

Her Ancestors' Keeper: Realising Africa's Sustainable Economic Development and Relations through the Infusion of Values in Intra-African Investment Agreements

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Abstract

Traditional African structures, customs, and values had been altered by the colonial authority. Around 1958, post-colonial regimes began to emerge as colonialism began to destabilise. A series of Pan-African Congresses (PAC) were held to explore African concerns and measures for attaining African unity. The PAC's 5th Congress of Manchester, when most African states earned their independence, is significant for this paper. The PAC argued for the African continent's full independence and a total rejection of colonialism and exploitation in all forms. As a result, when African governments recovered their independence, they prioritised sovereignty over re-identification in the post-colonial era. However, the African Union (which replaced the Organisation of African Unity) to a certain level, provided Africa with identity through Agenda 2063. Nevertheless, international investment agreements (IIAs) that African states conclude do not contain values or African cultures. The main question in this paper is how can Africa infuse culture and values in its IIAs? The paper seeks to find a way to include African identity, cultures and values in IIAs in a way that would increase the implementation of these instruments.

Keywords: Values; decolonisation; Afrocentrism; foreign investment; investment agreements

Introduction

Agenda 2063 is Africa's master plan for transforming the continent into a future global powerhouse. It is the continent's strategic framework, with the goal of achieving inclusive and sustainable development.¹ This strategic framework aims to deliver on its goal for inclusive and sustainable development.² Agenda 2063 underscores seven aspirations purported to be a vehicle which transports Africa into the global economy. These aspirations are to achieve the following: (1) A prosperous Africa based on inclusive growth and sustainable development; (2) an integrated continent, politically united and based on the ideals of Pan-Africanism and the vision of Africa's renaissance; (3) an Africa of good governance, democracy, respect for human rights, justice and the rule of law; (4) a peaceful and secure Africa; (5) an Africa with a strong cultural identity, common heritage, shared values and ethics; (6) an Africa whose development is people-driven, relying on the potential of African people, especially its women and youth, and caring for children; and (7) Africa as a strong, united and influential global player and partner.³

From an economic perspective,⁴ the African Union (AU) aims to: (1) Establish necessary conditions, which may enable the continent to play its rightful role in the global economy and international negotiations; (2) promote sustainable development at the economic, social and cultural levels; (3) integrate African economies; (4) coordinate and harmonise policies between existing and future Regional Economic Communities (RECs) for the gradual attainment of the objectives of the AU;⁵ and accelerate political and socio-economic integration, promote and defend African common positions on issues of interest to the continent and its peoples.⁶

Even though some values have been included in the Constitutive Act of the AU, they have received little attention in the context of international investment agreements (IIAs) in Africa. This is so even though Africa's systems have always been based on values. In the sphere of law, African ideas and values, whether moral, political, or economic, cover a large area. Furthermore, African states have struggled to implement

1 AU, 'Agenda 2063: The Africa we Want' <<https://au.int/en/agenda2063/overview>> accessed 21 April 2022.

2 *ibid.* This aim of repositioning Africa to become a dominant player in the global arena is not new to Africa as it was also embraced in the Organisation of African Unity (OAU).

3 AU, 'Agenda 2063: The Africa we Want' <<https://au.int/en/agenda2063/overview>> accessed 30 April 2020. These seven goals are translated into 18 goals, which are then divided into 44 priority areas and expressed in 161 different national-level targets. Thus, Agenda 2063's vision is broad, addressing issues of identity, self-determination, political independence, and socioeconomic development in the context of globalisation.

4 Since this a continental powerhouse with many objectives, some of them are not related to the economy *per se*.

5 Article 3(a)–(n) of the Constitutive Act of the African Union, 2000 (Constitutive Act of the AU).

6 *ibid* Art 3(3) and (4).

many of the IIAs that they have put in place, and as a result, they are performing less than the anticipated threshold when it comes to economic development. With the end of the colonial era, one wonders if Africans are still entrenched in the defining ideologies of their forefathers. The above brings the following questions to the fore: Is there a missed opportunity for African countries to develop their own investment policy space that speaks to and considers their distinct values and needs? In answering this question, the following ancillary question will be answered throughout the paper: How will incorporating these values increase the implantation of IIAs?

When and How Did Africa Lose its Identity?

When the Western world conquered Africa and introduced colonialism⁷ through the Berlin Conference in 1885,⁸ the powerful cultural society of pre-colonial Africa began to crumble. The General Act of the Berlin Conference took about three and a half months, from 15 November 1884 to 26 February 1885. It is important to note that African states were not represented at this conference, and the only territories which were recognised were the ones occupied by King Leopold the II of Belgium. During the time of colonisation, African values, culture and belief systems were viewed as bad, whereas everything from the Global North was viewed as a ‘mark of class’. This paved a way for the adoption of an outlook that ‘denied any culture or values in Africa’.⁹ As a result, any practices that were in conflict with European culture, had to be done away with.¹⁰ This was achieved through among others, religion and the creation of social classes under which sophistication, and ultimately social values, meant the abandonment of African values and the embracement of Eurocentric values instead. Parlo FR in 1902 stated that the Kikuyu culture¹¹ was ‘essentially deplorable, barbarous and inhuman’.¹² A similar view was taken by Virginia Blakeslee of the Africa Inland Mission who wrote that:

7 Colonisation has been controversially defined as the influence of ‘civilised people’ on people of ‘lower civilisation’ with the goal of gradually transforming the latter through the development of its ‘own’ natural resources and the improvement of the supposed natives’ moral and material condition.

8 *Thought.Co*, ‘The Berlin Conference to Divide Africa the Colonisation of the Continent by European Powers’ <<https://www.thoughtco.com/berlin-conference-1884-1885-divide-africa-1433556>> accessed 22 July 2022.

9 Judith Bahemuka and Joseph Brockington (eds), *East Africa in Transition: Images, Institutions and Identities* (University of Nairobi Press 2004) 236.

10 *ibid.*

11 The Kikuyu culture is found in central Kenya and Nairobi. They are believed to have belonged to a long-term movement of Bantu-speakers who migrated from Central Africa or Tanzania in pre-colonial times. See Droz Yvan, ‘Gikuyu (Kikuyu) People of Kenya’ <<https://www.oxfordbibliographies.com/view/document/obo-9780199846733/obo-9780199846733-0185.xml>> accessed 20 March 2020.

