisites to ensure the commonly defined 'objectives' (see Figure 3.1 Objectives and necessary conditions of the OAU).

Figure 3.1: Objectives and necessary conditions of the OAU

Objectives	Necessary conditions
• Achieve legitimate aspirations of African peoples • Total advancement of African peoples in all spheres of human endeavor • Human progress • General progress of Africa	• Assurance of the welfare and wellbeing of African peoples • Adherence to the Principles of the Universal Declaration of Human Rights • Freedom, equality, justice and dignity • Harnessing natural and human resources of the African continent • Adherence to the Principles of the Charter of the United Nations • Establishing and maintain conditions of peace and security • Peaceful and positive cooperation among African states • Solidarity • Brotherhood • Promoting understanding among African peoples • Transcending ethnic and national differences • Non-abrogation of the right of all people to control their own destiny • State independence • State sovereignty • State's territorial integrity • Fight neo-colonialism in all its forms • Cooperation among African states • Reinforce links between African states • Common institutions • Unity of African States

Source: Preamble of OAU Charter

The key variables that can be deduced from this framework are (i) dignity; (ii) peace; (iii) solidarity; (iv) empathy; (v) freedom; and (vi) cooperation, as 'conditions of possibility' for development and progress of Africa and its people. It perhaps is not unsurprising that these variables to some degree correspond to the fundamental needs outlined in the previous chapter, respectively, (i) physiological needs; (ii) safety needs; (iii) social belonging needs; (iv) esteem needs; (v) self-actualization needs; and (vi) self-transcendence needs (see Figure 3.2 (O)AU needs).

What is important to keep in mind is that with the birth of the OAU, conditions were put in place to develop an offspring of international legal instruments that refined and elaborated on the core principles underpinning the organization. Accordingly, various international legal instruments were adopted, or institutions established, that in one way or another contributed in the actualization of those principles and to meet their matching fundamental needs. Schematically, a few examples can be given.

2.1 Physiological needs

A first example may refer to the human rights treaties adopted and human rights bodies established to promote and protect fundamental rights concerning the dignity of humans, including, most notably, certain elementary rights enshrined in the African Charter on Human and Peoples' Rights (1981), such as the right to life and to the integrity of their person (article 4); the right to the best attainable state of physical and mental health (article 16); and the right to a general satisfactory environment (article 24). These rights are, among others, promoted and protected by the African Commission on Human and Peoples' Rights (1987) together with the African Court on Human and Peoples' Rights (2006). Other African international treaties and policies have also been adopted to help ensure that '*physiological needs*' are met, such as the Phyto-Sanitary Convention for Africa (1967); the Convention for the Establishment of the African Centre for Fertilizer Development (1985); and r the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) (2009).

2.2 Safety needs

Similarly, the whole security apparatus of the OAU and then the African Union (AU), re-organized under the African Peace and Security Architecture (APSA), can be seen in context of fulfilling '*safety needs*', with its Peace and Security Council (2002) and various peace support operations.[4]

2.3 Social belonging needs

Whereas the focus throughout the (O)AU political discourse surrounding the idea of 'solidarity' and 'brotherhood' and the drive to establish different types of 'communities' (for instance, the African Economic Community or Regional Economic Communities) echoed in a plurality of (O)AU treaties, can be reinterpreted in terms of meeting certain '*social belonging needs*'. Furthermore, the often-cited unique feature of the African human rights regime of creating *duties* for African citizens towards their 'family and society, the state and other legally-recognized communities and the international community'[5] can similarly be seen in terms of creating the appropriate conditions to fulfil particular social belonging needs.

2.4 Esteem needs

The (O)AU's agenda to meet '*esteem needs*' can easily be spotted in its focus to create the conditions for improved mutual understandings of African peoples and states, including through the development of common statistics,[6] initiatives for peer reviewing the management of resources,[7] exchanging information through treaty state reporting mechanisms[8] or by developing regular reports to exchange knowledge

4 See S Dersso 'The quest for Pax Africana: The case of the African Union's peace and security regime' (2012) 12 *African Journal on Conflict Resolution* 11; U Engel & J Gomes Porto (eds) *Africa's new peace and security architecture: Promoting norms and institutionalising solutions* (2010); A Jeng *Peacebuilding in the African Union: Law, philosophy and practice* (2012).

5 Arts 18, 27 & 29 African Charter on Human and Peoples' Rights (1981).

6 See, eg, Strategy for the Harmonisation of Statistics in Africa (2010).

7 See, eg, Memorandum of Understanding on the African Peer Review Mechanism (APRM) (2003).

8 See, eg, state reporting mechanisms on the different African human rights treaties. See M Evans & R Murray 'The state reporting mechanism of the African Charter' in M Evans & T Murray (eds) *The African Charter on Human and Peoples' Rights: The system in practice 1986-2006* (2008) 49.

on the state of human rights, peace and security and governance across the continent.[9] These initiatives create conditions favourable to better understandings of the context in which respective counterparts operate. They facilitate feelings of empathy and compassion between different entities and specifically among the people constituting those entities.

