

REVIEW ESSAYS

Exploring the Theory and Practice of the Relationship between International Human Rights Law and Domestic Actors

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Obiora Chinedu Okafor, *The African Human Rights System, Activist Forces and International Institutions*, New York: Cambridge University Press, 2007, ISBN 9780521869065, 350 pp., £58.00 (hb).

Rachel Murray, *The Role of National Human Rights Institutions at the International and Regional Levels: The Experience of Africa*, Oxford: Hart, 2007, ISBN 9781841133942, 137 pp., £35.00 (hb).

I. INTRODUCTION

In recent times the human rights discourse has become increasingly concerned with the relationship between domestic and international (UN and regional) human rights law. In 2007, two significant additions to this body of scholarship appeared. Although the authors of these texts are based in Canada and the United Kingdom respectively, their contributions explore the domestic–international relationship from a particularly African angle. While both works are concerned with the national arena (local activist forces and national human rights institutions respectively), the one investigates the *domestic* impact of *international* law and institutions, while the other explores the increased *international* impact of a particular *domestic* institution.

Obiora Chinedu Okafor (an associate professor at Osgoode Hall Law School, York University, Canada) investigates the domestic impact of the African Charter on Human and Peoples' Rights (African Charter or Charter) on selected state parties to the Charter. It may be contended that the term 'African human rights system', as used in the title, is inaccurate. The author does cover himself, explaining that the focus in the text falls on the 'main system' in Africa (pp. 1–2, 164). A reasonable reader may, however, arrive at the book with the expectation that it deals not only with the African Charter, but also the African Charter on the Rights and Welfare of the Child and the Protocol to the African Charter on the Rights of Women in Africa, and

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their relevant treaty-monitoring mechanisms. In the understanding of many, these various treaties and bodies form a single system – albeit lacking in co-ordination and coherence – rather than different and distinguishable ‘systems’ (p. 1). The title further suggests that the specifics of the African experience are extrapolated to provide insights about international institutions more generally. However, despite some canvassing of the relevance of the book’s central insights to the broader terrain of international human rights institutions, by far the major part of the book deals with case studies and insights focusing primarily on the African Charter. In my view, the central argument of the text would have been more focused, and the title more accurate, if both the text and its title restricted its focus to the African context.

It is unlikely that there would be similar qualms about the title of the second book, by Rachel Murray (professor of international human rights law at the University of Bristol). As the title clearly indicates, it focuses on a particular domestic institution, the national human rights institution (NHRI), and poses the question, what role has this institution played and should it play in global (UN) and African (AU) fora? Although highlighting the experiences of NHRIs in African states, the text investigates an issue and reaches conclusions that should be of relevance to NHRIs in other regions of the world. While much has indeed been written about elements of the domestic functioning of NHRIs, little careful analysis has been undertaken concerning the increasingly important role of these institutions within the UN treaty body system and before the African Commission on Human and Peoples’ Rights (African Commission). Murray’s book fills this gap.

2. *ACTIVIST FORCES*: RECOGNIZING THE ROLE OF LOCAL ACTIVISM IN DOMESTICATING INTERNATIONAL HUMAN RIGHTS LAW

Activist Forces is located in the burgeoning literature that concerns itself with the implementation of international human rights standards and, more specifically, with the assessment of the ‘extent’ of their ‘domestic impact’ (p. 1). The author adopts a theoretical stance that does not look through the ‘compliance optic’ (p. 62), but rather searches for the ‘correspondence’ between the regional human rights values and domestic actors’ ‘thinking/behaviour’ (p. 4). ‘Correspondence’, he maintains, is not coerced compliance, which is associated with ‘top down’ directives by a treaty body, but rather comprises altered and altering practices indicative of greater awareness of and reliance on the African Charter *within states* among ‘activist forces’ (activist judges and civil society actors (CSAs) such as activist lawyers, students, bar associations, and journalists). CSAs are defined as agents who ‘fight to ameliorate human rights violations’ (p. 2).

