2. Theoretical – Conceptual Framework

This chapter presents the theoretical and conceptual framework that grounds and analytically orients this thesis. It begins by reviewing the dominant paradigms explaining international adjudication: realism, rational choice institutionalism, liberalism and constructivism. Prevailing accounts of international adjudication in political science literature draw on established International Relations (IR) theories, which can be broadly grouped into two versions. The first strand is rooted in rational choice models and is state-centric. Despite their differences, realist, institutionalist, and liberalist theories emphasise rationalist assumptions of utility-maximisation by actors who create these international courts (ICs). Moreover, actors' preferences are subject to either domestic or internationally imposed exogenous constraints. The second strand, the constructivist (reflective) approach, focuses on processes and practices of diverse actors' engagement with ICs, arguing that states and social actors are mutually constitutive.

After brief reviews of these dominant paradigms, section five explores why these paradigms do not fully capture the reality of African ICs. Drawing inspiration from Africanist scholars who either critique contemporary theorisations or provide new explanations, the final sections of the chapter engage with an analysis centred around the notion of *judicial diplomacy* as empirically observed during fieldwork for this study. The aim of the chapter is two-fold: to advance the concept of judicial diplomacy beyond the contemporary understanding of the term and to decipher *how* judges operate outside expectations set for them by popular IR theories of international adjudication. Like the rest of the thesis, this chapter sets the ground for shifting the focus from state-centric narratives of Africa's ICs to an actor-centric view of these institutions. In the same vein, by adopting a multidisciplinary[16] approach, the thesis locates itself at the intersection of major political science and Africanist socio-legal debates on international adjudication to assess if they could be suitable in understanding African sub-regional courts and, if not, to what extent they fall short.

16 Multidisciplinarity, as used here, implies drawing on knowledge from multiple disciplines to enrich my own thinking, albeit using that knowledge contextually.

2.1 Realist Explanations

Traditional realist explanations view the state as the primary actor in international law (IL) and argue against the restraining potential of IL to non-complying governments (Morgenthau 1940). A critique of traditional realism, *structural realists* disputed the logic that all states share preferences and norms, calling for a thorough investigation into particular state interests (Waltz 1979). Even though realist thought is not a monolith, the common theme in their argument is that it assumes a state-centric explanation for the creation of ICs and generally does not perceive them as consequential outside of state intervention.[17] Realists reasoned against the real constraining power of international institutions in preventing anarchy and promoting peace. In this view, ICs operate at the whim of states, which create them, and IL cannot meaningfully constrain states in their relentless and anarchist pursuit of self-interest (Burley 1993). By this logic, ICs will almost always reflect the interests of their creators.

2.2 Rational Choice Institutionalism

In response to structural realists' limited perception of the role of international institutions, a "modified structural realist theory," which came to be known as *institutionalism*,[18] took shape to counter what they saw as an inadequate narrative (Pollack 2014a, 362). Advancing international institutions as the solution to the anarchistic world of self-interested states, rational-choice institutionalism perceives international regimes and formal international organisations as the *sine qua non* of world politics

17 See generally Waltz 1979 for detailed accounts of realist logic and Mearsheimer 1994 for a structural realist account of power and international law. In general, despite the range of realist approaches, the theory assumes that ICs only play a minor role in the world order because they merely mirror the interests of powerful states, either serving their self-interest or remaining inconsequential in constraining states. See Steinberg and Zasloff 2006 for a good summary and distinctions in realist thought.

18 Institutionalism or "new institutionalism" is not a unified school of thought – it has at least three distinct strands: rational choice, historical and sociological institutionalism (Hall and Taylor 1996). However, *only* rational choice institutionalism has been directly used by IR theorists to explain the international regimes' organisation and their institutions (Keohane 1984; 1988; Oye 1986).

and international cooperation (Keohane 1988, 386).[19] Accordingly, international regimes, principles, norms, and decision-making procedures are fundamental in facilitating egoistic governments' collaboration, and only by taking institutions seriously can we begin to understand international cooperation (Keohane 1984, 57).[20] Even though Keohane did not explicitly link institutionalist thought to understanding international law at the time, it soon caught on in international legal scholarship (Abbott 1989).[21]

ICs serve a functionalist/utilitarian purpose to their creators, or as Moravcsik aptly sums it up, they provide an "institutionalised contractual environment for structuring international bargaining" (Moravcsik 1995, 158).[22] In this view, states are the primary subjects of international rules and institutions; hence, they are the *only* recognised actors in the international realm – privileging state interests as the primary explanatory factor in international law (Helfer and Slaughter 1997, 288–89). Accordingly, the theories do not account for the preferences of individuals or the effects of learning and any unexpected behaviour arising from deviant practices while privileging state sovereignty (Keohane 1988, 391–92). Despite such loopholes, rationalistic models have fostered an explosion of studies investigating the application and adjudication processes of ICs, viewing judges and states that create them on a continuum of Principal-Agent (P-A) theory.[23]

19 Rational choice institutionalism is synonymous with neoliberal, functional or rationalist institutionalism. For purposes of simplification, this section refers to rational choice institutionalism as institutionalism.

20 Based on the assumption that human beings are rational actors driven by self-interest and utility maximisation, institutionalism proposes that states create institutions to manage the high transacting costs that come with international cooperation. As Keohane explains, the creation of international institutions occurs "whenever the costs of communication, monitoring, and enforcement are relatively low compared to the benefits derived from political exchange" (Keohane 1988, 387). In other words, the rationale for their creation, maintenance and survival depends on whether they fulfil the desired incentives for the relevant actors.

