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AFRICAN INTERNATIONAL LEGAL GOVERNANCE LABORATORIES

How does African international law work?[1]

Does African international law work? How does it work? Under what conditions? In providing a response to these questions, this chapter aims to explore more carefully the knowledge dimensions of African international law and its development. It seeks to examine how the African international legal terrain is made more visible, legible, measurable, calculable and ultimately more manageable.

Using the heuristic of a 'laboratory', this chapter maps out the different practices and professional knowledges deployed to *shape* African international law through various African international legal experiments, to *observe* African international law based on different African international legal performance indicators and to *understand* African international law based on a multitude of factors that influence its development.

From these insights we intend to better understand how this space called 'Africa' is made more 'knowable' and, ultimately, more 'governable' through international legal interventions.

Structurally, the chapter proceeds as follows. First, a brief overview is provided of the broad regulatory international legal regime governing Africa, which I call African international law. Bearing in mind the continuous tension about whether there should be more or less continental influence and oversight of the way in which the domestic political and socio-economic order is organized, the first part examines three main trends of continental governance: the growth of normative continental commitments and their increasing consolidation into legal instruments (legalization); the expanding role of continental (quasi)-judicial

1 This chapter draws on some of my work (including ideas and phraseology) that has previously been published, notably, M Wiebusch 'Africanization of constitutional law' in A Abebe, R Dixon & T Ginsburg (eds) *Comparative constitutional law in Africa* (2022) 1; M Wiebusch 'Enforcement of international human rights law in Africa' in J Contesse, I Tourkochoriti & M Sellers (eds) *Handbook on comparative enforcement of international law* (forthcoming); MR Madsen, P Cebulak & M Wiebusch 'Backlash against international courts: Explaining the forms and patterns of resistance to international courts' (2018) 14 *International Journal of Law in Context* 197; 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* 9; TG Daly & M Wiebusch 'The African Court on Human and Peoples' Rights: Mapping resistance against a young court' (2018) 14 *International Journal of Law in Context* 294; E De Groof & M Wiebusch 'The future(s) of transitional governance and international law' in E De Groof & M Wiebusch (eds) *International law and transitional governance – Critical perspectives* (2020) 153; M Wiebusch 'The African Court on Human and Peoples' Rights' in C Binder and others (eds) *Elgar encyclopedia of human rights* (2022).

bodies in enforcing these commitments (judicialization); and the increasing reliance on technical experts, bureaucrats and other professionals – as opposed to political and diplomatic actors – in the interpretation and implementation of African international legal instruments (technocratization).

In the second part a framework is developed for studying the performance of African international law, including its norms, actors and processes. The framework also charts key contextual factors that explain the variation in the development of African international law across time, space and subject areas.

The chapter concludes with a set of general observations about the importance of making the international legal norms, institutions and expertise that help to structure 'Africa' or, in other words, the *politics of African international law*, more visible.

1 Governing Africa

How is Africa governed? And more particularly, how is Africa governed through law? In chapter one, a broad overview was already presented of the expanding catalogue of African international legal objectives, reflected in the proliferation of treaties, institutions and decisions by the most authoritative (O)AU organs. Building on the observation about the increasingly more prominent role of the AU in setting and enforcing continental governance standards, this part considers in more detail three trends in continental governance: the legalization, judicialization and technocratization of politics.[2] First, it focuses on the growth of normative commitments on the continental plane and their increasing consolidation into legal instruments (turn to law). Second, it assesses the expanding role of continental (quasi)-judicial bodies in enforcing continental commitments (turn to dispute settlement mechanisms). Third, it explores the interpretation and implementation of these normative instruments, with a particular focus on the different initiatives to ensure and monitor compliance with these instruments, initiatives that are increasingly reliant on technical experts without an explicit political or diplomatic mandate (turn to experts). In examining these trends, the part explains how African international law is both a result of these processes as well as a catalyst accelerating them.

2 While the focus here lies at the continental level, similar trends have been discussed in a more general 'international' sense. See, eg, J Goldstein and others 'Introduction: Legalization and world politics' (2000) 54 *International Organization* 385; K Alter *The new terrain of international law: Courts, politics, rights* (2014); D Kennedy *A world of struggle: How power, law, and expertise shape global political economy* (2016). This framework of legalization, judicialization and technocratization draws on previous work by the author; see P Cebulak & M Wiebusch 'Comparative regional constitutionalism: Towards a research agenda' paper presented at the International Society of Public Law (ICON·S) Conference on Borders, Otherness and Public Law, Berlin, 17-19 June 2016); 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* 21-31.

1.1 Legalization

The African Union (AU)'s turn to law manifests itself first and foremost in the increase of various types of legal instruments it generates, most notably treaties, decisions by its most authoritative institutions and other documents that reveal standard-setting on how Africa should be governed.

Since 1963 the (O)AU has developed more than 60 multilateral treaties.[3] Their subject matter covers a range of issues, including economic integration (such as free trade);[4] social affairs (such as culture,[5] education[6] and sport);[7] human rights (such as women,[8] children[9] and internally-displaced persons);[10] environment (such as climate change[11] and pollution);[12] security (such as road safety[13] and cyber security);[14] and institutional frameworks (such as establishing the Peace and Security Council[15] and Pan-African Parliament).[16]

The form of these AU treaties differs from establishing a unique treaty (for example, the Mercenarism Convention),[17] complementing an existing treaty by the adoption of protocols (for example, the Maputo Protocol),[18] to revising existing treaties (such as the 2006 Charter for African Cultural Renaissance replacing the 1975 Cultural Charter for Africa).[19]

Remarkably, there has been an exponential growth of the continental treaty regime since the establishment of the AU. Over the course of almost four decades (1963 to 1999) the Organization of African Unity (OAU) adopted 20 treaties (less than 40 per cent of the total number of treaties). In contrast, the AU has adopted more than 40 treaties (more than 60 per cent of the total number) in just over two decades (2000 to 2020). This trend reflects a greater institutionalization of continental governance mechanisms through law and treaty law in particular.

3 An overview of different AU treaties is available at https://au.int/en/treaties (accessed 10 April 2022).
4 Treaty Establishing the African Economic Community (1991); Agreement Establishing the African Continental Free Trade Area (2018).
5 Cultural Charter for Africa (1976); Charter for African Cultural Renaissance (2006).
6 Revised Statute of the Pan-African University (PAU) (2016).
7 Statute of the Africa Sports Council (2016).
8 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) (2003).
9 African Charter on the Rights and Welfare of the Child (1990).
10 African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) (2009).
11 Agreement for the Establishment of the African Risk Capacity (ARC) Agency (2012).
12 Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa (1991).
13 Road Safety Charter (2016).
14 African Union Convention on Cyber Security and Personal Data Protection (2014).
15 Protocol Relating to the Establishment of the Peace and Security Council of the African Union (2002).
16 Protocol to the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament (2001); Protocol to the Constitutive Act of the African Union relating to the Pan-African Parliament (2014).
17 Convention for the Elimination of Mercenarism in Africa (1977)
18 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) (2003).
19 Another example is the African Convention on the Conservation of Nature and Natural Resources (1968) which was revised as the African Convention on the Conservation of Nature and Natural Resources (2003).

It also seems to suggest a level of confidence within the AU system in the ability of law to engineer social change.[20]

This move towards more (treaty) law has a series of consequences. Although treaties may take a longer time to draft and to attract a sufficiently broad substantive consensus, and reaching the sufficient number of ratifications for treaties to enter into force may also take a considerable time, the adoption of treaties and their subsequent ratification clearly establish at the international plane a state's consent to be bound by a treaty,[21] and signal a more credible commitment by states and the AU (as a forum and through its institutions) to the principles and objectives set out in a treaty.[22]

A treaty also unlocks a number of possible enforcement mechanisms generally not available with other sources of non-binding or soft law. This may include monitoring mechanisms in the form of state reporting or coercive enforcement by the Peace and Security Council (PSC) or (quasi)-judicial bodies such as the African Commission on Human and Peoples' Rights (African Commission) and the African Court on Human and Peoples' Rights (African Court), discussed further below.[23]

Furthermore, a whole set of techniques can be deployed to appeal for signature, ratification and implementation, routinely pronounced by AU policy organs and governance-monitoring mechanisms (including the Assembly, the Executive Council, the PSC, the African Peer Review Mechanism (APRM) and AU Election Observation Missions (AUEOMs)). The AU also developed a range of specific practices, including an AU treaty-signing week to encourage member states to commit to treaties they have not yet signed; AU advocacy and ratification campaigns to maximize treaty ratification; and technical assistance projects to help states overcome obstacles related to ratification.[24]

However, treaties are not the only form of legalization notable within the (O) AU governance regime. Another type of legalization of continental commitments can be found in the multitude of decisions by, arguably, the most authoritative AU institutions. Based on the statistical sketch of decisions outlined in chapter one, and specifically in Charts 1.2-7, we can establish a distinguishable growth of

20 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* 21-22.

21 Vienna Convention on the Law of Treaties (Vienna Convention) art 2(1)(b).

22 KW Abbott & D Snidal 'Hard and soft law in international governance' (2000) 54 *International Organization* 426.

23 On the understanding of 'coercive enforcement' as an imposition of costs on violators of international law to foster compliance, see A Thompson 'Coercive enforcement of international law' in JL Dunoff & MA Pollack (eds) *Interdisciplinary perspectives on international law and international relations: The state of the art* (2012) 502.

24 T Maluwa 'Ratification of African Union treaties by member states: Law, policy and practice' (2012) 13 *Melbourne Journal of International Law* 40. In 2012 the Executive Council also established a Ministerial Committee and a Standing Committee of Experts to address the 'challenges of ratification/accession and implementation of OAU / AU treaties', EX.CL/Dec. 705 (XXI). The Department of Legal Affairs of the AU Commission (Office of the Legal Counsel) has also organized various training sessions to build the capacity of national legislative drafters and to promote the domestic implementation of AU treaties. See also N Negm & GF Ntwari 'African Union legal drafting: Process, mechanisms and challenges' (2019) 8 *International Journal of Legislative Drafting and Law Reform* 93.

decisions that directly or indirectly relate to the question of how Africa ought to be governed.

For instance, the OAU Heads of State and Government over 39 years (1964 to 2002) took 321 decisions in total and in average 8,2 decisions annually, with, on average, 10 decisions annually in the 1960s, 3,8 decisions annually in the 1970s, 9,1 decisions annually in the 1980s and 9 decisions annually in the 1990s. In contrast, its successor, the AU Heads of State and Government, took over 20 years (2002 to 2021) 821 decisions and in average 40,6 decisions annually, with, on average, 33,3 decisions annually in the 2000s and 48,1 decisions annually in the 2010s.

Similar but less pronounced increases in the volume of decisions can be established for the OAU Council of Ministers and its successor, the AU Executive Council. The OAU Council of Ministers over 39 years (1963 to 2001) took 1977 decisions in total and on average 50,7 decisions annually during ordinary sessions, with, on average, 29,6 decisions annually in the 1960s, 55,8 decisions annually in the 1970s, 47,7 decisions annually in the 1980s and 59,3 decisions annually in the 1990s. In contrast, its successor, the AU Executive Council, took over 20 years (2002 to 2021) 1 142 decisions and in average 57,1 decisions annually, with, on average, 65 decisions annually in the 2000s and 55,2 decisions annually in the 2010s.

These statistics do not give the full picture of the decisions of the (O)AU main policy organs. For example, the decisions of the extraordinary sessions are not counted here. However, in giving a sense of the plurality of decisions, I preferred to underestimate rather than overestimate the volume of norm setting. Also, it must be stressed that not every decision of the (O)AU policy entails significant normative commitments. To better understand the richness of continental normative developments, the decisions should not only be counted, but should also be weighed. However, it is beyond the scope of this book to adequately give a full overview of the normative depth and mass captured in the various (O)AU policy organs' decisions. The point here rather was to give some numerical sense of the growing scope of continental regulation through decisions of the (O)AU most authoritative organs.

To this growing corpus of decisions may be added the decisions of the PSC and the African Court. Whereas the AU Assembly of Heads of State and Government (Chart 1.3) and the Executive Council (Chart 1.5) demonstrate a linear growth of decisions with an average of 23 and 30 decisions, respectively, per ordinary session of the AU's main policy organs, the PSC (Chart 1.6) and the African Court (Chart 1.6) clearly reflect an exponential growth in issuing decisions. While the PSC had an annual average of 28 decisions in the first years of its existence, this number almost tripled after 2012 to an average of 74 decisions. Similarly, the African Court, which had a very slow start, only started delivering more than a dozen judgments on merits per year after 2018. The evolving role of the PSC and the African Court will be discussed in greater detail in the subsequent part.

To these decisions may be added a variety of other standard-setting instruments, such as declarations, resolutions, opinions, General Comments and model laws. Although these documents are formally not binding, they do carry weight and are often considered as authoritative statements in the particular domain in which they are made, as they are generally intended to guide and harmonize the viewpoints of member states. Examples include the various declarations made by the Assembly[25] or the African Commission.[26] Resolutions from the African Commission have included topics relating to indigenous peoples;[27] freedom of association;[28] HIV/AIDS;[29] elections;[30] independence of the judiciary;[31] prisons;[32] the death penalty;[33] and fair trial.[34] The resolutions of the Commission may also address serious human rights concerns in member states. These resolutions are referred to as country-specific resolutions.[35] The Pan-African Parliament (PAP), an advisory and consultative body that has not yet been granted legislative powers, has also adopted resolutions covering a range of themes, including for example peace and security,[36] human rights[37] and corruption.[38]

The African Court may also issue an authoritative opinion on certain legal questions through its advisory proceedings. According to its founding Protocol, the African Court may 'provide an opinion on any legal matter relating to the Charter or any other relevant human rights instruments'.[39] As of April 2022, the Court received and finalized all 15 requests for advisory opinions. In the context of its advisory procedure, the African Court has considered, for example, the international legal standards applicable to elections organized during a public health emergency, such as the COVID-19 pandemic.[40] The African Court has also considered the compatibility of the Charter with vagrancy laws that criminalize the status of a person as being without a fixed home, employment or means of subsistence.[41] The African Court has also provided an opinion on its

25 See, eg, Declaration on Principles Governing Democratic Elections in Africa (2002); Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government (2000); and the Declaration on the Political and Socio-Economic Situation in Africa and the Fundamental Changes Taking Place in the World (1991).
26 See, eg, Pretoria Declaration on Economic, Social and Cultural Rights in Africa (2004).
27 Resolution on the Rights of Indigenous Peoples' Communities in Africa (2000).
28 Resolution on the Right to Freedom of Association (1992).
29 Resolution on the HIV/AIDS Pandemic – Threat Against Human Rights and Humanity (2001).
30 Resolution on Electoral Process and Participatory Governance (1996).
31 Resolution on the Respect and the Strengthening on the Independence of the Judiciary (1996).
32 Resolution on Prisons in Africa (1995).
33 Resolution Urging States to Envisage a Moratorium on Death Penalty (1999).
34 Resolution on the Right to Recourse and Fair Trial (1992).
35 See, eg, Resolution on Burundi (1996); Resolution on the Human Rights Situation in the Central African Republic (2013); Resolution on the Situation of the North of the Republic Mali (2012).
36 Resolution on Peace and Security; Women and Children in Armed Conflicts (2004).
37 Resolution on Press Freedom for Development and Governance: Need for Reform (2013).
38 Resolution on Corruption (2004).
39 Art 4 Protocol Relating to the Establishment of the African Court on Human and Peoples' Rights (1998).
40 Pan African Lawyers Union (PALU), Request 001/2020 (Advisory Opinion of 16 July 2021).
41 Pan African Lawyers Union (PALU), Request 001/2018 (Advisory Opinion of 4 December 2020).

relationship with the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee).[42]

The African Union Commission on International Law (AUCIL), an institution responsible for the progressive development and codification of international law, has also developed a practice of providing legal opinions to other organs of the AU. For example, the AUCIL prepared two legal opinions at the request of the African Court concerning the *locus standi* of the African Children's Committee to request an advisory opinion from or submit cases or disputes to the African Court and on whether or not systemic and widespread extreme poverty breaches certain provisions of the African Charter.[43]

General Comments have been developed by the African Commission as well as the African Children's Committee. General Comments are generally used by human rights treaty bodies to interpret the provisions of relevant international legal instruments with a view to promoting their further implementation and assisting state parties in fulfilling their reporting obligations. Whereas the Rules of Procedure of the African Children's Committee explicitly mandates the Committee to prepare General Comments,[44] the African Commission established its competence to adopt General Comments based on article 45(1)(b) of the African Charter on Human and Peoples' Rights (African Charter) which authorizes the African Commission to 'formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights'.[45]

The AU also uses the mechanism of model laws. This is a tool to harmonize the legal frameworks of different countries around a certain policy domain. The model laws developed by the AU include topics such as access to information;[46] anti-terrorism;[47] safety in biotechnology;[48] medical products regulation;[49] and rights of local communities, farmers, breeders and access to biological resources.[50] Three AU institutions have a mandate to develop model laws. The AUCIL has the

42 African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee), Request 002/2013 (Advisory Opinion of 5 December 2014).
43 See, e.g., Activity Report of AUCIL, May 2013-June 2014 (EX.CL/861(XXV)Rev.1).
44 Rule 73 Rules of Procedure for African Committee of Experts on the Rights and Welfare of the Child (2003). See, eg, General Comment 1 on article 30 of the African Charter on the Rights and Welfare of the Child on 'children of incarcerated and imprisoned parents and primary caregivers' (2013); General Comment 2 on article 6 of the African Charter on the Rights and Welfare of the Child on the 'right to birth registration, name and nationality' (2014).
45 See, eg, General Comment 1 on article 14(1)(d) and (e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2012); General Comment 2 on article 14(1)(a), (b), (c) and (f) and article 14(2)(a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2014); General Comment 3 on the African Charter on Human and Peoples' Rights: The Right to Life (article 4) (2015); General Comment 4: The Right to Redress for Victims of Torture and other Cruel, Inhuman or Degrading Punishment or Treatment (article 5) (2017); General Comment 5 on the African Charter on Human and Peoples' Rights: The Right to Freedom of Movement and Residence (article 12(1) (2019); General Comment 6 on the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol): The Right to Property during Separation, Divorce or Annulment of Marriage (article 7(D) (2020).
46 Model Law for AU Member States on Access to Information (2013).
47 African Model Anti-Terrorism Law (2011).
48 African Model Law on Safety in Biotechnology (2001).
49 African Union Model Law on Medical Products Regulation (2016).
50 African Model Legislation for the Protection of Rights of Local Communities, Farmers, Breeders and for the Regulation of Access to Biological Resources (2000).

competence to propose draft framework agreements and model regulations.[51] The Pan-African Parliament has been mandated to 'work towards the harmonization or co-ordination of the laws of member states'.[52] In a subsequent Protocol, which has not yet entered into force, the PAP was specifically granted the power to develop model laws.[53] Finally, the African Commission has used its broad human rights mandate as a basis to develop model laws.[54]

While definitely not exhaustive, this brief overview hopefully gives a sense of the wide vista of continental commitments enshrined in one type of continental legal document or another. The question then turns to the continental mechanisms that exist to give effect to this vast normative apparatus to help govern Africa. To address this question, we will briefly explore some of the main AU entities responsible for 'internationalizing' conflicts relating to these continental commitments.

