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978-0-521-18403-8 - The African Human Rights System, Activist Forces, and International Institutions

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The African human rights system, activist forces, and international institutions: an introduction

Aside from their weak attempts at commanding obedience and their very modest successes at cajoling compliance, are there other significant ways in which international human rights institutions (IHIs), such as the African human rights system,¹ can matter to those who wage domestic social struggles? Aside from doing something *for* the local activist forces that wage such struggles, can such activist forces do meaningful things *with* the African system in their engagement with the domestic institutions of their own countries? Can these activist forces, as local actors and agents, more effectively deploy and harness within states the norms, processes, and creative spaces that have been made available to them partly as a result of the character and behaviour of the African system? Can they by so doing facilitate a creative form and process of “trans-judicial communication” between the African system and such other IHIs (on the one hand) and the key domestic institutions (on the other hand)? In short, what precisely, if at all, is the extent of the domestic impact of the African system; how exactly has such domestic impact been achieved; and what does the manner in which it has been achieved tell us about the ways in which we imagine and evaluate IHIs like the African system?

A number of concepts are central to the questions raised above: the African human rights system, activist forces, IHIs, and trans-judicial communication. These require definition. Although it is in one sense possible to speak of the existence of African human rights systems, and despite the fact that specialized human rights systems such as those established under the African children’s rights and refugees’ rights conventions do exist,² as used in this book, the expression the “African human rights system” refers to the main, more general, human rights

¹ Hereinafter referred to as the “African system.”

² See the African Charter on the Rights and Welfare of the Child, 1990, available at www.achpr.org/english/_info/child_en.html (visited 12 March 2006); and the OAU

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system which is operational on the continent, and which was established by the African Charter on Human and Peoples' Rights in 1981 and physically set up in 1987.³ This more general African system consists in the main of the African Charter, the African Commission on Human and Peoples' Rights (hereinafter the "African Commission" or the "Commission"), the new Protocol on the Rights of Women in Africa, and the new African Court of Human and Peoples' Rights (hereinafter the "Court").⁴ As such, references in this book to the system includes reference to the African Charter (the treaty on which the system is founded and which iterates the system's goals and norms), to its Protocols (on the establishment of a Court and on women's rights), and to the African Commission (which was established by that treaty, *inter alia*, to monitor the observance of states with its provisions).

As I use it here, the expression "activist forces" refers to the activist judges and civil society actors (CSAs) who openly challenged and challenge aspects of dictatorial rule and continue to fight to ameliorate human rights violations in countries like Nigeria, South Africa, Togo, Benin, Ghana, Namibia that are discussed in chapters 4 to 6. While these groups are described in this book as activist because they tend to possess this "resistance character," it is worthwhile to note, even at the outset, that the activist orientation of any of these actors does not settle the question of the nature of its political ideology. While most of these activist forces will be considered by most observers as progressive rather than regressive elements, this cannot always be said for every such actor. To be clear, reference to CSAs in this book (as a sub-group of activist forces) are meant to include one or more of the following: self-professed human rights CSAs, activist lawyers, women's groups, faith-based groups, trade unionists, university students, pro-democracy campaigners, radical or dissident politicians (such as those who operated in Nigeria under the umbrella of the National Democratic Coalition (NADECO)), professional groups (such as the Nigerian Bar Association and the

Convention governing the Specific Aspects of Refugee Rights in Africa, 1969, available at www.achpr.org/english/_info/refugee_en.html.

³ See the African Charter on Human and Peoples' Rights, 1981 (1982) 21 ILM 59 (hereinafter the "African Charter" or the "Charter").

⁴ For the Women's Rights Protocol, see the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003, available at www.achpr.org/english/_info/women_en.html. For the African Court, see the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 1998, available at www.dfa.gov.za/for-relations/multilateral/treaties/court.htm.

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Nigerian Medical Association), independent journalists, and other such actors.

In the sense in which I use it in this book, the term “IHI” encompasses both international human rights regimes and the bodies and mechanisms that monitor actors’ adherence to regime norms and goals. Since both the regime and the monitoring bodies would normally operate in an integrated manner, this makes sense in a book such as this. While the exact legal status of these institutions remains unclear, there is little doubt that whatever else they are, they are also specialized political institutions. In many cases, they also function in the nature of quasi-judicial bodies without being formally styled as such. IHIs set and interpret international human rights standards and thus seek to produce international human rights meaning. Examples of such institutions include the Human Rights Committee established by article 28 of the International Covenant on Civil and Political Rights;⁵ the Committee Against Torture established by article 17 of the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment;⁶ and the African Commission on Human and Peoples’ Rights established under article 30 of the African Charter. To be clear, I must state the fact that I use the concept of IHIs in a broader sense than it was used in the leading international human rights textbook written by Steiner and Alston.⁷