21 Under the "concept of legalisation," institutionalist thought was extended to capture how precise established rules and principles of international law are binding on states through the delegated authority of applying and interpreting to a third party (Abbott et al. 2000). According to this theory, states create ICs and delegate to them to help them cooperate by interpreting and settling disputes about those agreements, generating information, reducing uncertainty, and monitoring compliance.

22 For instance, states bind themselves to human rights regimes not for morally altruistic reasons but as a brilliantly calculated move on their part for self-preservation against future opponents (Moravcsik 2000).

23 See generally Alter 2008; Pollack 2007; Carrubba, Gabel, and Hankla 2008; Stone Sweet and Brunell 2013.

Principal-Agent (P-A) Theory

Under the P-A theory, principals are those actors who draw on their authority to create agents who exercise delegated authority on their behalf (Thatcher and Sweet 2002, 3–4).[24] This delegated authority is conditional and "limited in time or scope and must be revocable by the principal", leaving the agent at the mercy of the principal (Hawkins et al. 2006, 5). Extending the theory to international adjudication indicates that ICs are "simple, problem-solving devices" (Posner and Yoo 2005, 6) whose judges are agents to whom member state principals delegate conditional authority. By this understanding, ICs can only play a minimal role in regulating anarchistic states, thereby reducing their involvement to an informative one.[25] Drawing on this logic, extant scholarship has clarified that the Court of Justice of the European Union (CJEU) lacks "sovereign authority" (Garrett and Weingast 1993, 205),[26] as do other ICs, on account of lacking compliance enforcement mechanisms as opposed to their domestic counterparts, which are backed by states (ibid., 201). However, such assumptions have not gone unquestioned (Majone 2001), especially considering the limited conception of power in the P-A approaches (Alter 2008; Stone Sweet and Brunell 2013).

Moreover, agents do not always succumb to the principal's wishes. They may "shirk" (tactfully evading their responsibilities) or even "slip" (cunningly pursue their preferences), disregarding the needs of the principal (Hawkins et al. 2006, 6). Such acts, dubbed "the agency problem" (Stephan 2002), are inherent to the costs of delegating to an agent. However, the agent's room for manoeuvre is constrained by various control mechanisms, formally (Pollack 1997) and informally. For instance, principals may use "recontracting politics as political leverage" (Alter 2008, 34) to rein in

24 Delegation to agents serves a "functional" purpose – minimising costs whilst maximising benefits – with the expectancy that the benefits dwarf the costs of delegation. Thus, the principal inherently grants the agent discretionary autonomy – operating within a "zone of discretion" – where agents walk a tightrope between exercising that discretion and appeasing the principal (Thatcher and Sweet 2002, 5).

25 P-A theories, broadly conceived, assume that ICs, and correspondingly, international judges' power, ultimately depend on the acquiescence of states acting under the wishes of the principal. Rather than being autonomous institutions that animate state behaviour, ICs only provide the desired information to their principals, thereby reducing their decision-making costs (Posner and Yoo 2004, 14–22). In this way, IC judges are perceived as devoid of wilful agency, and the idea of independent decision-making at the international judicial level seems implausible.

26 See also Garrett 1995.

disobedient agents. Therefore, the creation and survival of an international regime depend on how fastidiously the agents navigate their functional utility to the principal, depending on the conditions ascribed to the delegated authority (Pollack 1997, 103–4).[27]

2.3 Liberalist Approaches

Unlike realists who emphasise state power in international cooperation and institutionalist accounts that foreground institutions and their functional roles, *liberal theorists* highlight how domestic groups that make up the state impose structural constraints on state behaviour (Moravcsik 1992, 9–11; 1995, 158).[28] For liberal IR theorists, national preferences are not a result of exogenous but domestically engineered movements within the various domestic groups that constitute the state.[29] Likewise, a combination of societal ideas, interests and institutions *matters* in shaping state preferences and influencing their behaviour in world politics (Moravcsik 1997, 516). In contrast to the two earlier rational choice models, liberalism breaks down the idea of the unitary state into its domestic and international components. It foregrounds the interests of non-state actors and accords them a "distinct and independent status before supranational institutions dismantle the fiction of the unitary state" (Helfer and Slaughter 1997, 288–289).[30]

When applied to ICs, liberalism shifts the discussion to a bottom-up approach, focusing on how individuals and specific government institutions

27 Drawing on his earlier work (Pollack 1997; 1998), Mark Pollack advanced the P-A theory, putting its various facets to the test, especially with regard to the Court of Justice of the European Union (pages 155–203). He also addresses protracted critiques of the P-A theory in subsequent works (Pollack 2007).

28 Andrew Moravcsik's influential work puts forth three most critical elements of the liberal theory of international relations (IR): 1) the primacy of societal actors, individuals in groups in society, who place constraints on governments; 2) states are composed of governments, which governments represent some segment of domestic society, whose interests are reflected in state policy, and 3) independent state preferences regulate and are reflected in the international system (Moravcsik 1992, 9–11).

29 Therefore, global international relations are not merely driven by the coercive force of state power but rather by the demands of individual social groups. Such as individuals, privately constituted groups, corporations, and voluntary organisations, and governments.

