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

By:

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The Performance of Africa's International Courts published under the International Court and Tribunals Series of Oxford University Press, should quickly become a canonical text for all scholars of international adjudication, and especially those of them concerned with its nature, uses and impact in Africa. The book's editor (Prof. Gathii) and contributors make a significant contribution to "a second wave" of scholarship on Africa's International courts. Previous scholarship on these courts had tended to focus on their potential to advance legal integration across the continent and offer human rights protection, and their evolution from full-time regional economic integration institutions to part-time human rights protection bodies.

However, this book's contribution enlarges the terrain of scholarship on these and other such courts by moving beyond an interrogation of their jurisprudential contributions or juridical features to a focus on what Gathii describes as "thick description and analysis," one that emphasizes how cases are filed in these courts to "enable, spur, and embolden political and legal mobilization." The book thus:

"challenges and makes the case for displacing the widespread pessimism that pervades assessments of Africa's relatively new international courts. These gloomy assessments raise an important and largely unexamined question. By what standards, goals, or benchmarks should the impact of these international courts be assessed? This question is of particular importance for two reasons. First, there is no consensus about how best to measure the effectiveness and impact of international courts. Second, Africa's international courts operate in different legal and political contexts from their European cousins which are often the unstated benchmark for assessing the performance of Africa's international courts."

In so doing, the book situates itself within a growing field of scholarship on International Courts (ICs) that has been quite critical of the all-too-common conflation between the assessment of State "compliance" with IC decisions and their "effectiveness". Scholars like Gathii, in their previous writings have argued that using compliance as the only metric to measure the effectiveness of ICs, " minimizes other goals served by litigation." Obiora Okafor, one of the book's contributors, had in previous work argued that there is a need to reach "beyond, without abandoning, the search for State compliance as the measure of utility of the African system and other such bodies." Scholars like Yuval Shany have also argued that:

…complicated links exist between the effectiveness of international courts, on the one hand and… judgment compliance, usage rates, and impact on State conduct. For instance, judgment-compliance rates may depend as much on the nature of the remedies issued by a court as on the actual or perceived quality of the court's structures or procedures. Thus, a low-aiming court, issuing minimalist remedies, may generate a high level of compliance but have little impact on the state of the world.

The book under review makes a stellar contribution to the stream of scholarship that takes the approach urged by the scholars discussed above. This is so because the book demonstrates the varied ways that African ICs provide benefits to activists that lie well beyond State compliance (or lack thereof) with their decisions/rulings. The authors argue that the benefits of international adjudication to activists include the fact that in compelling the States to appear to defend themselves, the very process of international adjudication lends credibility to the cause of the activists. It can help litigants organize and construct an organizational identity among like-minded actors who have similar interests. It can facilitate the mobilization of similarly outraged constituencies who then use the processes and rulings of ICs as disruptive strategies that operate beyond the national level. Utilizing an IC can also provide: the basis for appealing to other sympathetic actors; an avenue for naming and shaming, and an impetus and ammunition for activists to promote their cause(s) in the court of public opinion; and a way of, as such, driving policy, legal, or social change.

The book has 8 chapters, not including the introductory chapter which sets out the arguments of the book and provides a useful summary of the contributions made by the book's various chapters. The first chapter is written by the book's editor, James Gathii, and focuses on the East African Court of Justice (EACJ). In the chapter, the author demonstrates how members of opposition parties in States with repressive governments are adopting the EACJ as a tool to challenge dominant political parties at the national level. Using suits filed challenging elections or non-elections into the East African Legislative Assembly (EALA), Gathii demonstrates how the EACJ offers a forum for contestation, coordination, and ammunition for opposition members in East Africa who are seeking to challenge the domination of certain powerful political parties in their home States. One of the most interesting contributions of this chapter is that it uses the cases filed before the EACJ in relation to EALA as a basis to demonstrate the significance of organizational rights (relative to individual rights), particularly in countries with deeply repressive regimes who invest large amounts of money and resources in intelligence gathering against, and demobilizing, opposition parties and civil society groups.