12 Alexander Vidler, *The Church in an Age of Evolution* (Penguin Books 1961) 252.

Kikuyu land has been dominated by the prince of darkness for past ages. The flooding of the district with the light of the gospel has revealed the hidden, the character and source of every evil tribal custom.¹³

The view that African culture, values and belief systems are evil has influenced many policy makers. As a result, they have not been widely embraced in modern IIAs. Apart from the economic exploitative agenda, colonialism expressed ‘the ethnocentric belief that the morals and values of the coloniser were superior to those of the colonised.’¹⁴ This is evidenced in Wheaton Henry’s assertion in 1866, where he opined that:

Is there a uniform law of nations? There certainly is not the same one for all the nations and states of the world. The public law, with slight exceptions, has always been, and still is, limited to the civili[s]ed and Christian people of Europe or to those of European origin.¹⁵

Wheaton’s sentiment was meant at keeping non-European countries out of the legal system. Unfortunately, in today’s legal order, the division between civilised and uncivilised governments that existed throughout the colonial era still exists. These sentiments, for example, influenced the development of the United Nations (UN) system. When outlining the sources of international law, article 38(1) of the International Court of Justice Statute (ICJ Statute) mentions ‘civilised nations’. Article 38(1) of the ICJ Statute provides that:

The Court whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply international conventions, whether general or particular, establishing rules expressly recognised by the contesting states; international custom, as evidence of a general practice accepted as law; and the general principles of law recognised by civilised nations.

Abi-Saab Georges, when analysing the above provision argued that:

[The] source of international law is very important from the point of view of the newly independent states. It is through it that they hope their legal systems will contribute to the development of international law. This would widen its base and increase its material sources. It would also give the newly independent state the satisfaction of participating in the creation of the law they are supposed to observe.¹⁶

Both the ICJ Statute and Abi-Saab operated from a stance of ‘othering’ non-European/American states. Even though article 38(1) of the ICJ Statute may generally be understood to mean ‘all nations’, one may argue that in this context, ‘civilised nations’ means Euro-American states and not African states taking into account the time

13 Virginia Blaslee, *Beyond the Kikuyu Curtain* (Moody Press 1994) 37.

14 *ibid.*

15 Henry Wheaton, *Elements of International Law* (Little, Brown and Co 1866) 15.

16 Georges Abi-Saab, ‘The Newly Independent States and the Rules of International Law: An Outline’ (1962) 8(2) *Howard Law Journal* 109.

of its conclusion.¹⁷ Furthermore, the use of ‘newly independent states’¹⁸ strips Africa of its identity. Many scholars and historians have failed to recognise pre-colonial African states. Furthermore, these scholars and historians have classified pre-colonial African states as ‘minimal governments’¹⁹ or ‘diffused governments’.²⁰ Some believe that in pre-colonial years, Africa had ‘settlers who did not know how to live in the wilderness’.²¹ The failure to recognise pre-colonial African states is further evidenced by the use of statements such as ‘newly independent African states’,²² ‘the dark continent’²³ or Africa’s ‘first dance of freedom’ by many authors and scholars.²⁴

Many authors emphasise on the ‘newness’²⁵ of post-colonial African states, and extol their willingness to embrace the Eurocentric/American version of international law in general and international economic law in particular.²⁶ July Robert posits that ‘after seventy-five years of colonial rule, African independence in the 1960s was for the most part a new experience’.²⁷ He further posits that the quest for independence in Africa only began at the beginning of the nineteenth century.²⁸ This suggests that during the

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- 17 Augusto Fabián and Castañeda Cárdenas, ‘A Call for Rethinking the Sources of International Law: Soft Law and the Other Side of the Coin’ (2013) 13 *Anuario Mexicano de Derecho Internacional* 371.
- 18 For another example, see Christoffer Cappelen and Jason Sorens, ‘Pre-colonial Centralisation, Traditional Indirect Rule, and State Capacity in Africa’ (2018) 56(2) *Commonwealth and Comparative Politics* 195–215.
- 19 Lucy Mair, *Primitive Government: A Study of Traditional Political Systems in Eastern Africa* (Baltimore Penguin Books 1962) 61; See also Anghie Antony, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2004).
- 20 Mair (n 19) 28.
- 21 Scholastic, ‘Colonial Period 1607-1776’ <<https://www.scholastic.com/teachers/articles/teaching-content/colonial-period-16071776/>> accessed 21 October 2021; See Gailey Harry, *History of Africa: From Earliest Times to 1800* (Holt Rinehart and Winton incorporated, Missouri, United States of America 1981) 10–14.
- 22 *ibid.*
- 23 *Government of the Republic of Zimbabwe v Fick* (CCT 101/12) [2013] para 1.
- 24 Gunther John, *Inside Africa* (Hamish Hamilton, London 1955) 3; see Meredith Martin, *The First Dance of Freedom* (Hamish Hamilton Publisher 1984) 173–177; See also Tiyanjana Maluwa, ‘International Law-making in Post-colonial Africa: The Role of the Organisation of African Unity’ (2002) 49 *Netherlands International Law Review* 82.
- 25 Antony (n 19).
- 26 See John Westlake, *Chapter on the Principles of International Law* (Cambridge University Press 1894); Angelo Dube and Lindelwa Mhlongo, ‘The Forgotten Continent? A South African Perspective on the Development of African International Legal Thought’ in Lesaffer Randall, *Politics and the Histories of International Law: The Quest for Knowledge and Justice* (Brill Nilhoff 2021) 278. For examples of authors who used this term, See Young Crawford, *The Post-Colonial State in Africa* (University of Wisconsin Press 2012); Shaw Malcolm, *International Law* (Cambridge University Press 2017); Michael Barnett and Kathryn Sikkink, ‘From International Relations to Global Society’ <<http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199604456.001.0001/oxfordhb-9780199604456-e-035?print=pdf>> accessed 10 March 2021.
- 27 Robert July, *An African Voice: The Role of the Humanities in African Impedance* (Duke University Press 1987) 7.
- 28 *ibid.*

pre-colonial era, Africa did not have states which were sovereign and independent, which is far from the truth.