30 See Slaughter 1992; 2000; Slaughter, Tulumello, and Wood 1998; Moravcsik 1992; 1995 for work that draws on the liberal theory of international relations.

interact to shape legal rules, norms and procedures.[31] Thus, ICs can *only* become consequential when societal groups (both domestic and transnational) find them functionally useful and engage with them to determine how effectively they function and perform. ICs, in liberal thought, alter compliance with international norms by changing the domestic incentives facing social groups and politicians, thereby shifting the domestic coalitions that define state preferences (Moravcsik 1995, 158). Understood this way, compliance with international law emanates from domestic actors' pressures on governments. As Slaughter reminds us, "the theory's power lies not in a static typology of levels of law, but in a dynamic account of lawmaking, implementation and enforcement" (Slaughter 2000, 242). Accordingly, works drawing on liberalism, usually alongside rationalistic accounts, aim to provide a more well-rounded portrayal of how the law impacts state-society relations.

2.3.1 Trustee Theories

One such liberalist theory of conceptualising ICs is the Trustee theory, which disputes that ICs are agents of the appointing states. Unlike P-A rationalist expectations, states are not hierarchically positioned above ICs in Trustee theory but are subject to and influenced by independent interpretations of ICs (Alter 2004, 39). Trustee theory views international courts as trustees (or fiduciaries) – selected because of their personal and professional reputation – and delegated with authority to make independent decisions as they see fit (Alter 2008, 39–40).

While P-A delegation stresses agent dependency on the principal's good graces, Trustees are endowed with a certain amount of trust, legitimacy and independent authority. As a result, they are chosen and empowered to act on behalf of a beneficiary to generate substantial authority for ICs (Alter 2008, 35). Similarly, the Trustee's delegated authority allows them to act relatively autonomously. After all, they have a reputation to maintain even if it is at the expense of their jobs and are, therefore, less prone to manipulation tactics (Alter 2008, 35–40). As a result, state influence on ICs does not emanate from contracting mechanisms, as P-A typically asserts.

31 Liberalism debunks the top-down view of states as the primary drivers of international relations and privileges a bottom-up view, which assumes that international and domestic arenas of international organisation are inextricably linked (Slaughter 2000).

Instead, states employ rhetorical and legitimacy politics and other legal avenues (such as refusing to consent to jurisdiction) to send signals to defiant ICs.

Trustee theories recognise that states appoint persons whose legal, professional and personal reputations are intact but tend to prioritise government control over the ICs and vary as far as they predict judicial independence. For these accounts, IC performance and effectiveness rest on the strength and extensiveness of their support networks – allies from whom ICs derive support against political interference and harmful state preferences. As Karen Alter reminds us, international judges – like their domestic counterparts – "wield neither the sword nor the purse" (Alter 2014, 4). Their strength lies in mobilising "compliance constituencies" on whom Trustees draw for support to exert pressure on states to comply with IC rulings and garner political leverage over appointing states (Alter 2008, 46–47).[32] The breadth of compliance constituencies also plays into the ICs' authority, which should be assessed contextually (Alter, Helfer, and Madsen 2016, 36). Alter's Trustee assumptions have met criticism from P-A enthusiasts who contend that the distinction between agents and trustees remains "an empirical rather than a theoretical question," citing that judges' actions lie on a continuum – influenced by their personal motivations and other structural, political and discursive constraints (Pollack 2007, 12–13).

Comparably, Stonesweet and Brunell (2013) advance a different version of the Trustee theory, arguing against Alter's (2008) conceptualisation on the grounds that the latter's formulation fails to account for circumstances when states overturn the trustees' decisions without much difficulty. In other words, they do not seem convinced by Alter's differentiation of Trustees from agents, as states may still delegate to "highly reputed experts while keeping them on a tight leash" (Stone Sweet and Brunell 2013, 68). Under their version of the Trustee theory, states intentionally create ICs as "super agents" – structurally superior to states – to act independently of state influence (ibid, 62).[33] In essence, principals create and delegate to ICs to

32 Compliance constituencies (e.g., civil society groups, fellow judges and the legal community) aid IC judges in convincing policymakers and the broader public to comply with their rulings (Alter 2008, 46–47).

33 According to this Trustee model, courts must fulfil three criteria to avoid interference: 1) Regular filing of non-compliance disputes, 2) IC rulings ought to be defensible, and 3) ICs have compulsory jurisdiction and state compliance where those rulings cannot be reversed (Stone Sweet and Brunell 2013, 62–63). Under such conditions, judges tend to produce rulings that reflect what states might do under majoritarian

force other member states to comply with their own Treaty commitment obligations.

2.3.2 Constrained Independence Theory

Primarily drawing on the experience of the European Union (EU), liberal scholars analyse how supranational courts and tribunals, like the CJEU, address disputes arising from international Treaty agreements between private parties and national governments, in consequence bringing domestic actors to the core of investigating international adjudication. The theory of constrained independence posits that states create formally independent ICs to enhance the credibility of their commitments in specific multilateral settings and then use a diverse array of structural, political and discursive controls to thwart judicial overreaching (Helfer and Slaughter 2005, 942). However, the authors note that these fine-grained control mechanisms do not necessarily translate into judicial dependence because state control over ICs usually requires the consent of other states and the potential mobilisation of resistance from domestic interest groups.

The constrained independence theory builds on their earlier work on the "effective supranational adjudication" framework, which highlights the role of legal mobilisation in pressuring governments to comply with IC rulings (Helfer and Slaughter 1997).[34] They also explain that IC judges operate in a *strategic space*. The strategic space is a combination of specific state-imposed control mechanisms limiting judicial authority and those emanating from the discursive constraints generated by interactions among domestic and international networks.[35] States employ "informal signalling devices" to warn ICs that surpass politically palatable limits of authority (Helfer and Slaughter 2005, 930). States allow ICs to rule against their interests only when those rulings advance their long-term value of Treaty commitments (Caserta 2017b, 66).

