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THE FRONTIERS OF AFRICAN INTERNATIONAL LAW

What is the future of African international law?

Extract from a 1981 interview with Richard Feynman, theoretical physicist and Noble Prize winner, on 'The pleasure of finding things out'

> One way that's kind of a fun analogy to try to get some idea of what we're doing here to try to understand nature is to imagine that the gods are playing some great game like chess. Let's say a chess game. And you don't know the rules of the game, but you're allowed to look at the board from time to time, in a little corner, perhaps. And from these observations, you try to figure out what the rules are of the game, what [are] the rules of the pieces moving.
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> You might discover after a bit, for example, that when there's only one bishop around on the board, that the bishop maintains its color. Later on, you might discover the law for the bishop is that it moves on a diagonal, which would explain the law that you understood before, that it maintains its color. And that would be analogous we discover one law and later find a deeper understanding of it.
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> Ah, then things can happen – everything's going well, you've got all the laws, it looks very good – and then all of a sudden, some strange phenomenon occurs in some corner, so you begin to investigate that, to look for it. It's castling – something you didn't expect.
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> We're always, by the way, in fundamental physics, always trying to investigate those things in which we don't understand the conclusions. We're not trying to all the time check our conclusions; after we've checked them enough, they're okay. The thing that doesn't fit is the thing that's most interesting--the part that doesn't go according to what you'd expect.
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> Also, we can have revolutions in physics. After you've noticed that the bishops maintain their color and that they go along on the diagonals and so on, for such a long time, and everybody knows that that's true; then you suddenly discover one day in some chess game that the bishop doesn't maintain its color, it changes its color. Only later do you discover the new possibility that the bishop is captured and that a pawn went all the way down to the queen's end to produce a new bishop. That could happen, but you didn't know it.
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> And so, it's very analogous to the way our laws are. They sometimes look positive, they keep on working, and all of a sudden, some little gimmick shows that they're wrong – and then we have to investigate the conditions under which this bishop changed color ... happened ... and so on ... And gradually we learn the new rule that explains it more deeply.

> Unlike the chess game, though ... In the case of the chess game, the rules become more complicated as you go along, but in the physics when you discover new things, it becomes more simple. It appears on the whole to be more complicated, because we learn about a greater experience; that is, we learn about more particles and new things, and so the laws look complicated again. But if you realize that all of the time, what's kind of wonderful is that as we expand our experience into wilder and wilder regions of experience, every once in a while, we have this integration in which everything is pulled together in a unification, which it turns out to be simpler than it looked before.[1]

1 Producing Africa

What is African about African international law? This book set out to make sense of the international legal enterprise imbued with and based on some common imaginary called 'Africa'. It sought to interrogate the reference points invoked to speak *in name of* and *for* this space and people that inhabit it, called 'Africa'. In doing so, it also tried to establish what kind of identity emerged from these processes in instrumentalizing this supposedly shared idea of Africa.

What the book found when excavating all these visible and invisible operations of working with, within and through the idea of Africa in developing and implementing a set of international legal mechanisms designed to give effect to the continental wide aspirations and ambitions of those granted power or who assumed power to think, speak and act in Africa's name, was the highly-contested nature of the understanding of 'Africa'.

Not only does the history of attempts to consolidate a shared common vision of Africa reveal a tale of continuous struggle, defiance and resistance, but it also clarifies the challenges that may be expected if this endeavour is continued in shaping and reframing some sort of a common ideal or understanding of Africa.

But what does that mean? Does that mean that the specific characteristics of Africa as a *quasi-object*[2] cannot be identified? The findings of this research do not allow unequivocally-conclusive answers to this question. However, what was established was the extent to which those processes of identity formation are contingent on numerous factors that were thus far understudied and not sufficiently understood.

The book attempted to clarify the various indeterminacies behind particular concepts, including an obfuscate one such as 'Africa'. The book specifically attempted to expose the different operations that lie behind the creation (and destruction) of developing a shared understanding of a particular concept.

Specifically, the book tried to express the idea that producing knowledge about Africa in effect is a contribution to the making and constant re-ordering of Africa as a normative and institutional entity. Through African international law and the multiple knowledge production operations that it entails, an image and vision

1 BBC, 1981, 'The pleasure of finding things out'.
2 A quasi-object is understood here in the Latourian sense referring to objects that are neither entirely natural nor entirely the result of social imagination and production. See B Latour *We have never been modern* (1991).

of Africa has been projected while, at the same time, these African international legal imaginaries are continuously being re-negotiated and reconfigured.

In chapter 2 an epistemological framework was developed to help understand this phenomenon of African international law. The framework aimed to set out the principles that would facilitate the study of the nature, origin, justifications, purposes and scope of knowledge related to the development of African international law. This structure was geared towards offering insights to help explain the development of African international law in the past, present as well as in the future. Focusing in particular on the core principles of knowledge production – observation, induction and comparison – the groundwork was laid to see how change and innovation can occur, in particular as a result of varying levels of dissent and resistance.

