African Human Rights System

Activist Forces and International Institutions

Obiora Chinedu Okafor

THE AFRICAN HUMAN RIGHTS SYSTEM, ACTIVIST FORCES, AND INTERNATIONAL INSTITUTIONS

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To the evergreen and fond memory of my father, Ichie F. Okwu-Okafor (1930–2004)

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ABBREVIATIONS

ACHPR African Charter on Human and Peoples' Rights
ACHPR/RPT Annual Reports of the African Commission on

Human and Peoples' Rights

ADNs advocacy networks

African Charter on Human and Peoples' Rights
African Commission on Human and Peoples'

Commission Rights

ASICL Proceedings of the African Society of International

Proceedings and Comparative Law

ASIL Proceedings of the American Society of

Proceedings International Law AU African Union

BCLR Butterworths Constitutional Law Reports

CGE Commission on Gender Equality (South Africa)
CHRLD Commonwealth Human Rights Law Digest
CILSA Constitutional and International Law Journal

of Southern Africa

CLC Community Law Centre
CLO Civil Liberties Organization
CPR civil and political rights

CRC UN Convention on the Rights of the Child

CRP Constitutional Rights Project

CSA civil society actor

DOJ Department of Justice and Constitutional

Development

ESC economic, social, and cultural rights

FHC Federal High Court
GLR Ghana Law Reports

HURILAWS Human Rights Law Service

HURISA Human Rights Institute of South Africa

ICCPR International Covenant on Civil and Political Rights

ICJ International Commission of Jurists
IHI International Human Rights Institutions

ILM International Legal Materials
ILR International Law Reports

INTERIGHTS International Centre for the Legal Protection of

Human Rights

JCA Justice of the Court of Appeal
JJCA Justices of the Court of Appeal
JJSC Justices of the Supreme Court
JSC Justice of the Supreme Court

KNCHR Kenyan National Commission on Human Rights

LRC Legal Resources Centre MRA Media Rights Agenda

NADECO National Democratic Coalition NASS National Assembly (South Africa)

NCOP National Council of the Provinces (South Africa)
NGOs Human Rights Non-Governmental Organizations
NNHC Nigerian National Human Rights Commission
NUPENG National Union of Petroleum and Gas Workers

NWLR Nigerian Weekly Law Reports
OAU Organization of African Unity
PINs principled issue networks

RPT Report

SACLR South African Constitutional Law Reports

SACLR LEXIS South African Constitutional Law Reports LEXIS

SAHRC South African Human Rights Commission

SALC South African Law Commission

SERAC Social and Economic Rights Action Center

SRI Shelter Rights Initiative

SSS State Security Service (Nigeria)
TANs Transnational Advocacy Networks
UDH Universal Declaration of Human Rights

UN United Nations

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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, 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

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.

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' adhesion 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 quasijudicial 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; 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; 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.

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," 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 quasiconstructivist (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.

[&]quot; 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.

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

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.

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.