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decision rules, which helps limit the growth of IC authority and address IC legitimacy problems (ibid., 64).

34 Drawing on the success of the CJEU and the European Court of Human Rights (ECHR), Slaughter and Helfer theorise a framework of "effective supranational adjudication" linking the two courts' decisions to directly impacting "the lives of ordinary Europeans by securing them rights and privileges enshrined in international instruments and by holding their governments to their word" (Helfer and Slaughter 1997, 387).

35 See Helfer and Slaughter (2005, 942) and Steinberg (2004, 249) for the original concept.

In the same vein, constrained independence acknowledges that delegation to ICs empowers non-state actors who mobilise to use the court. Cognizant of the political limits on their authority, IC judges draw on the alliances that emerge from belonging to a "global community of courts" (Slaughter 2003). This community of courts refers to the "institutional identity of the judges who sit on them" and is forged by their collective self-awareness as national and international judges who constitute this community (ibid, 192). Belonging to a global community of courts is essential for international courts' pursuit of compliance and the promotion of judicial autonomy and independence (Helfer and Slaughter 1997, 389). It also serves as a judicial safety net, shielding judges from overtly political influences and defending and advocating for judicial independence. In sum, the theory assumes that IC delegation occurs at the intersection of the strategic appeasement of both the principal (state) and the "global community of courts", which subsumes P-A and Trustee theory assumptions, even though it perceives judges on a spectrum of Trusteeship rather than controlled agents. As such, ICs have formal independence but are constantly put in check by states using several mechanisms that signal to the ICs if they have overstepped their authority.

2.3.3 The Altered Politics Framework

Building upon liberal scholarship that broadened IR theory to embrace the role of domestic and global non-state actors that place constraints on governments (Moravcsik 1992; 1997; Helfer and Slaughter 1997), the Altered Politics Framework advances that "New-Style ICs"[36] influence international politics through the "globalization of judicial politics" and the "judicialization of international politics" (Alter 2014, 335). In other words, even if states are still the creators of ICs and possess contractual power in judicial appointments, states are no longer in the proverbial driver's seat of international adjudication. New-style ICs are flexing their judicial muscle owing to their compulsory jurisdiction and access for non-state actors who "make it harder for governments to block inconvenient cases" (Alter 2014, 18). Alter goes beyond rationalistic approaches and reasons that ICs affect

36 Usually modelled on the experience of the CJEU, these ICs cropped up after the end of the Cold War, with special characteristics: compulsory jurisdiction and allowing for direct access by non-state actors to initiate litigation (Alter 2014, 5).

political outcomes through their ability to give "symbolic, legal and political resources to compliance constituencies" (ibid, 19). Thus, for ICs to become influential and politically significant, they ought to be grounded in a strong network of compliance partners (Alter 2014, 20).[37]

Also incorporating aspects of the Trustee theory, the Altered Politics Framework treats ICs as "trustees of the legal agreement, and their legal interpretations are presumed to be more independent and disinterested compared to self-serving arguments put forward by litigating states" (Alter 2014, 9). This does not imply complete independence on the judges' part. Instead, like in Trustee theory, IC judges exercise their power on behalf of beneficiaries and only draw on compliance constituencies to gain support for the enforcement of their rulings (ibid., 10).

Despite its merits, some critiques have been raised, positing that the theory fails to account for judges' career incentives and the impact that political pressures may have on their fiduciary duties (Pollack 2014b). Similarly, the framework, which draws on 24 new-style ICs, tends to treat ICs as unitary actors despite their varied backgrounds, contextual differences and preferences whilst ignoring individual actors' agency. Most pertinent of these critiques is the issue of the universal applicability of the Altered Politics Framework to other regional settings. Mark Pollack, citing the suspension of the SADC Tribunal, questions the transferability of the framework, cautioning against the certainty and celebratory tone of ICs altering politics worldwide, noting that even if new-style ICs are "robust in Europe and increasingly in Latin America (*they*) remain fragile in Africa and elsewhere – hothouse flowers in a world not yet fully purged of either domestic authoritarianism or international *realpolitik*" (Pollack 2014b, 964). While Pollack's critique and cautions are valid, they underestimate the potential that new-style ICs in Africa have shown despite the backlash they faced (Alter, Gathii, and Helfer 2016). Africa's ICs are not simply sitting by and letting member state governments dictate their trajectory.

37 Compliance supporters are "broader coalitions of actors whose tacit or mobilised support is needed to protect compliance partners" (Alter 2014, 20). Such actors are usually domestic support networks. They help to rein in non-compliant governments, thereby engendering political outcomes through their ability to "speak law to power and thereby influence governments to alter their behaviour" (ibid, xviii).