Okafor finds his theoretical grounding in ‘quasi-constructivist’ theories. In this respect, the author builds on the approach adopted in his groundbreaking work on non-governmental organizations (NGOs) in Nigeria.¹ There he describes the constructivist approach as mapping and analysing the way in which human rights

1 O. C. Okafor, *Legitimizing Human Rights NGOs: Lessons from Nigeria* (2006).

activists may contribute ‘to the alterations in understandings and in logics of appropriateness’.² One encounters in that earlier work many of the important theoretical constructs and terms that he uses in *Activist Forces*, such as ‘correspondence’, ‘trans-judicial communication’, and ‘brainy relays’. Quasi-constructivism, which the author embraces in *Activist Forces*, but does not clearly define, endeavours to show *how* norms and institutions operate to shape these ‘alterations’, focusing on the ‘link . . . between rationality and norm-based behaviour’ (p. 29).

2.1. Direct impact

Okafor’s discussion takes place against the following background. To make convincing claims about the impact of a treaty, and to hold states accountable for non-implementation of a treaty, one should ideally be able to establish some evidence of a change in state practice, or of the positive benefit in peoples’ lives, traceable back to (or ‘resulting from’) the treaty itself. I refer to this form of impact as ‘direct impact’. Assessing direct impact is an effort to answer the following two main questions: (i) do states comply with their treaty obligations? (ii) do individuals actually benefit from the ratification of treaties? Direct impact in this sense can be *de jure* or *de facto*.

De jure direct impact takes the form of legislative (or policy) measures or steps. These steps may result from a general process of domestication (which may precede ratification as the outcome of a compatibility study) or from specific treaty body directives (such as concluding observations) recommending legislative adaptation. The extent of the discernible treaty impact, in the sense of establishing some form of causal link between the international treaty and national law, is dependent on the extent of specificity of the relevant treaty provision or treaty body directive.

Like most international human rights treaties, the Charter is couched in open-ended and imprecise language, allowing states to work out the specificities of the Charter’s meaning in national legislation. Inevitably, therefore, because it ‘translates’ international principles into national laws, domestication is a process of adjustment and adaptation, inviting the question of how far this process may stretch before the link with the Charter norms becomes too tenuous to constitute compliance with these norms. Even if the view is not accepted that subsidiarity is a ‘structural principle’ of international human rights law,³ logic dictates that national lawmakers must be allowed a fair amount of discretion when they enact specific domestic measures. But how far does this discretion stretch? Adapting general principles of international law related to permissible reservations, it is argued here that the line would be crossed if domestic legislation is incompatible with the object and purpose of the Charter. Individual complaints and state reporting are the means through which the treaty body (the African Commission) monitors this process. The Commission’s findings and concluding observations (if they are in fact adopted and sent to states) indicate to the state when the line has been crossed, and require the

² Ibid., at 3.

³ See P. G. Carozza, ‘Subsidiarity as a Structural Principle of International Human Rights Law’, (2003) 97 AJIL 38; see also, e.g., *Prince v. South Africa* (2004) AHRLR 105 (ACHPR 2004), at para. 50.

state to react to the finding or observations. State compliance with these directives would be an instance of direct impact.

Beyond identifying instances of ‘correspondence’, Okafor does not engage in a critical analysis of the extent to which, and the boundaries within which, CSAs have translated substantive norms to the domestic arena.⁴

Assessing de facto direct impact depends, at least in principle, on empiricism. At the micro level the accrual of a demonstrable benefit to a complainant under a treaty demonstrates de facto direct impact. So, for example, when the African Commission recommends (or the Court, in the future, orders) that compensation be paid to a particular person, or that a detained person be released, this can be factually verified.⁵ Once more, the extent of verification depends on the specificity of the required remedy.⁶ Assessing the broader impact of a treaty on the lives of a population is much more problematic. Quantitative studies that have endeavoured to do so at the macro level, between states,⁷ have been criticized.⁸ Perhaps more reliable claims could be made if the focus falls on an in-depth analysis of a particular country,⁹ and if these studies use a combination of quantitative and qualitative techniques.

2.2. Indirect impact

I use the term ‘indirect impact’ to refer to the manifold ways in which international human rights law may have an effect on prevailing discourses, in changing attitudes and thinking, in raising awareness, and the like.¹⁰ It may be important to distinguish indirect from direct impact, because indirect impact is not immediately discernible, and does not allow for empirical verification in the form of altered state behaviour or life circumstances. However, the enduring direct impact of international human rights norms in great measure depends on the extent of indirect effect, which one may also call norm-internalization.

