Book Review: The Performance of Africa's International Courts Using Litigation for Political, Legal, and Social Change

By:

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While discussions on the performance of international courts are ongoing, the African international courts seem to be relegated to the background. Professor Gathii's edited collection, *The Performance of Africa's International Courts: Using Litigation for Political, Legal, and Social Change* endeavours to reverse this situation. The book provides a contextualised study of the various international courts in Africa. Unlike the general literature on theories of effectiveness and compliance of international courts, which tend to be State and Court centric, this book undertakes a bottom-up analysis of the litigants before African international courts. The main claim of the book is that the value of African international courts lies beyond the measurement of their effectiveness through the sole lens of State compliance since this does not account for the impact of the Courts within the African context. It argues that

the Courts are of particular importance to litigants, especially civil society organisations (CSOs) and opposition politicians of States with repressive ruling governments. These litigants use the court to mobilise, support and create awareness of on-going oppressions in their various countries (249).

This essay reviews the chapter co-authored by James Gathii and Jacquelene Wangui Mwangi, The African Court of Human and Peoples' Rights as an Opportunity Structure. Like the other chapters of the book, Gathii and Wangui's chapter reiterates the main theme of the book while focusing on the African Court of Human and People's rights (the African Court), which is the only dedicated human rights court in the region. The chapter is divided into three parts, and its underlying argument is that the Court, through the interpretation of its founding treaties and its decisions, has become a so-called "legal opportunity structure" for litigants irrespective of their socioeconomic status. Drawing from case studies and a "thick description" approach, it explains how and why opposition politicians, NGOs and prisoners invoke the jurisdiction of the Court by framing their grievances as human rights claims.

Part One introduces the "legal opportunity structure" (LOS) as the theoretical underpinning of the chapter and seeks to explain legal mobilisation and why individuals and civil society groups use litigation to achieve their objectives. It accounts for the use of LOS as an analytical lens on the basis that non-State actors use strategic litigation before African international courts to leverage dialogue with repressive governments that prevent them from doing so at the domestic level. Hence, part one generally elaborates on three main factors that enable litigants to advance their aims through litigation at African international courts (214). Firstly, the Court creates openings for social movements through its expansionist interpretations and decisions (215). Secondly, permissive interpretation of rules on access, admissibility and jurisdiction, ensures easier access to the Court for litigants. The analysis here illustrates that '…from a legal opportunity perspective, access rules, jurisdiction, and admissibility are not static, but rather in a vibrant relationship with the agency of social movements' (218). Thirdly, litigants are more likely to bring cases to an International Court where the cost of litigation is low.

Part Two examines eight fair trial cases filed by prisoners against Tanzania before the African Court, which became catalysts for it to position itself as a

favourable LOS paving the way for subsequent cases. The central argument of this part is that by adopting a lenient approach to the interpretation of access rules on jurisdiction, and admissibility the Court allowed indigent applicants to bring cases before it. This section identifies inherent challenges with the access rules in the design of the Court and exhibits how the African Court, through its case law, has lowered the barriers for the indigent and civil society organisations (CSOs) to allow for broader access to the Courts (217). Similarly, the Court is lenient with procedural rules concerning the drafting of applications and the applicable time limits especially when contrasted with the drafting requirements of pleadings and the timeframe involved in filing them before national courts (225-227). The African Court is thus depicted as an accessible court for all in relation to human rights violations. Additionally, this section of the chapter affirms through the case studies that the Court has made headway concerning fair trial cases by highlighting the low admissibility threshold set by the Court regarding exhaustion of local remedies. It highlights that the African Court has determined subsequent fair trial rights cases, through this approach, without the need to exhaust local remedies (231). Likewise, this part mentions how the Court ensures a low cost of litigation by consistently ordering parties to bear their own costs in a case based on its permissive procedural rules. Thus, making the African Court a favourable LOS (232-233). Curiously, the section concludes the case study analysis in part two by solely using subsequent jurisprudence of the Court on exhaustion of local remedies to reinforce the claim that the Court is a favourable LOS (233). Though this was stylistically disjointed, it does not detract from the analysis of part two as a whole.