2.4 Constructivist Accounts

Profoundly differing from rationalistic assumptions are constructivist accounts, which urge scholars to rethink the idea that states are rationalistic egoistic maniacs whose decisions in international relations are predetermined by preferences and utility maximisation considerations (Wendt 1992).[38] Per social constructivist thought, actors' preferences are endogenous to institutions, unlike in rationalist models, where they are treated as exogenous and predetermined. It follows, therefore, that the interests of states and other actors are a result of social interaction, where both social institutions and actors are *mutually constitutive* based on two core premises: the social and material environment in which agents/states (actors) take action and how that set-up constitutes the actors (Checkel 1998, 325–26). Therefore, human action is informed by the collective meanings or understandings (norms)[39] attached to objects. Such shared meanings then constitute structures, which are passed on through the act of socialisation.[40]

Scholars have extended constructivist thought to understand the constitutive power of international norms and how they may influence states.[41] This work has gone beyond the formalised aspects of international law to capture the purposive social construction of law, which includes paying attention to the processes and practices of actors' engagement with international law.[42] This broader perception of international legal regimes entails investigating how they emerge, establish legitimacy, maintain authority or

38 Even though Alexander Wendt popularized "constructivism" in IR scholarship, the term was originally coined by Nicholas Onuf in *World of Our Making* (Onuf 1989). Constructivist thought draws on structurationist work "to problematize the interests and identities of actors (Ruggie 1998, 862).

39 Norms are collective understandings, which constitute actor identities and shape their interests (Checkel 1998, 326).

40 Understood as a "cognitive process, not just a behavioural one" (Wendt 1992, 399), socialisation goes beyond behavioural changes to impact how individuals forge understandings of social phenomena. Hence, individuals, and by extension, states, operate according to socially accepted ideals, norms and rules that shape the identities and preferences of actors. In contrast, the inculcation of such shared virtues in human actors and the subsequent internalisation of those norms lies at the heart of social interactions.

41 See Finnemore 1999; Finnemore and Toope 2001; Koh et al. 1997; Koh 2005 for constructivist works on the constitutive power of international norms and how the law may influence states.

42 See also Koh 1996; Finnemore and Sikkink 1998; Wendt 1999; Lutz and Sikkink 2000; Goodman and Jinks 2004; Reus-Smit 2004; Hirsch 2005; Hurd 2008; Brunnée and Toope 2010 for constructivist approaches.

are undermined. Likewise, constructivist accounts have also emphasised an actor-based approach to understanding the construction of European integration – shifting the lens to the social processes that shape European integration – and challenging purely rationalistic interpretations that only saw ICs as functional to states (Vauchez 2008b; Cohen and Vauchez 2011; Vauchez and Witte 2013). Arguing that the process of law-making in Europe has been a complex social and political endeavour, scholars investigate the roles played by various national and transnational actors involved at different stages in creating and transforming European law (Vauchez and Witte 2013). Some have spotlighted how lawyers were "active ghostwriters of political change" (Pavone 2022, 11) in Europe.

Extending the social construction of law debates outside of Europe and privileging the non-strictly judicial roles of ICs (Hirsch 2020), scholars have linked the socialisation of ICs to influencing their performance (De Silva 2018b). They have also looked at judicial off-bench activities that increase the effectiveness and legitimacy of these courts (Squatrito 2021). Usually taking a bottom-up approach to researching ICs, these works emphasise the socialisation aspect of international legal norms, embracing the role of domestic society before states. However, as noted by recent scholarship, constructivist accounts have mostly reduced state action to a reactionary role (Brett and Gissel 2020, 25).

2.5 African REC Courts vs Dominant Paradigms

> "Over the last two decades, the largest and least investigated changes in the international judiciary have occurred in Africa. [] Indeed, the politics of Africa's international law is bewildering only insofar as analysis is informed by the assumptions of the mainstream paradigms" (Brett and Gissel 2018, 214–15).

Indeed, in agreement with these authors, the chapter argues that although theories explaining international adjudication are based on empirical work that draws on the experience of the CJEU on which African REC courts are modelled, they do not easily transfer to other regional contexts. While rationalistic-leaning explanations are suitable for understanding why REC courts in Africa struggle to assert their authority, they may not be well-equipped to explain how judges strategically alter the precarious conditions in which they operate. Explanations for why ICs struggle to assert their authority often attribute state-driven compliance processes as the primary

explanatory factor. However, questions linger about how freely IC judges can interpret the law and issue binding judgements without risking improper and unwarranted interference. For instance, only when the IC has expansive formal or self-created jurisdiction over which it commands and exercises extensive authority is it deemed both "politically influential and effective" (Alter, Helfer, and Madsen 2016, 34–5). Thus, by this framework, African ICs have limited or narrow authority and, by extension, are deemed politically ineffective. By this understanding, courts that struggle with compliance would not warrant attention in terms of assessing their emerging influence in REC politics.

Yet, empirical evidence shows that actors within regional judicial institutions engender change, shape and mould the implications of meaning, behaviour, and reception of international legal regimes. Rather than examining these courts through an authority dimension, which inevitably paints a singular, unflattering picture of IC authority in Africa, recent work emerging from socio-legal studies dares to suggest otherwise by framing the analysis in a critical tradition. The following section briefly reviews the most influential works from which this study draws inspiration.

2.5.1 Extraversion Explanations

An Africa-focused explanation for the creation of ICs in the region was put forth by Brett and Gissel (2018), who refuted liberal institutionalist theory and constructivist theories as viable explanatory factors in the creation of African ICs in the 1990s and the early 2000s. They argued that member state preferences cannot adequately account for their creation. Instead, "extraverted strategies for attracting international resources and pre-empting donor pressures for political and legal reforms" (Brett and Gissel 2018, 204) were the dominant grounds for their creation and proliferation on the continent within that time frame. The authors maintain that the need for these supposedly weak states to appear law-abiding was a strategy to pre-empt donor pressures, and the creation of international legal regimes was part of the ploy to "redefine their international identities" (ibid, 204).