It is with this last form of ‘impact’ that *Activist Forces* concerns itself. In steering a course through this complex terrain, Okafor adopts a qualitative and often

4 See Section 2.2, *infra* (making reference to the *Prince, Kaunda, Fourie, and Frank* cases).

5 See F. Viljoen and L. Louw, ‘An Assessment of State Compliance with the Recommendations of the African Commission on Human and Peoples’ Rights between 1993 and 2004’, (2007) 101 AJIL 1. Although the ‘compliance optic’ is employed in this study, a statistical analysis of factors that are predictive of improved compliance reveals that one of these indicators is the level of involvement by NGOs in the submission and follow-up of the Commission’s findings. This finding is in line with one of Okafor’s main insights.

6 However, the matter is not so simple. The more vague the recommendations or orders directed at state parties, the more leeway states have in deciding on specific steps that would amount to compliance. If the content of a required remedy is not clear, assessing compliance with it becomes a moving target.

7 A. O. Hathaway, ‘Do Human Rights Treaties Make a Difference?’, (2002) 101 *Yale Law Journal* 1935; see also L. C. Keith and A. Ogundele, ‘Legal Systems and Constitutionalism in Sub-Saharan Africa: An Empirical Examination of Colonial Influences on Human Rights’, (2007) 29 *Human Rights Quarterly* 1065, who employ a similar quantitative methodology.

8 R. Goodman and D. Jinks, ‘Measuring the Effect of Human Rights Treaties’, (2003) 14 EJIL 171; see also Hathaway’s response: O. A. Hathaway, ‘Testing Conventional Wisdom’, (2003) 14 EJIL 185.

9 See, e.g., C. Heyns and F. Viljoen, ‘The Impact of the UN Human Rights Treaties on the Domestic Level’, (2001) 23 *Human Rights Quarterly* 483, in which in-depth research was undertaken by country correspondents in 20 UN member states, four in each of the five regions.

10 See D. Cassell, ‘Does International Human Rights Law Make a Difference?’, (2001) 2 *Chicago Journal of International Law* 121.

impressionistic (read 'constructivist') methodology. Insights about indirect impact (or 'correspondence', in the author's terminology) are based on interviews and analyses of counsels' arguments, decided cases, legislation, policy documents, and statements by government officials and activist forces. These sources are scrutinized for signs of the 'influence' (p. 7) of the African Charter. The dearth of detail about the sampling of interviewees, the omission of a comprehensive list of interviewees, the anonymity of some subjects (pp. 125 (n. 69), 144 (n.121), 206 (n. 230)), and the omission of some sources (e.g. on the outcome of the *Lekwot* case, pp. 90, 124) detract somewhat from the reliability of the methodology and attendant conclusions.

By its very nature, 'correspondence' is difficult to pin down. By employing this framework the author obviates the need to 'prove' a link between cause and effect (for example, between the 'invocation' of the Charter and the implications or 'impact' of this fact). Still, in some instances conclusions of 'direct impact' seem to be drawn, and drawn too easily. If the adoption of a particular decree is, for example, cited as an example of 'correspondence' between legislative action and the views of the Commission (p. 129), the suggestion of a causal relationship may be questioned on the basis of the role of myriad other (socio-political) factors in this enactment, particularly in the absence of any explicit indication of the role of the Commission's view in the preceding deliberations or in the wording of the decree itself. In similar vein, the establishment and work of the Nigerian National Human Rights Commission (NNHRC) are described as having been 'influenced' by the African Commission (pp. 126, 127). However, this conclusion is rather speculative, based as it is on the surrounding circumstances comprising the general criticism of the Commission and Professor Oji Umzurike's membership of both the Commission and the NNHRC. It also seems a tad tautological to mention as a significant indicator of 'correspondence' that the South African parliament invoked the African Charter in its debate about ratification of the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights (p. 190).

The author does not dismiss the utility of the 'compliance optic', but stresses the need to go 'beyond' it (p. 90). Despite protestations about moving beyond compliance, in my view there is a sense in which 'correspondence' and compliance become more closely related than the author generally allows for. The objective of the 'correspondence', surely, is, as the author admits, to 'make a difference to the lives of Africans', by 'influencing the actions of domestic institutions' (p. 93). If CSAs deployed the African Charter to 'produce desired outcomes' (p. 124), if those outcomes involve government action, they may be couched as instances of compliance. There is thus an inevitable symbiotic relationship between 'correspondence' and government compliance with its obligations. In fact, the clearest cases of 'correspondence' cited in the work are indeed those instances where actions of CSAs resulted in government adherence to treaty norms and treaty-body directives. However, Okafor's point, as I understand it, is that compliance comes about as result of local forces, rather than government action or treaty-body coercion.