2.5 Self-actualization needs

Then, for the '*self-actualization needs*', these are most readily visible in the (O)AU's agenda and discourse on political emancipation, freedom, self-determination, sovereignty and territorial integrity.[10]

2.6 Self-transcendence needs

Finally, initiatives to meet '*self-transcendence needs*' are most obvious in the (O)AU's fundamental rationale of promoting cooperation in various forms,[11] greater unity[12] and integration.[13]

Why is it relevant to reframe the origins and development of the (O)AU international legal apparatus according to the needs-structure discussed in the previous chapter? The reason is related to the overall

9 See, eg, annual AU Peace and Security Council Report on the State of Peace and Security in Africa Reports and the biennial African Governance Reports produced by the APRM.

10 See, eg, the core principles of the OAU and later the AU captured in the OAU Charter (1963) in art 3 and in the AU Constitutive Act (2000) in art 4, respectively.

11 See, eg, art II of the OAU Charter (1963) where the purpose of the OAU is framed in terms of promoting, respectively, political, diplomatic, economic, educational, health, sanitation, nutritional, scientific, technical, defence and security cooperation.

12 Unity is most notably promoted in the OAU Charter (1963) and later in the Constitutive Act of the AU (2000). However, the most nuanced argument reconciling the notion of respect for African diversity together with African unity is made in the Cultural Charter for Africa (1976), superseded by the Charter for African Cultural Renaissance (2006), whereby 'unity of Africa is founded first and foremost on its history; [t]hat the affirmation of cultural identity denotes a concern common to all peoples of Africa; [and that] African cultural diversity and unity are a factor of equilibrium' (Preamble). The Preamble continues to express the objective of the (O)AU to establish a 'greater cultural unity which transcends ethnic, national and regional divergences on the basis of a shared vision'.

13 The integration agenda of the (O)AU, while mainly invoked in terms of economic integration, is also regularly expressed in terms of political, social and cultural integration. See, eg, Treaty Establishing the African Economic Community (1991); Constitutive Act of the African Union (2000); and Agreement Establishing the African Continental Free Trade Area (2018).

ambition of this book to underline the human aspect that lies beneath these international legal endeavours. Through complex abstraction processes, the fundamental feelings that are linked to certain needs not being met are largely effaced. However, it is considered here that it is those feelings that prompt certain actions, including the development of particular international legal strategies. So, in an attempt to better understand the rationales behind certain international legal developments, I maintain that it is advisable to adopt a lens that keeps one attuned to the feelings resulting from distinct needs that are (un) met, to then grasp the actions that are envisaged to meet those needs.

What this perspective also allows is the identification of possible distortions in how certain envisaged actions may be ill-suited to meet particular needs. In other words, the excavation of certain unmet needs may permit an analysis to determine why and how certain actions are inadequate to address those needs. This point is intimately related to the notion that to establish the fundamental needs of a people, context-specific knowledge is necessary. Considering that the primary objectives of the OAU, as enshrined in its founding Charter, are to ensure general progress of African peoples in all spheres of human endeavour and to achieve their legitimate aspirations, it follows that a thorough understanding of their context is required, from which a needs assessment may follow to determine which needs are plausibly still unmet.

However, such context-sensitive approach has not been the ordinary *modus operandi* when developing ruling schemes across the African continent. This is not to say that the African continent is unique in terms of being subjected to a-contextual governmental regimes. Rather, the point is that for a long period of time and across vast domains of space, the needs of people *inhabiting* the African continent have been considered unequal to the needs of the people that *encountered* African peoples on their exploration and later domination missions. I do not venture to say here that the needs of African peoples were considered entirely insignificant. First, such a remark would conflict with the relativity-based approach in this book to avoid as much as possible absolutist truth claims. Second, such a statement would be untenable, considering that the needs of African people were duly considered, but from a lens where assumptions were made about the needs of others without investing sufficient effort to test those assumptions and to

attempt to understand the needs of the others, without projecting personal needs structures and priorities on others.