While the authors are aware of the limits of this argument, they emphasise that understanding the creation of the ICs could shed light on the future backlash that ensued. They perceive the intense revolt against these courts as "neither a departure from a cost-benefit calculus nor a rejection of previously internalised values" (Brett and Gissel 2018, 215). According

to the authors, it is thus not surprising that African RECs experienced immense backlash upon exercising some form of autonomy in the mid-2000s. "Regional leaders had simply failed to protect their interests when drafting the Treaty" (Brett and Gissel 2018, 212), as was the case in the South African Development Community (SADC).

Likewise, the two authors privileged extraversion tactics over the institutional diffusion model (Lenz and Burilkov 2017) as the most feasible explanation for IC creation in Africa. This is a refreshing approach to studying these courts and the resulting backlash, instead of comparisons to the EU model. And yet, fieldwork for this study echoed institutional emulation, as the EAC Treaty drafting experts drew on the European Court of Justice (CJEU) as well as the Economic Community of West African States (ECOWAS) and the Common Market for Eastern and Southern Africa (COMESA) treaties.[43] Partner state executives were more welcoming of the idea of a court, seeing it simply as a necessary extension of the new REC bloc; after all, it was modelled after the CJEU. Besides, there was public participation in the treaty-making process, where legal professionals and civil society groups negotiated the terms, format and jurisdiction of the new international court (Taye 2020). However, the drafters of the EAC Treaty disagreed over the nature of the Court and the scope of its authority, mostly wishing for an appellate court similar to its predecessor. The fact that the revamped EAC state executives consulted and prevented an appellate and human rights jurisdiction, choosing to ponder its implications before setting up the court, shows that they were not merely signing the Court into existence unthinkingly. This is in agreement with the idea that the creators of the EAC did not contemplate "an active role for the EACJ in the regional integration process" (Gathii 2013, 250), hence its limited remedial power.

In sum, while Brett and Gissel argue convincingly, with two examples that seem to fit the extraversion explanation, their intervention also prioritises the level of IC creation. However, one wonders whether there is much more to the creation of these ICs than merely donor appeasement and extraversion tactics. Also, how do the authors account for divergent practices from those envisioned by the creators? Where is the place for judicial agency in their argument? Nonetheless, in agreement with the above authors, the study seeks to offer an *alternative* explanation of African international legal regimes that goes beyond mainstream paradigms informing our contemporary understanding of these institutions. Additionally, it extends

43 Interview, EACJ former judge, November 5, 2021, Bujumbura.

beyond explaining backlash and the creation of these courts to understanding how they operate once established. The study draws inspiration from critical approaches to studying African courts.

2.5.2 Critical Studies of African ICs

While we already knew that going beyond compliance to capture the effects of international law is essential (Howse and Teitel 2010), only recently has scholarship challenged dominant rationalistic accounts that measure the performance of African ICs against Eurocentric standards of institutional design and effectiveness, thereby seeking to move past state-driven compliance (Gathii 2020b). Gathii urges scholars to consider the broader political, social, and economic context within which these courts operate. Building on earlier work that highlighted how human rights litigation in the EACJ is used as a tool of political mobilisation (Gathii 2013), his edited volume made a case for appreciating the role of Africa's ICs as arenas of legal mobilisation (Gathii 2020b, 8).[44] He draws attention to the broader impact of legal mobilisation while foregrounding actors behind litigation, situating the litigated cases in their localised contexts, and debunking knowledge universalisms (Gathii 2020b, 16–18).[45]

Critical perspectives are actor-centric, unlike rationalistic views on compliance and effectiveness, which centre states and minimise judicial and non-state actors' roles in shaping and using litigation processes in ICs. They emphasise alternative views on the performance of ICs (Gathii 2020b). More still, they have belaboured to challenge uncritical comparisons of African Regional Trade Agreements (RTAs) with the European Union and other regional integration arrangements,[46] highlighting the underappreciat-

44 This usage aligns with work that considers legal advocacy as a source of institutional and symbolic leverage against (political) opponents (McCann 2006, 29).

45 Perceiving the growing strategic litigation in Africa's ICs as both a strategic resource and constraint- while they provide activists and litigants with an additional avenue to name and shame political foes, publicise their grievances and mobilise their supporters, providing access that may otherwise not be possible in their national jurisdictions, they also expose the courts to executive interference (Gathii 2020b, 12–18).

46 Their crucial contribution has been to challenge the Eurocentric gaze on African RTAs, challenging scholars to perceive them as flexible cooperative arrangements that are not meant for strict adherence but rather allow member states to collaborate on various goals beyond narrow trade liberalization (Gathii 2011a; Akinkugbe 2013).

ed jurisprudence that emanates from African REC courts (Gathii 2010; 2013; 2016b; Okafor and Okechukwu 2020; Akinkugbe 2020).