De-linking 'correspondence' from compliance (for example, by listing instances of the mere mention of the Charter by CSAs irrespective of the intended or actual result) may end up in an analysis where any reliance or argument based on the

African Charter is seen as desirable in itself. In a number of South African cases, such as the *Prince*, *Kaunda*, and *Fourie* cases, the ‘percolation’ of the Charter into counsels’ arguments (pp. 184–6) served to bolster contentions that tend to detract from providing the fullest possible scope to the rights of the applicants. (See also the Namibian Supreme Court’s reliance on the Charter in *Chairman of the Immigration Selection Board v. Frank and another*, which the author describes as ‘more or less significant’ (p. 240).)

2.3. Case studies of South Africa and Nigeria

Although Okafor’s study purports to cover the whole of Africa, it mainly deals with two countries, Nigeria and South Africa, which are dealt with in the only two country-specific chapters in the book (the reasons for this choice are given on pp. 5–7).

While CSAs in Nigeria are treated in a value-free way, there seems to be an attempt, not based on any systematic comparison, by the relevant CSAs operating in South Africa to anoint one particular South African CSA (Human Rights Institute of South Africa (HURISA)) as ‘of course, at the top of the list of the CSAs which have positively engaged with the African system’ (p. 206), as seeming to ‘stand out’ (p. 199), and as laying the ‘most credible claim to the title of the most devoted and effective civil society-based intelligent transmitter and dispenser of the African system’s normative energy within South Africa’ (p. 196). Without denying HURISA’s very crucial role, it should be noted, as Okafor actually shows, that other CSAs have also made important contributions.¹¹

One of the work’s major conclusions is that the African Charter had its ‘most appreciable impact’ (p. 299) in Nigeria during the 1990s, when that country was under military rule. The author expresses surprise about this state of affairs, remarking that it ‘flies in the face of almost every prediction regarding the likely locations of the system’s impact’ (p. 93). Why, the question is posed, did the system not have a more significant impact in a ‘consistently democratic’ state such as Botswana?

Two main answers come to mind.

First, Nigeria is the only African country following the dualist legal tradition in which the African Charter has been domesticated – by way of the African Charter on Human and Peoples’ Rights (Ratification and Enforcement Act), Chapter 10 of the Laws of the Federation of Nigeria, 1990. In its Preamble, the Act states that it is ‘necessary and expedient to make legislative provisions for the enforcement in Nigeria’ of the Charter ‘by way of an Act of the National Assembly’. The domesticating provision of the Act stipulates that the provisions of the African Charter, which are attached in a schedule to the Act, ‘have force of law in Nigeria and shall be given full recognition and effect and be applied by all authorities and persons exercising legislative, executive or judicial powers in Nigeria’ (Art. 1). (Although

11 In addition, the work could have benefited, for example, from exploring more fully the role of the Centre for Human Rights at the University of Pretoria, which is engaged in education on and dissemination of African human rights law and had been involved in submitting the only South African case (the *Prince* case) to the Commission. The author merely mentions that the case was ‘brought before the African Commission in 2002’ (Okafor, at 203).

monist systems should, in principle, provide a basis for effective domestication, with the exception of Benin African practice reveals very little evidence of the domestic effect of international norms, particularly in court decisions, in the countries following the monist tradition.)

To a large extent the explicit domestication of the Charter accounts for the reliance placed on the Charter by Nigerian lawyers arguing cases in domestic courts. By extension, the comparatively intimate relationship of the Charter with domestic law arguably predisposes the legal community, human rights organizations, and the media to integrate the Charter into academic writing, strategies, and publications. It is true that the author acknowledges the importance of this fact (e.g. p. 97). However, it is disappointing (to this reader, at least) that the surrounding circumstances, including the role of 'activist forces', giving rise to the initial decision to enact the legislation domesticating the African Charter, is left unexplored. The subsequent 'correspondence' between the Charter and Nigerian practice hinges on and is inextricably linked to the almost mythical enabling moment of domestication.