Soon after settling in Africa, European states convened a conference in Berlin between 15 November 1884 and 26 February 1885 (the Berlin Conference)²⁹ the purpose of which was to allocate to themselves different parts of the African continent.³⁰ Africa has not only suffered sorely from imposed priorities of European colonialism but also from the deleterious effects of the political geography of modern Africa.³¹ This is evidenced, for example, by the encouragement of the ‘*emergence*’ rather than ‘*re-emergence*’ of Africa, even though African states have always been in existence. Consequently, this influenced the theory that African states had no international legal order, and the harmfulness of pre-colonial treaties such as the Treaty of Berlin are overlooked, and they continue to be given a fundamental role in the international legal order.

Furthermore, it is believed that the only form of trade Africans knew was slave trade.³² However, slave trade cannot be regarded as a form of trade in international law. Elevating an abominable colonial practice to a form of international trade, obtained through coercion, in violation of the principles of law (even those principles of natural law which were prevalent at the time) and rules of customary law cannot be countenanced.

Iiffe John in his book titled *Africans: The History of a Continent* argues that the main contribution that Africans made was being the frontiersmen who won against colonialism on behalf of the entire human race.³³ He further argues that the only ‘themes of African history’ are: ‘(1) The peopling of the continent, (2) the achievement of human coexistence with nature (3) the building up of enduring societies and (4) their defence against aggression from more favoured regions’.³⁴ For this reason, he believes that pre-colonial Africa has been a recipient rather than a contributor to the policy development at the international level. It is unfortunate that he omitted any other contributions Africa made such as contributions in international law or international economic law.³⁵

29 Adu Boahen (ed), *General History of Africa: VII Africa under Colonial Domination 1888-1935* (James Currey Ltd 1990) 465.

30 Judith Bahemuka and Joseph Brockington (eds), *East Africa in Transition: Images, Institutions and Identities* (University of Nairobi Press 2004) 234; See Uzoigwe Godfrey, ‘Reflections on the Berlin West Africa Conference, 1884-1885’ (1985) 12(2) *Journal of the Historical Society of Nigeria* 9–22. Art 34 of the General Act of the Berlin Conference provides that any European nation which takes possession of an African coast or declared a ‘protectorate’ there, must notify signatories to the Act. This was called the doctrine of ‘effective occupation’.

31 Griffiths Ieuan, *The African Inheritance* (Routledge 1995) 6.

32 Joshua Settles, *The Impact of Colonialism on African Economic Development* (University of Tennessee Honours Thesis Project 1996) 1. For how slave trade was conducted in pre-colonial Africa see Griffiths (n 31).

33 John Iiffe, *Africans: The History of a Continent* (Cambridge University Press 1995) 1.

34 *ibid.*

35 To read more on this see Dube and Mhlongo (n 26) 270–297.

Anghie Antony argues that the ICJ has made only a rudimentary effort to include African legal and cultural traditions into the administration of international justice.³⁶ This has allowed colonial systems of social, economic and political inequality which were created by colonialism to continue to operate despite the ostensible change of international legal regime.³⁷ However, the concept of African culture must be recognised as having historical relevance in the global economic and legal order.

From a foreign investment perspective, the above led to the introduction of the classical Marxist theory.³⁸ The classical theory advocates that foreign investment is beneficial to the host state, and as such, foreign investors should have high protection of their rights.³⁹ This view has to a certain extent influenced policy makers in the field of foreign investment and has resulted in the imbalanced foreign investment landscape since the view is that foreign investors should be fully protected as they contribute immensely to the economy of host states. The problem with this is that the IIAs tend to be skewed against host states in a bid to attract foreign investment. Furthermore, it does not allow host states to fully regulate in the public interest as required by domestic laws. This is one of the reasons why the promotion and protection of foreign investment has found itself in the majority of modern IIAs. However, intra-African investment Agreements should be balanced taking into account both the rights as well as obligations of foreign investors and host states.

Africa's Resistance Against Colonialism and Identity Theft

Taking into account the historical events that led to Africa losing its identity, the question that begs for an answer is: Did pre-colonial African people and leaders try to resist colonisation? The answer is yes. The vast majority of African leaders were adamantly opposed to the shift and stated their intention to keep things as they were.⁴⁰ But above all, they were determined to retain their sovereignty and independence.⁴¹ During the colonial period, African leaders attempted to protect their economic environment.⁴² African resistance was the consequence, not of slave trade, but of the collapse of their economies caused by the impact of European capital manipulation.⁴³

36 Antony (n 19) 111.

37 James Gathii, 'International Law and Eurocentricity' (1998) 9 *European Journal of International Law* 184.

38 Sornarajah Muthucumaraswamy, *International Law on Foreign Investment* (Cambridge University Press 2017) 61.

39 Subedi Surya, *The Law of Investment Treaties* (Oxford International Law Library 2010) 60-61.

40 Robert Smith, 'Peace and Palaver: International Relations in Pre-colonial West Africa' (1973) *Journal of African History* 603.

41 There are many quotations regarding Africa's resistance to the colonial powers. For these quotations see Adu Boahen, *African Perspective on European Colonialism* (Diasporic Africa Press 2011); See also Francis Fuller, *A Vanished Dynasty-Ashanti* (Routledge 2012) 172.

42 Griffiths (n 31) 11.

43 Uzoigwe (n 30) 14.

Machemba, King of the Yao in what is now known as Tanzania, said to the German commander, Hermann von Wissmann, in 1890 that:

I have listened to your words but can find no reason why I should obey you - I would rather die first. If it should be friendship that you desire, then I am ready for it, today and always; but to be your subject, that I cannot be. If it should be war you desire, then I am ready, but never to be your subject. I do not fall at your feet, for you are God's creature just as I am. I am Sultan here in my land. You are Sultan there in yours. Yet listen, I do not say to you that you should obey me; for I know that you are a free man. As for me, I will not come to you, and if you are strong enough, then come and fetch me.⁴⁴

In 1891, the then Prempeh I of Asante in the Gold Coast (present day Ghana) rejected the protection offered by the British. His response was:

The suggestion that Asante in its present state should come and enjoy the protection of Her Majesty the Queen and Empress of India is a matter of very serious consideration. I am happy to say we have arrived at this conclusion, that my Kingdom of Asante will never commit itself to any such policy. Asante must remain as of old, at the same time to remain friendly with all white men. I do not write this in a boastful spirit, but in the clear sense of its meaning. The cause of Asante is progressing and there is no reason for any Asante man to feel alarm at the prospects or to believe for a single instant that our cause has been driven back by the events of past hostilities.⁴⁵

In 1895, Wobogo, the Moro Naba or King of the Mosi (Burkina Faso) told the French Captain Destenave that:

I know the whites wish to kill me in order to take my country, and yet you claim that they will help me to organi[s]e my country. But I find my country good just as it is. I have my own merchants. Consider yourself fortunate that I do not order your head to be cut off. Go away now, and above all, never come back.⁴⁶

When the Italians launched their campaigns against Ethiopia with the connivance of Britain and France, Menelik the Emperor issued a mobilisation proclamation in September 1895 where he stated:

Enemies have now come upon us to ruin our country and to change our religion. Our enemies have begun the affair by advancing and digging into the country like moles.