So, while the needs of African peoples were considered in various ruling schemes, I argue that they were considered unequally and that such an approach undermines the proclaimed virtues of dignity, freedom, solidarity and liberty part of the *zeitgeist* of that era, as part of the age of enlightenment. In fact, it is this tension, between these proclaimed virtues and the imperial and colonial practices, that draws attention to our previously-identified vice, namely, that of hypocrisy. It is this concept that is put forward here, as a more important conceptual lens to understand the power dynamics in play that affect the quality of well-being and the programmes to shape and support the well-being of populations or, in other words, the bio-politics.[14]

The reason that the lens of 'hypocrisy' is advanced as a more useful analytical lens is because it has fewer historicized connotations and it necessitates a more nuanced approach. I would argue that concepts such as colonization and its countermovement, that is, decolonization, have comparatively a much more limited analytical import. Some of the non-exhaustive reasons for this conclusion include the unhelpful tendency to assimilate colonization and decolonization with the 'state'. This state-centred lens obfuscates the intricacies of how and where power and dominance is actually exerted and resisted. The limits of this conceptual register became visible, moreover, in the aftermath of what has been called 'formal decolonization', a process whereby formerly-colonized areas gained so-called 'independence', with the associated fanfare seen through the tokens of national holidays and the heroization of those ardent supporters in the pursuit of freedom from domination. Important as these achievements were in the emancipation of swaths of territory across the world, the subsequent realities of these changes have demonstrated that the emancipation was partial at best.

Considered through the perspective of material, rational and emotional resources, as discussed in the previous chapter, whereby *material* resources refer among others to military, natural and financial resources, *rational* resources refer among others to scientific and technological resources, and *emotional* resources refer, among others, to cultural, communication and media resources, it becomes apparent

14 See M Foucault *Society must be defended: Lectures at the Collège de France, 1975-76* (2004).

that these resources were not subsequently governed with fully autonomy or independence in the respective 'decolonized' territories. The access to and development of these resources were not confined to the 'native' people of those territories. While the extent of control over those resources have varied across time and space, what is undeniable has been the existence of some form of a joint control over these resources, which is diametrically opposed to the idea of freedom and independence.

It was subsequent to this realization that 'formal decolonization' was not sufficient and that continued schemes of control and influence existed, that the term of 'neo-colonialism' had to be invented.

3 Neo-colonial mentalities

> Neo-colonialism is also the worst form of imperialism. For those who practise it, it means power without responsibility and for those who suffer from it, it means exploitation without redress.[15]

The OAU was conjured, in part, in terms of creating a political monolith against colonialism. As captured in its founding treaty, one of its proclaimed purposes was to 'eradicate all forms of colonialism from Africa'. An important nuance made here is that the OAU founders clearly appreciated the multiplicity of types of colonialism, as the Charter refers to the different types of colonialism. Similarly, the founders of the OAU were deliberate in capturing the same nuance in the Preamble when they expressed their determination 'to fight against neo-colonialism in all its forms'.

These references reveal the preoccupation of those political actors to not only fight initial oppression (*colonialism*) but also some of its lasting effects (*neo-colonialism*). Accordingly, the scope of colonialism and its resistance to it was not necessarily limited to foreign territorial, political and economic domination, it also had a particular cultural awareness. One of the most prominent examples is the problematization of colonialism in the Cultural Charter for Africa, adopted in 1976.

In this treaty's Preamble the political leaders of the OAU recalled

> that, under colonial domination, the African countries found themselves in the same political, economic, social and cultural situation; that cultural domination led to the depersonalization of part of the African peoples, falsified their history, systematically disparaged and combated African

15 Kwame Nkrumah 'Neo-colonialism, the last stage of imperialism' (1965).

> values, and tried to replace progressively and officially, their languages by that of the colonizer, that colonization has encouraged the formation of an elite which is too often alienated from its culture and susceptible to assimilation and that a serious gap has been opened between the said elite and the African popular masses.

This framing clearly addresses the sensitivities relating to a socio-political and cultural consciousness whereby it was realized that colonialism created a legacy that extends far beyond any territorial and formal relinquishment of occupational powers. This formulation clearly goes to the heart of an identified vice of the generation of a particular (neo) colonial mentality shaped by and resulting from a depersonalization of African people, a falsification of history, consistently undermining so-called 'African values' and a suppression of a key cultural expression, that is peoples' languages and means of communication. Furthermore, these leaders lamented the act of assimilation and growing gap between elites and the majority of the populations of African countries. This gap is expressed in terms of the growing alienation between the said elites from its original culture.

Similar to the OAU Charter, the Cultural Charter expresses as one of its main objectives 'the combating and elimination of all forms of alienation and cultural suppression and oppression everywhere in Africa, especially in countries still under colonial and racist domination including apartheid' (article 1). The Cultural Charter even outlines some of the tools to achieve that objective, including the 'exchange and dissemination of cultural experience between African countries, in the field of cultural decolonization in all its forms' (article 2). In even more specific terms, a treaty obligation was created in the Cultural Charter towards decolonization. It provides that 'African governments should ensure the total decolonization of the mass media and increase the production of radio and television broadcasts, cinematographic films which reflect the political, economic and social realities of the people in order to enable the masses to have greater access to and participation in the cultural riches' (article 22).