The second chapter, authored by Andrew Heinrich, also focuses on the EACJ. However, rather than focusing on how electoral opposition groups utilize and benefit from that IC, it explores the potential and actual use of the EACJ in the

pursuit of transitional justice in Burundi. The author demonstrates the ways in which the EACJ offers a means for activists who labour under a very authoritarian regime in Burundi to pursue transitional justice especially given the nature of conflict in Burundi. The chapter's contributions are particularly significant not only to the scholarship on the ways in which African ICs are mobilized but especially in relation to their potential for transitional justice.

The third chapter, co-authored by Obiora Okafor and Okechukwu J. Effoduh, shifts the focus to the ECOWAS Court, paying attention to the ways in which the court has been utilized to advance "pro-poor" as opposed to "anti-poor" human rights. The chapter demonstrates how the ECOWAS Court can be mobilized to assist in the struggle to legally protect and promote economic and social rights, despite the fact that many of those rights remain non-justiciable within domestic systems. The arguments of the authors in this chapter, dovetails quite nicely with the broader arguments in the book which seek to demonstrate how ICs in Africa serve a function which reaches beyond just compliance with IC decisions.

The fourth chapter in the book is authored by Olabisi Akinkugbe, and similar to Gathii's work in the first chapter, this chapter interrogates the jurisprudence of the ECOWAS Court in relation to the judicialization of what the author calls "mega-politics". Focusing on the ECOWAS Court, the author demonstrates how politically motivated actors are utilizing the ECOWAS court to pursue cases arising from opposition politics. These cases involve challenges to alleged unconstitutional amendments to the constitutions of the States at issue, exclusion from electoral processes, human rights violations in the electoral processes, or general dissatisfaction with the election results. Akinkugbe's contribution, much like Gathii's in the first chapter, demonstrates the ways in which these African ICs are mobilized by opposition members challenging their domestic governments, but more than that, it demonstrates a concern with the expansive reach and potential of these ICs, beyond just assessing State compliance with their decisions or concern with their interpretations of human rights protection.

The fifth chapter, co-authored by Solomon T. Ebobrah and Victor Lando, takes a slightly different turn from the other chapters by focusing on the EACJ and the ECOWAS Court comparatively. The chapter demonstrates how decisions of

African ICs can have “direct and indirect” implications, even in the absence of “clear compliance”. The authors argue that African ICs, serve a number of functions, including monitoring and flagging violations, progressing norm development and setting boundaries for what is acceptable behaviour or State conduct. As an “early warning system” these authors submit that African ICs provide a forum for actors and activists to file cases in a forum that is not controlled by States and would likely not have received public attention if it had been filed within domestic context.

The sixth chapter in the book shifts focus from the *regional integration* courts such as the EACJ and the ECOWAS Court, to the African Court of Human and Peoples Rights. In this co-authored chapter, James Thuo Gathii and Jacquelene Wangui Mwangi, discuss the African Court as “an opportunity structure” for politicians and political parties seeking political reform under their national law and for prisoners seeking a forum to adjudicate grievances arising from the conduct of their criminal trials in national courts. The jurisprudence examined in this chapter are particularly significant to the overarching theme of the book because they demonstrate how cases originate from countries that are particularly repressive and “where the opportunity structures for pursuing their goals at the national level are constrained”.