As I use the expression here, “trans-judicial communication” refers to the brokered transnational transmission of norms, ideas, or knowledge between the African system (which in reality functions in a kind of quasi-judicial mode) and the key domestic institutions of some states parties to that system. This transmission of norms has been brokered and facilitated by the activist forces, especially human rights CSAs which operate within these states. I am, of course, aware that Anne-Marie Slaughter has used this expression in a somewhat different sense.⁸

The first of the two overarching objectives of this book is to show that, with or without fostering direct state compliance, the African system can (under certain identifiable conditions) achieve domestic impact by affecting significantly the thinking processes and action of the key domestic

⁵ See (1967) 6 ILM 368. ⁶ See (1984) 23 ILM 1027.

⁷ See H. J. Steiner and P. Alston, *International Human Rights in Context: Law, Politics, Morals* (New York, Oxford University Press, 2000), p. 771.

⁸ See A. Slaughter, “A Typology of Transjudicial Communication” (1995) 29 *University of Richmond Law Review* 99.

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institutions of certain African states, thereby fostering “correspondence” between the African system’s norms and the thinking/behaviour of these sub-national institutions. It will be shown that this possibility (what I will refer to in this book as the “ACHPR (African Charter on Human and Peoples’ Rights) phenomenon”) is best realized when local activist forces, especially CSAs, lead a process of trans-judicial communication that involves the creation of a virtual human rights network among the African system and these activist forces, as well as the deployment by these activist forces of the norms and/or processes of the African system within key domestic institutions, such as the judiciary, the legislature, and the executive, in ways that can often enable previously unavailable arguments to become available and acquire even more persuasive power; increase the success rate of these arguments; and facilitate alterations in the logics of appropriateness, conceptions of interest, and self-understandings that had hitherto prevailed within the relevant domestic institutions. As these activist forces tend to act as “norm entrepreneurs,”⁹ tend to make detailed ends-means calculations,¹⁰ and tend to deal more in the currency of ideas, knowledge, and norms, than in more material factors, a quasi-constructivist (and therefore constructivist) explanation seems entailed.¹¹ Thus, in developing this argument, key elements of the broadly constructivist approach to the study of IHI effectiveness will be pressed into service. Constructivism is rich in understandings and explanations of the processes through which the self-understandings, logics of appropriateness, and conceptions of interest held within key domestic institutions can be shaped or re-shaped in the process of interacting with IHIs and other kinds of international institutions. The work of quasi-constructivists is particularly important in this respect.

A consequential and second objective of the book is to argue for a modest extension of the measure by which the effectiveness of the African system (and other similar IHIs) has hitherto been assessed. This modest extension is necessary because the currently dominant measure of IHI effectiveness has tended to focus almost entirely on observing and analyzing the capacity of the African system (and other such IHIs) to command, cajole, or attract state compliance.¹² As a result,

⁹ See M. Finnemore and K. Sikkink, ‘International Norm Dynamics and Political Change’ (1998) 52 *International Organisation* 887 at 895.

¹⁰ *Ibid.*

¹¹ The nature of both “constructivism” and “quasi-constructivism” will be discussed in detail in chapter 2.

¹² This concept is explained in detail in chapter 2.

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while it has been of great utility in measuring state compliance with IHI decisions, the conventional measure of IHI effectiveness has all-too-often been unable to capture the occurrence of correspondence and therefore of the possibility of the ACHPR phenomenon.

To be clear, however, the objective of the book is not to dismiss or treat with contempt the measurement of state compliance as a form of inquiry into the value of IHIs. Rather it is to extend the frontiers of that measure and deepen that barometer. In the end, what is suggested in this book is that scholars reach beyond (without abandoning) the state compliance optic.¹³

As importantly, the reader should keep in mind the fact that the book is not really a doctrinal study of the jurisprudence of either the African system or any of the relevant domestic courts in Africa. The analysis of the case law that is provided here is merely aimed at supporting the focus of the book on how the cases show the capacity of activist forces to deploy creatively the African system within states. Similarly, the book is also not a treatise on the procedures and processes of the African system. The literature is now so well endowed in that regard that it needs little addition.