1.2 Judicialization

It appears that African international law was traditionally geared primarily towards better managing *horizontal* inter-state relationships. Evidence of this can be found, among others, in the mandate of the Commission of Mediation, Conciliation and Arbitration, the OAU's principal dispute settlement mechanism, which had 'jurisdiction over disputes between states only'.[55] Gradually, however, the scope and intent of African international legal instruments shifted towards a more comprehensive regulation of internal governance arrangements, together with the establishment of specialized dispute settlement mechanisms to better manage *vertical* intra-state conflicts between domestic law and practice and African international law and practice. The (O)AU's four main dispute settlement mechanisms are the African Commission, which was operationalized in 1987 to protect and promote human and peoples' rights across the continent; the African Children's Committee which was operationalized in 2001 to specifically protect and promote children's rights; the Peace and Security Council (that is, the successor to the OAU Central Organ of the Mechanism for Conflict Prevention, Management and Resolution) which was operationalized in 2004 as the AU's standing decision-making organ for the prevention, management and resolution of conflicts; and the African Court which was operationalized in 2006 to complement and reinforce the protective mandates of the two other AU human rights bodies, namely, the African Commission and the African Children's Committee.

51 Art 4 Statute of the African Union Commission on International Law (2009).
52 Art 11 Protocol to the Treaty Establishing the African Economic Community relating to the Pan-African Parliament (2001).
53 Art 8, Protocol to the Constitutive Act of the African Union relating to the Pan-African Parliament (2014).
54 See, eg, the Model Law for AU Member States on Access to Information (2013) prepared under the auspices of the Special Rapporteur on Freedom of Expression and Access to Information in Africa of the African Commission on Human and Peoples' Rights.
55 Art 12 of the Protocol to the OAU Charter on the Commission of Mediation, Conciliation and Arbitration (1964).

While these four bodies have a *de jure* double mandate to resolve both horizontal *inter*-state international legal disputes as well vertical *intra*-state international legal disputes, the bulk of their work *de facto* concerns resolving domestic conflicts that have been 'internationalized'.

For example, a glance at the disputes managed by the PSC reveals its focus on domestic strife, such as the civil wars in Sudan,[56] Somalia,[57] Mali,[58] and Central African Republic,[59] the electoral violence in Comoros,[60] Kenya[61] and Côte d'Ivoire[62] and terrorism threats in the Central-Eastern and Western regions in Africa involving the Lord's Resistance Army[63] and Boko Haram,[64] respectively.

Similarly, skimming the dockets of the African Court and the African Children's Committee, not a single case can be found concerning a human rights dispute between two or more states. All cases before these dispute settlement mechanisms involve claims brought directly or indirectly by individuals or civil society organizations. The African Commission has been called upon a few times to resolve a dispute between states, but this is by far the minority of its case load.[65]

Rather, what we are witnessing is the 'internationalization' of domestic conflicts whereby the governmental technology of international dispute settlement is deployed consisting of an assemblage of international *and* domestic actors, principles, norms, practices and specific types of expertise.

Hirschl, among others, has described the global trend of judicializing politics, where courts are increasingly relied upon to 'address core moral predicaments, public policy questions, and political controversies'.[66] We may observe a similar trend in Africa whereby continental dispute settlement mechanisms are called upon to intervene in such domestic differences. With their involvement we may also trace how these dispute settlement processes are fused with foreign elements, including international funding, actors with a nationality different from the

56 See, eg, African Union Mission in Sudan (AMIS) (2004); African Union-United Nations Mission in Darfur (UNAMID) (2007).
57 See, eg, African Union Mission in Somalia (AMISOM) (2007).
58 See, eg, African Union-led International Support Mission in Mali (AFISMA) (2013).
59 See, eg, African Union-led International Support Mission in the Central African Republic (MISCA).
60 See, eg, African Union Mission for Support to the Elections in Comoros (AMISEC) (2006); African Union Electoral and Security Assistance Mission to the Comoros (MAES) (2007).
61 See, eg, AU-led Mediation of Kenya's Post-Election Crisis (2008).
62 See, eg, AU High Level Panel on Côte d'Ivoire (2011).
63 See, eg, Regional Cooperation Initiative for the Elimination of the Lord's Resistance Army (RCI-LRA) (2011).
64 See, eg, Multinational Joint Task Force (MNJTF) against Boko Haram (2015).
65 See, eg, *Democratic Republic of the Congo v Burundi, Rwanda and Uganda* (2004) AHRLR 19 (ACHPR 2004); Communication 422/12 *The Sudan v South Sudan*; Communication 478/14 *Djibouti v Eritrea*. At the time of writing, out of the more than 500 communications submitted to the African Commission only three have been by states. See R Murray *The African Charter on Human and Peoples' Rights – A commentary* (2019) 655-656.
66 R Hirschl 'The judicialization of politics' in GA Caldeira, RD Kelemen & KE Whittington (eds) *The Oxford handbook of law and politics* (2008) 119.

dispute at hand as well as expertise developed in a different national context[67] and sometimes in a different international context.[68]

The result of these processes is that domestic governance items are put more prominently on the agenda of continental institutions, while at the same time embedding continental law and policies deeper into the national level.

It could be pointed out that the PSC is not a judicial body, which certainly is true. I would suggest, however, that since this body operates as a mechanism with increasingly formalized rules and practices, drawing on continental norms to settle disputes and with a mandate to impose sanctions of varying nature and intensity as retribution for non-compliant behaviour with continental norms, that this institution may still be classified as some form of a 'judicialized' dispute settlement mechanism.

Similarly, the African Commission and African Children's Committee are strictly speaking not judicial bodies either. However, for all intents and purposes, their communication procedures differ little from the formal litigation procedures before other international tribunals, such as the African Court. They too are called upon, following pre-described rules and procedures, to measure the concord or discord of domestic law or practice with continental norms. Following the establishment of a transgression of these norms they may also impose costs of varying nature on a state party found to be in violation of continental law as well as outline the necessary steps to be taken to remedy the violations.[69]

It lies beyond the remit of this book to give a comprehensive overview of the operational intricacies of the African Commission, the African Children's Committee, the PSC and the African Court and their normative contributions to African international law.[70] We will also return to some of these aspects in the

67 See, eg, involvement of experts in the context of *amicus curiae* interventions or as (staff) members of the different AU dispute settlement mechanisms who developed their know-how in different national contexts and then used comparative examples, to help resolve the issue at hand.

68 See, eg, the referencing by the African Commission, the African Children's Committee and the African Court to the jurisprudence of other international courts, such as the European Court on Human Rights, the Inter-American Court of Human Rights and the International Court of Justice.

69 Differences of opinion remain whether the outcome documents of the litigation processes before the African Commission and the African Children's Committee are 'binding'. Following the reasoning of Viljoen, I would suggest that the findings or 'decisions' issued by the African Commission and the African Children's Committee 'become 'final' and (arguably) 'binding' once they are contained in [their] Activity Report and are approved by the OAU/AU Assembly or Executive Council. See F Viljoen *International human rights law in Africa* (2012) 339.

70 For an excellent institutional overview of the AU's human rights bodies, see, eg, Viljoen (n 69). However, for a more up-to-date comprehensive overview of the norm development by the African Commission, see, eg, Murray (n 65). For a detailed overview of the norm development by the African Court, see, eg, L Burgorgue-Larsen & GF Ntwari 'Chronique de jurisprudence de la Cour Africaine des Droits de l'Homme et des Peuples (2015-2016)' (2018) 113 *Revue Trimestrielle des Droits de l'Homme* 127; L Burgorgue-Larsen & GF Ntwari 'Chronique de jurisprudence de la Cour Africaine des Droits de l'Homme et des Peuples (2017)' (2018) 116 *Revue Trimestrielle des Droits de l'Homme* 911; L Burgorgue-Larsen & GF Ntwari 'Chronique de jurisprudence de la Cour Africaine des Droits de l'Homme et des Peuples (2018)' (2019) 120 *Revue Trimestrielle des Droits de l'Homme* 851; L Burgorgue-Larsen & GF Ntwari 'Chronique de jurisprudence de la Cour Africaine des Droits de l'Homme et des Peuples (2019)' (2020) 124 *Revue Trimestrielle des Droits de l'Homme* 851; L Burgorgue-Larsen & GF Ntwari 'Chronique de jurisprudence de la Cour Africaine des Droits de l'Homme et des Peuples (2020)' (2021) 128 *Revue Trimestrielle des Droits de l'Homme* 991. For a decent institutional overview of the Peace and Security Council, see, eg, U Engel & J Gomes Porto (eds) *Africa's new peace and security*

next part. However, for illustrative purposes, a brief overview will be given of a few instances of how the African Court enriched the body of African human rights law through its contentious procedure,[71] as the continent's youngest but numerically most active dispute settlement body in the domain of human rights.[72]

For example, in respect of the right to participate in government, the Court found the ban on independent electoral candidacies in Tanzania's national Constitution to constitute a violation of the African Charter (*Mtikila v Tanzania*).[73] In another judgment in electoral matters, the African Court ruled that a new law on the Electoral Commission of Côte d'Ivoire violated both the right to equal protection of the law and the obligation to create independent and impartial electoral management bodies for placing opposition electoral candidates at a disadvantage by packing the electoral body with more representatives of the government, thus creating an imbalanced composition in favour of candidates associated with the incumbent party (*APDH v Côte d'Ivoire*).[74] And subsequent to an amendment of the Constitution of Benin, the Court held that a process of constitutional revision violated article 10(2) of the African Charter on Democracy, Elections and Governance if it is not preceded by a referendum or by a consultation of all actors and different opinions with a view to reaching a national consensus (*Ajavon v Benin*).[75] Furthermore, the Court held

architecture: Promoting norms and institutionalising solutions (2010); PD Williams 'The Peace and Security Council of the African Union: Evaluating an embryonic international institution' (2009) 47 *Journal of Modern African Studies* 603. For an overview of the Peace and Security Council's recent practice, see, eg, the Peace and Security Council Reports published by the Institute for Security Studies Africa, https://issafrica.org/pscreport (accessed 11 April 2022).

71 Under its contentious procedures, the Court has material jurisdiction over all cases and disputes submitted to it concerning the interpretation and application of the African Charter, its constitutive Protocol and any other relevant human rights instrument ratified by the states involved in the dispute (art 3 Protocol). This expansive provision has led the Court to interpret and find violations of a wide variety of international human rights treaties including the International Covenant on Civil and Political Rights (ICCPR); the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); the African Charter on Democracy, Elections and Governance; the Maputo Protocol the African Charter on the Rights and Welfare of the Child (African Children's Charter); and the ECOWAS Democracy Protocol. Generally, to establish whether a treaty or convention is a human rights instrument, the Court has held that 'it is necessary to refer in particular to the purposes of such Convention. Such purposes are reflected either by an express enunciation of the subjective rights of individuals or groups of individuals, or by mandatory obligations on states parties for the consequent enjoyment of the said rights' (African Court, *APDH v Côte d'Ivoire* [2016] para 57). For a discussion on how the Court establishes whether a treaty can qualify as a human rights instruments, see G Niyungeko 'The African Charter on Democracy, Elections and Governance as a human rights instrument' Special supplementary issue: The African Charter on Democracy, Elections and Governance (2019) 10 *Journal of African Law* 63; B Kioko 'The African Charter on Democracy, Elections and Governance as a justiciable instrument' Special supplementary issue: The African Charter on Democracy, Elections and Governance (2019) 10 *Journal of African Law* 39.

72 For a comparative perspective concerning the volume of merit decisions (or in other words decisions where the (non)-existence of a human rights violation is established) in the first 15 years of their existence, the following statistics can be established: 10 decisions by the European Court on Human Rights (1959-1974); 5 decisions by the Inter-American Court on Human Rights (1979-1994); 35 decisions by the African Commission on Human and Peoples' Rights (1987-2002); 6 decisions by the African Committee Experts on the Rights and Welfare of the Child (2001-2016); and 75 decisions by the African Court on Human and Peoples' Rights (2006-2021).

73 *Mtikila v Tanzania*, Application 011/2011 (Judgment of 14 June 2013).

74 *APDH v Côte d'Ivoire*, Application 001/2014 (Judgment of 18 November 2016).

75 *Ajavon v Benin*, Application 062/2019 (Judgment of 4 December 2020).

that a constitutional revision that does not repose on national consensus may constitute a major disruption of economic, social and cultural development and thus violate the right to development protected by article 22(1) of the Charter.[76] Similarly, the Court found that a constitutional revision that is not based on national consensus is likely to put aside a large segment of the population and, therefore, may pose a threat to the peace and stability of a state and the security its citizens and accordingly violate the right to peace and security protected by article 23(1) of the Charter.[77]

The African Court has also ordered the repeal of custodial sentences for acts of defamation as they constitute a violation of the right to freedom of expression (*Konaté v Burkina Faso*).[78] While in relation to fair trial rights, the Court has repeatedly found that where an accused person is indigent and charged with a serious criminal offence that carries a severe sentence, they should be able to enjoy free legal assistance in order to give effect to the right to defence. Furthermore, according to the African Court, this right is not contingent on whether or not individuals request such assistance, rather the respective state has an obligation to provide free legal assistance in the interests of justice in such circumstances (*Alex Thomas v Tanzania*).[79]

Concerning the issue of the death penalty, the African Court has ordered that the mandatory death penalty should be removed from the penal code of Tanzania as it violates the right to life, the right to dignity and prohibition of inhuman and degrading punishment as well as the right to a fair trial by taking away the discretionary power of a judicial officer to impose criminal punishment on the basis of proportionality and the particular circumstances of the person who committed the offence (*Ally Rajabu & Others v Tanzania*).[80]

In a case involving women's and children's rights in Mali, the Court held that states have an obligation to ensure that the minimum age of marriage for both men and women is 18 years, that states have a duty to establish a marriage regime that avoids forced marriages and ensures adequate verification of the free consent of the parties, and that states are obliged to ensure the equal enjoyment of the right to inheritance for both men and women as well as for children born in and out of wedlock (*APDF and IHRDA v Republic of Mali*).[81]

In sum, these instances show the broader tendency of continental dispute settlement mechanisms in Africa to not only adjudicate on violations of continental norms in relation to a particular domestic setting, but in the process also gradually to develop continental norms and embed them into other national contexts following a mobilization process of actors to ensure wider compliance with the decisions of these continental institutions, which brings us to the third

76 *Ajavon v Benin* (n 75).
77 As above.
78 *Konaté v Burkina Faso*, Application 004/2013 (Judgment of 5 December 2014).
79 *Alex Thomas v Tanzania*, Application 005/2013 (Judgment of 20 November 2015).
80 *Ally Rajabu & Others v Tanzania*, Application 007/2015 (Judgment of 29 November 2019).
81 *APDF and IHRDA v Republic of Mali*, Application 046/2016 (Judgment of 11 May 2018).

continental governance trend, the increased involvement of technical experts to ensure the implementation of continental legal instruments.

1.3 Technocratization

The challenge of ensuring adequate implementation of African international law has been a key component of the AU's recent agenda to transition from 'norm setting to norm implementation'.[82]

To ensure adequate implementation of African international legal instruments, the AU has developed a comprehensive compliance system. The types of AU mechanisms, through which the quality of governance is assessed in line with African international law, are increasing in both number and scale. This increase may be explained by a combination of factors, including institutional emulation, a certain level of path dependency, and a drive towards hierarchical observation.

Underlying this expanding compliance system is a trend to rely more and more on AU bureaucrats and experts to monitor and provide technical assistance to ensure the implementation of AU instruments. One of the key consequences of this trend is the gradual expansion of the AU's authority. This is not to say that the AU has necessarily gained much in decision-making powers, which generally remain in the purview of diplomats and politicians. However, the increased reliance by member states on AU bureaucrats and experts does lead to important gains in AU influence by allowing these technocrats to have a key role in setting the agenda for decision making[83] and framing the context in which decisions are made.[84]

One of the most direct mechanisms to monitor and enhance compliance with African international legal instruments is the state reporting mechanism. Monitoring of governance in Africa in the form of state reporting was first established in 1968 with the African Convention on the Conservation of Nature and Natural Resources.[85] The contracting states agreed to submit to the OAU the various legal and policy instruments in force that aim to ensure implementation of the Convention as well as reports on the results achieved in applying the provisions of the Convention and other information relating to the Convention if requested.[86] But the actual template for state reporting mechanisms in the (O)AU context was set by the African Charter in 1981.[87] Accordingly, state parties

82 See, eg, statement by Dr Nkosazana Dlamini Zuma, Chairperson of the AU Commission, on the occasion of the commemoration of Africa Human Rights Day under the theme 'Women's rights: Our collective responsibility' (21 October 2016), https://au.int/en/newsevents/31522/commemoration-africa-human-rights-day (accessed 10 January 2019).