This obligation buttresses the point that by and large the existing media presumably did not reflect the political, economic and social realities of those consuming it on the African continent. Considering the important influence of media, televised and radio, on peoples' perceptions of the world and their opinions, it is perhaps not surprising that this area was identified as a key terrain to combat foreign domination and to try to infuse it with more local experiences.

A year later, in 1977, another OAU treaty was adopted whereby the role of mercenaries was problematized in the struggle for independence. In the Preamble to the Convention for the Elimination of Mercenarism in Africa, the political leaders of the OAU voiced their concern in relation to 'the threat which the activities of mercenaries pose to the legitimate exercise of the right of African people under colonial and racist domination to their independence and freedom'. In fact, the core objective of this instrument was to address the grave threats to self-determination and development caused by the activities of mercenaries,[16] witnessed, for instance, in their use by the colonial power Portugal against Guinea with the aim of 'intimidating those states which in the name of African solidarity ... are giving material and moral support to the liberation movements'.[17]

Another four years later, the *problématique* of colonialism found its expression in the African Charter on Human and Peoples' Rights, adopted in 1981. First of all, the African Charter links its *raison d'être* with the OAU Charter, whereby the political leaders of the OAU reaffirmed 'the pledge they solemnly made in article 2 of the said [OAU] Charter to eradicate all forms of colonialism from Africa, to coordinate and intensify their co-operation and efforts to achieve a better life for the peoples of Africa and to promote international cooperation having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights' (Preamble). The African Charter continues its anti-colonial mission statement, when expressing the OAU political leaders' awareness of 'their duty to achieve the total liberation of Africa, the peoples of which are still struggling for their dignity and genuine independence, and undertaking to eliminate colonialism, neo-colonialism, apartheid, Zionism and to dismantle aggressive foreign military bases and all forms of discrimination, particularly those based on race, ethnic group, color, sex, language, religion or political opinions' (Preamble). Some of the 'conditions of possibility' of this liberation are then even enshrined in the African Charter, as specific rights. Article 20 in particular reads:

> (1) All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self- determination. They shall freely determine their political status and shall pursue their

16 Mercenarism Convention, Preamble read in conjunction with art 1(2).
17 ECM/Res. 17 (1970) (copy on file with author).

economic and social development according to the policy they have freely chosen.

(2) *Colonized or oppressed peoples* shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community.

(3) All peoples shall have the right to the assistance of the states parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural (my emphasis).

Not only does article 20 of the African Charter re-affirm the *grundnorm* of the right self-determination or, in other words, peoples' right to choose their own form of political organization and socio-economic pathway they want to pursue, but it also expressly legitimizes resistance methods and actions to undermine colonial structures. The article even imposes an indirect obligation on other state parties to assist subjugated peoples in their fight against political, economic or cultural foreign domination.

The legitimatization of practices to fight colonial systems, whereby the ends justify the means, was recaptured in the 1999 OAU Convention on the Prevention and Combating of Terrorism. Here the OAU deliberately carved out an exception regime whereby 'the struggle waged by peoples in accordance with the principles of international law for their liberation or self-determination, including armed struggle against colonialism, occupation, aggression and domination by foreign forces *shall not* be considered as terrorist acts' (article 3) (my emphasis).

What these cursory references to the different OAU treaty frameworks show is that colonial practices and, more broadly, foreign oppression in various forms, greatly dominated the continental governmental agenda in terms of a problem that was imagined in need of a transcontinental solution. It is not my intention here to go into detail of the continental governmental practices that were developed during this period to operationalize solutions for the '(neo)colonial problem'.[18] What I *did* try to demonstrate was the continued presence of the colonial *problématique* as a feature of the OAU's core mandate

18 Initiatives launched to subvert remaining colonial regimes on the continent included lobbying for the expulsion of colonial regimes from different international organizations; breaking of diplomatic ties with colonial governments; trade boycotts; training of liberation armies; providing financial resources to liberation movements; and mobilizing international and bilateral support against colonial governments to condemn and impose economic and military sanctions on them. See B Boutros-Ghali *L'Organisation de l'Unité Africaine* (1968) 67-78.

and thereby also as a main feature of the African international legal consciousness and agenda.