In consonance with the book's objectives, the author has gathered relevant evidence from Nigeria, South Africa, and a number of other African countries in order to ground the broader effort that is undertaken in the book to map more accurately the domestic impact of the African system (and thereafter to examine its implications for our evaluation and understanding of IHIs). Although relevant evidence from a number of other African countries was gathered, the bulk of the more high quality evidence happens to be Nigerian and, to a lesser extent, South African. Given the fact that Nigerian civil society groups have been acknowledged by many discerning observers to be one of the two most dynamic on the African continent;¹⁴ given the fact that over 20 percent of the population of that entire fifty-four-country continent

¹³ For a sophisticated version of the compliance-centered approach, see O. A. Hathaway, "Do Human Rights Treaties Make a Difference?" (2002) 111 *Yale Law Journal* 1935. For a critique of her study, one that hints at the kind of expanded optic that the book will argue in favour of, see R. Goodman and D. Jinks, "Measuring the Effects of Human Rights Treaties" (2003) 14 *European Journal of International Law* 171. Hathaway's reply to Goodman and Jinks is published in the same volume. See O. A. Hathaway, "Testing Conventional Wisdom" (2003) 14 *European Journal of International Law* 185.

¹⁴ For instance, see T. Shaw, "Africa in the New World Order: Marginal and/or Central?" in A. Adedeji (ed.), *Africa within the World* (London, Zed Books, 1993), pp. 91–92.

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lives in Nigeria,¹⁵ and given the fact that its population is, in relative terms, among the most highly educated in Africa,¹⁶ the concentration of the evidence in Nigeria is perhaps not as surprising and problematic as it could be. What is more, Nigeria's notoriety during most of the relevant period (that is, from 1987 to the early 2000s) as a state which was captured, governed, and dominated by dictatorial forces;¹⁷ its status during the relevant period as one of the most powerful and endowed African states;¹⁸ the fact that complaints originating from Nigeria constituted the single most numerous chunk of complaints that came before the African Commission during the relevant period;¹⁹ and Nigeria's status as an original party to the African Charter and consistent participant in the work of the African Commission, are all factors that helped produce this situation. Overall, given the fact that Nigeria constitutes only about 2 percent of the number of states parties to the African system but has generated about 17 percent of all the cases brought before the African Commission, it is fair to conclude that should the system be shown to have promise in Nigeria, that would be a very significant development in a direct sense for 20 percent of Africans (Nigeria's share of Africa's population). What is more, in an indirect sense, it would be

¹⁵ See www.country-data.com/cgi-bin/query/r-9371.html (noting that Nigeria's population is about twice the size of that of the next largest country in Africa, Egypt, which had an estimated mid-1989 population of 52 million; Nigeria represents about 20 percent of the total population of black Africa). This is corroborated by a review of the UN Economic Commission for Africa's website. See www.uneca.org/aisi/nici/country_profiles/Nigeria/nigeriab.htm.

¹⁶ UNDP statistics indicate that Nigeria has a youth literacy rate of about 87 percent and an adult literacy rate of about 65 percent. See http://hdr.undp.org/reports/global/2003/indicator/cty_f_NGA.html. Nigeria also has over forty-five universities and hundreds of institutions of tertiary education.

¹⁷ See A. Olutokun, "Authoritarian State, Crisis of Democratization and the Underground Media in Nigeria" (2002) 101 *African Affairs* 317 at 317–318.

¹⁸ I. Mgbeoji, *Collective Insecurity: The Liberian Crisis, Unilateralism, and Global Order* (Vancouver, University of British Columbia Press, 2003), p. 42.

¹⁹ Just for instance, an analysis of the cases which were dealt with by the African Commission in the five year period between 1994–1999 (some of its most active years) reveals that 17 of the total number of 107 cases were brought against Nigeria (just under 17 percent of the total number of cases). Yet, Nigeria is only one of fifty-three states parties to the African Charter, and therefore it is just one of fifty-three states actors within the African system (that is, it is only 2 percent or so of the total membership of the African system). This is a highly disproportionate relationship that is only tempered by the fact that the 17 percent of the cases that are attributable to Nigeria almost match Nigeria's share of Africa's total population, which is about 20 percent. In any case, the point is that Nigeria has, during the relevant period at least, been the single most important state actor within the African system.

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a significant development for the African system itself (since Nigerian matters take up 17 percent of its time, effort and resources!). As such, it will, in an indirect way, also be a significant (though not absolutely definitive) development for most African states. Similarly, given South Africa's giant stature in Africa (especially its large population of about 48 million, its status as by far Africa's richest country and strongest economy, and its extremely strong support for and participation in the African system), it will also be significant if the African system were to be found to have had an appreciable degree of impact within that country. However, as we shall see, because South Africa's CSAs have not engaged as much with the African system as their Nigerian peers, and for other such reasons, even the appreciable South African evidence that exists is not as profound or even bountiful as that from Nigeria. As relatively important is the fact that some direct evidence from a number of other countries regarding the domestic impact of the African system does exist and is reported and analyzed in chapter 6.