Second, the perplexing conclusion cited above is not inconsistent with a 'struggle' approach to human rights (including international human rights law), in terms of which human rights norms are at their most powerful, and are most urgently required, in the face of tyranny, oppression, and deprivation.¹² Hawkins shows that international human rights law played a significant role in steering Chile away from authoritarian rule.¹³ He also refers to the example of South Africa, where the mobilization of global censure of the apartheid regime was orchestrated in the terms of international human rights law. The role of activist forces, which is a central focus of Okafor's work, may not have been as pronounced in Chile, but it was in South Africa and Nigeria. This element should have been explored more fully in an attempt to answer the question that perplexed the author. As the South African example shows, a functional domestic democratic culture may indeed inhibit reliance on the African regional human rights system. The requirement of exhaustion of domestic remedies calls attention to the kinds of decisions handed down by the highest court of a country. Following democratic elections the South African Constitutional Court emerged as a bastion of human rights protection. The low level of engagement with the African human rights system by South African CSAs is therefore not necessarily linked to the dearth of cases submitted to the African Commission, as the author concludes (p. 258).

The author rightly takes issue with the tendency of both the 'African system' and CSAs to 'deprioritize' socio-economic rights (pp. 151–2). The question arises why the book does not devote more attention to a comprehensive discussion of the *Ogoniland* case¹⁴ at least as part of the discussion of the use of the African Charter by Nigerian CSAs (in particular the Nigerian-based Social and Economic Rights Action Centre). The *Ogoniland* case concerns the adverse effects of oil exploitation on the Ogoni

12 See, e.g., C. H. Heyns 'A "Struggle Approach" to Human Rights', in A. Soeteman (ed.), *Law and Pluralism* (2001), 171–90.)

13 D. G. Hawkins, *International Human Rights and Authoritarian Rule in Chile* (2002).

14 Communication 155/96, *Social and Economic Action Centre and Another v. Nigeria*, (2001) AHRLR 60 (ACHPR 2001).

people, who live in the Niger delta, an oil-rich part of Nigeria, and the government's harassment and killing of them, and the destruction of their property, in response to the Ogonis' campaign of non-violent resistance against the ensuing environmental degradation. In its finding, the Commission not only affirmed the justiciability of all rights in the Charter, including the socio-economic rights, but also found that some rights in the Charter imply the existence of non-enumerated rights, such as the rights to nutrition and to shelter.

By concluding that the Charter system has had a significant, yet modest, effect in Nigeria and South African, the author takes care not to overstate his case. He further concludes that the system has had a 'much more modest impact' (p. 223) in other African countries. It could be argued, though, even on the relatively meagre information provided in the text (pp. 237–8, 247), that the impact of the system in (at least) Benin has also been quite significant. Future research could explore this tentative conclusion in greater depth.

2.4. Overall impression

Some minor inaccuracies and inelegancies mar the work. Eritrea, it is stated, 'is the only state that has not ratified the Charter' (p. 86). In fact, Eritrea ratified the African Charter on 14 January 1999. Shadrack Gutto is cited as 'Shedrack' (p. 82). Some striking words and phrases recur in the text, reinforcing a general impression of unnecessary repetition. Examples are '*tour d'horizon*' (pp. 12, 46, 163) and 'brainy relays' (pp. 178, 260, 286, 292).

However, one's overall impression of *Activist Forces* remains very favourable. The author makes a very cogent and well-researched argument that a proper understanding of the influence of the African Charter depends not only on what governments (and the African Commission) do, but also on the ways in which and the extent to which civil society actors integrate the African human rights system into their thinking, programmes, and action. Okafor reminds us that treaty impact is not a one-off event, but part of a prolonged and continuous process. By contextualizing his analysis against the broad socio-political context, the author steers clear of a technical-formalistic analysis.

Especially with respect to Nigeria, he reveals very valuable information. His discussion of the *Zamani Lekwot* case¹⁵ is one of most significant illustrations. A special tribunal convicted Zamani and six other leaders of the Kataf ethnic minority (p. 124) and sentenced them to death. In the ensuing communication the Commission found that the complainants' fair trial guarantees were grossly violated.¹⁶ Okafor states that the Commission's recommendation that the government should free the seven men was followed, even if their sentences were first commuted and they were only released by the next government (pp. 99, 124). While communicators

15 *Constitutional Rights Project (in respect of Lekwot and Others) v. Nigeria*, (2000) AHRLR 183 (ACHPR 1995).