44 Griffiths (n 31) 11.

45 Boahen (n 41) 24.

46 Quotron, 'African Responses to Imperialism' <<http://academic.brooklyn.cuny.edu/education/progler/readings/quotrons/africanresponses.html>> accessed 16 October 2021.

With the help of God I will not deliver up my country to them. Today, you who are strong, give me of your strength, and you who are weak, help me by prayer.⁴⁷

Makombe Hanga of Mozambique said to a white visitor in 1895:

I see how you White men advance more and more in Africa, on all sides of my country companies are at work. My country will also have to take up these reforms and I am quite prepared to open it up. I should like to have good roads and railways, but I will always remain the Makombe my fathers have been.⁴⁸

Even though there were pre-colonial African leaders who readily welcomed the colonial powers,⁴⁹ there were others who totally opposed it.⁵⁰ These thoughts demonstrate that pre-colonial African leaders considered their communities and kingdoms to be sovereign even if they did not use the word sovereignty. When confronted with the tough task of colonisation, they remained steadfast in their opposition to traditional European life, defending their sovereignty, religion, and African traditional way of life.⁵¹ They were confident in the ‘magic of their ancestors and certainly their gods or God’.⁵²

The philosophy of colonial resistance was clearly based on the concept of sovereignty. Chief Nana Olomu of Itsekiri in the Niger Delta (now Nigeria) and Rumliza, who fought the Belgians and Germans in East Africa, led the resistance against economic manipulation.⁵³ This conflict eventually became a pivotal event that shattered traditional African-European alliances. The brutal nature of the ensuing conquest of Africa, as well as the callous treatment of African leaders who objected to the European possession of their country, revealed no humanitarian qualities at all.⁵⁴

47 Adu Boahen (ed), *General History of Africa: Africa under Colonial Domination 1880-1935* (University of California Press 1985) 4.

48 Quotron (n 46).

49 For example, in the nineteenth century, King Somhlolo of Swaziland said he had a vision in which white men would come bearing two things on their hands. On the one hand, they would have *umculu* (the Bible) whilst on the other, they would bear *indilinga* (money). The voice in King Somhlolo’s vision advised him that the nation should choose *umculu*. Since then, Christianity has enjoyed a favoured position in Swaziland. To read more on this, see Angelo Dube and Sibusiso Nhlabatsi, ‘The King Can Do no Wrong: The Impact of the Law Society of *Swaziland v Simelane NO and Others* on Constitutionalism’ (2016) 16 *African Human Rights Law Journal* 288.

50 Margret Peil and Olatunji Onyenye, *Consensus, Conflict, and Change: A Social Introduction to African Societies* (East African Educational Publisher 1998) 3.

51 *ibid.*

52 *ibid.*

53 For a detailed discussion of the resistance of colonialism by African leaders during the colonial period, see Adu Boahen (ed), *General History of Africa: VII Africa under Colonial Domination 1880-1935* (University of California Press 1990) 33–107; See also Erezene Henchard, ‘European Influence in Ijo-Itsekiri Relations in Nigeria’ (2016) 10(1) *African Research Review: An International Multidisciplinary Journal* 104–115.

54 Uzoigwe (n 30) 16.

What is an African Culture and Value System?

Culture can be defined as that whole complex which includes knowledge, belief, art, morals, law, customs or any other capabilities and habits acquired by people as members of society.⁵⁵ Culture, as it is usually understood, entails a totality of traits and characters that are peculiar to people to the extent that it marks them out from other people or societies.⁵⁶ These peculiar traits include social norms, taboos and values.⁵⁷ Culture is generally timeless, and encompasses the unique inheritance of a distinct group of people.⁵⁸ It is universal and each geographical manifestation is unique.⁵⁹

Values are beliefs that are regarded by the community as right or wrong, and thus hold what is important in that community.⁶⁰ They are thus the moral standards that members of the community adhere to in their personal and communal interactions.⁶¹ Values play a crucial role in the African environment as agents of moral implementation. Culture, norms, and values are significant human survival tools that form the foundations of societies.⁶²

Values and principles are often goal-oriented because they point to a desired objective toward which actions are directed and on which each individual's and community's expectations are based.⁶³ Values may thus be 'taken to mean a set of institutionalised ideals which guide and direct the patterns of the life of Africans'.⁶⁴ Individual member states' actions are mirrored in the context of IIAs by the IIAs' agreed values. African states should consider integrating principles that can improve the continent's economic legal framework and implementation in order to attain their desired economic goals. As a result, relevant values can be employed to determine what is acceptable and unacceptable in terms of foreign culture.

55 Edward Taylor, *Primitive Culture* (Cambridge University Press 1871, reprinted in 1958).

56 Gabriel Idang, 'African Culture and Values' (2015) 16(2) *Phronimon* 98.

57 *ibid.*

58 Judith Bahemuka and Joseph Brockington (eds), *East Africa in Transition: Images, Institutions and Identities* (University of Nairobi Press 2004) 236.

59 Benson Igboin, 'Traditional Leadership and Corruption in Pre-colonial Africa: How the Past Affects the Present' (2016) *Studia Historiae Ecclesiasticae* 150.

60 Gathii (n 37) 184.

61 Onuoha Frank, 'Locating African Values in Twenty-First Century Economics' <<https://www.africanliberty.org/2015/09/09/onuoha-frank-locating-african-values-in-twenty-first-century-economics/>> accessed 21 July 2021.

62 Benson Igboin, 'Colonialism and African Cultural Values' (2011) 3(6) *African Journal of History and Culture* 96–103; see also Olusola Olaniran and Aisha Arigu, 'Traditional Rulers and Conflict Resolution: An Evaluation of Pre-and Post-Colonial Nigeria' (2013) 3(21) *Research on Humanities and Social Sciences* 120.