83 N Negm & GF Ntwari 'African Union legal drafting: Process, mechanisms and challenges' (2019) 8 *International Journal of Legislative Drafting and Law Reform* 93.

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

85 See art 16 of the African Convention on the Conservation of Nature and Natural Resources (1968). This Convention was revised as African Convention on the Conservation of Nature and Natural Resources (2003). See art 29 for the reporting procedure.

86 See art 16 of the African Convention on the Conservation of Nature and Natural Resources (1968).

87 See art 62 of the African Charter on Human and Peoples' Rights (1981).

are required to submit a report to the African Commission on the legislative and other measures that have been taken to give effect to the instrument. Later state reporting mechanisms were included in other human rights instruments where states are also required to report to the African Commission on those respective instruments as part of the African Charter reporting procedure. These instruments include the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa[88] the Convention for the Protection and Assistance of Internally Displaced Persons in Africa;[89] and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa.[90] Other African international legal instruments established a separate entity to whom state parties have to report: the African Children's Committee for the African Charter on the Rights and Welfare of the Child (African Children's Charter);[91] the African Commission on Nuclear Energy for the African Nuclear-Weapon-Free Zone Treaty;[92] and the AU Advisory Board on Corruption for the Convention on Preventing and Combating Corruption.[93] Some instruments provided for the establishment of an *ad hoc* monitoring body such as the joint OAU/UNECA Regional Monitoring Group for the African Charter for Popular Participation in Development and Transformation[94] or the joint OAU/UNECA Secretariat for the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa.[95] Other broader governance instruments designated the AU Commission as the body to whom state parties must submit their reports. This is the case for the African Charter on Democracy, Elections and Governance,[96] the African Charter on Values and Principles of Public Service and Administration[97] and the African Charter on the Values and Principles of Decentralization, Local Governance and Local Development.[98]

Typically, state parties are obliged to submit a report of the various measures they have taken to give effect to the principles and commitments in the different African international legal instruments based on a set of guidelines prepared by those reporting bodies.[99]

88 See art 26 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003).
89 See art 14 of the Convention for the Protection and Assistance of Internally Displaced Persons in Africa (2009).
90 See art 22 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa (2016).
91 See art 43 of the African Charter on the Rights and Welfare of the Child (1990).
92 See art 13 of the African Nuclear-Weapon-Free Zone Treaty (1995).
93 See art 22 of the Convention on Preventing and Combating Corruption (2003).
94 See paras 33-34 of the African Charter for Popular Participation in Development and Transformation (1990).
95 See art 13 of the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa (1991).
96 See art 49 of the African Charter on Democracy, Elections and Governance (2007).
97 See art 24 of the African Charter on Values and Principles of Public Service and Administration (2011).
98 See art 19 of the African Charter on the Values and Principles of Decentralization, Local Governance and Local Development (2014).
99 See, eg, 'Guidelines for state parties' reports under the ACDEG' (2016). For the African Commission, see Guidelines for National Periodic Reports (1989); State Party Reporting

On the basis of those reports, the coordinating entities will usually prepare a synthesized report on the implementation of the respective instruments.[100] This summary report will then generally outline a number of specific recommendations to state parties on further measures that need to be taken to effectively implement the legal instrument. The preparation of such a synthesis report and the selection of information grant these reporting entities an influential role in framing the issues and debates on which the state parties and sometimes the Assembly and Executive Council are then to decide. To date, the consistency and quality of state reporting has been very uneven. For example, for the African Charter on Democracy, Elections and Governance only two reports have been prepared to address this treaty obligation (by Togo and Rwanda),[101] whereas state reporting on the African Charter is notoriously characterized by late, *ad hoc*, vague and limited reporting.[102]

These treaty reporting mechanisms show the emphasis placed on transparency and information sharing as key conditions to ensure compliance.[103] Eventually, the self-reporting by state parties may also lead to a level of harmonization of governance arrangements through the adoption of Concluding Observations and recommendations from which fellow member states can emulate best practices and take steps to avoid receiving similar critique on their governance systems.

This rationale of 'managing' compliance through 'cooperative processes of consultation, analysis and persuasion, rather than coercive punishment',[104] is similarly embedded in the African Peer Review Mechanism (APRM), which uses various AU international legal instruments as some of its main benchmarks to assess the quality of the political governance, economic governance and management, corporate governance and socio-economic development of APRM member states.[105] Through an external review and a country self-assessment, complemented by a peer review process at the level of heads of state

Guidelines for Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (Tunis Reporting Guidelines); State Reporting Guidelines and Principles on Articles 21 and 24 of the African Charter relating to Extractive Industries, Human Rights and the Environment (2018). For the African Children's Committee, see the Guidelines for Initial Reports of State Parties; and the Guidelines on the Form and Content of Periodic State Party Reports to be Submitted Pursuant to Article 43(1)(b) of the African Charter on the Rights and Welfare of the Child.

100 ACDEG art 49(3).

101 See Decision on Report of the Commission on Governance in Africa (with Focus on the African Governance Architecture and Elections), Assembly/AU/Dec.585(XXV) (2015) and Decision on Governance, Constitutionalism and Elections in Africa, Assembly/AU/Dec.592(XXVI) (2016).

102 M Evans & R Murray 'The state reporting mechanism of the African Charter' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The system in practice 1986-2006* (2008) 49.

103 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.

104 Chayes and others (n 103) 41.

105 The legal framework of the APRM includes the Declaration on Democracy, Political, Economic and Corporate Governance (2002), AHG/235(XXXVIII), Annex I; the Memorandum of Understanding on the APRM (2003) which is the accession document for the APRM; the APRM base document (2003); the APRM Organization and Processes (2003); Objectives, Standards, Criteria and Indicators for the APRM (2003); Outline of the Memorandum of Understanding on Technical Assessments and the Country Review Visit (2003); Assembly Decision (Assembly/

and government, best practices and challenges are identified to improve the continental governance landscape.

The idea for peer review assessments in the (O)AU may be traced to concerns regarding the failure of earlier development initiatives due to inadequate monitoring of governance policies and practices on the African continent.[106] A similar monitoring and evaluation initiative was initially proposed under the Conference on Security, Stability, Development and Cooperation (CSSDCA).[107] CSSDCA was envisaged as a policy forum for the elaboration and advancement of common values within the (O)AU and specifically in the areas of peace, security, stability, development and cooperation.[108] It envisaged a peer review mechanism to assess the progress made by member states in ensuring compliance with the commitments made in the CSSDCA process.[109] However, due to the anticipated overlap with the APRM, the CSSDCA peer review process was never operationalized.[110]

The idea of sharing experiences is not unique to the APRM. It also figures prominently in the AU's electoral support agenda. This agenda consists of two core mandates: election observation and electoral assistance. (O)AU observation missions started with the elections in Namibia in 1989.[111] Together with the United Nations (UN), the OAU deployed a mission to observe the independence elections in Namibia. This apparatus gradually expanded, and the AU has now become one of the most prominent actors in the field of election observation on the African continent. Although the AU does not cover all types of elections, it has observed and assessed presidential elections, parliamentary elections and important referenda on the basis of AU and other relevant international standards for democratic elections.[112]

Over the past decade the AU has greatly professionalized its operations in evaluating domestic electoral processes against international and continental standards. Before, AU Election Observation Missions (AUEOMs) were largely diplomatic missions with small observer teams comprising career diplomats and a limited number of AU staff. These missions have gradually become more technical, composed primarily of election experts from the AU Commission,

AU/Dec/527 XXIII) which stipulates that 'the APRM shall be an autonomous entity within the AU system' (2014); and the Statute of the APRM (2016).

106 M Killander *The role of the African Peer Review Mechanism in inducing compliance with human rights* (2009) 46.

107 Solemn Declaration on Conference on Stability, Security, Development and Democracy (CSSDCA) (2000) and Memorandum of Understanding on CSSDCA (2002).

108 Solemn on Declaration on CSSDCA para 7.

109 Memorandum of Understanding on CSSDCA (2002).

110 Killander (n 106) 57.

111 See S Karume & E Mura 'Reflections on African Union Electoral Assistance and Observation' in R Cordenillo & A Ellis (eds) *The integrity of elections: The role of regional organizations* (2012); CC Aniekwe & SM Atuobi 'Two decades of elections observation by the AU: A review' (2016) 15 *Journal of African Elections* 25.

112 Relevant AU instruments include the AU Constitutive Act (2000); the African Charter on Democracy, Elections and Governance (2007); the African Charter on Human and Peoples' Rights (1981); the OAU/AU Declaration on Principles Governing Democratic Elections in Africa (2002); and the African Union Guidelines for Election Observation and Monitoring Missions (2002). International instruments include the Universal Declaration of Human Rights (1948) and the International Covenant on Civil and Political Rights (1966).

election management bodies and civil society.[113] Some of the most notable developments have included the transition of AUEOMs from short-term observation to long-term observation missions; institutionalized training sessions for AU election observers (short and long-term observation missions, election, media and legal experts); consolidation of the practice of sending AUEOMs to all parliamentary and presidential elections; and improvement and standardization of the observation methodology and reporting.

In a form of path dependency, the increased level of detail in the assessments also contributes to a finer level of recommendations to specific target groups. These recommendations then form the basis of technical assistance programmes, as seen, for example, in Malawi (2015), Côte d'Ivoire (2015), Madagascar (2016), Cameroon (2016), Somalia (2017) and Zimbabwe (2018). The AU through its Democracy and Electoral Assistance Unit (DEAU)[114] has gradually developed its capacity to organize follow-up missions to strengthen electoral institutions and improve electoral processes through the deployment of experts to support election management bodies and by facilitating peer-to-peer learning among election authorities.[115]

With time the AU also expanded the observation mission governmental technique to other fields, including the deployment of human rights observers and military experts. Key examples of such legal surveillance initiatives whereby *lacunae* in the legal capacity of a state are revealed, which the AU aims to supplement or even replace, include the AU human rights observation missions in Mali[116] and Burundi.[117] These missions generally have as their mandate to monitor the human rights situation on the ground and to report violations of human rights and international humanitarian law, possibly leading to changes of the operationalization of the legal systems of those countries, especially when they concern their judicial system and their prison system. Another example relates to the aftermath of the contentious elections in Gabon, where the AU proposed to deploy constitutional court observers.[118] These observers were intended to assist the Constitutional Court of Gabon in dealing with an electoral dispute submitted by one of the main contenders of the presidential elections. Eventually,

113 See CC Aniekwe & SM Atuobi 'Two decades of election observation by the African Union: A review' (2016) 15 *Journal of African Elections* 32-33.

114 Decision on the Establishment and Organization of a Democracy and Electoral Assistance Unit and Fund, EX.CL/Dec.300 (IX) (2006). The DEAU was established in 2006 and became fully operationalized in 2008.

115 See, eg, 'African Union BRIDGE training for the Independent National Electoral Commission opens today in Antananarivo, Republic of Madagascar' (6 October 2018), https://au.int/en/pressreleases/20161006-0 (accessed 10 January 2019); 'African Union Commission convenes 4th annual continental forum of election management bodies' (8 November 2017), https://au.int/en/pressreleases/20171108/african-union-commission-convenes-4th-annual-continental-forum-election (accessed 10 January 2019).

116 See PSC Communiqué of the 353rd Meeting (25 January 2013), AU doc PSC/AHG/COMM/2.(CCCLIII).

117 See PSC Communiqué of the 507th Meeting (14 May 2015), AU doc PSC/PR/COMM (DVII); PSC Communiqué of the 515th Meeting (13 June 2015), AU doc PSC/PR/COMM.2 (DXV); PSC Communiqué of the 551th Meeting (17 October 2015), AU doc PSC/PR/COMM.(DLI).

118 See PSC Communiqué of the 624th Meeting (13 September 2016), AU doc PSC/PR/COMM(DCXXIV).

Gabon did not accept the proposed observation mission. Another surveillance technique deployed by the AU within the security realm are military observation missions, such as in the case of Burundi, which was mandated to verify processes of disarming militias and other armed groups.[119]

In terms of information gathering and production on governance in Africa, a few more noteworthy mechanisms may be mentioned, such as the development of the African Charter on Statistics[120] in 2009 and in 2010 the Strategy for the Harmonization of Statistics (SHaSA) in Africa.[121] These instruments are envisaged as frameworks to guide the production of quality, comparable and timely statistical data in Africa covering all aspects of political, economic, social, and cultural integration.[122] The Statistics Division located within the Department of Economic Affairs of the AUC has been the most prominent driver within the AU in building capacity for the production, use and dissemination of harmonized statistical data on the continent.

Another relevant information gathering tool is the Continental Early Warning System (CEWS). Its purpose is to facilitate the anticipation and prevention of conflicts through the collection and analysis of information based on an explicit framework with clearly-defined and accepted political, social, military and humanitarian indicators.[123] The information and analysis gathered through the CEWS, located at the Conflict Management Division of the Peace and Security Department of the AUC, is used by the Chairperson of the AUC to 'advise the PSC on potential threats to peace and security in Africa and recommend the best course of action'.[124]

To these examples may be added the Africa Regional Integration Index. This is a tool to measure the level of regional integration in Africa on the basis of five dimensions which are presented as the key socio-economic categories fundamental to Africa's integration: regional infrastructure, trade integration, productive integration, free movement of people, financial and macro-economic integration.[125] The regional integration index is developed on the basis of 16 indicators that cut across the five dimensions.[126] The overall objective is to rank

119 See Peace and Security Council Communiqué PSC/PR/COMM.(DLI) adopted on 17 October 2015.
120 African Charter on Statistics (2009) (not yet entered into force).
121 Strategy for the Harmonisation of Statistics in Africa (2010).
122 As above.
123 Art 12 Protocol Relating to the Establishment of the Peace and Security Council of the African Union (2002).
124 Art 12(5), Protocol Relating to the Establishment of the Peace and Security Council of the African Union (2002).
125 Africa Regional Integration Index, Report 2016 11.
126 As above. These are for trade integration: Average tariff on imports, Share of intra-regional exports over GDP, Share of intra-regional imports over GDP, Share of intra-regional trade, AfCFTA (only at continental level); for Productive Integration: Share of intra-regional intermediate exports, Share of intra-regional intermediate imports, Merchandise trade complementarity index; for Macro-economic Integration: Number of bilateral investment treaties, Regional convertibility of currency, Regional inflation differential; for Infrastructural Integration: AfDB Composite Infrastructure index, Proportion of intra-regional flight connections; and for Free Movement of People: Free Movement of Persons Protocol (Kigali), Number of countries that may obtain a visa on arrival; Number of countries that require a visa.

member states according to their performance as calculated in the index, evincing the drive towards hierarchical observation.

It would lead us too far to examine in great detail all the expertise-based governance techniques of the AU. For the purposes of this book, what I wanted to show was the growing number of specific governmental technologies aimed at collecting information about the state of governance of AU member states and with the objective of shaping and reforming the respective governmental structures and modes of organizing governance.

These forms of governing and their embedded mechanisms (including knowledge making and knowledge discrimination, in the sense that certain forms of knowledge are privileged compared to others) have a range of effects that are traditionally not attended to in institutional, functional or impact analyses. These effects may include the re-shaping of the identity of those whose behaviour is to be influenced, limiting the imagination of alternative ways for changing conduct, and a continuous reifying effect of models impeding the selection of alternative models for organizing government.

In this sense, these expertise-based interventions are capable of effectively disciplining behavior in ways typically not visible in more traditional legal analyses. In fact, these 'laboratory' technologies of seeing and experimenting play a crucial in measuring and calculating 'Africa' and are therefore crucial 'conditions of possibility' of the AU's ambition in making Africa more visible in order to make it more governable. While this part only presented a rudimentary anatomy of the AU's governing techniques, a more thorough scrutiny of these 'legibility tactics', could facilitate a deeper understanding of the characteristics and perspectives of Africa the AU unavoidably brings into the light while obscuring others.

2 The performance of African international law

One of the key objectives of this book is to argue against simplistic linear understandings of the development of African international law. It is true that the previous part highlighted the expansion of African international legal practices in scope and intensity with a commensurate enlarged African international legal consciousness. However, I did not intend to suggest that such occurrences are not contingent, variable and relative. The growth and impact of African international law is by no means uniform and differs significantly across time, space and subject-matter.

Given the relative dearth of theoretical and empirical studies of African international law and its impact, it appears that there still is a genuine need for a deeper understanding of African international law and how well it actually works (or not) and why. Therefore, in this part a framework is developed to foster empirical analyses of the performance of African international law as well to set out distinct directions for further theoretical research which hopefully will be taken up by other scholars.

A key component of any accountability procedure are specific measurement devices that can reveal changes. Therefore, to demonstrate the functioning

of something, recourse is had to 'indicators' as tools to assess performance. Accordingly, to analyze the accomplishments and impact of African international law and to understand their variability, this part outlines a number of performance indicators to conduct a more sophisticated evaluation of African international law.

In line with the 3D conceptualization of law in chapter 2, the framework outlines key indicators to identify variations in the functioning of African international law based on its distributive (norms), constitutive (actors) and decisional (processes) effects.

Using these three categories, series of indicators are mapped to better understand, first, the changing normative function of African international law with particular reference to the establishment of new principles, standards and rules (or 'norms') that prescribe or prohibit certain forms of behaviour. The *distributive* nature of these norms is considered in terms of its allocation of particular roles and resources. Second, the institutional function of law is gauged in reference to the capacity of law in *constituting* a social identity and framework around a group of 'actors' that share a mandate and resources to foster the realization of certain norms. Third, the procedural function of law is considered with respect to the 'processes' that influence how *decisions* are made and the constraints that limit the form and substance of decisions (see Table 4.1 African international law performance indicators).