16 The complainants' right to be heard by an impartial tribunal was violated because the special tribunal was composed of a judge and four members of the military; their right to an appeal flew in the face of the exclusion of any appeal possibility from the tribunal's decision; and their right to be represented by counsel was flouted when their case was concluded despite the withdrawal of their counsel due to harassment.

have long hailed this case as a clear illustration of 'compliance', the role of domestic processes has never been discussed in sufficient depth.¹⁷

This neglect of the domestic ramifications of this case may in part be ascribed to the fact that the relevant domestic decision remains – quite surprisingly – unreported, and therefore quite inaccessible. To Okafor's credit, he unearthed this decision and shows how the presiding judge, steered by arguments presented by the Constitutional Rights Project, used an interim 'order' of the African Commission to ensure crucial and politically risky domestic relief.¹⁸

3. TOWARDS A THEORY OF THE INTERNATIONAL ROLE OF NHRIS

One of the 'activist forces' with a potential role in facilitating the infiltration of the African Charter into the national legal order is a country's national human rights commission (if it has one). Given that both Nigeria and South Africa have established such institutions (in 1996 and 1995 respectively), one would have expected these bodies to have had a significant 'percolating effect' on the domestication of the African Charter – especially since both countries saw overlapping membership at the regional and national levels.¹⁹ However, on the available data, Okafor concludes that these two institutions have had a disappointingly insignificant engagement with the African system.

It is with the unexplored potential and complexities of this engagement that Murray's text deals. Observing the increasing engagement of NHRIs with international fora such as the UN human rights treaty bodies,²⁰ the UN Human Rights Council (and its predecessor the Commission on Human Rights), and the African Commission, she poses this crucial question: *why* should NHRIs participate in international fora? This is certainly a very valid question to raise at the outset, as a threshold issue, especially as the remainder of the book is premised on the notion that NHRIs have a legitimate role to play before international fora.²¹ In my experience as an observer at the African Commission sessions, NHRIs often fade away once they have obtained official recognition (called 'affiliate status') with the African Commission. Affiliate status entitles a NHRI to be invited to, to be present at, and to take the floor during sessions of the Commission. One of the reasons for their subsequent non-attendance is the difficulty they experience in justifying the allocation of meagre resources and limited personnel for the period of the Commission's public sessions (of at least two weeks per year). The NHRIs that most regularly attend are often those that

17 However, it may be pointed out that there is some confusion in the information that Okafor provides, in that he first states that the convicted men were released in 1996 (Okafor, at 99), but later mentions that they were eventually released by the 'Babangida-led military regime' (*ibid.*, at 124), which had already come to an end, in 1993.

18 See also Okafor's discussion of the *Newspaper Registration Decree 43 of 1993* case, at 101–3.

19 Oji Umzurike (Nigeria) was a member of both the NNHRC and the African Commission, and Barney Pityana was simultaneously chair of the South African Human Rights Commission and a member of the African Commission.

20 See, e.g., General Comment 2, adopted by the Committee on the Rights of the Child, on 'the Role of Independent National Human Rights Institutions in the Promotion and Protection of the Rights of the Child'.

21 That is, in her exposition, the 'why' question precedes the 'how' – and 'how effective' – questions.

have a close relationship with government, who use their presence to airbrush the government's reputation.

3.1. The rationale for NHRI participation

This justification (of serving as government agents) is understandably not one of those that Murray identifies as legitimating NHRI engagement with and participation in international fora. She discusses five rationales: (i) by submitting parallel or 'shadow' reports, by submitting individual communications, and by providing an 'alternative voice' in debates or discussions, NHRIs ensure government accountability; (ii) they bring particular expertise; (iii) their presence allows the collective voice of NHRIs to be heard; (iv) NHRIs assist in protecting human rights defenders; and (v) they act as a 'channel', linking the national and international levels, on the one hand, and NGOs and government, on the other.

To assess these rationales for NHRI participation at the international level, the question must be posed to what extent the participation of NHRIs adds to and improves on the way in which the two main categories of participants – states and NGOs – already manage to attain the stated objectives. In particular, given their unique 'semi-official' position, how do or would NHRIs improve on the role already played by NGOs? And, to the extent that their roles overlap, what is the justification for the duplication of effort? Although she raises issues relevant to these questions in other parts of the work (e.g. p. 65), Murray's exposition does not adequately answer these pertinent questions.

The two most prominent means of ensuring government accountability by way of international mechanisms are the submission of communications and shadow reports – activities in which NGOs are already engaged. The question that therefore needs to be addressed squarely is: what added advantage does the participation of NHRIs bring? Perhaps the role of NHRIs becomes more pronounced when NGOs are weak or when they have to function in a constrained environment. Perhaps the closer links of NHRIs to government make their interventions more palatable to government. It is these aspects that should be explored in more depth to make a persuasive argument for the participation of NHRIs in international human rights fora on the basis of their ability to ensure government accountability at that level.