What is remarkable is that this 'problem' quasi-disappeared from the pan-continental policy space with the transition of the OAU into the AU. The issue of colonialism or even neo-colonialism does not even appear in the founding treaty of the AU, the Constitutive Act, adopted in 2000. Certainly, reference is made to the past on which this African international organization builds. For example, in its Preamble the leaders of the OAU refer to 'the heroic struggles waged by our peoples and our countries for political independence, human dignity and economic emancipation'. They also pay tribute to the OAU by acknowledging that 'since its inception, [it] has played a determining and invaluable role in the liberation of the continent'. Nonetheless, besides establishing in generic terms the international legal principles of 'sovereignty, territorial integrity and independence of its member states' as principles worthy of defence in the framework of the AU (article 3), the Constitutive Act does no longer problematize in any specific terms the notion of direct or indirect oppression and domination as issues that need to be addressed. The only indirect exception could be the reference to the principle of 'promotion of self-reliance within the framework of the Union' (article 4(k)), which arguably is formulated as an ambition to move away from overly relying on resources with a foreign origin.

Even the Charter for African Cultural Renaissance, which was adopted in 2006 to replace the 1975 African Cultural Charter, seems to have sanitized the continent's anti-colonial ambitions. While emulating some of the language of the Preamble to the 1975 African Cultural Charter, the Cultural Renaissance seems to have effaced any reference to the *solutionization* of the colonial problem. In its Preamble it is recalled

> that despite cultural domination which during the slave trade and the colonial era led to the depersonalization of part of the African peoples, falsified their history, systematically disparaged and combated African values, and tried to replace progressively and officially, their languages by that of the colonizer, the African peoples were able to find in African culture, the necessary strength for resistance and the liberation of the continent.

This language seems to suggest that liberation of the continent (in cultural terms or otherwise) was considered a *fait accompli*. Reference is still made in the Cultural Renaissance Charter to the objective to

'combat and eliminate all forms of alienation, exclusion and cultural oppression everywhere in Africa' (article 3). However, the source of oppression is less linked to the idea of foreign oppression.

One of the explanations that could be offered for this reduced anti-colonial rhetoric, as found in its absence in the AU's treaty apparatus, is the declared end of formal colonization in Africa in the 1990s.[19] Another factor that seemed to have mattered was the growing consensus at the continental level to accept the discourse of universality of certain key liberal ideas. See, for example, the commitment expressed in 2007 by the AU political leaders in the African Charter on Democracy, Elections and Governance towards the promotion of the notoriously vague 'universal values and principles of democracy, good governance, human rights and the right to development' (Preamble and article 1). To a large extent this acceptance of supposedly universal values diminishes the need for resistance against foreign imposed values, despite similar points of origin.

A third explanatory factor might be the increased sponsorship of AU operations by foreign actors, many of them former colonizers. Rather than frame this external funding of the AU as neo-colonial support, an alternative language of 'donors' and later 'partnerships' was adopted.[20] With the increased funding available in the AU, it became possible to pursue agendas, aligned with those of donors, that endorse these 'universal' values through democratization, securitization, the rule of law, human rights and development projects. Considering the alignment of these agenda between certain political leaders in Africa and the donor community, the impetus naturally disappears to decry these agendas as neo-colonial.

The question then is, have people in Africa actually been fully emancipated? Politically, economically, culturally, legally? Have African peoples come to terms with their past and become fully in

19 One of the most emblematic examples of this view can be found in the dissolution of the OAU Coordinating Committee for the Liberation of Africa, established in May 1963 and dissolved in June 1994, based on the recognition that it 'satisfactorily accomplished' its mandate. See AHG/Res.228 (XXX) Resolution on dissolution of the OAU Liberation Committee (1994) (on file with author).

20 For an excellent scholarly analysis of the AU's finances, see UMI Staeger 'Financing the African Union: Diversified resource mobilization and agency in international organizations' PhD thesis, Graduate Institute of International and Development Studies, 2021. See also the important collective political economy study of U Engel & F Mattheis (eds) *The finances of regional organisations in the Global South: Follow the money* (2020).

control of their future? Can the socio-political and economic choices being made by political actors be characterized as the result of a process absent of adverse direct or indirect foreign influence? Increasingly, voices are growing louder that would answer these questions in the negative.[21] Evidently, there have always been different groupings skeptical about the levels of Africa's autonomy. However, the point that I am advancing is that the shallowness of the freedom of choice in African societies is being decried by a larger and more diverse group of actors. Increasingly, criticism is being voiced about not just incidental manifestations of forms of inequality, but rather the systemic nature of enduring inequality and the use of double standards is being revealed to larger parts of the populations affected by it. Increasingly, not only material conditions are being considered in terms of causes of perpetual forms of hierarchy, but more attention is now also paid to immaterial conditions that preserve unequal power relations. These realizations have led, as indicated in the previous chapter, to greater awareness, first, about the legal-political systems that cemented unequal power relations of certain groups that have no honest claim to those power resources. Second, these realizations have led to more critical examinations of the systems of thought behind the operation of power.