An interdisciplinary combination of legal and other social science techniques, including detailed field work in Nigeria and South Africa – the two most promising and most important sites – were utilized. The concentration of the detailed field work on these two locations was because preliminary purposive inquiries did not reveal the existence of much evidence elsewhere that could not be obtained via textual searches. As such, the huge expenditure that would have been involved in traveling to the other African countries could not be justified. As such, the general methodology adopted was purposive, and not random, sampling. The evidence was systematically sought wherever it could be found.

The study sought to demonstrate the arguments made in this book by collecting, examining, and analyzing the available evidence concerning the influence of the African system within Nigeria, South Africa, and certain other African states (that is, the system's influence on domestic courts, executive action and policy-making, and legislation in these countries, as well as its influence as a crucial resource in the hands of CSAs in the relevant African states). The first kind of influence was observed in the decisions of the courts and in the arguments and briefs of counsel, as well as by interviewing domestic counsel and judges. The second was observed by analysing the relevant governmental policies and laws, all in their various historical contexts. The third kind of influence was observed by analyzing domestic legislation, relevant *Hansards*, other relevant documents, and the texts of the decisions and

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resolutions that emanate from within the African system, as well as by analyzing the documents that reveal the social context of the legislation and governmental reactions to criticisms of such legislation. Relevant legislators and policy-makers were also interviewed informally when necessary. In all these cases, further evidence was obtained by interviewing, observing, or collecting evidence about CSA activists and other activist forces, as well as by analyzing their annual activity reports, the decisions, and the text and context of the decisions that have emanated from the African system. Whenever relevant and necessary, textual analysis of quasi-judicial decisions, resolutions, activity reports, and other related documents that have emanated from the African system was done. The African Charter and its Protocols were also analyzed when relevant and necessary. All of the textual analysis was done by purposefully seeking, collecting, and analyzing every one of such documents that was viewed as relevant. This was so because of the need to capture as much as possible the entirety of the picture of the work of the various bodies being studied. The interviewees were also selected through such purposeful sampling. Given the need to capture as much data as is available, and given the relative scarcity of the data, the purposeful method for collecting the evidence and determining samples was preferred in this specific case as the use of the random sampling method would have likely led the study to concentrate on sites in which little or no relevant data existed or on persons from whom little, if any, evidence could be extracted. Given very scarce resources and the need for efficient work methods, that kind of negative result post resource expenditure was better avoided than encountered.

As importantly, the book's focus on the African system (as opposed to, say, the European system) is informed in part by the fact that that institution has faced, and continues to face, far more obstacles to its success than most other similar bodies. Another good reason for its selection is that the African system is, almost without exception, portrayed in the literature as the weakest and most ineffective of these international bodies.²⁰ Thus, a mapping of its promise has more of a potential to provide a valuable guide for the more accurate assessment of those IHIs which are already viewed as much more effective. The converse will likely not be true. What is more, in comparison with both the

²⁰ For example, see C. E. Welch, "The African Commission on Human and Peoples' Rights: A Five-Year Report and Assessment" (1992) 14 *Human Rights Quarterly* 43.

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UN system and its regional counterparts, the African system has been under-studied.

The book has benefited tremendously from the existing legal and social science literature, particularly those elements of it that have addressed the broad issue of the effectiveness of IHIs and other kinds of international institutions.²¹ In this connection, the work of constructivists has been particularly helpful.²² Even more helpful have been the insights developed by their quasi-constructivist siblings such as Kathryn Sikkink, Martha Finnemore, and Margaret Keck.²³ The work of these scholars on the processes via which certain ideas, norms, and IHIs can penetrate state borders and exert domestic influence has helped shape the arguments that are offered in this book. The book has also been much enriched by the work of scholars of the African human rights system, such as Rachel Murray, Malcolm Evans, Claude Welch, Makau Mutua, Joe Oloka-Onyango, Chidi Odinkalu, Shadrack Gutto, Evelyn Ankumah, Vincent Nmehielle, George Mugwanya, and Nsongurua