63 Ikechukwu Kanu and others, *African Cultural Personalities in a World of Change: Monolithic Cultural Purity and the Emergence of New Values* (Author House 2018) 119.

64 *ibid.* 8.

The Constitutive Act of the AU does not acknowledge values or cultural systems. The African Union's policymakers realised this error and integrated African ideals in Agenda 2063. Agenda 2063's fifth goal is to create an Africa with a strong cultural identity, shared heritage, values, and beliefs. According to the first report of Agenda 2063, Africa has only achieved a total of 12% of this goal.⁶⁵ The African Continental Free Trade Area Agreement (AfCFTA Agreement) does not incorporate values, it only states that the AfCFTA Agreement should not be interpreted as derogating from the values of other instruments.⁶⁶

African cultural systems, values, and ideas are codified at the national level, but their IIAs do not reflect this crucial feature of democracy. Even if African states differ significantly from one location to the next, African culture, values, and beliefs are all intertwined.⁶⁷ Therefore, African states to a large extent, share some dominant traits in their cultural systems and have similar values, making it possible to incorporate cultural values in IIAs concluded by them. However, they have followed the Eurocentric approach which echoes article 38(1) of the ICJ Statute, by focusing on those values that find resonance in Euro-thought or the Western world outlook on account of their endorsement by 'civilised nation'.

Values that Can be Infused in Intra-African Investment Agreements Peace

The Preamble of the Constitutive Act of the AU recognises peace, security and stability as a prerequisite for the implementation of Africa's development and integration agenda. Peace is further recognised as one of the objectives as well as principles of the AU.⁶⁸ As a result, intra-African IIAs should include peace as a foundational value in the realisation of sustainable economic development. By requiring legislative and other policy-related programs to provide a framework within which 'peace' can be consolidated, an environment that is conducive to the state's responsibilities can be created.

Various obstacles and atrocities obstruct the realisation of sustainable economic growth in Africa, affecting the development of peace as a value in the promotion and protection of foreign investment. These issues include violence, corruption, disdain for African value systems, and other elements that jeopardise the African continent's stability as

65 AU, 'Agenda 2063: First Continental Report on the Implementation of Agenda 2063 (2020)' <<https://au.int/en/documents/20200208/first-continental-report-implementation-agenda-2063>> accessed 15 December 2021.

66 Article 12 of the AfCFTA Agreement.

67 Idang (n 56) 98.

68 Articles 3(f) and 4(i) of the Constitutive Act of the AU.

well as the centrality of peace as a value in the development of international economic law in Africa.

Humanness

Humanness is a moral value and is directly linked to the cultural values in that African culture has a moral code. An example of such moral code includes the prohibition of doing harm to others.⁶⁹ It has been widely embraced in phrases such as ‘I am because you are’ or ‘you are because I am’.⁷⁰ This flows from the reality that one’s action affects the entire community. African communities have always had traditional mechanisms for interacting with each other and handling disputes arising in their communities.⁷¹ Humanness as a value is premised on the belief that the welfare of the individual and of the community is inextricably linked—the one cannot exist without the other.⁷² In essence, the philosophy of humanness advocates that everyone must be treated with common humanity.⁷³

Values are beliefs that are regarded by the community as right or wrong, and thus hold what is important in such community.⁷⁴ They may be ideas that propel one’s daily actions.⁷⁵ They are thus the moral standards which members of the community adhere to in their personal and communal interaction towards the achievement of their goals.⁷⁶ They can be institutional and cherished by individuals and by a group of people. Values can refer to the usefulness of a thing which is a function of choice-making.⁷⁷ The concept of choice is preponderant to the greatest aptitude of the person making the choice.⁷⁸ Moral value is directly linked to cultural values in that African culture has a moral code. An example of such a moral code includes the prohibition of doing harm to others.⁷⁹

Humanness is premised on the belief that ‘the welfare of the individual and of the community is inextricably linked – the one cannot exist without the other’.⁸⁰ In essence,

69 This is widely accepted as one of the international law principles.

70 Mfuniselwa Bhengu, *Ubuntu: The Essence of Democracy* (Novalis Press 1996) 5.

71 In Yoruba it is referred to as *Omoluabi* (good character).

72 Yvonne Makgoro, ‘Ubuntu and the Law in South Africa’ (1998) 1(1) PELJ 2–3.

73 Angelo Dube and Sibusiso Nhlabatsi, ‘The King can Do no Wrong: The Impact of the Law Society of Swaziland v Simelane NO & others on Constitutionalism’ (2016) 16 African Human Rights Law Journal 275.

74 *ibid.*

75 *ibid.*

76 Frank Onuoha, ‘Locating African Values in Twenty-First Century Economics’ <<https://www.africanliberty.org/2015/09/09/onuoha-frank-locating-african-values-in-twenty-first-century-economics/>> accessed 20 March 2020.

77 Idang (n 56) 98.

78 *ibid.*

79 This is widely accepted as one of the international law principles.

80 Makgoro (n 72) 2–3.

it advocates that everyone must be treated with common humanity.⁸¹ Humanness espouses: (1) A notion of humanistic experience that treats everyone with respect and dignity; (2) values like universal brotherhood [and sisterhood] for Africans; (3) a belief in the centrality, sacredness, and foremost priority of the human being in all conduct and lives; (4) a way of life that contributes towards sustaining the well-being of people, a community or society.⁸²

In its most basic definition, humanness denotes humanity and morality, and it encompasses the important qualities of group solidarity, compassion, respect, human dignity, compliance to basic rules, and collective unity. Its spirit emphasises human dignity, signalling a shift away from confrontation and toward compromise.

Unity and Inclusiveness

It is believed that the Pan-Africanism⁸³ movement began just after the World War I when African states signed the Versailles Peace Treaty.⁸⁴ It is further believed that Garvey Marcus, du Bois WEB, and Nkrumah Kwame are the Pan-Africanists who ushered in unity in Africa.⁸⁵ This is far from the truth; Africans have always been united, despite the lack of a political phrase for it. They were connected prior to colonisation, dealing with trade in numerous sectors such as mining and agriculture. African leaders were united in their resistance against colonialism during the colonial era. They have remained unified in decolonisation and Africanisation programs in recent years. The only difference is that the union is now described by a political word.