Some of the distinguishing features of this analytical framework is that it goes beyond more traditional forms of analyzing African international law in terms of its 'compliance rates' and 'usage rates'. Instead, it also pays attention to measures to assess socio-economic, cultural and political characteristics that are affected by and at the same time shape African international legal developments.

Importantly, this analytical framework not only proposes to examine how African international law makes 'progress'. It also suggests attentiveness to the different forms African international law is opposed, resisted, criticized or undermined.

In line with the theoretical insights on which this book draws, it is readily acknowledged that the framework outlined below is not exhaustive and that particular caveats should be borne in mind when considering these indicators. Especially, because the mere act of considering these indicators and the knowledge they may produce, institutionalize, hierarchize and naturalize, could plausibly have an influence on the policies and discourses surrounding African international law, since they may shape how African international legal operations are seen, measured and, often, managed. By focusing on some indicators and not on others, blind spots may be created in the performance assessments, based on what is brought into view and what is then subsequently obscured.[127]

127 L Fioramonti *How numbers rule the world: The use and abuse of statistics in global politics* (2014) 8.

The use of indicators, which is reductionist by design,[128] may also adversely oversimply complex phenomena, leading to inaccuracies and loses of important subtleties of socio-political phenomena.[129]

Furthermore, it is recognized that many of the indicators identified here may require significant amounts of resources and the development of new research tools in order to aptly measure the performance of African international legal practice.

However, rather than seeing these methodological challenges as reasons not to pursue these performance assessments, they are instead highlighted as cautions for carefulness while conducting the important task of generating knowledge about the actual *impact* of African international law by operationalizing these indicators in practice.[130]

Table 4.1: African international law performance indicators

Norms

1. Standards, principles and rules established and regulated by African international legal instruments
2. Sanctions and reparations for violations of African international law
3. National legal instruments adopted to give effect to African international law
4. References to African international legal instruments by national courts
5. References to African international law in public discourse
6. Knowledge products and platforms on African international law
7. Meetings, trainings, courses and degrees organized on African international law
8. Accessibility to African international law documents

Actors

1. Scope of African international institutions
2. Levels of participation and inclusion in African international legal processes
3. Resources available to African international legal institutions

128 KE Davis, B Kingsbury & SE Merry 'Indicators as a technology of global governance' (2012) 46 *Law and Society Review* 76.

129 See SE Merry *The seductions of quantification: Measuring human rights, gender violence, and sex trafficking* (2016).

130 I am grateful to Larry Helfer for encouraging me to discuss some of the critical facets in relation to the use of indicators and other metrics to assess international law and institutions.

Processes

1. Membership in African international legal regimes
2. Secondary legal instruments to regulate African international legal processes
3. Volume of African international legal litigation
4. Levels of implementation of African international law
5. Evidence about compliance with African international law
6. Cooperation during African international legal processes

2.1 Norms

To measure the performance of African international law in terms of its normative development, we can establish at least eight key indicators (which could be further disaggregated), including the relative increase or decrease of standards, principles and rules established and regulated by African international legal instruments; sanctions and reparations for violations of African international law; national legal instruments adopted to give effect to African international law; references to African international legal instruments by national courts; references to African international law in public discourse; knowledge products and platforms on African international law; meetings, trainings, courses and degrees organized on African international law; and accessibility to African international law documents.

2.1.1 Standards, principles and rules established and regulated by African international legal instruments

The most obvious measure of establishing the growth or regression of African international law will involve calculating the respective expansion or contraction of standards, principles and rules established in and regulated by some form of an African international legal instrument.

Throughout this book, I have already given a sense of these trends by measuring the number of 'African' treaties and decisions of key African international legal institutions. This analysis remained rather superficial, however, concerning the actual standards, principles and rules that are aimed at shaping the conduct of the continent's inhabitants and the management of resources available on the continent. Such investigations could consider in greater detail how African international law intends to be an asset or a liability in improving the rationalization of available resources, meaning to release untapped resources, better exploit available resources and avoid wastage of scarce resources.

Differences of opinions about distribution of resources are inevitable. Legal philosophy has made its career in seeking answers to the questions of 'who gets what, says who and based on what authority?' The plurality in answers to these questions undoubtedly are going to continue to create tensions in

the development of African international law as well. For example, during the 1970s to 1980s there appeared to be a continental belief in ideas related to non-alignment and collective self-reliance. In the 1990s, however, African international legal developments seemed to converge with an emerging global consensus on liberalism as a dominant mode of thought with a gradual maximization of the market and minimalization of the state in their roles as distributing and organizing mechanism of resources. This trend went hand in hand with faith in and commitment to free trade, democracy, human rights and the rule of law. It is reasonable to assume that the future of African international law will also be contingent on a number of global social, political and economic factors. This raises the question of whether an apparent yet ambiguous African consensus on liberalism will maintain momentum if a global trend continues towards a post-liberal world order. The rise of China, the inward turn of the United States concurrent with its withdrawal as the principal promotor of liberal values, and a further ascent of illiberal governments and nationalist movements across the globe suggest a possible transformation of the international liberal order. Exploring the degree of convergence with this global trend or, alternatively, divergence through a potential African counter-trend, promises to be a fertile area for future research.

Besides these mega-trends, it is also worth examining specific pockets of socio-cultural values that may positively or adversely affect the African international legal regime. For example, emboldened commitment against undesirable forms of inequality across multiple forms of social identity, including gender, race, age, religion, tribe and ethnicity, may prompt further regulation to improve diversity management. Nonetheless, history has time and again shown that such social battles are not won overnight. Resistance is inevitable in such social reform projects. The curiosity is how law will be, or rather, will *continue* to be instrumentalized at the African international level to pre-empt or accelerate such social justice projects. Will 'guerrilla lawfare' tactics, including strategic litigation before African international dispute-settlement mechanisms, continental agenda-setting, counter-hegemonic information campaigns and protest actions, have the desired effect of altering the *status quo*? Or will counter-insurgency legal projects turn out to be more successful in maintaining and reinforcing the *status quo*?

For example, in advancing lesbian, gay, bisexual and transgender (LGBT) rights and giving a greater access to a platform to advocate these rights, the African Commission found itself strongly criticized by diplomatic actors from particular AU member states for having given observer status to a non-governmental organization (NGO) advocating LGBT rights (Coalition of African Lesbians).[131] The independence of the African Commission came under serious pressure by

131 In its Decision EX.CL/Dec.887(XXVII) of 7-12 June 2015 the Executive Council requested 'the ACHPR to take into account the fundamental African values, identity and good traditions, and to withdraw the observer status granted to NGOs who may attempt to impose values contrary to the African values; in this regard, REQUESTS the ACHPR to review its criteria for granting Observer Status to NGOs and to withdraw the observer status granted to the Organization called CAL, in line with those African values'.

AU member states and the Commission ultimately withdrew the civil society organization's observer status.[132] Other highly-contested or controversial social issues may trigger similar resistance if they were to become subjected to more extensive African international law regulation, for example, the death penalty, gay marriage, abortion, land rights, environmental issues, amnesty laws, and so on.

Furthermore, a growing divergence may occur between the development of different types of African international legal instruments. Whereas we noted a linear growth of decisions by the AU's main policy bodies, the Assembly of Heads of State and Government and the Executive Council, we observed an exponential growth of treaties and decisions by the AU's key dispute settlement mechanisms, the PSC and the African Court. Over time, however, it is possible that, comparatively speaking, the level of treaty development diminishes or becomes stagnant compared to the growing volume of law making through the decisions of the PSC and the African Court, and possibly other dispute settlement bodies that are yet to be established, such as the African Court of Justice (and Human and Peoples' Rights) and the dispute settlement bodies in context of the African Continental Free Trade Area. Conversely, such 'judicial' expansion is not a given and depends on numerous other facts, detailed further below.

As Koskenniemi has pointed out, 'political intervention is today often a politics of re-definition, that is to say, the strategic definition of a situation or a problem by reference to a technical idiom so as to open the door for applying the expertise related to that idiom, together with the attendant structural bias. Here, only imagination sets the limit'.[133]

In line with this thought, it remains to be seen through which technical idiom the contemporary silences and blind spots in African international law will be addressed. What 'gaps' in African international law will be filled, by whom and how? For a comparative example drawing on the experience of regional African international courts, we can refer to the difference in mandate between the *Economic Community of West African States* (ECOWAS) Court of Justice, the East African Community (EAC) Court of Justice and the *Southern African Development Community* (SADC) Tribunal whereby the former has an explicit human rights mandate and the latter two do not.[134] Nonetheless, through re-definition various litigants have brought 'human rights' claims under the 'rule of law' mandate of the EAC Court and SADC Tribunal, despite that the founders of these regional African tribunals arguably had not intended for these judicial

132 In its Decision EX.CL/Dec.1015(XXXIII) of 28-29 June 2018 the Executive Council underlined 'that the independence enjoyed by ACHPR is of a functional nature and not independence from the same organs that created the body, while expressing caution on the tendency of the ACHPR acting as an appellate body, thereby undermining national legal systems'.

133 M Koskenniemi 'The politics of international law – 20 years later' (2009) 20 *European Journal of International Law* 11. See similarly on the politics and importance of re-imagination, re-definition and re-interpretation in the international legal sphere, the magistral work of A Lang *World trade law after neoliberalism: Reimagining the global economic order* (2011).

134 See R Ben Achour & H Gueldich (eds) *Les juridictions internationales régionales et sous-régionales en Afrique* (2019) and S Ebobrah 'Critical issues in the human rights mandate of the ECOWAS Court of Justice' (2010) 54 *Journal of African Law* 1.

bodies to entertain such 'human rights'/'rule of law' litigation.[135] Once the dispute settlement mechanisms of the African Continental Free Trade Area are operationalized, will similar human rights/trade tensions find their way before these judicial entities? How will these trade dispute settlement bodies interpret and resolve conflicts with a dual trade/human rights logic?

In sum, it is apparent that the development of the normative volume and density of African international law may encounter both steps forward and backwards and may merit further scrutiny.

Key Performance Indicators

▲ Measurement of the respective expansion or contraction of African international legal norms (incl. standards, principles and rules) established in and regulated by some form of an African international legal or policy instrument:
- Number of (O)AU treaties
- Number of (O)AU policies
- Number of (O)AU decisions

2.1.2 Sanctions and reparations for violations of African international law

A study of the normative development of African international law may also decide to focus on the nature, type, scope, teleologies, effectiveness and trends of sanctions for violations of African international law and reparations granted to victims of these violations.

Overall, the key objective of discipline, including African international legal discipline, is to achieve 'normality'.[136] This process assumes at least five constitutive elements. The first is the elaboration of an idealized or optimal model. Second, is the development of an analytical grid to measure the concord and discord of actual practice. Third, is the deployment of a surveillance apparatus to identify and distinguish normal and abnormal behavior. Fourth, is the imposition of costs of varying nature and intensity as retribution for abnormal behaviour. Fifth, is the evaluation of the effects of the imposed costs towards normalization, that is, achieving conformity with the norm.

Translated into our African international legal discussion, this may mean, first, the identification of normative values serving as an optimal model or format of

135 See TE Achiume 'The SADC Tribunal: Socio-political dissonance and the authority of international courts' in KJ Alter, LR Helfer & MR Madsen (eds) *International court authority* (2018) 124; MJ Nkhata 'Tribunal of the Southern African Development Community (SADC Tribunal)' in C Binder and others (eds) *Elgar encyclopedia of human rights* (2022) 439; A Possi 'Striking a balance between community norms and human rights: The continuing struggle of the East African Court of Justice' (2015) 15 *African Human Rights Law Journal* 192; K Gastorn 'The legality of the Appellate Division and the human rights jurisdiction of the East African Court of Justice of the East African Community' (2015) 3 *Africa Nazarene University Law Journal* 41-64.

136 Some of the tenets of this thinking stem from Foucault's work on disciplinary processes; see M Foucault *Security, territory, population: Lectures at the Collège de France* (2009); and M Foucault *Discipline and punish* (1995).

behaviour that are collectively enshrined in the relevant African international legal frameworks (see the previous part). Second, are the modalities related to establishing a threshold of infringement of the African international legal order that necessitates the involvement of any of African international legal enforcement agents. Third, are the different mechanisms for enforcing the African international normative framework. Fourth, is the respective African international legal sanctioning regime, imposing costs and withholding benefits. Fifth, are the conditions and the verification process for determining a return to African international legal rule.

One of the key metrics to trace African international legal performance includes considering when the African international legal apparatus is invoked to gauge the conformity of laws and practice with its normative dispositions, and establishes violations, which sanctions does it impose, from which register of sanctions does it choose and why, is that menu of sanctions expanding or narrowing, and how effective are they proving to be?

Overall, a rather steady trend can be recorded of an increase in the material scope of action and levels of coercion to deal with African international legal malpractice. Considering the importance of sanctions in underpinning a robust African international legal accountability system, greater attention is paid in this part to the rapidly-evolving African international legal sanctioning regime.

In accordance with the disciplinary framework outlined above, 'sanctions' refer here to those measures taken by the AU in response to suspected or actual violations of African international legal norms. These measures aim to ensure that the future action of the parties involved are in line with those norms. One can identify six different categories of AU sanctions: social, diplomatic, political, economic, legal and security sanctions. This categorisation is based on the type of 'capital' that is targeted by the AU measures. With capital is simply meant the accumulation of a particular type of resources. The coercive power of the AU is measured by its ability to impose costs which are understood as reductions of particular forms of capital, whether existing or anticipated. For example, imposing a fine would be a direct form of economic sanction whereby the economic capital or amount of resources is directly reduced. However, withholding financial assistance or any form of trade sabotage is also viewed as an economic sanction, because it concerns withholding or obstructing an anticipated increase in available economic resources. This book uses this 'capital approach' to develop a more sophisticated understanding of how the AU has expanded and intensified its coercive powers.

2.1.3 Social sanctions

The first and the broadest category refers to social sanctions. This category includes the AU's different responses that may cause reputational damage to a state. In this context, social capital is understood as a particular image of a state that might be positively or negatively affected by certain events. The key point here is that the image is only adaptable due to its relational character with other

states. In other words, a state's image is determined by its position in relation to its 'other'.

According to this understanding, the social capital of a state is shaped by the respective agents of that state, including diplomats with an explicit representational function, state officials with a shared functional identity or simply civilians who are broadly identifiable as constituent elements of that state. Examples of social sanctions include the organisation of a PSC meeting, especially an extraordinary PSC meeting, to discuss events taking place in a particular state. Simply by putting a country specific situation on the agenda of the PSC may already impose reputational damage on that state. AU press statements expressing 'concern' or 'condemnation' about a situation can also hurt a country's image. These statements are usually issued by the AU Chairperson, the AU Commission Chairperson or the PSC.

Furthermore, the African Commission also has a wide spectrum of institutional tools at its disposal to inflict reputational damage, including through press releases, mentioning specific human rights violations in their reports or even issuing country or thematic resolutions. Other AU organs, such as the Pan-African Parliament (PAP), the APRM, the Economic, Social and Cultural Council (ECOSOC) and the African Children's Committee, have developed similar instruments.

Often, these measures by AU organs are the first line of public response by the AU to undesirable developments in member states, typically involving a suspected infringement of one African international legal norm or another. Usually, these are also the only costs imposed by AU organs in response to unfavourable situations. Nonetheless, the AU does have other tools at its disposal, and it is not shying away from further expanding its coercive toolbox. Of course, all other categories of sanctions, detailed further below, may also produce reputational damage. Yet, since they target a more specific type of 'capital', it makes analytical sense to distinguish them into separate categories.

2.1.4 Political sanctions

The second category consists of political sanctions. The resources or capital targeted by such measures relate to an entity's decision-making capacity. These measures generally influence the levels of participation in decision-making processes. The most prominent example of political sanctions is the suspension of member states from the AU. While the suspension of the 'right to speak at meetings, to vote, to present candidates for any position or post within the Union or to benefit from any activity or commitments' can result from defaulting on the payment of membership fees,[137] the suspension of 'participating in the activities of the Union' is most infamously imposed after an unconstitutional change of

137 Art 23(2) AU Constitutive Act (2000).

government.[138] These suspensions prevent states' participation in the decision-making processes during meetings of the AU's policy organs.

Since the adoption of the ACDEG, the AU also foresees additional political sanctions by barring the perpetrators of unconstitutional changes of government from participating in ensuing elections or taking up positions of responsibility within domestic political governance arrangements. This has also included barring certain personalities from *transitional* governance arrangements. For example, after the political unrest in Sudan in 2019, the AU imposed a civilian led transition, precluding a transition directed by senior military officials.[139]

Furthermore, the African Court and the African Commission have not refrained from finding violations of the right to participate in government provided for in article 13 of the African Charter.[140] The subsequent remedies imposed by these human rights organs can also be categorised under the political sanctions' regime of the AU to the extent that they impact levels of participation in decision-making processes. For example, in its first judgment on merits, the African Court found the Tanzanian constitutional ban on independent candidacy in violation of the African Charter. It then ordered the country to create political space for independent candidates to participate in elections creating the opportunity for them to eventually participate in the state's political decision-making processes, although the Constitution is yet to be amended to give effect to the decision.[141]

Through its interpretation of such political rights, the African Court is effectively co-defining and demarcating the levels of legitimate participation in political decision-making processes at the national level in line with evolving African international law standards. A final example is the systematic deployment of AU Election Observation Missions that through their reporting either help legitimise or discredit newly-elected political regimes in relation to international legal norms.