In chapter 3 these principles were used as an underlying grid to help make sense of how African international law was both a trigger and an outcome of a translation process to create some sort of a consensus about a shared destiny that supposedly relied on a shared history and identity. Specifically, the challenges were excavated related to knowledge deficits about 'Africa' and how they influence the practices of African international legal developments.

In chapter 4 the book turned to how African international law actually works. Through a review of different methods of measurement and assessment, and institutional practices of knowledge generation, I sought to explore the set of strategies through which African international law is given effect. By examining a wide range of performance indicators, I sought to outline some of the discourses through which common understandings of Africa are formed. The role of expertise and professional knowledges was given particular attention, in particular through an application of a market logic whereby greater demand seems to lead to greater supply of African international legal knowledge. The analysis of the different performance indicators of African international law and its measurement techniques forced us to realize the extent of its multi-layered and multi-dimensional nature. The expansive range of African international law across time and subject-matter also brought into light how uneven its accomplishments are. We established how its operationalization varies in relation to contextual factors, including limitations foreseen in the law itself, the role of different actors involved or absent in developing and implementing African international law and the dependency on other socio-economic, cultural and political contextual factors. The book argued that all of these elements in one way or another contribute to great levels of variations in the performance of African international law across countries, subject areas and time. In turn, it was suggested that these factors also greatly influence the conceptions held, shared and developed about the notion of Africa as a unifying element underlying all these African international legal programmes and interventions. In other words, it may be deduced that African international law in fact is instrumental in creating and sustaining public understandings of Africa due to its inherent logic of using 'Africa' as an object and problem in need of 'African' solutions.

2 Developing a different African international legal consciousness

> We create many problems for ourselves by using static language to express or capture a reality that is ever changing: 'Our language is an imperfect instrument created by ancient and ignorant men. It is an animistic language that invites us to talk about stability and constants, about similarities and normal and kinds, about magical transformations, quick cures, simple problems, and final solutions. Yet the world we try to symbolize with this language is a world of process, change, differences, dimensions, functions, relationships, growths, interactions, developing, learning, coping, complexity. And the mismatch of our ever-changing world and our relatively static language forms is part of our problem.[3]

What then can be concluded from these observations? First, the so far underestimated role and power of *language* in the African international legal discipline needs to be stressed. One of the key points advanced in this book concerned an explanation of the mechanics involved in formulating concepts and stabilizing meaning of certain terms, while underlining the relative ambiguity and indeterminacy of concepts and, consequently, of their associated theories. What was noticed was the relative poverty of conceptual innovation in African international legal discourses. Certainly, common terms in international legal jargon have been appropriated and given renewed or finer meaning in their application to 'African' circumstances. Yet, few new concepts have been devised to address a specific segment of social reality that thus far lacked an appropriate terminology. The reasons for this perhaps are two-fold. One the one hand, given the wide availability of existing legal terms, it may be more prudent and trigger less resistance by reshaping, however slightly or drastically, a definition of a term, rather than invent a new term altogether to demarcate a fragment of social reality. On the other hand, a more substantive reason could be that the observational techniques at the continental level have not (yet) reached a level of sophistication allowing the detection of finer nuances of social complexities meriting the creation of a new term. For this reason, it may be suggested that the tools for observing social realities within the African continent may be further sharpened to allow for a more nuanced understanding of the African international consciousness rendered visible through the practices of the actors inhabiting the African international legal field.

The ways of making these practices more visible, legible, measurable, calculable and ultimately more manageable may entail expanding the continental gaze by increasingly putting the quality of African international legal governance arrangements on the radar of the actors that constitute this field, including 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

3 MB Rosenberg *Nonviolent communication – A language of life* (2015) 26, referring to Wendell Johnson.

societies, the private sector and African international organizations.[4] Following a 'process of circular reinforcement' the force or authority of African international law will likely then grow. In line with Bourdieu, we can plausibly predict that through the multiplication of interventions in the African international legal domain, new 'juridical needs' may be created concerning the 'interpretation' of the African international legal terrain, which will then need to be supplied with specific forms of African international legal expertise.[5] The availability of such expertise will then make it easier to read and understand the dynamics and trends of African international legal practices. The subsequent knowledge production within and of the African international legal terrain expectedly will generate greater African international legal literacy among the respective actors occupying this terrain, together with the confidence to better diagnose African international legal problems and to make calculations about how African international legal interventions can be impactful. This would likely then result in further experimentation with programmes and projects to better organize and manage such interventions.[6]

Second, and drawing on the first point, the enhanced systematization of African international legal knowledge through better record keeping, dissemination, study and engagement, might also add to greater levels of transparency about African international legal commitments that ultimately may have a deterrent effect on bad faith commitment failures or in other words *hypocrisies*. Furthermore, the greater social investment in African international legal artefacts, and the consequence of augmenting the value of these artefacts, may also lead to longer-term thinking in developing new African international legal products. In the shadow of august African international legal achievements and the 'high(er) stakes' involved, a realization may follow of the weight and significance of creating new African international legal instruments, to which more diligence will be paid during the developmental process. In essence, the actors involved in African international legal processes may become more concerned with their legacy, based on a contemplation of the past they expect to be part of and the particular type of future of African international law that they want to create. Drawing on more systematically-available and rigorously-analyzed African international law information, opportunities would be created to facilitate oversight and scrutiny of the implementation of the African international legal agendas. It would also contribute to a constructive dialogue between relevant stakeholders toward the improvement of these agendas. More expertise and capacity could develop if it would not need to be re-invented time after time, leading to a much greater impact of these African international law

4 Some of the ideas developed here build on the work of James C Scott on 'State projects of legibility and simplification' in *Seeing like a state – How certain schemes to improve the human condition have failed* (1998).