This does not, however, mean that Africa has never faced a challenge of unity. For example, in 1960 tensions arose between states which had just *regained* their independence, and the initial decision was to split Africa into two economic and political blocs.⁸⁶ In 1961, the Casablanca bloc had a dynamic anti-imperialist view, and the Monrovia-Brazzaville bloc, was vocal on issues of decolonisation.⁸⁷ In the end, these

81 Dube and Mhlongo (n 26) 275.

82 Mfuniselwa Bhengu, *Ubuntu: The Essence of Democracy* (Novalis Press 1996) 4.

83 Pan-Africanism is the belief that people of African descent have common interests and should be unified. See South African History Online, 'Pan-Africanism' <<https://www.sahistory.org.za/article/pan-africanism>> accessed 18 March 2021.

84 Tajudeen Abdul-Raheem, *Pan-Africanism: Politics, Economy, and Social Change in the Twenty-First Century* (New York University Press 1996) 3–5.

85 Marcus Garvey is believed to have founded the 'Negro Empire' in 1920, which attracted millions of Afro-Americans by using slogans as 'Africa for the Africans' 'Back to Africa' and 'Renaissance of the Black Race'. See Martin (n 24) 7.

86 Edgar Mangwende, 'The OAU: An Analysis of the Function, Problems and Prospects of the Organisation' (1984) African E-Journals Project 23.

87 Elias Taslim, 'The Charter of the Organisation of African Unity' (1965) 59(2) American Journal of International Law 243; see also Baba Shaik and others, 'Successes and Failures of the Organisation of African Unity: Lessons for the Future of the African Union' (2005) 40(3)2 Journal of Public Administration 500.

two blocs compromised, and merged to form the OAU in 1963.⁸⁸ The OAU Charter was signed despite disagreement between the Casablanca and the Monrovia groups.⁸⁹

A closer look at the principles endorsed by the OAU shows that these principles were intently focused on protecting sovereignty of states which had just *regained* independence, and to assist dependent states to *regain* their independence, as compared to sustainable economic development and *relations*. This means that the principles of the OAU were motivated by the reality that African states had been colonised and the focus was mainly to preserve sovereignty and non-interference in member states' internal affairs. Its failure to meet the cumulative results of, among others, economic freedom affected its relevance.⁹⁰

Unity is directly linked to inclusiveness, and article 4(c) of the Constitutive Act of the AU recognises the inclusion of African people in the activities of the AU as one of its principles. The blueprint for the social, political, and economic transformation of the continent, emphasises a bottom-up, inclusive, participatory and people-driven approach to development.⁹¹ The Constitutive Act of the AU recognises unity and solidarity between the African countries and the people of Africa as one of its objectives. Africa's diversity should spearhead the continent's transformation and direct its development.⁹² The Preamble of the Constitutive Act of the AU recognises the need for African people to be united in strengthening solidarity and cohesion in Africa. International law is sometimes described with words such as 'unity' or 'unified' to denote the fact that it is a connected web of related rights and obligations among states.⁹³ Even though the founding document of the AU recognises these values, the intra-African IAs are yet to embrace them as founding values. There is currently a need in the African context to embody unity of norms and unity of policy makers.

The question now is how would this manifest in practice? The heads of governments or their representatives would generally speak for their countries. They would, however,

88 Rachel Murray, *Human Rights in Africa: From the OAU to the African Union* (Cambridge University Press 2004) 4. At first, the name Organisation of African States was considered. However, in the end, African Heads of State thought that it could easily be confused with the Organisation of the American States.

89 The Preamble of the OAU generally covered issues of sovereignty, solidarity and unity in Africa. The aim of the OAU was to promote unity and solidarity amongst African states, achieve a better life for Africans and defend the sovereignty, territorial integrity and independence of its members. It intended to do this by coordinating and intensifying cooperation for development. The OAU is believed to have been the contemporary epitome, and the vehicle which transported political consciousness in Africa.

90 Kufuor Oting, 'The Collapse of the Organisation of the African Unity: Lessons from Economic and History' (2005) *Journal of African Law* 133.

91 John Mbaku, 'The African Union: Which Way Forward?' <<https://www.brookings.edu/blog/africa-in-focus/2016/02/11/the-african-union-which-way-forward/>> accessed 20 July 2021.

92 *ibid.*

93 Matthew Craven, 'Unity, Diversity and the Fragmentation of International Law' in John Klabbbers (ed), *Finnish Yearbook of International Law* (Martinus Nijhoff Publishers 2003) 3.

have to allow for public debate on a national basis. Before issues are brought and addressed at an international level, members of the public should be given an opportunity to fully engage with them. Many African countries' economic development has been hampered by excluding citizen participation. Policymakers, on the other hand, must recognise that Africans must have a say in problems that affect them socially, economically, and politically.

Equality, Equity and Dignity

Linked to inclusiveness and unity is equality equity and dignity. Inclusivity and unity should be compatible with the recognition of different levels of development of African countries. African states have different levels of economic development. In the international investment policy space, states' inequality may have an impact on the implementation and achievement of certain IIA's goals. For many years, rich countries tried to shield their foreign investors from political risk in emerging host countries, while developing countries tried to attract international investment by pledging to protect it.⁹⁴

Diana Panke argues that states which have higher capacities usually take the floor to voice their national and regional positions.⁹⁵ However, states which lack resources are more likely to be inactive during negotiations even if they possess resources to play an active role in achieving objectives of the anticipated instrument.⁹⁶ Therefore, if individual capabilities of states are not taken into account, then there may be lost opportunities in Africa, and weaker economies will retain their 'observer-like status'. Steps need to be taken to improve the political oversight of officials participating in negotiations in areas such as trade and investment.⁹⁷

Every legal instrument should, as a matter of principle, respect the equality and dignity of all stakeholders. The inclusion of state and national equality and dignity in the achievement of sustainable economic development and *relations* in IIAs should become a standard practice. Modern Africa exists in a democratic legal order, and its efforts should aim to restore the equality and dignity that were taken away by colonialism. Recognising the equality and dignity of African states is a direct acknowledgement of the injustices and marginalisation brought about by colonialism. On the economic front,

94 World Trade Institute, 'Rule-takers or Rule-makers? A New Look at African Bilateral Investment Treaty Practice' (2016) Working Paper No. 72.