With the latter – analyses of systems of thought – I mean that more attention is being paid to identifying the frameworks of how people think and act. Attention is being paid to elements that are actively part of people's consciousness that may influence certain actions and choices as well as unconscious factors that may weigh in on a decision. Considering how people think, evidently relates to the production process of knowledge, as described in the previous chapter.

4 So what?

As explained in the previous chapter, people rarely make decisions or, in other words, choices, based on rational knowledge alone. Although emotional knowledge maybe be filtered through rational thought, including through the development of categories and labels to distinguish shades of emotions and different feelings, it remains distinct from, yet associated with, rational thought. Or at least that is my assumption. However, it is beyond the scope of this book to

21 See CM Fombad 'Fostering a constructive intra-African legal dialogue in post-colonial Africa' (2022) 66 *Journal of African Law* 1.

exhaustively analyze how exactly emotions influence decisions that impact African international legal developments. This caveat is offered to clarify that it is not because the book does not engage substantively with this variable that it is thought to be inconsequential.[22] On the contrary, expanding our knowledge with empirical and theoretical resources in this field suggests a fruitful area for further study.

On the other hand, this book did set out to develop a better grasp of the knowledge resources that shape African international law developments and *vice versa*. Here it is important to emphasize the theoretical framework developed in the previous chapter where it was argued that all knowledge is considered to be inductive and comparative. What this means in the context of the choices made by political leaders of the OAU and later the AU is that we need to explore the knowledge basis of these leaders and the amalgam of 'experts' surrounding these leaders and that influence their decision-making processes, as well as their techniques for expanding their knowledge resources inductively and comparatively.

Typically, one of the observations made, and which are later often reformulated as critiques by those analyzing (neo)colonial thought, are the consideration of the education backgrounds of political leaders and experts as well as their socialization through professional experiences and networks.

A common deduction made concerns the attendance of these actors at educational facilities in former colonial empires, such as France (Sorbonne), the UK (Oxford, Cambridge, LSE, UCL), Belgium, Germany and Portugal, and the instilling of Western knowledge frames with corresponding theories, categories and concepts. What is involved in those knowledge frames, but usually in a more subtle way, is that these theories generally do not tend to be amoral or value free. For the natural sciences, we can refer to the growing ethical regulations in terms of the increased awareness about the ethical components of (natural) science. And it is not because before the ethical dimensions of science were regulated in a minimal fashion, that the ethical and moral components of science were absent.

22 Some small inroads in this domain to fill this knowledge gap arguably are made in the field of 'law and literature'. See generally the *Journal of Law and Literature*, as 'the leading interdisciplinary law journal directed to law and the arts, with a specific focus on critical theory, historical inquiry, and literary expression in its diverse media and forms'.

For the social sciences including, for example, economics and law, the underlying morality of scientific theories in these disciplines is even more obvious. Every theory, like every map, is only a partial representation of reality. Like the example given by Borges in the beginning of this chapter, a theory (or a map) that tries to describe and explain everything quickly loses its value. Instead, theories tend to be reductions of reality where key variables are distilled that are considered more important than others to help make sense of something. Invariably, however, this reduction or distillation process involves making choices that reflect a certain value system whereby different variables are weighed and considered more 'valuable' than others.

The point here is that analysts that attempt to understand the underlying thought of African political actors, make the assumption that through their exposure to and study of Western social science theories (particularly legal and economic theories, considering that the majority of political leaders and influencers tend to have an educational background in either or both disciplines) they assimilate the value systems that underly these theories.

For example, legal theories generally aim to make sense of the regulatory structures of societies. They seek to describe the principles that help explain how legal instruments and practice develop and for what purpose, sometimes anticipating how they evolve and other times even prescribing how they *should* evolve. But as structured forms of knowledge, these theories, even those aiming to be abstract, are inescapably rooted in the experience of the author of the theory. They are constructed on the basis of the perceptions of the author. These observations are invariably coloured by the context in which these authors gradually developed filters for the information and their sources to which they are exposed. So, the patterns they are able to establish are necessarily tied to the context they are familiar with. These identified patterns in turn are essential to then identify the principles explaining the patterns observed, which form the basis of the theory. For these reasons, I maintain that theories, including legal theories, inevitably are context dependent. What that means is that theories that are developed to understand (and sometimes shape) the legal characteristics of a particular society during a particular time under particular socio-cultural and economic conditions, may not be as *transposable* to other societies in a different time operating under

different socio-cultural and economic conditions. While this idea of the challenges of legal transplants and its associated literature has already been addressed in chapter one, it is worthwhile to remember the key tenets underlying these problems. On the other hand, I do not suggest that these nuances necessarily should lead us to the conclusion in absolute terms that no elements of one context-dependent legal theory can be transposed to another society. Rather, the point is that the transfer process needs to occur in a sophisticated manner, based on a thorough comparative understanding of both contexts. And it is this operation that is enormously resource intensive and often underestimated.