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

6 These ideas to some extent build on some of my earlier work in the African constitutional sphere; see M Wiebusch *Constitution building in the African Union* (2020) 195.

programmes and projects, especially if they are based on greater respect for and understanding of the 'African' context.

Third, as has been repeatedly stressed throughout this volume, knowledge is considered to be inherently inductive and dependent on information gathering and analyzing faculties. Therefore, a conclusion that may be drawn is that the development of African international law may benefit from more adequate levels of *transparency*, *inclusiveness* and *participation* – what I call a TIP approach – at the risk of otherwise inadvertently replicating legacies of amnesia, exclusion and structural inequalities.

More *transparency* in this context demands more accessible information about African international legal processes, including information about who is involved in any deliberative and decision-making bodies, what the issues are on the African international legal agenda, as well as access to all relevant documentation (for example studies, preparatory documents, and advisory and consultation reports), related to the making or implementation of African international law.

More *inclusion* would require greater levels of involvement of representatives of largely-marginalized social groups (in varying degrees) such as women, the youth, older persons and persons with disabilities.

More *participation* would demand greater opportunities for more people, including groups with opposing views, to engage in public debates about African international law-making and implementation processes.

These elements would likely entail the development of a different type of African international legal consciousness from that which has been known thus far. However, that does not mean that there are no risks involved. There is a dark side to law too, and we should be alert to the risks associated with the indeterminacies behind the notion of an African international rule of law. Far from African international law always being a solution, the book has shown that African international law can also be part of the problem, and throughout, this book has tried to identify some of the various and ongoing struggles in dealing with such an open-ended concept. For example, the controversies behind the agenda of decolonization of law revealed that the African international legal frameworks may also be overly infused with foreign elements of which their suitability with the African context may have taken for granted, without adequate recourse to properly ascertain their transferability. The book discussed how these legal transplant operations may follow from an insufficiently-demystified ideal and inadequate consideration of the contested character of the emulated legal models and their inherent compromises that may not be required for, let alone be conducive to, 'the African' context.

Furthermore, the book also explored how the flexibility of law as a tool allows the frustration of achieving certain pre-determined goals. As explained in chapters 2 and 3, law tends to be both part of the orthodox or hegemonic system, as well as a condition of possibility for heterodox and counter-hegemonic projects to subvert the system in *vigeur* through the deployment of different *guerrilla lawfare* tactics and strategies. Accordingly, the indeterminacy of law has made and continues to make it possible to (re)-impose certain interpretations and interpretative

practices that counter efforts towards closer cooperation and integration for the purposes of developing common solutions to problems commonly faced. In the same way that a person's individual rights can be overly claimed to the detriment of group or community rights, individual state rights may be overly claimed to the detriment of community of states' rights. For example, the exercise of the right to self-determination and economic development may at some point pass the threshold whereby the negative externalities associated with particular forms of economic growth, such as pollution, may end up creating excessive harm to the wider community, thereby putting undue pressure on the *solidarity* ethos of an African legal-political community.

For this reason, it has been argued in favour of greater transparency, inclusion and participation (TIP) in African international law making and implementation, including its inherent accountability processes, not necessarily as a *panacea* to the tension between individual and community interests, but as necessary conditions for the intricate balancing act that continuously needs to be conducted to avoid or at least mitigate undesirable excesses or *demasiado*.

This approach, together with improved and more nuanced historical record keeping, is then also expected to diminish levels of amnesia concerning the construction of particular shared understanding of concepts and ideas, and the political and economic choices made in their construction and stabilization of meaning. It is from this vantage point that such background power struggles are not necessarily eradicated, but at least they are rendered more visible and therefore more susceptible to constructive interpellation and criticism.

No research is perfect. This book undoubtedly suffers various inadequacies, including some important knowledge gaps. As indicated above, Feynman famously compared the scientific process with the discovery of the rules of chess without a rule book. Building on that analogy, we could acknowledge that there are things that we know that we do not know, and there are things that we do not know that we do not know. It is readily admitted that various dimensions of the African international legal enterprise were unexplored in this book. However, rather than see this as a failure of this research, it is considered here as a natural consequence of the moving frontiers of science, including legal science, which are continuously expanded, re-examined and re-thought. To paraphrase astrophysicist Neil deGrasse Tyson, as the terrain of our knowledge about African international law grows, so too grows the perimeter of our ignorance about it. Faced with this paradox, it must be re-emphasized how important it is to enjoy the process of discovery because, ultimately, science, like life, is about the journey and not the destination.

Panta Rhei