2.1.5 Diplomatic sanctions

The third category consists of diplomatic sanctions and involves measures that affect the diplomatic capital of a state. For ease of reference, diplomatic capital is understood here in relation to the general functions of diplomacy as expressed by the Vienna Convention on Diplomatic Relations. These functions include representation, protection of interests, negotiation, information gathering and relation building.[142]

138 Art 30 AU Constitutive Act (2000).
139 See PSC Communiqué of the 854th Meeting (6 June 2019), AU Doc. PSC/PR/COMM. (DCCCXLIV).
140 For an overview of the jurisprudence of the African Court and the African Commission on art 13, see Murray (n 65) 343-363.
141 See *Tanganyika Law Society and Legal and Human Rights Centre and Reverend Christopher R Mtikila v United Republic of Tanzania* ACtHPR 009 and 011/2011.
142 Art 3 Vienna Convention on Diplomatic Relations (1961).

In terms of the ability to represent the state, the diplomatic capital of a state can be negatively affected through restricting the mobility of state representatives through travel bans or the refusal to grant visas, such as in the cases of Mauritania (2008), Guinea (2009), Madagascar (2010) and Central African Republic (2013) following unconstitutional changes of government in those states.

The ability to protect the interests of a state, negotiate and gather information can also be substantially diminished when a state is suspended from the activities of the AU. Since suspension reduces the respective states access to information concerning the functioning of the AU, it becomes more difficult to actively weigh in on negotiations and ensure that its interests are protected within the continental arena. The suspensions of states after an unconstitutional change of government are cases in point. Therefore, the measure of the AU to suspend states can have both political as well as diplomatic consequences. This of course is rather unsurprising considering the intimately-connected nature of diplomacy and politics. Yet, there is merit in distinguishing between the two types of sanctions to better understand the distinct effects of the drastic measure of suspension.

2.1.6 Economic sanctions

The fourth category of sanctions concerns measures that affect economic resources. Economic sanctions are generally expressed in relation to financial resources or economic activities and transactions. Examples in response to African international legal infringements include the freezing assets or the imposition of trade restrictions. Also, the African Court frequently imposes sanctions of an economic nature by ordering states to pay compensation to victims of human rights violations. Similarly, the African Commission and the African Children's Committee have called on states to pay compensation for violating African international human rights norms.

2.1.7 Legal sanctions

The fifth type of sanctions are aimed at the legal capital of a state. With this type of measures the AU seeks to directly influence the legal frameworks and legal system of a member state. The most prominent example of legal sanctions is the African Court's authority to conduct an 'international judicial review', whereby it assesses national legal instruments for their compatibility with international norms. In several cases the Court found domestic laws to be in violation of international legal instruments and ordered AU member states to change their laws and in some cases even their constitution.[143]

143 See, eg, *APDF & IHRDA v Republic of Mali* ACtHPR 046/2016; *Lohe Issa Konaté v Burkina Faso* ACtHPR 004/2013; *Actions Pour la Protection des Droits de l'Homme v Republic of Côte d'Ivoire* (*APDH v Côte d'Ivoire*) ACtHPR 001/2014; *Tanganyika Law Society and Legal and Human Rights Centre and Reverend Christopher R Mtikila v United Republic of Tanzania* ACtHPR 009 and 011/2011; and *Jebra Kambole v United Republic of Tanzania* ACtHPR 018/2018.

Based on its human rights promotion and protection mandate, the AU has also developed a whole set of initiatives that may undermine the legal capital of a state. For example, the range of human rights violations found in relation to fair trial rights by the AU's human rights bodies together with their orders to remedy these violations through the adoption of alternative procedures and practices, may be categorised as legal sanctions.

Similarly, the growth of AU surveillance mechanisms to monitor the legal systems of AU member states may also impact the legal capital of a state. For example, in the context of preventing unconstitutional changes of government and strengthening the capacities of the AU to manage such situations, the PSC 'requested the [AU] Commission to collect the constitutions of all AU member states for reference and ultimate study, subject to the availability of funds, in order to identify inconsistencies with good governance and standard constitutionalism and therefore constitute a potent threat to social order, peace and stability'.[144] Another example is the deployment of AU human rights observation missions, as seen in the cases of Mali[145] and Burundi.[146] These missions generally have as their mandate to monitor the human rights situation on the ground and to report violations of human rights and international humanitarian law, possibly leading to internal changes in national legal, judicial and prison systems. Similar recommendations are usually formulated in the context of AU Election Observation Missions to suggest legal and institutional reform of the electoral frameworks of member states. In the aftermath of the contentious elections in Gabon, the AU also proposed to deploy constitutional court observers, to assist the local body in dealing with an electoral dispute.[147] (The offer was not accepted.)

These legal surveillance initiatives generally do not constitute sanctions in a direct sense. However, they do reveal *lacunae* in the legal capacity of a state, which the AU aims to supplement or even replace.

Similar complementary or substitute action by the AU in the legal field can be found in the domain of criminal justice. For example, the AU was instrumental in the establishment of the 'Extraordinary African Chambers in the Senegalese Courts for the Prosecution of International Crimes Committed in Chad between 7 June 1982 and 1 December 1990'.[148]

At the time of writing, the AU was also considering establishing a hybrid court to dispense international criminal justice in the context of the humanitarian crisis

144 PSC Press Statement of the 432nd Meeting (29 April 2014), AU Doc. PSC/PR/BR.(CDXXXII).
145 See PSC Communiqué of the 353rd Meeting (25 January 2013), AU Doc. PSC/AHG/COMM/2.(CCCLIII).
146 See PSC Communiqué of the 507th Meeting (14 May 2015), AU Doc. PSC/PR/COMM (DVII); PSC Communiqué of the 515th Meeting (13 June 2015), AU Doc. PSC/PR/COMM.2 (DXV); PSC Communiqué of the 551st Meeting (17 October 2015), AU Doc. PSC/PR/COMM.(DLI).
147 See PSC Communiqué of the 624th Meeting (13 September 2016) AU Doc. PSC/PR/COMM(DCXXIV).
148 Statute of the Extraordinary African Chambers in the Senegalese Courts for the Prosecution of International Crimes Committed in Chad between 7 June 1982 and 1 December 1990 (EAC Statute), available in the *African yearbook of international law online* (2011) 443-458.

in South Sudan.[149] The AU equally developed and adopted a legal instrument in 2014 (the Malabo Protocol) to establish international criminal jurisdiction for the AU's judicial mechanism.

2.1.8 Security sanctions

The final category of sanctions involves all forms of actions or threats that impact the security resources of a state. Examples of security sanctions imposed or threatened by the AU include arm embargos, which may have as an effect the reduction of the state' resources to defend itself from internal or external violence.

As an additional surveillance technique within the security realm, the AU has also started deploying military observation missions, as in the case of Burundi, with the mandate to verify processes of disarming militias and other armed groups.[150]

The AU has also developed a range of instruments to complement or supplant conflict mediation efforts, which can influence how states' security resources are best managed. These AU mechanisms range from appointing a special representative or envoy, as seen in the cases of Guinea (2009) and Libya (2013), a high-level panel as in the cases of Côte d'Ivoire (2011) and Egypt (2014), an International Contact Group as in the cases of Madagascar (2009) and the Central African Republic (2013), to deploying its own standby mediation body, the Panel of the Wise.[151] Depending on the success of these mediation efforts, they may ultimately even result in military interventions, as threatened during the political crisis in Burundi (2015).

This wide variety of sanctioning mechanisms and its ongoing expansion underscores an overall trend of a steady yet fragile growth of the AU's governmental authority. Its increased capacity to signal disapproval of member states' behaviour and impose costs on states to modify their action and make amends where necessary, underpins this growing authority. Table 4.2 gives an overview of examples of the variety of African international legal sanctions.

149 See, eg, PSC Communiqué of the 912th Meeting (27 February 2020), AU Doc. PSC/PR/COMM.(CMXII).

150 See PSC Communiqué PSC/PR/COMM.(DLI) adopted on 17 October 2015.

151 The Panel of the Wise is a body composed of distinguished Africans with a mandate to advise and support the AU in all matters relating to the promotion and maintenance of peace, security and stability in Africa; see art 11 of the AU Protocol Relating to the Establishment of the Peace and Security Council of the African Union (2002).

Table 4.2: Variety of African international legal sanctions

Social sanctions

- Put the situation on the Peace and Security Council agenda or on the African Court on Human and Peoples' Rights docket
- Organize an extra-ordinary Peace and Security Council meeting or session of the African Court on Human and Peoples' Rights to discuss the alleged violations
- Expressing concern about a situation
- Condemning a situation
- Mentioning the violation in a report, resolution or other type of decision

Political sanctions

- Suspension from AU policy organs meetings and activities
- Restrict participation in national elections
- Restrict participation in (transitional) governments
- Order remedies for the violation of the right to participate in government
- Deploy election observers

Diplomatic sanctions

- Travel bans
- Visa refusals
- Limit access to information

Economic sanctions

- Freezing of assets
- Imposing trade restrictions
- Ordering the payment of reparations

Legal sanctions

- Order the amendment of laws
- Order the amendment of constitutions
- Deploy human rights observers
- Deploy constitutional observers
- International criminal justice penalties

Security sanctions

- Imposing of arms embargos
- Deploy military observers
- Setting up mediation missions
- Organizing a military intervention

Source: M Wiebusch 'Africanization of constitutional law' in A Abebe, R Dixon & T Ginsburg (eds) *Comparative constitutional law in Africa* (2022) 376-382

Closely related to this mapping of imposition of costs on violators of African international law are reflections about the ways and means of repairing damage caused by the said infringements. Five categories of reparations are commonly distinguished, namely, restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.[152]

Drawing primarily on the Comparative Study on the Law and Practice of Reparations for Human Rights Violations conducted by the African Court, the following definitions of these reparation forms may be converted in relation to violations of African international law, more generally.

The first reparations category, *restitution*, is described as the act of ending any ongoing violations and restoring the victim, to the greatest extent possible, to his or her original situation before the commission of the African international law breach. Whereas *compensation* constitutes the award of monetary funds following the finding of an African international legal violation. The third category, *rehabilitation*, aims at restoring the health and well-being of victims of African international law infringements through the provision of medical and psychological care as well as legal and social services. While *satisfaction*, the fourth category, refers to measures that acknowledge the violation of African international law, aim to end any continuing violations, and restore the dignity and reputation of the victim. Finally, measures in the fifth category, *guarantees of non-repetition,* seek to avoid the commission of similar African international legal contraventions from reoccurring, whether against the same or other possible victims.

It goes beyond the scope of this book to give a full overview of the different possible forms of reparations. However, for an overview of specific examples of such reparation measures, see Table 4.3.

152 See, eg, the excellent 'reparations guide' developed by the Human Rights Implementation Centre at the University of Bristol Law School (2021) as well as from the extremely useful 'Comparative Study on the Law and Practice of Reparations for Human Rights Violations' conducted by the African Court on Human and Peoples' Rights (2019).

Table 4.3: Possible forms of African international legal reparation measures

Restitution measures

- Restoration of employment and reinstatement of employees to their former positions, including restoration of benefits, retirement rights and pensions
- Restoration of liberty through release from prison or detention
- Nullification of criminal judgments
- Cancellation of fines
- Expungement of criminal records
- Retrial on criminal charges
- Return of property to restore victims to their original situation, where possible, before they suffered harm
- Requiring detained persons to have access to family members
- Publication of a book that was previously censored
- Demarcating and granting title to land, including traditional lands claimed by indigenous communities
- Reviewing and modifying natural resource concessions within the traditional lands of indigenous communities
- Guaranteeing the safety and security of individuals so they can return to homes from which they were displaced
- Ordering return of children to their parents or to a particular parent
- Recognition of citizenship
- Permitting persons to return to their country
- Replacement of national identity documents
- Restoration of the natural environment

Compensation measures

- Monetary and quantifiable awards for damages for moral damages
- Lost income and loss of future earnings
- Lost property
- Lost opportunities, including employment, education, and social benefits
- Medical expenses
- Legal costs and expenses

Rehabilitation measures

- Provision of legal and social services to those who have suffered harm
- Provision of medical or psychological care
- Provision of education
- Provision of goods and basic services

Satisfaction measures

- Verification and acknowledgement of the truth
- An official declaration or a judicial decision establishing the international legal violation
- Public apologies
- Publication of decisions establishing responsibility for violating international legal norms, including possible instructions about their translation and scope of dissemination
- Reporting obligations or the establishment of specific mechanisms to monitor compliance with reparations ordered

- Searching for individuals who have disappeared
- Attempts to locate, identify and recover the remains of deceased victims and deliver them to their next of kin for reburial
- Investigation of the facts regarding the violation and holding the perpetrators accountable, including through prosecutions as appropriate
- Erection of monuments, establishment of memorials, and other forms of commemoration, memorialization or tribute to the victims

Guarantees of non-repetition measures

- Institutional reforms
- Legislative changes or constitutional amendments
- Nullification or repeal of laws that violate international legal norms
- Establishment of administrative procedures or practices to ensure that violations are not repeated
- Ratification of relevant treaties related to the subject matter of the violation
- Ensuring that complaints are properly investigated and that perpetrators are brought to justice and held accountable
- Review of state policies and procedures with respect to prosecution
- Creation of standard protocols for investigations and forensic analyses
- Taking measures to ensure that domestic courts apply the law in ways that are consistent with international law
- Requiring that certain kinds of cases be heard before ordinary, rather than military courts
- Bringing conditions of public facilities, such as prisons, into compliance with international norms
- Establishment and enforcement of minimum norms and standards for public or private services, including lustration and vetting of public officials.
- Supervision, monitoring and/or inspections of facilities, such as prisons, by public authorities or appropriate non-governmental organizations to ensure compliance with laws and standards
- Establishment of complaint procedures and mechanisms to report violations of international legal norms
- Ensuring access to competent authorities, such as administrative tribunals and courts, to review complaints of violations of international legal norms
- Requiring State consultation with victim communities, particularly indigenous communities, before undertaking actions that may affect their rights
- Granting indigenous communities legal recognition of their collective juridical capacity
- Requiring environmental and social impact assessments prior to awarding certain kinds of projects
- Training and sensitization of officials, including law enforcement personnel, judicial personnel, military and security forces, civil servants, health sector personnel, social workers, and/or community members, as appropriate, on particular international legal norms aimed at preventing their violation from reoccurring

Source: 'Providing reparation for human rights cases: A practical guide for African states' (2021, Human Rights Implementation Centre, University of Bristol Law School) 10; 'Comparative study on the law and practice of reparations for human rights violations' (2019, African Court on Human and Peoples' Rights) 46-67

Tracing the trends relating to (i) the development of types of African international legal sanctions and reparations; (ii) their application tailored to specific circumstances; (iii) their varying levels of effectiveness and the explanatory factors for that variability; (iv) together with the evolving belief systems of the actors ordering these measures about what it is they intend to achieve, or in other words, their diverse punitive teleologies; (v) their shifting levels of remedial consciousness; (vi) their different corrective silences; as well as (vii) the rapidly-evolving disciplinary cultures they inhabit and shape, suggest a fruitful area for further research, as this may gradually lead to more complex and more complete theories of African international legal poenology.

Key Performance Indicators

▲ Measurement of the nature, type, scope, teleologies, effectiveness and trends of sanctions for violations of African international legal norms and reparations granted to victims of these violations:
- Number of sanctions (disaggregated by type: social, political, diplomatic, economic, legal and security sanctions)
- Number of reparation measures (disaggregated by type: restitution, compensation, rehabilitation, satisfaction, guarantees of non-repetition measures)

2.1.9 National legal instruments adopted to give effect to African international law

In line with the view of Ginsburg that 'domestic politics [are] a driving determinant of international behavior, and specifically legal behavior,'[153] I suggest that any comprehensive grasp of the development of African international law will also entail a similar firm grasp of the extent to which it is embedded in domestic contexts. This embeddedness may come in different forms. One crucial measure is the degree to which African international law is translated into standards, principles and rules captured in national legal instruments, such as legislative or administrative acts, decisions or policies or even constitutions.[154] This exploration may also usefully consider the role of national law commissions to ensure that domestics legal systems remain aligned with international legal developments.

These operations naturally invoke questions that resonate with 'monism' and 'dualism' debates, as well as considerations of the applicability of the doctrines of 'primacy' and 'direct effect'. All of these merit further exploration in their applicability or irrelevance to the impact of African international law, especially since there is likely going to be significant variation of this international legal

153 T Ginsburg *Democracies and international law* (2021).
154 Eg, various constitutions of AU member states make explicit reference to the African Charter on Human and Peoples' Rights; see the Constitutions of Benin, Angola and Guinea.

conversion into domestic instruments across countries, subject-areas and types of domestic legislative or administrative measures.

Key Performance Indicators

▲ Measurement of the degree to which African international law and policies are translated into standards, principles and rules captured in national legal instruments:
- Number of national constitutional articles
- Number of national legislative acts
- Number of national administrative acts
- Number of national policies
- Number of decisions by national institutions

2.1.10 References to African international legal instruments by national courts

Besides national governments and parliaments, the most consequential actors for the development of African international law are plausibly national courts. The attitudes of national judiciaries towards African international law can be highly significant in terms of enhancing the performance of African international law or undermining it.