There seems no solid basis to conclude that NHRIs will bring particular expertise that NGOs lack. As Murray points out (p. 21), the composition of NHRIs may, in fact, cause their representatives to lack the background and expertise that are required for effective participation – notwithstanding formal requirements for their appointment, such as human rights expertise and experience.

It is correct to state that international fora present a space where the collective voice of NHRIs can be heard. Going beyond the procedural, though, the question may still be posed what the substantive contribution of this collective 'voice' would be. To what end would that opportunity be used? In this regard, Murray points out later in the book that collectives of African NHRIs have not, even at their own meetings, taken a clear stand on particular human rights violations (p. 82). In any event, this rationale justifies the participation, in the African context, of a representative of the Co-ordinating Committee of African National Human Rights Institutions (CCANI)

at sessions of the African Commission, rather than the attendance of individual NHRIs.

The last two justifications suggested by Murray seem to me to be the most cogent in legitimating the international role of NHRIs. Although NGOs also engage in and advocate the protection of human rights defenders, the unique position of NHRIs may enable them to intervene more effectively, especially in dire situations where there is a breakdown in communication between governments and civil society. Given their 'semi-official' status, NHRIs in one country may also be well placed to intervene with their governments to exert pressure on another government. This rationale is thus linked to the last on Murray's list: the role of NHRIs in channelling information from the international to the national level, and of playing a facilitating role between governments and NGOs, in order to ensure domestic implementation of and adherence to international human rights law. While the argument for NHRI participation in respect of the first three justifications is in my view best made on the basis of mutual reinforcement of NGO and NHRI contributions, the argument with respect to these last factors is that NHRIs add something unique which NGOs do not and cannot easily contribute themselves.

3.2. NHRI accountability

Murray further investigates where NHRIs fit in the state/non-state dichotomy, essentially as a prelude to the discussion about their accountability. Although the status of NHRIs derives from the situation obtaining domestically, their status also informs the kind of role they would play internationally and affects their accountability at that level. Murray carefully shows that NHRIs defy easy categorization, and concludes that they are independent bodies with a 'semi-official' status (p. 68). Problems that arise within international fora are, according to her, due to the approach of these bodies, in terms of which they seem to require NHRIs to fit into one of two predetermined categories. Arguing for greater recognition that international fora are 'multi-actor' settings (p. 68), Murray makes a case that more emphasis should be placed on the role in fact played by each of the various participants in these fora.

Murray seems to accept that NHRIs should be held accountable, at the international level, for the extent to and way in which they fulfil their mandate to promote and protect human rights (pp. 69–71). This then leads to consideration of the question of who is accountable for NHRIs before international bodies – government or NHRIs themselves? – and to whom are they accountable? It seems persuasive that government should be accountable for those aspects over which it has control, such as the composition (independence) and financial allocation available to NHRIs. NHRIs should, logically, be accountable for those aspects under their control, such as their operation and the interpretation of their mandate. Responsibility for their own functioning may be allocated along a sliding scale of lesser or greater dependence on government. As Murray's analysis shows, UN treaty bodies and the African Commission have not consistently followed this logic.

Perhaps the relative confusion may be addressed by reconceiving the place of NHRIs within a state/government (rather than state/non-state) dichotomy. While the terms 'state' and 'government' are usually not clearly distinguished in the NHRI

discourse, and are often used indiscriminately, there is – at least conceptually – a clear distinction. In traditional understandings, ‘state’ is a more encompassing term than ‘government’, denoting the entire geographically determined organized community – in Aristotle’s terms, the ‘polis’. ‘Government’ denotes the more transient authority or ‘power’ in control of (or ‘ruling’) a state at a particular time. (Effective) government is indeed one of the requirements for statehood. A distinction may also be drawn between a ‘head of state’ and ‘head of government’. Obviously, the clear divide falters in the real world, often because governments act as the ‘representative’ of the state and, therefore, become the state-in-action, for international law purposes. In this regard, one may consider the ambiguity embodied in the term ‘state party’. Under the principle of state responsibility, a state remains a party despite a change in government; it is essentially the state that is a party, with the government becoming the temporary custodian of that responsibility while it holds power.