²¹ For example, see O. Young, "Political Leadership and Regime Formation: On the Development of Institutions in International Society" (1991) 45 *International Organisation* 281; T.M. Franck, *The Power of Legitimacy Amongst Nations* (New York, Oxford University Press, 1990); A. Chayes and A.H. Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge, Mass., Harvard University Press, 1995); O. Schachter, *International Law in Theory and Practice* (Dordrecht, M. Nijhoff, 1991); J.A. Caporaso, "International Relations Theory and Multilateralism: The Search for Foundations" (1992) 46 *International Organisation* 599; S. Krasner, "Structural Causes and Regime Consequences: Regimes as Intervening Variables" (1982) 36 *International Organisation* 185; J.J. Mearsheimer, "The False Promise of International Institutions" (1994/95) 19 *International Security* 5; D. Kennedy, "The Move to Institutions" (1987) 8 *Cardozo Law Review* 841; G. Alfredsson and D. Turk, "International Mechanisms for the Monitoring and Protection of Minority Rights: Their Advantages, Disadvantages and Interrelationships" in A. Bloed *et al.* (eds.), *Monitoring Human Rights in Europe: Comparing International Procedures and Mechanisms* (Dordrecht, Martinus Nijhoff, 1993), p. 169; and M. Mutua, "Looking Past the Human Rights Committee: An Argument for Demarginalizing Enforcement" (1998) 4 *Buffalo Human Rights Law Review* 211.

²² For example, see E.B. Haas, "Why Collaborate? Issue Linkage and International Relations" (1979–80) 32 *World Politics* 357; J.G. Ruggie, "Peace in Our Time? Causality, Social Facts and Narrative Knowing" (1995) *ASIL Proceedings* 93; J.G. Ruggie, "Multilateralism: The Anatomy of an Institution" (1992) 46 *International Organisation* 561; and J. Brunnee and S.J. Toope, "International Law and Constructivism: Elements of an Interactional Theory of International Law" (2000) 39 *Columbia Journal of Transnational Law* 1.

²³ For example, see Finnemore and Sikkink, *supra* note 9; and K. Sikkink and M. Keck, *Activists without Borders* (Ithaca, Cornell University Press, 1998).

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Ndombana.²⁴ Although the focus of this book does differ from almost all of these writings, without the many insights gained from them, this book could not have been written.

The sequence of analysis in the book will proceed as follows. First, chapter 2 maps and assesses the conventional ways of evaluating the effectiveness of IHIs. Thereafter, the conventional conceptions of the African system that are present in the specific literature on that system are discussed in chapter 3. Following this exercise, an attempt is made in chapter 4 to offer key evidence which supports the proposition that the African system has had appreciable, if modest, impact within Nigeria. The factors that have either facilitated or impeded the ability of the African system to achieve influence within Nigeria are also discussed. In chapter 5, the nature, extent, and limits of the impact that the African system has had within South Africa is analyzed. And just like in chapter 4, the factors that have either facilitated or impeded the capacity of the African system to produce such correspondence are also identified and discussed. In chapter 6, an attempt is made to offer more modest (though still significant) evidence suggesting that the African system may possess similar, if less, domestic promise in certain other African states. In the end, an attempt is made to isolate and specify the minimum conditions for the optimization of the domestic impact of the African system. In chapter 7, key insights from the theoretical discussion in

²⁴ See R. Murray, *Human Rights in Africa: From the OAU to the AU* (Cambridge, Cambridge University Press, 2004); R. Murray, *The African Commission on Human and Peoples' Rights and International Law* (Oxford, Hart Publishing, 2000); M. Evans and R. Murray (eds.), *The African Charter on Human and Peoples' Rights: The System in Practice, 1986–2000* (Cambridge, Cambridge University Press, 2002); M. Mutua, "The African Human Rights Court: A Two-Legged Stool?" (1999) 21 *Human Rights Quarterly* 342; M. Mutua, "The African Human Rights System in a Comparative Perspective" (1993) 3 *Review of the African Commission on Human and Peoples' Rights* 5; C. E. Welch, "The African Commission on Human and Peoples' Rights: A Five Year Report and Assessment" (1992) 14 *Human Rights Quarterly* 43; J. Oloka-Onyango, "Reinforcing Marginalized Rights in an Age of Globalization: International Mechanisms, Non-State Actors, and the Struggle for Peoples' Rights in Africa" (2003) 18 *American University International Law Review* 851; S. B. Gutto, *Human and Peoples' Rights for the Oppressed* (Lund, Lund University Press, 1993); C. A. Odinkalu, "The Individual Complaints Procedure of the African Commission on Human and Peoples' Rights: A Preliminary Assessment" (1998) 8 *Transnational Law and Contemporary Problems* 359; E. A. Ankumah, *The African Commission on Human and Peoples' Rights: Practice and Procedures* (The Hague, Martinus Nijhoff, 1996); V. O. Nmeihelle, *The African Human Rights System* (The Hague, Kluwer Law International, 2002); G. Mugwanya, *Human Rights in Africa: Enhancing Human Rights through the African Regional Human Rights System* (Ardsey, NY, Transnational, 2003).