Part Three discusses three cases illustrating how the African Court is an LOS for CSOs and opposition parties to engage the media and international organisations outside the Court. This section of the chapter primarily argues and buttresses the claims that the African Court is one of the many fora that opposition politicians and NGOs bring cases to advance their pro-democratisation agenda in national political contexts. The underlying reason it provides is that these groups come from predominantly hostile political environments, which seek to encroach on their political space to organize against the incumbent and repressive governments. Part three analyses three cases involving opposition politicians or civil society groups involved in democratization processes in the respective States: *Ingabire v Rwanda, Mtikila*

v Tanzania and *APDH v. Ivory Coast*. Opposition politicians, CSOs and lawyers are seen using these cases as a means not only to mobilise support and create awareness from media coverage but also to garner support from the international community by shedding light on the violations going on their various countries. In effect, an opposition politician can overcome legislative and judicial barriers in their country and gain access to a neutral arbiter between a repressive government and him or her (*Mtikila and Ingabire cases*). CSOs can also draw attention to the repressiveness of a government, through litigation before the African Court, to mobilise support from opposition political parties and the international community against it (*APDH case*). Another feature of the analysis was how these groups were able, through the cases before the Court, to compel repressive governments to defend and answer for their repressive conduct before an international forum. Consequently, it becomes apparent that these opposition politicians and CSOs do not bring cases before the Court because they simply expect to win. Neither do they expect States to comply with the Court's decisions. They also have other aims for bringing cases before the African Court. This part sums up the chapter and emphasises assessing litigation before African international courts from a broader context of mobilisation against repressive governance. In so doing, a wholistic perspective on the cases can enable an understanding of the value of the Court to opposition politicians. The claims and analysis provided in part three tie into those made in Chapter One of the book about the EACJ, that litigants use these international courts due to the unfavourable political environments in which they find themselves. These opposition politicians and CSOs bring cases to these Courts because they seek an advantage in such regimes to leverage the balance of separation of powers.

Gathii and Wangui's chapter is a great and welcome contribution to the literature on the African Court, specifically, because of scepticism of the Court in literature like Mutua (1999) and Bekker (2007). Their apprehension is that the institutional design of the Court safeguards the interests of States. However, this chapter advances a different approach to evaluating the value of the Court from the perspective of non-State actors. It further explains why and how different groups of litigants use the Court by stressing its important role in balancing the democratisation processes of repressive States. In doing so, the chapter admirably employs the case study and thick description approaches to

buttress how the Court meets the criteria of a favourable LOS.

The chapter also draws causal links in the use and pairing of the case study and thick description approaches to show how litigants use the Court to mobilise for their aims, ultimately, to change the behaviour of repressive governments. Despite the analysis admits in some instances that no direct link exists between a case and subsequent events flowing from mobilisation efforts arising from it (248), few of the connections made in the analyses (247) do not always convince me. Establishing causal links can be complicated in the context of CSO mobilisation efforts through strategic litigation where actual relationships between actions and events are difficult to determine. As there also is a risk of bias when using the thick description approach, there must be sufficient bases for drawing a causal link of how the litigants leveraged litigation through mobilisation to achieve their aims.

In its discussion of how the Court has, through its interpretations and decisions, provided a favourable LOS for litigants, the chapter notes that the Court has as a result ‘become a victim of its success’(222). The reason here is that States have pushed back on the opportunity afforded these groups of litigants, by withdrawing their declarations granting NGOs and individuals direct access to the Court (220-221). In this chapter, the selected cases for analysis originate from Tanzania, Ivory Coast and Rwanda, all countries that have withdrawn this access. Consequently, the chapter could have elaborated on the relationship between the Court as an LOS for non-state actors and backlash from states by delving into the implications of the Court positioning itself as a favourable LOS, especially when the backlash chapter of the book does not treat the African Court.

Overall, the chapter effectively buttresses the claims of the book and reveals the role and influence of African international courts as well as the context in which they seek to thrive. It unearths several layers and further prompts important questions about the utility of the African Court. Of particular interest will be how political and legal mobilisation arising from litigation before the African Court influence the behaviour of States. The Chapter provides a great contextual analysis that demonstrate the important role of the Court and the strategic litigation of litigants whether they are elites or indigent prisoners.

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