NHRIs are not government institutions – they are state institutions. This is most clearly illustrated with reference to those NHRIs that derive their existence from the constitution. Even if the details of their functioning are set out in legislation (passed by government), they exist to support the fundamental compact and values contained in the constitution. Even if they are established purely by statute, the very essence of their existence is to act in the collective interest of the whole community, rather than in that of the government.²²

Should one accept that NHRIs are state institutions, in the sense outlined above, their place and responsibility in respect of a ‘state report’ becomes clearer. Such a report should, ideally, contain comprehensive and balanced information providing a picture of human rights in the *state*. Treaty body insistence that NHRIs, and NGOs, be involved in the drafting of the report then makes sense: state reports provide not the government’s view, but the cumulative view of state institutions, such as NHRIs, the government, and civil society. It is the failure to realize this ideal that legitimates – and necessitates – ‘shadow’ reports by NGOs and NHRIs. It is therefore possible that the delegation presenting the report may be either a *state* delegation, which is representative of more than merely the government, or a *government* delegation, narrowly defined.

How does this slight digression assist in analysing NHRI accountability? In my view, a reconceptualization of an NHRI as state institution, in the sense outlined above, explains why the government should be held accountable for those aspects over which it, being in charge of state resources and appointment processes, has control, and why the NHRI should be accountable for fulfilling its mandate of acting in furtherance of the foundational values of the state and the interest of all sectors in the community. Concluding observations of a state report may therefore also quite legitimately be addressed to both the government and the NHRI (or other state institutions).

22 In the Tanzanian Commission for Good Governance and Human Rights Act, 7 of 2001, for example, the Commissioners are aptly described as holding public office ‘in the services of the United Republic’ (section 13(1)).

At the national level (an aspect which falls outside the scope of Murray's investigation), NHRIs are formally accountable to the government, in that they usually have to submit annual reports to the parliament. Substantively, as state institutions, they should be held accountable not to the government's programmes and priorities but to the values on which the state is built, as contained in the Constitution, and to obligations under international law which the state has accepted. The lack of clarity about NHRI accountability at the international level leads Murray to investigate the possibility of accountability to UN treaty bodies, the African Commission, the International Coordinating Committee of National Human Rights Institutions (ICC) and its regional counterpart in Africa, the CCANI.

Murray goes on to deal with the process of ensuring NHRI accountability, in international fora, pointing out in particular the weakness of the African Commission's practice. As is the case with NGOs, NHRIs have to submit two-yearly reports about their activities to the Commission. However, the reports are not required to deal with the institutions' substantive engagement with the African human rights system. No NHRI has ever been 'called to account for its activities' (p. 83) by the Commission. This statement also applies to NGOs. Given that submission of these reports is required in the absence of any discernible indication of the purpose they are serving, it should come as little surprise that few of these bodies are up to date with this obligation. The failure of the Commission to assume the mantle of ensuring substantive compliance with reporting requirements has therefore contributed to the weakness of the international accountability of these bodies.

The book highlights the importance of independence to an NHRI's effective functioning (e.g. p. 89). Independence rests in part on perceptions of legitimacy earned in the eyes of civil society and the media, which form part of the CSAs of which Okafor writes. NHRI independence is therefore not entirely dependent on, and should not be seen as merely 'granted' by, government. Rather, it should be viewed as being co-constructed by government and CSAs. Local forces also have an important contribution to make towards enhancing the international role of NHRIs.

3.3. Overall impression

In *NHRIs*, Murray both takes a step back and reflects on the emerging practice of NHRIs' ad hoc participation in international fora, and takes a leap forward towards the formulation of a clear and coherent theory of this phenomenon. The book is a pleasure to read. Its sober and concise use of language makes the book accessible. Its analyses are accurate and thoroughly substantiated. The addition of five appendices containing the most relevant legal instruments enhances the user-friendly nature of the text.

4. CONCLUSION

Scholars and practitioners interested not only in the African regional human rights system specifically, but in international human rights law more generally, should read my exploratory marks above as an invitation to serious engagement with these

two texts and the underlying issues they address. Both texts not only competently and comprehensively describe issues of increasing importance to international law, but also provoke the reader into reflection. These are works of considerable scholarship, grounded in theory and practice, which shift the boundaries of current yet ongoing debates. *Activist Forces* and *NHRIs* are important signposts on the road to reaching the elusive ideal of ensuring the most significant possible impact of international human rights norms on domestic forces and institutions.