James Thuo Gathii's influential critical scholarship on Africa's ICs (Gathii 2007; 2010; 2011a; 2012; 2013; 2016a; Alter, Gathii, and Helfer 2016; Gathii 2018; 2020b) has demonstrated how Africa's ICs are avenues of resistance, expansion, creation, consolidation, and restitution of international institutions by taking a social turn to investigate the different cultural, socioeconomic, and political values in which these regimes are embedded. Gathii draws on Third World Approaches to International Law (TWAIL), which advances a critical analytical framework for studying international legal regimes in the Global South.[47] It foregrounds questions of coloniality, global power, and identity in international law scholarship (Gathii 2011b, 27). Although IL is premised on the assumption of sovereign equality and self-determination, TWAIL-ers reject the idea of a neutral and objective scholarship of IL and, by extension, its institutions and posit that only by acknowledging the colonial and imperialist legacies of IL can we understand its impact in formerly colonised regions (Gathii 2011, 30–31). TWAIL inquiry on Africa and its relationship to IL is both "contributionist" and "critical" (Gathii 2012, 407).[48] While the former emphasises Africa's contributions to IL, arguing in favour of cementing its place in the production of international legal norms, critical theorists examine the imperial and colonial character of international law, linking it to Africa's subjugation in the global world order.[49] Gathii's work on Africa's ICs has advanced

47 TWAILers problematise the term "third world" by using it in an emancipatory tone, as "a necessary and effective response to the abstractions that do violence to difference" within formerly colonised countries of Asia, Africa and Latin America (Chimni 2006, 5). Even if proponents of this approach do not seek to "produce a single authoritative voice" on IL (Gathii 2011b, 27), they also emphasise that it is not "a method" but an analytical framework (Anghie and Chimni 2003, 77).

48 TWAIL draws on Critical International Legal Theory (CILT) and seeks to challenge narratives that only view IL and its institutions as inherently devoid of biases within the global order. They strive to address the injustices perpetrated by uncritical analyses of the application of IL (Johns 2019). There is a diverse range of what counts as CILT, as Johns emphasises, it is not a "single movement, school or approach" (Johns 2019, 133).

49 The supremacy of European practice, norms, values, rationality and its audacity to claim universality in international relations have received immense criticism from scholars of African IR. Seeking to decolonise IR theory is not only about adding subaltern voices to the debates but also about rethinking the world order, its constituent themes and logic, decentring Eurocentricity to unmake the "internationalised" and remake what constitutes the international (Zondi 2018, 8). On the other hand, Tieku

both agendas, though he mainly draws from the critical tradition to centre narratives from African ICs through alternative imaginaries of these institutions.[50]

TWAIL scholarship has challenged dominant paradigms in favour of an alternative explanation for Africa's ICs. The EACJ and Economic Community of West African States (ECOWAS) courts have both emerged as consequential – transforming into avenues for legal and political mobilisation (Gathii 2020b), dealing with megapolitical jurisprudence (Akinkugbe 2020), and have even carved out a niche in subject areas to which jurisdiction is officially limited (Gathii 2013) – defying realist expectations. Besides, rather than extending the coercive power of EAC states, as realism would envisage, the EACJ has imposed checks on member state sovereignty (Gathii 2013, 293). It has dared to challenge authoritarian states and even "saved" the Serengeti from degradation (Gathii 2016a), among other audacious moves in its extensive docket.

Likewise, EACJ judges have surpassed constructivist expectations that they would internalise the court's restricted jurisdiction and operate within its confines. Instead, they craftily push boundaries, creating their own interpretation of the limited jurisdiction to allow for human rights adjudication, thereby expanding and growing it. Besides, EACJ intervention in human rights is an exception rather than the rule, given the expectations of prevailing IR theories, which would have predicted the EACJ's demise

is more sympathetic to IR theories, acknowledging their usefulness, but problematizes their "individualist worldview which exaggerates the significance of competitive and self-centred international practices and experiences while simultaneously peripheralizing" the collectivist nature of Africa's international life (Tieku 2014, 11). In fact, until recently, most scholarly accounts of legal mobilisation in ICs drew on the European experience and the dominant IR theories. This is where the TWAIL approach bridges this divide in a critical tradition.

50 For Gathiii and other TWAIL-ers, it is important to "formulate a substantive critique of the politics and scholarship of mainstream international law to the extent that it has helped reproduce structures that marginalise and dominate third world peoples" (Gathii 2011b, 32). His edited volume, *The Performance of Africa's International Courts (2020)* draws on critical thought to rethink the Western gaze that dominates the study of Africa's ICs (Gathii 2020b, vi). It also seeks to attain "cognitive justice" by framing Africa's ICs as sites of knowledge production rather than mere contexts of reception of transplanted legal norms (Gathii 2020b, 4–5). See Kisakye 2021 for a review of this book that aligns with the perspective presented in this chapter.

(Gathii 2013, 292).[51] These approaches have moved beyond the rigid analysis of court decisions and compliance measures to centre the social and political aspects, offering a more nuanced explanation for the performance of Africa's ICs. By focusing on contextual factors that are, for the most part, outside of the control of IC judges, the latter would ignore the agency of non-state actors and judges themselves.

2.5.3 Neither Agents nor Trustees

While understanding how contextual factors, largely beyond the control of international courts, can provide enlightening insights into the peculiarity of Africa's ICs, focusing solely on exogenous factors does not adequately capture the emerging dynamics of Africa's ICs (Gathii 2020b). Principal-Agent (P-A) theory would partially support why the COMESA court has remained operational, albeit politically restrained (Gathii 2018). P-A may suggest that the COMESA court reflects the character of engagement of the member states and their preferences toward the REC bloc. Similarly, they could tell us something about why the Southern African Development Community (SADC) Tribunal succumbed to the interests of a powerful state (Nathan 2013), albeit in an unsatisfactory manner. This is because it would ignore the complexity of the racialised discourse behind the SADCT's demise (Achiume 2017).