Tools to measure the impact of African international law through the lens of national judiciaries may include the relative increase or decrease in number of citations of African international legal instruments. At the moment, however, references to the jurisprudence of African international legal bodies by national courts are still very limited. There are some notable exceptions. See, for example, the references by the Constitutional Court of Lesotho,[155] the High Court of Kenya,[156] the High Court of Malawi[157] to the African Court's decision in *Konaté v Burkina Faso* concerning the decriminalization of defamation. Or, the South African Constitutional Court's reference[158] to the African Court's decision in *Mtikila v Tanzania*, where the African Court found the ban on independent electoral candidacies in Tanzania's national Constitution to constitute a violation of the African Charter in respect of the right to participate in government.[159]

The increase or decrease in references to African international law (including its case law) can be explained through various factors. National courts can refer to or ignore relevant judgments of African dispute settlement mechanism or relevant provisions of African international law for a host of reasons, including variable levels of knowledge of and familiarity with African international law;

155 Lesotho, Constitutional Court, *Basildon Peta v The Minister of Law, Constitutional Affairs and Human Rights, Attorney General and The Director of Public Prosecutions* (Judgment 18 May 2018).
156 Kenya, High Court, *Jacqueline Okuta & Another v Attorney General & 2 Others* (Judgment of 6 February 2017).
157 Malawi, High Court, *Joshua Chisa Mbele v The Republic* (Order of 20 June 2022).
158 South Africa, Constitutional Court, *New Nation Movement NPC & Others v President of the Republic of South Africa & Others* (Judgment of 11 June 2020).
159 *Mtikila v Tanzania* Application.011/2011 (Judgment of 14 June 2013).

legal tradition influence whereby common law courts appear to show a greater, yet not uniform, openness, than courts in civil law systems to reference foreign legal instruments; as well as principled resistance or appreciation to the infusion of international legal elements in national jurisprudence.

Systematically monitoring the tendencies of national judiciaries to refer (or not) to African international legal instruments across various across countries, types of jurisdictions (for instance, civil, criminal, administrative, constitutional courts) and judicial hierarchy (for instance, first instance courts, court of appeal, supreme courts) would provide valuable insights concerning the levels acceptance or rejection of African international law across national jurisdictions.[160]

Key Performance Indicators

▲ Measurement of relative increase or decrease in number of citations of African international legal instruments (including case-law):
- Number of references to (O)AU legal instruments in decisions of national courts, disaggregated by civil, criminal, administrative, constitutional courts.
- Number of references to (O)AU legal instruments in decisions of national courts, disaggregated by first instance courts, courts of appeal, supreme courts.

2.1.11 References to African international law in public discourse

To better grasp the performance of African international law, it is also significant to consider the practices relating to how it is spoken about. The discourse surrounding African international law can be immensely revealing about its *reception* and the broader *perception* of how African international law works. For example, if political interventions are justified in African international legal terms, rather than theological arguments or economic justifications, this would be salient from a discursive point of view. It reveals the importance attributed to legal argumentation schemes as tools to persuade interlocutors or constituencies from where their power is directly or indirectly derived.

The sources of such discourse may include public statements by state officials and politicians in the media or through the institutional channels of the AU (for instance, through *notes verbale* during meetings of the AU policy organs or during other AU activities) or during national level proceedings of state organs (for instance, during sessions of parliament or cabinet discussions). Public opinions about the impact of African international law may also derive from transnational legal communities (including international and domestic judges, academia, legal practitioners, civil society, regional and continental bar associations and law

160 Currently no systematic data is available of the number of references in national courts to African international legal instruments. For some initial explorations in this field, see RB Dinokopila 'The impact of regional and sub-regional courts and tribunals on constitutional adjudication in Africa' in CM Fombad (ed) *Constitutional adjudication in Africa* (2017); M Killander & H Adjolohoun (eds) *International law and domestic human rights litigation in Africa* (2010).

societies) in professional outlets or the media. Or more generally, opinions could be voiced in newspapers, social media outlets, television or radio evaluating in one way or another the operation of African international law.

In terms of substance, these opinions may either be favourable or critical and address, among others, the quality of legal reasoning or methods of African international legal decision making, the outcome of an African international legal decision, or the opinion may be based on general popular resentment or support towards African international law and institutions more generally.

Key Performance Indicators

▲ Measurement of the reception and the broader perception of how African international law works:
- Number of references to (O)AU legal instruments in public statements by state officials and politicians in the media.
- Number of references to (O)AU legal instruments through the institutional channels of the (O)AU (e.g., through notes verbale during meetings of the (O)AU policy organs or during other (O)AU activities).
- Number of references to (O)AU legal instruments during national level proceedings of state organs (e.g., during sessions of parliament or cabinet discussions).
- Number of references to (O)AU legal instruments in newspapers, social media outlets, TV or radio.

2.1.12 Knowledge products and platforms on African international law

The impact of African international law may also be measured by the volume of knowledge production associated with its functioning. This may refer to relative increases or decrease of academic publications and platforms to disseminate knowledge about how African international law works. Specific measures of this nature would include the number of reports, articles, blogs,[161] books, encyclopedias, textbooks, advanced introductions, model syllabi,[162] research handbooks, research projects,[163] special issues of journals, databases, research bibliographies, canons on African international legal thought, canons of African international legal theories, professorial chairs, dedicated journals,[164] book series, research centers,[165] documentaries, film, podcasts produced relating to African international law.

161 See, eg, Afronomicslaw.org.

162 On African legal education reform, see, eg, CM Fombad 'Africanisation of legal education programmes: The need for comparative African legal studies' (2014) 49 *Journal of Asian and African Studies* 383; CM Fombad 'Fostering a constructive intra-African legal dialogue in post-colonial Africa' (2022) 66 *Journal of African Law* 1.

163 See, eg, 'African Union Law Research Network', https://africanunionlaw.org/ (accessed 15 April 2022).

164 See, eg, *African Human Rights Law Journal*, *African Yearbook of International Law*, *AUCIL Journal of International Law*, *Yearbook of the African Union Commission on International Law*, *Yearbook on the African Union*, *African Journal of International and Comparative Law*, *African Human Rights Yearbook* and, to some extent, the *Journal of African Law*.

165 See, eg, Centre for Human Rights and Institute for International and Comparative Law in Africa, University of Pretoria.

Thus far, the level of academic engagement with African international law remains arguably limited but is gradually expanding. Many of the knowledge products outlined above do not yet exist. However, it may be anticipated that with further expansions of the volume of African international law there will likely be a corresponding effort to start systematizing and categorizing its outputs as well as developing theories to better explain the development of African international law. And if there is a growing sense of importance attributed to African international legal operations, more academic scrutiny may follow, which in turn raises greater awareness about the African international legal field, probably prompting further analysis and knowledge production in a circular fashion.

Key Performance Indicators

▲ Measurement of the volume of academic and policy knowledge production associated with functioning of African international law:
- Number of reports
- Number of journal articles
- Number of blogs
- Number of blog posts
- Number of books
- Number of encyclopedias
- Number of textbooks
- Number of advanced introductions
- Number of model syllabi
- Number of research handbooks
- Number of research projects
- Number of special issues of journals
- Number of databases
- Number of research bibliographies
- Number of canons
- Number of professorial chairs
- Number of dedicated journals
- Number of book series
- Number of research centers
- Number of documentaries
- Number of films
- Number of podcasts

2.1.13 Meetings, trainings, courses and degrees organized on African international law

Monitoring the knowledge production activities surrounding African international law should arguably not be restricted to tangible knowledge products such as books and journals. Relative increases or decreases of meetings, conferences, colloquia, trainings, courses or even full academic degrees[166] on

166 See, eg, the LLM/MPhil in Human Rights and Democratisation in Africa at the University of Pretoria, South Africa, and the Master's Degree programme on African Union Law and policies at the University of Carthage, Tunisia.

African international may equally reveal the level of socialization of actors that through their participation in such 'knowledge events or activities' become of members of the social field of African international law.

Key Performance Indicators

▲ Measurement of the volume of 'knowledge events or activities' contributing to acculturation with African international law:
- Number of (O)AU meetings or meetings in general dedicated to African international legal issues
- Number of (O)AU conferences or conferences in general dedicated to African international legal issues
- Number of (O)AU colloquia or colloquia in general dedicated to African international legal issues
- Number of (O)AU trainings or trainings in general dedicated to African international legal issues
- Number of (O)AU courses or courses in general dedicated to African international legal issues
- Number of full academic degrees (BA, MA, PhD) dedicated to African international legal issues

2.1.14 Accessibility to African international law documents

The reach of African international law may also be expressed in levels of its accessibility of its constituent documentation, including African international decisions, policies, reports, *travaux préparatoires* of treaties, and so on. The quality of accessibility of African international law can be further analyzed in terms of its availability across linguistic barriers (for instance, the number of languages African international law documentation is available) or geographical barriers (for instance, the level of digitalization of African international law documentation or existence of decentralized information centers or archives across the continent). Such measures may allow the drawing of important conclusions concerning the level of transparency of the African international legal procedures.

The challenges of access to African international legal data has been frequently criticized by AU observers, with particular reference to the practice of the AU of holding its deliberations usually behind closed doors as well to as the unavailability of records or minutes of the meetings or voting records of the key decision-making bodies of the AU, including the Assembly, the Executive Council and the PSC, as these transparency deficits inhibit more accurate understandings of individual member states' interests, motivations, preferences and decisional behaviours.[167]

167 See, eg, U Engel 'The 2007 African Charter on Democracy, Elections and Governance: Trying to make sense of the late ratification of the African Charter and non-implementation of its compliance mechanism' (2019) 54 *Africa Spectrum* 128, 139; R Chitiga & B Manby *Strengthening popular participation in the African Union: A guide to AU structures and processes* (2009).

Key Performance Indicators

- ▲ Measurement of the accessibility of African international law's constituent documentation, including (O)AU decisions, policies, reports, travaux préparatoires of treaties, etc.:
- Number of (O)AU legal documentation available
- Number of (O)AU legal documentation available in different languages
- Number of (O)AU legal documentation available in different regions
- Number of (O)AU legal documentation available online

2.2 Actors

Making and implementing African international law involves a wide range of actors both at AU level as well as state level, whereby the state can be disaggregated into various sub-state components, including governments, courts, parliaments, public administration, electoral bodies, media and civil society. The development of African international law is dependent on the level of synergy among and between these African international law constituencies, including, for example, between the Pan-African Parliament and national parliaments; the AU's Economic Social and Cultural Council (ECOSOCC) and civil society organizations; the African Court and constitutional and supreme courts, as well as the broader legal community comprising judges, lawyers, legal academics, bar associations and (transnational) NGOs; and the DEAU and electoral bodies, as well as other key electoral stakeholders such as political parties.

The quality of African international legal strategies in engaging with its constituencies in a holistic manner will influence its ability to hold states accountable and collectively build momentum to improve levels of compliance with African international law. Cooperative engagement with a wide variety of implementation partners might also encourage more robust enforcement of African international law through political pressure in the AU policy organs, that is, the Assembly and Executive Council. For example, article 23(2) of the AU Constitutive Act establishes an as of yet unused, sanctioning mechanism for 'any member state that fails to comply with the decisions and policies of the Union'. Without sufficient domestic and transnational political support, it is unlikely that a wide enough consensus will materialize in such political fora to sanction other governments for the violation of legal commitments.

Importantly, resistance or acquiescence of African international law may proceed according to different patterns depending on the actors involved. Therefore, it is helpful to move away from general references to 'member states' and identify instead specific governance and civil society actors that play key roles in the different forms of resistance to or acceptance of African international legal norms, procedures and institutions. This is especially the case since support or resistance at one site can be expressed in different ways, founded on different premises and of varying levels of intensity, but can become mutually reinforcing where a dominant narrative of consensus or resistance emerge. Promotion of or resistance to African international law can emanate from a single actor (for

instance, national government) or, more commonly, a constellation of different actors within the governance system (for instance, courts, political parties) and civil society (NGOs, media, academics, bar associations, law societies).

Such disaggregated approaches to analyzing *constituencies* of African international law may facilitate more nuanced analyses of the level of socialization of the actors involved in African international law making and implementing, including the extent to which their attitudes and behaviour are influenced by the African international legal machinery. It also helps to debunk impractical references to bland concepts without analytical content, such as 'political will'.

Furthermore, it is expected that the levels of making and implementing of African international law will vary according to the quality of the governmental regime. Implementation of international agreements is more probable in rule of law regimes[168] than in authoritarian states.[169] Of course, this observation is almost tautological considering that respect for African international law to some extent can be be considered inherent in the evaluation of a state's adherence to the rule of law. Nonetheless, if, for example, African international legal institutions energetic seizure of their mandate (including enforcing of African international legal instruments) is not matched with a commensurate commitment by states to the idea of rule of law, then political backlash against these institutions may follow, which could range from (systematic) non-compliance with decisions to a broad transnational coalition to dismantle these institutions, as discussed below.

Considering the operation of African international law on a continent where a variety of governance systems exist, ranging from authoritarian states to well-established democracies, extreme variability of its performance can be expected across countries.

In authoritarian regimes, for example, one can expect the national government to take the leading role in resisting to African international legal influence and national courts and the media – depending on the extent to which they have been 'captured' by the government – might be considered 'national government' actors rather than separate actors.

In contrast, civil society actors, especially human rights NGOs, tend to be more active and numerous in a democratic regime than in an authoritarian regime, with the result that their role in African international legal processes will be affected by the nature of the state in which they operate. Accordingly, resistance to African international law (or support of African international law, but this tends to be more rare) emanating from authoritarian regimes can differ from resistance emanating from more democratic regimes (although all exist on a spectrum, and this is not to say that resistance strategies from authoritarian and democratic states will necessarily differ). Resistance can come about more swiftly, and national governments tend to take on a more central role in authoritarian states than in the slow consensus-building required within democratic states.

168 M Kahler 'Conclusion: The causes of and consequences of legalization' (2000) 54 *International Organization* 675.

169 For an analysis of the influence of regime types (liberal versus illiberal democracies) on the implementation of ACDEG, see Engel (n 167).

Further, on a continent marked by various instances of armed conflict, it is presumable that such conflict dynamics may have an influence on the ability of some states to implement African international legal instruments. Higher levels of implementation are expected in stable countries and post-conflict states. However, the latter group may struggle with more capacity challenges as armed conflicts tend to drain and destroy state resources. At the same time, post-conflict processes, including transitional governance arrangements, are increasingly fused with international law and politics matched with assistance programmes with a bias towards liberal democratic state reconstruction.[170] These dynamics could also propel acceptance and implementation of African international legal norms.

Finally, the mobilization of support for or resistance to the development of African international law may also be contingent on the interests of powerful states. Support by states with greater military and economic clout, such as South Africa, Nigeria, Algeria, Morocco and Egypt, for the making and implementing African international law, would increase the likelihood of 'binding weaker states to the system' as well as allowing the 'stronger powers to bear the costs of enforcement'.[171]

I have identified three key indicators (which could be further broken down) to measure the performance of African international law in terms of its institutional development, including the relative increase or decrease of the scope of African international institutions; levels of participation and inclusion in African international legal processes; and resources available to African international legal institutions.

2.2.1 Scope of African international institutions

One of the key measures to detect the development of African international legal regime relates to the institutional arrangements underpinning it. Accordingly, the development of African international law can be measured by, on the one hand, the progressive expansion of its institutional apparatus by establishing new mechanisms and gradually enlarging their mandate in the African international legal field. On the other hand, resistance to African international legal developments can also be established through initiatives directed at tinkering with the institutional set-up and functioning of African international legal institutions by suspending or dissolving institutions or some of its procedures, or by creating new or alternative institutions to either replace an institution or to co-exist alongside it.[172] An example of the latter is the establishment of a new dispute settlement mechanism under the African Continental Free Trade

170 See E De Groof & M Wiebusch (eds) *International law and transitional governance – Critical perspectives* (2020); R Paris 'International peacebuilding and the "mission civilisatrice"' (2002) 28 *Review of International Studies* 637.

171 J Goldstein and others 'Introduction: Legalization and world politics' (2000) 54 *International Organization* 391.

172 Although not a study of the African judicial context, see Webb for an excellent analysis and rich insights on the ways, means and consequences of international judicial integration and fragmentation; P Webb *International judicial integration and fragmentation* (2016).

Agreement, whereas similar functions could arguably have been fulfilled by the earlier foreseen African Court of Justice. This example could be considered a form of resistance, as it would arguably impair the authority of the original court. Furthermore, the co-existence within the field of human rights of a continental human rights court and a number of sub-regional economic integration courts, such as the ECOWAS Court of Justice and EAC Court of Justice, which have incrementally increased their mandate in the field of human rights, could also cause challenges to the authority of the African Court. The reason is that it may lead to "forum shopping' and the option of avoiding the African Court and thereby depriving the Court of the possibility to fully exercise its jurisdiction. A systematic and widespread avoidance of the African Court can drastically limit its authority and, thus, amount to a form of resistance to African international law.

Key Performance Indicators

▲ Measurement of expansion or reduction of the African international institutional apparatus by establishing new mechanisms or discontinuing older mechanisms, and gradually enlarging or limiting their mandate in the African international legal field:
- Number of (O)AU institutions or mechanisms
- Number of responsibilities of different (O)AU institutions and mechanisms

2.2.2 Levels of participation and inclusion in African international legal processes

The performance of African international law can also be measured in terms of the levels of participation and inclusion in African international legal processes, including decision-making procedures, litigation and capacity-building initiatives.

This assessment fundamentally involves asking questions about who is involved? Who is authorized to speak? When are they involved? What is the extent of their involvement? What is done with their views?

Calculating the varying levels of participation necessitates breaking down the types of participants across different categories, such as institutional identities and social identities. With regard to institutional identities, the number and extent of involvement in African international legal processes could be traced of members of parliament, government, public administration, the judiciary, the diplomatic community, national human rights institutions, ombudspersons, academia, non-governmental organizations, the media, bar associations and law societies, the private sector and African international organizations.

These figures could then be cross-matched with the tracking of particular social identities of these actors, for example, across gender, age, nationality, ethnicity, language, class, academic discipline, political affiliation, religion or disabilities.

Such disaggregated analyses of the field of African international law in terms of the producers and recipients of African international legal discipline and interventions may paint a much more nuanced picture of the direction in which African international law is developing.