95 *ibid.*

96 Diana Panke, 'Dwarfs in International Negotiations: How Small States Make their Voices Heard' (2012) 25(3) Cambridge Review of International Affairs 6.

97 Jeswald Salacuse and Nicolas Sullivan, 'Do BITs Really Work: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain' (2005) 46 Harvard International Law Journal 67; see also Emily Jones, *Negotiating Against the Odds: A Guide for Trade Negotiators from Developing Countries* (Palgrave Macmillan 2013) 44.

it refers to recognising the need to change the status quo, as well as radically redressing historical, social, and economic inequalities and injustices caused by colonialism.

This should include addressing the following pressing policy challenges: (1) strengthening the development dimension of the investment policy regime; (2) ensuring adequate policy space for host countries by balancing public and private interests; (3) addressing serious deficiencies in the current international investment system; and (4) resolving issues arising from the increasing complexity of the international investment policy regime. African states must therefore not only recognise the goals of IIAs, but also apply values and cultural systems in order to restore Africa's dignity.

To achieve equity and equality of African states, member states will need to redress specific economic situations of historically harmed states. This may be done through the provision of special and differentiated treatment for least developed countries.⁹⁸ Such special treatment could refer not only to orthodox issues such as investment incentives, but also to specific forms of exceptions and carve outs, and by emphasis on freedom of governmental regulation.⁹⁹ To respond to the need to find a way to properly implement IIAs in Africa, member states must recognise the need for fundamental change to promote equity in ways that do not jeopardise foreign investment sustainability. As a result, reducing inequalities between member states should be part of the goals, not an end in itself. It is worth noting that inequalities in global income and wealth distribution have emerged as a result of, among other things, a historical process pervaded by colonial grievous wrongs.¹⁰⁰

Of importance at this juncture is the recognition of the level of development of each member state, which ultimately affects the implementation strategies of IIAs. The discussion regarding equality and equity of member states relates to how host states should treat each other, taking into account the unique needs and capability of each African state on an individual level. African history has shown us that there is a need to infuse equality and equity on the continent; taking into account levels of development. Equality and equity of member states in an IIA should be a fundamental element of any successful implementation of these types of treaties. This will address the power imbalance that currently exists, and achieve the realisation of a fair economic landscape.

The economic difficulties and dangers that Africans faced as they embarked on *regaining* their independence were daunting. However, Africa made remarkable advances since the colonial era, and at the end of the post-colonial period, rapidly rising

98 Louise Delany and others, 'International Trade and Investment Law: A New Framework for Public Health and the Common Good' (2018) 602 BMC Public Health 5.

99 *ibid.*

100 *ibid* 3.

post-war revenues and a new ideology of economic ‘developmentalism’ gave momentum to state expansion that was to endure the African economic challenges.¹⁰¹

Trust

The IIAs should also include trust as its value. The lack of trust, respect and commitment towards the AU dates back to the OAU days. For years, many scholars have written about these challenges which affect not only the negotiation, but also impede the implementation of international agreements.¹⁰² As a result, this has opened a gap at negotiation tables. Deborah Larson in 1997 bluntly opined that ‘in international relations there is lack of trust despite its importance’.¹⁰³ Even though this discussion has been going on for years now, the issue of trust, respect and commitment still comes into play when African leaders are supposed to commit to their obligations at the international level. This is so even though the active participation of member states in IIAs is an important condition for the ability of states to exert influence over the content of international norms and rules.¹⁰⁴ Furthermore, many of the most important tactical moves taken in a negotiation occur ‘away from the table’.¹⁰⁵ Such moves are vital for setting up the most promising situation at the negotiating table. Indeed, if negotiators do not seek to influence the negotiating set-up, they are likely to be placed at an inherent disadvantage.¹⁰⁶

Furthermore, Agenda 2063 may have a challenge of commitment, which may ultimately affect its implementation on a practical level.¹⁰⁷ Given that Agenda 2063 seeks to ultimately establish a political union and supra-national organs to act on behalf of African governments, it is unlikely that some African leaders will let go of their sovereign power easily.¹⁰⁸ One of the causes for Africa’s lack of progress is governments’ refusal to hand up control of their macroeconomic policies to an international body. Economic integration in Africa has been hampered by a lack of strong and long-term political commitment as well as macroeconomic volatility.¹⁰⁹

101 Crawford Young, *The Post-Colonial State in Africa* (University of Wisconsin Press 2012) 8.

102 Danso Kwaku, ‘The African Economic Community: Problems and Prospects’ (1995) 42(4) *The Politics of Economic Integration in Africa* 31.

103 Deborah Larson, ‘Trust and Missed Opportunities in International Relations’ (1997) 18(3) *Political Psychology International Society of Political Psychology* 702.

104 *ibid.*

105 Emily Jones, *Negotiating Against the Odds: A Guide for Trade Negotiators from Developing Countries* (Palgrave Macmillan 2013) 43.

106 *ibid.*

107 Vedaste Ndizera and Hanna Muzee, ‘A Critical Review of Agenda 2063: Business as Usual?’ (2018) 12(8) *African Journal of Political Science and International Relations* 143.

108 *ibid.*

109 Geda Alemayehu and Kibret Haile, ‘Regional Economic Integration in Africa: A Review of Problems and Prospects with a Case Study of COMESA’ (2002) Working Paper 125.

When governments do not trust or respect the values of negotiated instruments and international organisations, they will jump from one accord to the next in the hopes of achieving their own goals. Some countries have been slow to ratify IIAs, while others have moved to withdraw from international organisations, regional and global tribunals.¹¹⁰ For example, Burundi was the first country to withdraw its membership from the International Criminal Court (ICC) after accusing the ICC of undermining its sovereignty and unfairly targeting Africans.¹¹¹ South Africa attempted to withdraw from the ICC¹¹² and the SADC Tribunal,¹¹³ however, on both occasions the South African Constitutional Court ruled against these decisions. Lesotho, Mozambique and Tanzania left COMESA, and joined other RECs,¹¹⁴ while other states such as South Africa¹¹⁵ and Morocco¹¹⁶ have terminated some of their IIAs.¹¹⁷ This should not only form the basis of Agenda 2063, but should also be incorporated within IIAs in Africa, as it has the potential to build a strong harmonised Africa.