Comparisons that are faithfully executed necessitate an equal understanding of the factors constituting both entities that are compared. If there is inequality of understanding between the entities that are compared, the comparison will be flawed. Given the challenge of fully understanding an entire entity, selections are usually made to compare only certain constitutive elements in order to improve the quality of the translation and to make the comparison more feasible. The result being a comparison that is narrower, yet more accurate. However, a risk will remain that the constitute elements compared may not allow for equal conclusions about value implications for the entire entities that were put side by side. As the constitutive elements that were compared may stand in a different relation to the entities they are a part of it. These are some of the main methodological challenges in making comparisons.

This point is stressed because it reveals some of the challenges in transposing a legal theory from one place to another. The assumption made by analysts of the educational backgrounds, networks and practices of political decision makers and experts is that if the socio-political, economic or legal theories to which they have been exposed during their studies and professional careers are not based on the societies that they shape, that the application of those 'foreign' theories without nuanced translation and transformation, will lead to unfavourable distortions and transplant rejections. I consider this point to be quite salient, as in the experience of the AU a long list of examples of emulation and copying can be developed (see Table 3.1 Examples of (O)AU mimicry).

Table 3.1: Examples of (O)AU Mimicry

Examples of (O)AU Mimicry	
UNITED NATIONS MODELS	**(O)AU EQUIVALENT**
Norms	***Norms***
• United Nations Convention on the Rights of the Child • United Nations Convention against Corruption • Convention Relating to the Status of Refugees	• African Charter on the Rights and Welfare of the Child • African Union Convention on Preventing and Combating Corruption • OAU Convention Governing the Specific Aspects of Refugee Problems in Africa
Institutions	***Institutions***
• International Law Commission (ILC) • ECOSOC • Security Council • UN/EAD Electoral Trust Fund • ICC	• African Union Commission on International Law (AUCIL) • ECOSOCC • Peace and Security Council • DEAU • Malabo protocol
EUROPEAN MODELS	**(O)AU EQUIVALENT**
Norms	***Norms***
• European Convention on Human Rights	• African Charter on Human and Peoples' Rights
Institutions	***Institutions***
• OSCE • OECD • European Union (EU) • European Commission on Human Rights • European Court on Human Rights • European Union Election Observation Missions (EUEOM) • European Parliament • European Court of Justice • European Economic Community (EEC)	• CSSDCA • African Peer Review Mechanism (APRM • African Union (AU) • African Commission on Human and Peoples' Rights • African Court on Human and Peoples' Rights • African Union Election Observation Missions (AUEOM) • Pan-African Parliament • African Court of Justice • African Economic Community (AEC)

AMERICAN MODELS	(O)AU EQUIVALENT
Norms	***Norms***
• Inter-American Democracy Charter (IADC) • Inter-American Convention on Human Rights • Pan-Americanism • *Uti possidetis* doctrine	• African Charter on Democracy, Elections and Governance • African Charter on Human and Peoples' Rights • Pan-Africanism • *Uti possidetis* doctrine
Institutions	***Institutions***
• Inter-American Commission on Human Rights • Inter-American Court on Human Rights	• African Commission on Human and Peoples' Rights • African Court on Human and Peoples' Rights
REGIONAL AFRICAN MODELS	**(O)AU EQUIVALENT**
Norms	***Norms***
• ECOWAS Democracy Protocol	• African Charter on Democracy, Elections and Governance
Institutions	***Institutions***
• ECOWAS Council of Elders	• Panel of the Wise

Source: Compilation by the author

This brief overview of the emulation practices by the (O)AU of norms and institutions drawing on United Nations (UN), European, American and regional African models seems to challenge the narrative of 'African solutions to African problems'. The significant extent of normative and institutional mimicry suggests a tension between the (O)AU's desire to devise solutions tailored to local circumstances and the heavy influence of foreign ideas that may or may not be suitable to those contexts.