Key Performance Indicators

▲ Measurement of the levels of participation and inclusion in African international legal processes, including decision-making procedures, litigation and capacity-building initiatives. Calculating levels of participation necessitates breaking down the types of participants across different categories, such as institutional identities and social identities:

Participation in African international legal processes across institutional identities:

- Number of parliamentarians
- Number of government officials
- Number of public administration members
- Number of members of the judiciary
- Number of diplomats
- Number of national human rights institutions' staff
- Number of ombudspersons
- Number of academics
- Number of non-governmental organizations' staff
- Number of journalists
- Number of bar associations and law societies' members
- Number of private sector actors
- Number of African international organizations staff

These figures could then be cross-matched with the tracking of particular social identities of these actors:

- Gender
- Age
- Nationality
- Ethnicity
- Language
- Class
- Academic discipline
- Political affiliation
- Religion
- Disabilities

2.2.3 Resources available to African international legal institutions

The performance of African international law is significantly determined by the human, technical and financial resources available to the institutions responsible for its making and implementation.

Any institution is only as strong as the people behind it. Therefore, a closer examination of the evolution of human resources and the organizational culture of African international legal institutions may lead to a revealing account of how African international law develops. The availability or absence of adequate staffing and technical expertise in these institutions may significantly affect the extent to which African international law may have an impact. Furthermore, the functioning of such institutions may also be considerably influenced by the availability of material resources, including sufficient workspace, dedicated buildings, fit-for-purpose digital technology tools and other material equipment.

The availability of these resources of course to a large extent is tied to the amount of financial resources dedicated directly or indirectly to the work of African international law.

The challenge of capacity (financial, technical and human) is well-known both within member states as well as within different AU institutions. A lack of capacity within national law and policy-making organs can impede various crucial aspects of the African international law implementation, ranging from organizing the ratification processes and developing implementation legislation and policies, to carrying out procedural treaty obligations such as state reporting. Capacity challenges, combined with an increasing onus on states to report on a multitude of instruments, risk undermining the impact of treaty reporting mechanisms. However, as noted above, there appears to be a trend of greater continental technocratization whereby AU experts provide technical support to ensure effective implementation of African international law. This trend may form a solution to overcome national capacity problems, provided that the AU itself is endowed with sufficient capacity.

In sum, auditing the economy of the African international legal field may disclose far-reaching insights about the evolution of African international law.

Key Performance Indicators

▲ Measurement of resources available to institutions responsible for making and implementing African international law:
- Size of budget
- Number of staff
- Available technical expertise
- Material equipment
- Digital technology tools
- Square meter office space

2.3 Processes

The performance of African international law will also be significantly dependent on a number of procedural factors. I have identified at least six measures (which could be further disaggregated). These are relative increases or decreases of membership in African international legal regimes; secondary legal instruments to regulate African international legal processes; the volume of African international legal litigation; levels of implementation of African international law; evidence about compliance with African international law; and cooperation during African international legal processes.

2.3.1 Membership in African international legal regimes

A relevant variable of the performance of African international law are the membership levels in the African international legal regime. For example, treaties are generally only binding on those states that have ratified the instruments or, in

other words, become members of the particular treaty regime.[173] Therefore, full continental implementation of African international treaties can only be achieved through full continental ratification of these treaties. However, only a few African treaties have reached the status of full ratifications[174] and several treaties have not even been ratified by enough states for them to enter into force. Many treaties have received higher numbers of signatures, which could be an encouraging sign, as signature often is an important stepping stone towards ratification.[175] At the same time, several states have been signatories of treaties for many years without seeming to take the necessary extra step of ratification.

Non-participation in particular treaty regimes can also have institutional effects. For example, *de jure* the AU has envisaged a much more complex African international judicial structure, than that operating *de facto* right now. This structure foresees one combined African Court of Justice and Human and Peoples' Rights with three separate jurisdictions: general affairs; human and peoples' rights; and international criminal jurisdiction. There are four protocols underpinning this AU judicial structure, but only two of these have entered into force: the 1998 Protocol establishing an African Court with human rights jurisdiction and the 2003 Protocol setting up an African Court of Justice with general international legal jurisdiction.[176] The latter Court has not yet been operationalized as it has been overtaken by the 2008 Protocol that aims at merging these two jurisdictions under one Court and the 2014 Protocol which intends to add international criminal jurisdiction to this merged Court.[177] However, these two protocols have not yet entered into force and, therefore, this single Court with combined jurisdictions has not yet been operationalized.

Furthermore, at the time of writing, only 33 (or 60 per cent) of the AU's 55 member states have accepted the jurisdiction of the African Court by ratifying its establishing Protocol. Many states have also declined to make the special declaration required to permit petitions by individuals and recognized NGOs to the Court, who are otherwise the main protagonists of human rights litigation. To date, only 12 states (or 22 per cent) made this declaration,[178] of which four states have already withdrawn their declaration in response to judgments that they found unfavourable.[179] The result is a continental judicial governance regime with a very limited geographical reach which presents serious challenges to the overall effectiveness of the Court's mandate to protect human rights across the whole African continent.

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173 For current purposes, included in this understanding is the act of 'accession', as it has the same legal effects as ratification. See Vienna Convention, art 2(1)(b).

174 Notable exceptions are the AU Constitutive Act (2000) which has been ratified by all 55 AU member states and the African Charter on Human and Peoples' Rights which has been ratified by 54 AU member states, the only missing state being Morocco.

175 Vienna Convention arts 12 & 18.

176 See KD Magliveras & GJ Naldi 'The African Court of Justice' (2006) 66 *ZaöRV* 187.

177 CC Jalloh, KM Clarke & VP Nmehielle (eds) *The African Court of Justice and Human and Peoples' Rights in context: Development and challenges* (2019).

178 These are Burkina Faso (1998), Malawi (2008), Mali (2010), Tanzania (2010), Ghana (2011), Rwanda (2013), Côte d'Ivoire (2013), Benin (2016), Tunisia (2017), The Gambia (2020), Guinea Bissau (2021) and Niger (2022).

179 These are Rwanda (2016), Tanzania (2019), Benin (2020) and Côte d'Ivoire (2020).

Overall, the monitoring of states' behaviour in joining, partially joining (for instance, by making treaty reservations[180]), not joining, threatening withdrawal, partial withdrawal, and full withdrawal of African international legal regimes may lead to important conclusions concerning the development of African international law.

Key Performance Indicators

▲ Measurement of membership levels in the African international legal regime:
- % of (O)AU treaties signed
- % of (O)AU treaties ratified
- % of (O)AU treaties entered into force
- Number of withdrawals of (O)AU treaties
- Number of reservations made on (O)AU treaties

2.3.2 Secondary legal instruments to regulate African international legal processes

Another important measure of the performance of African international law is the extent of and level of detail to which its internal procedures are regulated. This metric may relate to the existence and growth of manuals, guidelines, policies, standard operating procedures and practice guides concerning African international law making and implementation.

These 'secondary' international legal instruments and the extent to which they are adhered to may have a significant impact on the consistency and predictability of how African international law processes operate in practice. The quality and extent of codification of these procedural rules as well the levels of compliance with them may also reduce or enhance transaction costs, which may have an effect on the levels of efficiency and effectiveness of African international legal processes.

180 Art 2(1)(d) of the Vienna Convention on the Law of Treaties (1969) defines 'reservations' as 'a unilateral statement, however phrased or named, made by a state, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that state'. Eg, with regard to the African Charter on the Rights and Welfare of the Child (1990), following reservations made, Botswana does not consider itself bound by art II (definition of a child) of the Charter; Egypt does not consider itself bound by arts XXIV (adoption), XXX (a-e) (children of imprisoned mothers), XLIV (communications), XLV(1) (investigations by the Committee) of the Charter; Mauritania does not consider itself bound by art IX (freedom of conscience and religion) of the Charter; and Sudan does not consider itself bound by arts X (protection of privacy), XI(6) (education of children who become pregnant before completing their education) and XXI(2) (Child marriage and betrothal of girls and boys) of the Charter, respectively.

Key Performance Indicators

▲ Measurement of the extent and level of detail to which the internal procedures of African international legal processes are regulated and complied with, by looking at the number, scope of regulation and compliance rate of African international legal process:
- Manuals
- Guidelines
- Policies
- Standard operating procedures
- Practice guides

2.3.3 Volume of African international legal litigation

Litigation is one of the key tools for generating the impact of African international law. Therefore, measuring the relative increase or decrease in litigation before African (quasi)-judicial bodies may allow important inferences concerning the effects of African international law.

Relevant indicators may include the number of applications (including requests for advisory opinions) brought before dispute settlement bodies as well the number of cases finalized.

Factors that may affect the variability of volume litigation may include restrictive or expansive access rules (see above concerning the limited availability of the African Court to potential litigants); familiarity with the system (see above concerning techniques to enhance or reduce awareness of the African international legal system); or cost-benefit analyses concerning the anticipated gains of litigation compared with the costs involved in financial terms as well as in time and effort.

Importantly, these cost-benefit analyses are not made solely in reference to chances of victory in individual cases or even whether compliance with decisions in their favour can reasonably be anticipated (see further below on implementation of decisions). Recent scholarship has shown that broader calculations are made concerning litigation strategies before African international dispute settlement mechanisms. Accordingly, it is suggested that

> litigants, activists, and opposition parties use these international courts for a variety of reasons: to articulate the legal political theories upon which their movement's goals are based; to give publicity and draw and promote public attention to mobilize aggrieved constituencies; to educate the public about a general problem of public policy; to expose conflict between aspiration of legal guarantees and the lived reality; and to put public pressure on governments and others to take their movements and concerns seriously.[181]

For this reason, it is submitted that studying the goals, processes and effects of African international litigation may facilitate a better understanding of how law may serve legal, social and political goals, including how African international

181 J Gathii (ed) *The performance of Africa's international courts – Using litigation for political, legal, and social change* (2020) 30.

dispute settlement mechanisms may 'act as focal points for mobilizing and organizing political actors, including opposition parties competing for power or [activists] contesting the use of political power by its wielders in their home country'.[182]

Key performance indicators

▲ Measurement of the relative increase or decrease of litigation before African (quasi)judicial bodies:
- Number of new cases filed (incl. requests for advisory opinions)
- Number of cases finalized

2.3.4 Levels of implementation of African international law

One of the most common measurements of African international legal performance of course is the relative increase or decrease in levels of implementation of African international legal instruments, including treaties, policies and decisions made by African international legal institutions.

Systemic (non)-implementation or partial implementation with African international law may erode or bolster the confidence by its constituents in the commitments and rule of law credentials of the members of the African international legal regime. It may also undermine or strengthen the credibility in the effectiveness and added value of the African international legal system.

Systemic non-implementation goes beyond single cases and often involves resistance by key institutions of the state, including parliaments and courts in their role as 'gatekeepers' for the penetration of African international law into national law.

Limited implementation will be the case if implementation is restricted to a particular sub-set of African international legal instruments or decisions. Partial implementation is different but related. Partial implementation refers to a situation where there is only implementation of parts of an individual legal instrument or decision. This will be the case if states comply only with some provisions of a treaty or an African international policy decision or if states comply only with some remedies prescribed in a decision by an international dispute settlement mechanism and leave others unimplemented, for a variety of reasons, ranging from a lack of commitment, political inertia to a lack of institutional and financial capacity.

Therefore, a strong variation in the implementation of the African international law may be detected across different policy issues, countries and time. Systematic monitoring of African international legal implementation will allow the detection of divergence or convergence in bringing national laws, policies and practice gradually into conformity with continental norms.

182 Gathii (n 181) 34.

Key performance Indicators

▲ Measurement of the relative increase or decrease in levels of implementation of African international legal instruments:
- % Implementation of (O)AU treaties
- % Implementation of (O)AU policies
- % Implementation of decisions made by (O)AU institutions and mechanisms.

2.3.5 Evidence about compliance with African international law

Assessments of levels of implementation of African international law are dependent on the availability of sufficiently reliable and comprehensive evidence concerning the compliance or non-compliance with African international law. This aspect of measuring the performance of African international law, therefore, relates to the volume and quality of information generated to establish (non)-compliance. Such information can typically be found in reports on compliance produced by states themselves in the context of state reporting mechanisms, by civil society actors, including NGOs or academia through shadow reports or empirical scholarly research, or by litigants before African international dispute settlement mechanisms in their submissions to allege violations of African international law.

Levels of (non)-compliance can also be established by African international institutions themselves, for example, in the context of elections, human rights or military observation missions, or through governance monitoring in the context of APRM review missions, or through fact-finding missions of the AU human rights bodies. With regard to the implementation of decisions of the AU policy organs, the AU Commission has a leading role in establishing the level of state compliance with AU policy decisions. A recent practice has developed to that effect whereby the Commission annually reports to the AU policy organs on the level of implementation of its decisions based on an implementation matrix.

Concerning the monitoring of the level of compliance with the decisions of the African Court, article 31 of its founding Protocol requires the Court to report on its work during the previous year, including specifically on the cases in which a state has not complied with its decisions, during each session of the Assembly of Heads of State and Government. This reporting obligation has since been devolved, and the African Court now reports on its activities and the status of compliance with its decisions to the Executive Council. Moreover, the Executive Council is notified of all the decisions of the Court and is responsible for monitoring their execution on behalf of the Assembly. The Court has considered that the division of competences between itself and Executive Council to ensure execution of its decisions can be described in terms of complementarity. Accordingly, the mandate of the Executive Council to monitor the execution of judgments does not prevent the Court from making a determination whether

a state has or has not complied with its judgment.[183] While the Protocol does not prescribe how the Court should proceed to make the determination of the degree of compliance with its judgments, the Court, like other international human rights courts, has developed a practice where it orders respondent states to report on the implementation of its decisions within a specified time.[184] In addition to these reports submitted by the states concerned on compliance with the decisions of the Court and the observations by the applicants on the said reports, the Court may obtain relevant information from other credible sources in order to assess compliance with its decisions. Furthermore, in case of a dispute as to compliance with its decisions, the Court may, among others, hold a hearing to assess the status of implementation of its decisions. At the end of the hearing, the Court will make a finding and, where necessary, issue an order to ensure compliance with its decisions. As of April 2022, no such compliance hearings have yet taken place. Based on reports submitted by state parties to the Protocol, the African Court established that in December 2020 the level of full compliance with its judgments stood at 7 per cent, whereas in 18 per cent of cases there was partial compliance, and in 75 per cent of cases there was non-compliance with its judgments. The African Court also calculated that as of December 2020 there had been 10 per cent compliance with its rulings on provisional measures.[185]

For the other AU human rights bodies, no systematically-collected information and reliable statistics are available on the compliance rates with its decisions. This reveals one of the main challenges facing the African human rights system as a whole, namely, the lack of adequate mechanisms to effectively monitor state compliance with decisions of the African human rights bodies. These challenges evidently, in turn, complicate the ability to generate accurate, reliable, specific, timely and comparable data about the performance of African international law.

Key performance indicators

▲ Measurement of availability of reliable and comprehensive evidence concerning the compliance or non-compliance with African international law:
- Number of state reports on compliance with African international law
- Number of NGO reports on compliance with African international law
- Number of academic reports on compliance with African international law
- Number of reports from litigants on compliance with decisions of African international dispute settlement mechanism
- Number of (O)AU institution reports on compliance with African international law
- Number of databases that track compliance with African international law

183 *Suy Bi Gohore Emile & Others v Côte d'Ivoire* Application 044/2019 (Judgment of 15 July 2020) para 53.
184 *Suy Bi Gohore Emile* (n 183) para 54.
185 Strategic Plan of the African Court 2021-2025 – *Deepening trust in the African Court by enhancing its efficiency and effectiveness* (2021) para 97.

2.3.6 Cooperation during African international legal processes

The effects of African international law to a large extent will also be dependent of the levels of cooperation and coordination among the various actors implicated in African international legal processes. These forms of cooperation may be strictly regulated, or these may be organized more loosely.

Procedures that have been more rigorously formalized may include appointment procedures of members to African international dispute settlement mechanisms or the procedures governing their functioning. For example, states may cooperate in electing members to different positions in African international legal institutions by dutifully submitting suitable candidates for election and appointment. However, such appointment processes can also be a source of resistance to African international law through, for example, the blocking of certain candidates for appointment, typically because the candidate is perceived to represent a particular direction of international law that is unfavourable to some states, or, alternatively, by promoting candidates who are highly skeptical of African international law. In some cases, the continuous blocking of appointments may not be because of political opposition to a particular nominated member of an African international legal institution, but to render the institution non-functional. For example, such blocking strategies have been deployed in the context of the SADC Tribunal and the EAC Court of Justice.[186] In the context of the African Court, member states also delayed in nominating judges to the Court after its founding Protocol was ratified in 2004. The initial plan to elect judges to the African Court in July 2004 failed, as too few candidates had been nominated, and it was not until July 2006 that the first 11 judges were sworn in before a summit meeting of African leaders in The Gambian capital, Banjul.[187] However, this instance does not necessarily mean that bad faith was involved. Rather, this delay can more plausibly be explained by the novelty of and relative lack of familiarity with the African Court at the time. Nonetheless, tampering with the independence of the members serving in African international legal institutions, such as by putting pressure on serving members or unfairly dismissing them before the end of their term, can amount to a clear sign of resistance to African international legal developments.

Another form of (non)-cooperation related to the procedural law of African international legal institutions may be expressed in the level of adherence to the procedural requirements during litigation proceedings. This can range from a total boycott of the proceedings to simply not showing up before the dispute settlement body or not replying to briefs. These forms of boycott can be either case-specific or systematic. The latter will amount to resistance to African international law, as it clearly challenges the authority of the African international

186 See KJ Alter, JT Gathii & LR Helfer 'Backlash against international courts in West, East and Southern Africa: Causes and consequences' (2016) 27 *European Journal of International Law* 293.