The Importance of Including Values and Cultural Systems in International Investment Agreements

The world is at the threshold of the twenty-first century and the third millennium; Africa should fully prepare for the future. There are currently many IIAs that African states concluded either on bilateral or multilateral bases which are awkwardly flawed from the African perspective. Many African states concluded many IIAs where the focus was to be part of the international economic community, without comprehending the negative effects of these treaties.¹¹⁸ Africa should not only focus on being part of the international economic community but should also channel its inter-state relations to achieve *inter alia* its unique economic development goals.

110 Stephan Schill, 'International Investment Law and Rule of Law' Amsterdam Law School Legal Studies Research Paper No. 2017-18 1–2; see also OECD, 'Key Issues on International Investment Agreements' (2017) 2.

111 UN's Africa Renewal, 'ICC: Beyond the Threats of Withdrawal' <<https://www.un.org/africarenewal/magazine/may-july-2017/icc-beyond-threats-withdrawal>> accessed 21 July 2021.

112 *Democratic Alliance v Minister of International Relations and Cooperation and Council for the Advancement of the South African Constitution Intervening* 2017 (1) SACR 623 (GP).

113 See *Law Society of South Africa v the President of the Republic of South Africa* 2019 (3) SA 30 (CC).

114 SAIIA, 'A Pending Crisis of Overlap' <<https://saiia.org.za/research/a-pending-crisis-of-overlap/>> accessed 20 July 2021.

115 South Africa has terminated about 11 BITs.

116 Morocco has terminated about 10 BITs.

117 UNECA, *Investment Policies and Bilateral Investment Treaties in Africa: Implications for Regional Integration* (Economic Commission for Africa 2016) 26.

118 Ewout Frankema, 'How Africa's Colonial History Affects its Development' <<https://www.weforum.org/agenda/2015/07/how-africas-colonial-history-affects-its-development/>> accessed 13 October 2021.

Colonialism fundamentally changed the nature of relationships that existed between African states in the pre-colonial era. What also emerged from the discussions above is that some of the key international law rules currently attributed to events in Europe occurred in Africa and other third world societies before the so-called European Renaissance.¹¹⁹ Sanders Boykin argues that the white world:

Brought an end to one of the long-tested principle of African life and survival around the world: *I am because we are, and we are because I am*. That principle, a defining one for the African concept of community in traditional society and a staple for African behaviour, was replaced by individualism, i.e., the right of each person to determine life's courses without threat of group sanctions. As a result, a freedom that once suggested interethnic solidarity now suggested the individuated existence.¹²⁰

Colonialism divided and constrained development, encouraged neo-colonialism and helped perpetuate Africa's economic and political weakness in global affairs.¹²¹ As a result, when African states *regained* their independence, they focused more on issues which would strengthen their sovereignty, rather than economic development.¹²² Values, cultures and beliefs should not be considered to be a normative evil, but rather a product of African history which may be embraced in the contemporary international legal order.

Furthermore, values are directly linked to inherent human dignity, equality, supremacy, continental common goals, respect, and transparency. For Africans, culture and values constitute what we can term an 'African personality', as evidenced in the pre-colonial and reform in the post-colonial era. Values and culture need to be revived with fresh vigour, developing and adapting to the exigencies of the modern world.¹²³ It is one thing to decolonise and Africanise the mind, body and spirit, however, Africa needs to decolonise and Africanise its economic space.

The imposition of colonialism on Africa altered its history, modes of thought, and patterns of cultural development. African practices have been impacted upon by the change in the political structure brought about by colonialism.¹²⁴ One of the ways of overcoming the colonial legacy is by concluding IIAs that embrace values. This will assist in fostering economic development, protect the environment, uphold the rights,

119 Dube and Mhlongo (n 26) 281.

120 Boykin Sanders, *Blowing the Trumpet in Open Court: Prophetic Judgment and Liberation* (Africa World Press 2020) 14.

121 *ibid* 3.

122 This is evident from the objectives of the OAU discussed above. See also Martin (n 24) 173.

123 Robert July, *An African Voice: The Role of the Humanities in African Impedance* (Duke University Press 1987) 19.

124 Joshua Settles, *The Impact of Colonialism on African Economic Development*' (University of Tennessee Honors Thesis Project 1996) 1.

values, and principles of this Agreement at national and regional levels with a purpose of achieving a progressive realisation of socio-economic rights.

The life experiences of Africans (in terms of everyday reality, indigenous knowledge, cultural transmission, community engagement, and so on) should be taken into account when it comes to developing a robust economy in Africa. The empirical research on the international economic order has primarily concentrated on the concepts of this field of law, rather than looking into whether any African practices have been or could be transmuted into the current international economic system. As a result, many international economic accords signed by African countries fail to reflect African ideals and beliefs. They mostly contain international law's westernised ideas. African reality, on the other hand, has its own set of values, norms, and standards that govern how Africans behave.¹²⁵

Having highlighted the above, it is important to note that the discussion of these practices in this paper does not presuppose that all African societies experienced the same events, same language, same practices and same mode of addressing issues. African reality comprises of its own values, norms and standards which underscores the behaviour of African people. One can argue that values and practices may be incorporated into modern IIAs in order to achieve the sustainable economic development of African states.

Conclusion

Values are not static. They are capable of being incorporated into the contemporary international economic framework, and thus infusing a qualitative new ethos. Africans have a value system that colonialism, segregation, and apartheid managed to distort and suppress but could never eradicate.¹²⁶ Thus far the incorporation of values in the IIAs is a missed opportunity, however, the AU can still remedy this by incorporating them in one document which is meant to be the umbrella of investment in Africa. Values and principles should occupy a central place in intra-Africa IIAs. If these IIAs were to reflect African principles and values in a practical sense, the potential to have a transformative effect on sustainable economic development and relations could be higher.

To ensure the successful incorporation of values and cultural systems, African states should include them in their national legal instruments that are related to investment. The integration of African values in IIAs will ensure effective and responsible leadership and empowerment of people to participate and bring inputs into the decision-making process. Including values in the IIAs will also motivate African states to be

125 Joseph Balwin and Yvonne Nell, 'The African Self-consciousness Scale: An Afrocentric Personality Questionnaire' (1985) 9(2) *Western Journal of Black Studies* 62.

126 Mbulelo Mzamane, 'Culture and Social Environment in the Pre-colonial Era' (2009) 46(1) *Tydskrif vir Letterkunde* 204.

conscious and deliberate in their efforts to nurture a transformative leadership that will drive the economic agenda and defend Africa's interests.

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