The seventh and penultimate chapter of the book charts a slightly different course that the previous chapter. Instead of focusing on the ways in which actors mobilize these courts, the chapter focuses on the backlash that these courts can too often endure from States consequent upon unfavourable decisions. This chapter by Karen J. Alter, James Thuo Gathii, and Laurence R. Helfer, discusses the specific incidences of backlash against the ECOWAS Court, the EACJ and the South African Development Community (SADC) Tribunal. It undertakes an extensive discussion on the backgrounds of the cases that incited these incidences of backlash against the ICs, the histories of the Courts, and the success, relative success, or failures of the attempts to resist the influence of the Courts. The contributions of this chapter are particularly significant to any discussion on international adjudication because they capture the implications of the unique relationship that ICs have with the States that create them via treaties; States that are at the same time subject to the jurisdiction of these courts. Because of this somewhat peculiar relationship, ICs are too often subject of backlash, although the scope and extent of this

backlash may vary. This chapter thus contributes to the scholarship by demonstrating the range of backlash attempts, as well as the factors that are likely to aggravate or mitigate backlash against ICs and conversely bolster or undermine IC's resistance to backlash.

The eighth and final chapter of the book is perhaps the most interesting chapter of the book. Co-authored by James Thuo Gathii and Harrison Otieno Mbori, the chapter establishes the book as canonical text for all scholars, academics, advocates, activists, and actors interested in international adjudicatory institutions in Africa. The chapter provides an important reference tool for readers that are unfamiliar with the eight active international courts in Africa; it provides context for understanding these international courts and makes "the analytical nature of the chapters in the rest of the book more accessible to readers unfamiliar with these courts." The guide provides a "table summarizing the subject matter jurisdiction of each court, the year it was created, the year it made its first ruling, the number of Member States subject to its jurisdiction, and how many binding rulings it has made."

As I have mentioned earlier, the book is so important and the gap it fills so significant that it will quickly become a canonical text for all scholars of African ICs. One of the many areas in which it will provide much guidance for a long time is in relation to the study of the backlash that is too often levied against these regional judicial institutions. Trends in this direction persist, though only to an extent. For example, recently, Rwanda, Benin, Tanzania, and Côte d'Ivoire withdrew their declarations allowing individuals and NGOs to submit cases directly to the African Court of Human and Peoples Rights citing "poor judicial decision-making" by the IC and arguing that in deciding these cases brought by individuals, the Court was *undermining State sovereignty and exceeding its jurisdiction and authority*. What is particularly interesting is that the specific rulings that provoked these decisions of the relevant States to withdraw from the jurisdiction of the African Court almost all involved litigation by members of the political opposition in those States that challenged the conduct of the relevant governments. The role of ICs as avenues for the (continued) expression of political opposition, and its function as one of the factors that has produced or shaped State backlash against such courts, are well-analysed by this book.

In a similar vein, the book offers significant analytical insights that will be most helpful to scholars of the backlash against the SADCT as well. It offers useful and important material on the specific and highly consequential nuances of the socio-economic and political history of southern Africa that led to the relative success of the backlash against SADCT. In my own doctoral research (which has been submitted for publication), I relied – in part – on the book's contributions to understand the implications of the relevant ruling of the SADCT in the *Campbell Case*. This research demonstrated how this ruling deeply implicated highly divisive issues of racial inequality and historical land dispossession in Africa, and so negatively impacted the potential of certain civil society actors to mitigate State and societal resistance against the Tribunal – forms of resistance that (following Tendayi Achiume), I argue, resonated widely within State and society in the entire SADC region, as well as within the political organs of SADC, such as its Secretariat.

Finally, the book's contributions provide a scholarly community and reference material for scholars seeking to disrupt the dominant scepticism about African ICs. It has, in part, inspired newer scholarship, such as mine, which employs more granular ethnographic data, along with analysis of the relevant case law, to demonstrate the various ways in which the processes and rulings of many African ICs are actually employed on a quotidian basis by activists as *strategies for forcing transparency* from their recalcitrant or belligerent States/governments. Work that adopts this approach, such as mine, easily find community within the book's overarching theme, analysis and conclusions. The book demonstrates, as I have myself argued, that whether ICs are *effective* or not depends to a large extent on what they are being assessed as *effective for*. As such, the usual kind of "broad strokes" dismissal of African ICs as ineffective does not capture the multiple ways in which African ICs have had, and can have, significant *effect*.

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