Various academic studies have already analyzed some of these examples of international legal mimicry to tease out the differences and similarities between the different legal models and identify whether and how the 'African variant' of the model adds to the original one.[23]

23 See, eg, T Maluwa 'Reassessing aspects of the contribution of African states to the development of international law through African regional multilateral treaties' (2020) 41 *Michigan Journal of International Law* 327; F Viljoen *International human rights law in Africa* (2012); F Viljoen, H Sipalla & F Adegalu (eds)

Typically, two forms of African international legal innovations are distinguished. The first is one where African international law making is 'the pioneer' in regulating a particular phenomenon at the international level. Examples include the AU Convention for the Assistance and Protection of Internally Displaced Persons (2009) (Kampala Convention) to govern internally-displaced persons.[24] Another often-cited example of such 'original' international regulation is the international legal regulation of 'peoples' rights' in articles 19 to 24 of the African Charter on Human and Peoples' Rights as well as the 'right to development' enshrined in article 22 of the African Charter on Human and Peoples' Rights and the more explicit language of 'individual duties' in articles 27 to 29.[25] A further example of international legal trailblazing that is often identified concerns the 'right to humanitarian intervention' captured in article 4(h) of the AU Constitutive Act (2000).[26]

The second form of African international legal innovation involves normative developments to 'expand' the scope of existing international regulations. Examples here include additional protective layers of 'refugees', 'children', 'women' and 'international investments' in the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (1969); the African Charter on the Rights and Welfare of the Child (1990);[27] the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003)

Exploring African approaches to international law – Essays in honour of Kéba Mbaye (2022); B Fagbayibo *African approaches to international law* (2021).

24 See C Beyani 'A view from inside the kitchen of the Kampala Convention: The modernisation of the international legal regime for the protection of internally displaced persons' (2020) 17 LSE Law, Society and Economy Working Papers 1.

25 See MW Mutua 'The Banjul Charter and the African cultural fingerprint: An evaluation of the language of duties' (1995) 35 *Virgina Journal of International Law* 339; F Ouguergouz *The African Charter on Human and Peoples' Rights: A comprehensive agenda for human dignity and sustainable democracy in Africa* (2003); M Kamto (ed) *La charte africaine des droits de l'homme et des peuples et le protocole y relatif portant creation de la Cour africaine des droits de l'homme: Commentaire article par article* (2011).

26 See N Negm 'The African Union's humanitarian policies: A closer look at Africa's regional institutions and practice' (2022) 104 *International Review of the Red Cross* 1918.

27 See D Chirwa 'The merits and demerits of the African Charter on the Rights and Welfare of the Child' (2002) 10 *International Journal of Children's Rights* 157.

(the Maputo Protocol);[28] and the Pan-African Investment Code,[29] respectively. See Figure 3.2 African international legal innovations: Types and examples.

Figure 3.2: African international legal innovations: Types and examples

Pioneer in international legal regulation	Expanding existing international legal regulation
• Internally displaced persons • Peoples' rights • Right to development • Individual duties • Right to humanitarian intervention	• Refugees • Children • Women • International investments

I will not add much to those specific debates of distinguishing legal differential nuances. My concern rather lies to with the rationale behind such overall mimicry processes. Why do political decision makers and experts borrow so heavily from these foreign models in the first place? Why is the African international legal discourse replete with vocabulary drawing so heavily on concepts and categories appropriated from Western legal thought while, comparatively speaking and barring the few exceptions outlined above, so little concepts and doctrines have been devised drawing from vernaculars devised to reflect local 'African' circumstances?

I would claim that this 'conceptual paucity' is related to the so far limited (but increasingly growing) arsenal of knowledge production techniques about the 'African' continent. My assumption is that due to the limited availability of intricate knowledge of the highly complex societies that African international law aims to govern, a vacuum is created about how to address problems as they become increasingly

28 See F Banda 'Blazing a trail: The African Protocol on women's rights comes into force' (2006) 50 *Journal of African Law* 72.

29 See MM Mbengue & S Schacherer 'The "Africanization" of international investment law: The pan-African Investment Code and the reform of the international investment regime' (2017) 18 *Journal of World Investment and Trade* 414.

more visible at the international plane, following more frequent encounters, based on improved levels of communication and travel.

Faced with these knowledge deficits and capacity challenges to address this knowledge lacuna, yet pressed to devise a solution to the symptoms of the problems that manifest themselves, including, for example, political violence and limited economic growth, conditions are created to borrow solutions that seem to address the same problems. However, it is suggested here that in those processes of comparing problems, rarely sufficient attention is paid to properly evaluate whether the underlying problems are as similar as they are assumed to be and rather only resemble the same problem in mere superficial ways. It therefore is suggested that such knowledge limitations may directly undermine the authenticity and, therefore, the legitimacy and, ultimately, the effectiveness of African international legal engineering processes. It is from this perspective that this book argues to pay more attention to the knowledge-producing faculties of the AU in order to develop a better understanding of how African international law evolves and could progress. In the following chapter, these elements will be considered in greater detail.