187 Amnesty International *Malabo Protocol: Legal and institutional implications of the merged and expanded African Court* (2016).

legal institutions. For example, in the context of the contentious proceedings before the African Court, some states repeatedly defied its procedural rules, through overly late filing of responses or not filing at all. This resulted in the Court either extending its deadlines for submission of briefs or accepting late submissions 'in the interest of justice'.[188] This forgiving stance may be explained by the Court's eagerness not to frustrate states over rigorous proceduralism, especially when it is still developing its authority. In the *Saif Al-Islam Gaddafi* case Libya blatantly failed to comply with the Court's orders for provisional measures and refused to participate in the proceedings, which led to the Court's first judgment in default.[189] Another example is the limited number of referrals of cases from the African Commission to the African Court in the context of contentious procedures, which significantly undermines the 'complementarity' logic on which the African human rights system was built.[190]

The quality and quantity of cooperation can also be assessed in other African international legal processes, such as state reporting, governance monitoring and observation missions. With regard to state reporting, a tendency has been noted of late, *ad hoc*, vague and limited reporting,[191] while in the context of APRM, only a limited number of country assessments has been recorded over its two decades of existence, as well as the limited actual implementation of recommendations articulated in the context of such assessments.[192] In contrast, in the context of AU Election Observation Missions (AUEOMs), a practice has developed in such a way that formal invitations are no longer required. This practice helps to circumvent attempts by governments to renegotiate the terms under which observation missions are organized, particularly when their objective is submitting the mission to unfavourable restrictions, including vetting election observers or unduly narrowing the scope of the observation mandate.[193] These are just a few examples of how the evolution of the impact of African international law can be measured through these processes.

Cooperation between African international legal actors can also materialize in less formalized contexts. The role of NGOs in developing the African human rights system, through public awareness raising, assisting AU human rights bodies

188 See, eg, *APDH v Côte d'Ivoire* Application 001/2014 (Judgment of 18 November 2016) paras 26, 31.

189 *The African Commission on Human and Peoples' Rights v State of Libya* Application 002/2013 (Judgment of 3 June 2016).

190 As of the time of writing, only three cases were cases referred by the African Commission to the African Court|. See Application 004/2011 – *The African Commission on Human and Peoples' Rights v Libya* Application 002/2013; *The African Commission on Human and Peoples' Rights v Libya* Application 006/2012; *The African Commission on Human and Peoples' Rights v Republic of Kenya*. For a more comprehensive analysis of possible 'complementarity' within the African human rights system, see S Ebobrah 'Towards a positive application of complementarity in the African human rights system: Issues of functions and relations' (2011) 22 *European Journal of International Law* 663.

191 M Evans & R Murray 'The state reporting mechanism of the African Charter' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The system in practice 1986-2006* (2008) 49.

192 S Gruzd & Y Turianskyi 'The African Peer Review Mechanism at 15: Achievements and aspirations' (2018) 170 *SAIIA Policy Briefing* 2.

193 T Legler & TK Tieku 'What difference can a path make? Regional democracy promotion regimes in the Americas and Africa' (2010) 17 *Democratization* 481.

through information gathering and parallel monitoring of rights violations, is such an example.

Nonetheless, there appears to be a drive towards further formalization of different types of African international legal cooperation and coordination. This can be witnessed in the incremental growth of inter-institutional agreements between actors populating the African international legal terrain. These agreements can take different forms, such memoranda of understanding (MoUs), declarations, framework agreements, arrangements, joint declarations, resolutions, protocols or accords. However, their main objectives generally overlap with ideas to enhance cooperation through better coordination of the joint efforts, to increase the predictability of the cooperation, improve expectation management about the roles, responsibilities and commitments of the participating entities, and to increase accountability.

Evidently, the quality and frequency of cooperation is not a given. Various factors may influence the execution of these agreements, which merit careful consideration. This may include levels of follow-up and consistency; quality of planning, evaluation and lesson learning to improve performance; availability of capacity (including human resources, financial resources and information technology (IT) resources; see also above); levels of support from senior leadership in the respective institutions to execute the agreements; the amount and quality of institutional memory, which may be negatively or positively affected by staff turnover or staff retention; and levels of transparency and quality of communication, which arguably translate into levels of trust among counterparts at different institutions.

Considering the importance of cooperation among African international actors in relation to their performance, it is suggested that monitoring the developments of such inter-institutional agreements, including their implementation, may shed light on broader impact assessments of African international legal governance.

Key performance indicators

- ▲ Measurement of the levels of cooperation and coordination among the various actors implicated in African international legal processes:
- Number and profile of candidates for positions in African international institutions
- % of adherence to the procedural requirements of African international legal processes (incl. litigation, state reporting, fact-finding missions, governance monitoring and observation missions)
- Number of inter-institutional agreements between African international law actors
- % of implementation of inter-institutional agreements between African international law actors

3 So what?

The intention of this book was to offer more clarity about the ways and means through which African international law, including its norms, actors and

processes, develops. The phenomenon of African international law, as defined in this book, has gained significant traction and is likely to continue to do so in the foreseeable future. This is why I think it is timely to start moving the discussion about the architecture of African international law towards its actual performance.

This chapter has shown the richness and diversity of actors populating the field of African international law offering their expertise and know-how as well as the diverse and numerous practices, methods and techniques involved in the making and implementing of African international law. From observing the deployment of these governmental technologies, we can establish that to some extent a consolidation is taking place of accepted ways of dealing with and thinking about African international law. Accordingly, one of the main objectives of this chapter was to dig deeper and analyze these emerging patterns of African international legal governance.

By no means have I exhaustively identified and covered all the possible factors that may explain the development of African international law. My ambition, rather, was to add to the debate and to encourage further (self)-reflection about African international law and how it works.

By way of conclusion, I wanted to signal a few key biases and challenges worth bearing in mind by practitioners and academics alike in this growing field of African international law.

3.1 Terms and conditions of African international law

The future of African international law will to a large extent depend on its 'demand'. Will there be a need to set continental standards for appropriate behaviour and to outlaw inappropriate behaviour, and to provide for guidance for resolving conflict in non-violent ways? Will this need justify the increase of 'supply' of African international legal arrangements? As suggested in chapter 2, conflict is inevitable, but violence is optional, and as remarked in chapter 3, the problems identified to be facing the African continent are not all confined to the African continent, nor are they circumscribed within state boundaries. Rather, in line with an African conceptualization of 'solidarity', namely, the idea of 'ubuntu', which is often typified through the maxim 'I am because you are', there appears to be a growing consciousness concerning the inter-connectivity of humanity as well as a growing practice to that effect. However, with this enhanced inter-connectivity follows an increase in tensions that can either be resolved predominantly through force or through reason. Therefore, while it is not a given, but if political actors would be inclined to avoid or at least mitigate making the same mistakes of their past, it is plausible that the continent would resort to more international legal engineering to resolve conflict in non-violent ways.

Nonetheless, whether there actually will be a sustainable turn towards more African international law will in part depend on the perceived success of the mechanism as a conflict resolution tool and the consequent willingness (and political calculations) of domestic actors to resort to this technique to 'achieve

legitimate aspirations of African peoples', 'total advancement of African peoples in all spheres of human endeavour', 'human progress' and 'general progress of Africa'.[194]

However, measured by one of the primary goals of African international law to bring and maintain harmony among and between communities, we are bound to attest that those African international legal arrangements have so far yielded mixed results, as witnessed by the recurrent patterns of limited or non-implementation of African international law as well as its violations in varying degrees across countries, subject-areas and actors. So, while African international law should be imagined less as a panacea and more as an invented technique spurred by the fertile breeding ground of 'necessity' in orchestrating an intricate and fundamental societal transformation, it is clear that past approaches towards African international law are in need of alterations as to their *modus operandi*. At least, that is, if achieving a higher success rate remains a key objective in reducing disproportionate socio-economic inequalities reflected in excessive (*demasiado*) wealth and opportunity gaps across various social groups such as women, the youth and marginalized communities, as well as reducing levels of systemic political violence and unrest often as a result of the manipulation of government accountability mechanisms, electoral fraud, and inadequate diversity management across religion, gender, age, race, tribal and ethnic identities.

Some alterations have concretely been proposed in this book, including increased transparency about the actors and their political interests and constraints in shaping African international law; increased accounting of the general continental governance trends, which also influence how African international law is legitimized, constrained and regulated; and broader problematization of the contextual factors underlying the development of African international law.

In the remainder of the conclusion of this chapter, I will briefly elaborate on these proposed alterations, while hoping that more academic and policy efforts will be dedicated to further unravelling them in the near future.

3.2 Increased transparency

Rather than viewing present African international legal operations as politically colourless technical processes, I consider it important to account for the actual power dynamics and underlying political interests during the making and implementing of African international law,[195] especially since the 'continental technocratization' of African international law through the increasingly institutionalized deployment of international experts offering technical assistance

194 See Preamble to OAU Charter (1963).

195 For more general discussions on transparency in international law, see the ground-breaking work of A Bianchi & A Peters (eds) *Transparency in international law* (2013) and the useful analysis of M Donaldson & B Kingsbury 'The adoption of transparency policies in global governance institutions: Justifications, effects, and implications' (2013) 9 *Annual Review of Law and Social Science* 119. For a refreshing critical account of transparency in an international legal governance context, see I Koivisto 'The anatomy of transparency: The concept and its multifarious implications' (2016) 9 *EUI Working Paper MWP* 1.

to support African international law can be rightly qualified as a domain of (hidden) political struggle.[196] Through their background work and decision framing (not necessarily decision making), such experts can have considerable amounts of influence that often are not made very explicit.[197] Such expertise is rarely politically neutral, and yet is often depicted to be. To avoid and mitigate hidden politics in the day-to-day operations of African international law, it will be crucial to demand higher levels of transparency about the implicit as well as the explicit assumptions and constraints behind the expert advice offered in African international legal contexts.

A recommendation that can be offered here is to enhance mutual awareness of the actors populating the African international legal field. A singular project that arguably could make a noticeable difference in this domain would be to take greater advantage of the opportunities presented by digital technology. These advantages include more opportunities for remote cooperation as well as greater availability of information and information-sharing tools. One of the main challenges in the African international legal field is the limited online availability and accessibility to legal information (for instance, laws, judicial decisions, policies, regulations) in different African states.[198] Equally, there is very limited knowledge available about where to start looking for this legal information. These knowledge gaps obviously hinder solid comparative research among African jurisdictions and foster attitudes towards more borrowing by African jurisdictions from jurisdictions in the Global North, which generally have better legal record keeping, which run contrary to the spirit of efforts mobilized toward the 'decolonization of law'. These circumstances underscore the acute need for more centralised legal information centres.[199] Accordingly, a recommendation is made to encourage setting up an electronically-searchable African international legal information database, integrated into national legal information databases, to facilitate accessing African international legal developments and their implementation status. Such a comprehensive and accessible repository of African international law, owned and maintained by the AU legal bodies, with an aim of ensuring greater rationalisation of resources and sustainability of the initiative, can include relevant citation systems to track and display how often

196 See, eg, in a similar but different context, S Kendall 'Constitutional technicity: Displacing politics through expert knowledge' (2015) 11 *Law, Culture and the Humanities* 363.

197 See Kennedy (n 84); F Baetens (ed) *Legitimacy of unseen actors in international adjudication* (2019); J Pauwelyn & K Pelc 'Who guards the "guardians of the system?" The role of the secretariat in WTO dispute settlement' (2022) 116 *American Journal of International Law* 534; GF Sinclair 'Unseen and everyday: International secretariats under the spotlight' (2022) 116 *AJIL Unbound American Journal of International Law* 378.

198 According to Open Law Africa, their 'African Law Index shows that over 90% of surveyed African countries do not provide the essentials of free access to legal information, including legislation, court judgments and official government gazettes'. For an overview per country, see https://www.openlawafrica.org/african-law-index (accessed 30 March 2024).

199 See in this context, eg, the important work done by Laws. Africa, an organisation that in cooperation with respective parliaments and the judiciaries of African states aim to gradually make legal information more available and accessible in different African countries. See, eg, eSwatiniLII, GhalII, KenyaLaw, LesothoLII, MalawiLII, MauritiusLII, NamibLII, RwandaLII, SierraLII, SeyLII (Seychelles), LawLibrary (South Africa), TanzLII (Tanzania), ULII (Uganda), ZambiaLII ZanzibarLII, ZimLII (Zimbabwe).

legal instruments and decisions of African international legal actors are cited by national courts and parliaments, providing insights into their legal impact. Importantly, such a database could also foresee regular and relevant updates on the fluctuating, non-linear and sometimes even regressive implementation status of such legal instruments. This real-time implementation monitoring can even be based on collaboration with legal institutions, universities, NGOs, national human rights institutions, national law commissions and other relevant organizations to enhance the quality and comprehensiveness of the database. Ultimately, then, such an initiative of an integrated continental e-justice database system could foster greater legal and judicial dialogue through improved mutual institutional, procedural and jurisprudential awareness, which will eventually contribute to enhanced continental legal integration based on greater legal transparency and accountability within Africa.

3.3 Continental governance trends

The growth of continental ambitions raises further questions about how this phenomenon relates to the future development of African international law. A claim underlying this book is that there is a continuous process of mutual influencing between African international law and politics. This observation was highlighted when considering two international legal trends: international legalization and international judicialization (the third trend, international technocratization, was already discussed above).

I referred to African international legalization as the noticeable trend whereby more African international legal instruments, broadly speaking, are developed. Over the past six decades, several African international treaties and policy frameworks have been developed to consolidate existing commitments on the appropriate ways to govern the resources on the African continent into legal instruments. The increase in such international legislation may prove effective in guiding the process and providing some clarity about the role of different actors in governing Africa. Developed with the aim of addressing political (mal)-practice through law, this expanding normative apparatus now forms a crucial yardstick for holding actors legally accountable for (dis)-respecting norms of African governance.

In addition to African international norm development, we must also account for the development of an African international legal enforcement regime, which has become increasingly more robust measured by the ability to use coercive measures to impose heavier costs on states and state actors through social, political, diplomatic, economic, legal and security sanctions. A key dimension of this trend has been the further development of an African international machinery of dispute settlement mechanisms to enforce African international standards and impose measures to remedy possible violations (judicialization).

These international (quasi)-judicial developments and the mobilization of actors to ensure compliance with the decisions of African international

dispute settlement mechanisms may lead to the further embedding of African international law into national contexts.[200]

These trends of African international legalization and judicialization mean that we need to be watchful about the different continental parameters that are increasingly being imposed on how national politics can be contested and the various continental demarcations limiting what is politically contestable.[201] Continentally-imposed boundaries on national politics may undermine or, at least, restrict the possibility of political actors advancing alternative worldviews and policy preferences.[202] Therefore, these trends may be worthy of further scrutiny and sufficient critical interpellation.

3.4 Dealing with indeterminacies

One of the main threads throughout this book and this chapter, in particular, was to underline the context dependency of the development of African international law and the various indeterminacies distorting its regulation. This point seems particularly salient considering the tension between the understanding that every state is unique and the consolidation of certain African international legal governance practices to govern the behaviour of *all* African states. While I have argued against the idea of universal panaceas or one-size-fits-all solutions, it is quite clear that some features of international law technologies and practices have nevertheless been widely diffused.

The stabilization of certain discourses and practices in relation to African international law can be claimed to result from the acculturation and interaction within a small epistemic community composed of diplomats, policy experts, specialized academics and legal practitioners dealing with African international law. This may be attributed to particular social phenomena such as a migration of ideas, legal borrowing and the interaction of transnational actors and norm entrepreneurs.[203] As this epistemic community dealing with African international law is still relatively small (for now at least), this creates conditions favourable to the reproduction and reification of professional practices by emulation. In turn, such acts of reproduction building on 'lessons learnt' and the compilation of 'best practices' from past experiences may lead to the consolidation of dominant perspectives on how to organize African governance, while obscuring the contested character of past experiences and their inherent compromises that may not be required for, let alone be conducive to, the future development of African international law.

200 See K Alter *The new terrain of international law: Courts, politics, rights* (2014) and HH Koh 'Bringing international law home' (1998) 35 *Houston Law Review* 623.

201 A similar idea is expressed in a slightly different context by Anderson in GW Anderson 'Constitutionalism as critical project: The epistemological challenge to politics' in S Gill & C Cutler (eds) *New constitutionalism and world order* (2014) 283.

202 Hirschl expresses a similar thought in a different context in R Hirschl 'The origins of the new constitutionalism: Lessons from the "old" constitutionalism' in Gill & Cutler (n 201) 101.

203 See, eg, TK Tieku *Governing Africa: 3D analysis of the African Union's performance* (2017).

The growth of institutional memory surrounding African international legal processes is laudable for it may reduce transaction costs by avoiding to reinvent the wheel by offering opportunities for constructive critical reflection on past approaches, but there are also risks involved. One such risk includes the danger of creating a form of tunnel vision where the limited epistemology of past African international legal practice is replicated in such ways that it shrouds other relevant underlying factors that led to the need for African international legal interventions in the first place. It is from this perspective that I have pointed out the need for a broader assessment of the causes of problems faced on the African continent, including historical legacies of oppression, hypocrisy, and structural inequalities. Very often these pasts are obscured, or their weight underestimated, as frequently only the analyses of the immediate cause of discontent are privileged in designing African international legal 'toolboxes'. This obviously has repercussions for how African international law is framed and how its objectives are determined. Nonetheless, developing an adequate problematization of the situation poses its own problems. The challenge of finding an overall consensus about which problems to address and how, has generally been a key contributing factor in producing high levels of variation of African international law making and implementing.

Together, these factors raise several questions about how African international legal governance arrangements may be configured in the future. To cater for broader problematizations, will the scope of the subject-matter of African international law be further expanded? Will it lead to more comprehensive overhauls of the previous regime? Will this in turn lead to more expansive African international legal frameworks? If so, to what new norms and practices may this give rise? What additional types of expertise may be required to accommodate more sophisticated problematizations? And importantly, what forms of resistance exist or will be triggered against possible alternative solutions outside the currently dominant liberal consensus? Finding adequate responses to these questions promises a fertile ground for more African international legal research on these issues as well as, in general, more public debate.