Relatedly, the EACJ challenges rationalistic anticipations on two grounds. Firstly, even though the EAC partner states (principals) have denied the expansion of the court's mandate to include express human rights jurisdiction (Gathii 2013, 284), the court has craftily circumvented these limitations in its jurisdiction, much to the dismay of its creators.[52] Secondly, the court has not been afraid to check its appointers, as in the *Anyang' Nyong'o vs Attorney General of Kenya*,[53] where it declared irregularities in Kenya's elections to the parliamentary organ of the EAC. Unlike arguments that consider ICs toothless, powerless, and mere puppets of their creators, this ruling, despite eliciting an immense backlash, showed that the court was not only a state agent.

51 Rather surprisingly, the court has demonstrated an "ability to carve out its autonomy and independence, defying both other EAC organs, such as the Council and EAC member states" (Gathii 2013, 292).

52 Through an expansive reading of Articles 6(d) and 7(2) of the EAC Treaty (Taye 2019).

53 *Anyang' Nyong'o, supra* note 5.

Similarly, rational choice theories converge on their understanding of judicial authority – IC judges have limited delegated authority which is rooted in state interests – prioritising government control over the ICs and varying only insofar as they predict judicial autonomy. However, governmental control of judges on ICs tends to be more complicated than the P-A theory supposes. A single government can hardly control an activist/defiant judge on the IC bench as there is simply limited control possible for collective principals (Alter 2008, 46). P-A theories may not satisfactorily account for complexity of overlapping and competing jurisdictions, which can only function against mutual trust and cooperation (Majone 2001). As in the *Anyang' Nyong'o* case, Kenya alone could not control the court; instead, it sought the help of other member states to impose penalty measures on the court.

Moreover, as an organ of the East African Community, the theories must also be understood within the context of the IC. As scholars have noted, the persistence of different national interests, as manifested in "protectionism," complicates regional integration agreements in the EAC (Khadiagala 2016, 179). Likewise, divergent personal relationships between Heads of State and national political agendas impact EAC national relations and the trajectory of regional integration (Makulilo, Stroh, and Henry 2018). Consequently, the notion of shared state preferences does not satisfactorily fit the EACJ model, as realist and rationalist institutional explanations would suggest.

Turning to the Trustee approach, Alter's trustee model could partially explain some aspects of the EACJ experience. Pioneer bench appointments seemed to fit the trustee model – judges were selected primarily because of their reputation or professional norms as trusted representatives of their countries. This could explain the bold nature of the first bench, as will be explored in the next chapter. Likewise, Trustee, constrained independence and the altered politics frameworks all centre the role and influence of support networks – domestic and transnational actors who not only define state preferences but also apply pressure to persuade them to comply with their Treaty agreements. As such, Trustees are endowed with delegated authority to alter politics through the deployment of support from domestic constituencies that empower the ICs to cement their place in international relations. However, unlike the European ICs on which these theories are based, the EACJ is a relatively new court. It is still grappling with a paucity of support networks despite regularly seeking them out to fight for judicial autonomy.

Following the Trustee theories, constrained independence theory and the altered politics framework outlined above, the resilience of ICs under pressure hinges heavily on their embeddedness in judicial support networks, which provide a solid foundation of support on which they rely to fend off the backlash, grow networks and visibility, gain effectiveness and at times even their survival rests on it. The presence of judicial constituencies has even been linked to the *de facto* authority of ICs – they become authoritative when their rulings are endorsed by litigants, compliance partners, and the legal field (Alter, Helfer and Madsen 2016, 35). Indeed, African REC courts do not act in isolation but in concert with well-organised judicial constituencies, albeit limited in number due to their relative newness.

It is noteworthy, though, that despite the limited presence of judicial support networks, the existing network has mobilised to circumvent limitations in the jurisdiction and drive human rights jurisprudence in the region (Gathii 2013; Taye 2019; Gathii 2020a) even if they have not rallied against non-compliance to the extent that Trustee assumptions imagine. In this regard, the experience of the EACJ is consistent with these frameworks, as the court has created valuable symbolic, legal, and political resources, albeit without meeting the conditions that necessitate the enforcement of international rules to be supported by powerful constituencies.

On the other hand, the idea that ICs and their judges are weak trustees who must depend on compliance constituencies to thrive does not fully capture the reality of the EACJ. "The EACJ has not waited for the other organs of the EAC to acknowledge its presence", but it has "openly strategized" (Gathii 2013, 275) and fought for its place in the REC body.

As such, we need *alternative explanations* for why African REC courts, despite their institutional constraints, take on politically salient cases and check their appointing governments despite all the foreseeable risks involved in upsetting the power holders. As Tom Ginsburg noted:

> "Much of the existing work on international courts draws from European and Latin American experiences, where integration is deeper and legal regimes are older. The African courts' challenges are not trivial. Theirs is not a straightforward story of ever-expanding jurisdiction in alliance with national courts. Rather, the developments are more messy, uneven–and perhaps therefore more worthy of attention" (Ginsburg 2021, 780).

The following section endeavours to capture the peculiarities of African REC court operations. While we are starting to grasp judicial behaviour at

the national level, we do not know much about the experience of judges who sit on regional court benches in Africa, and much less is known about how these judges exercise *agency*.[54] This question frames the crux of my investigation: how do African sub-regional court judges navigate the strategic space and forge (political) relevance? The study considers the strategies judges employ to protect judicial independence, enhance assertiveness, and defend themselves against executive interference. Drawing on the notion of strategic space, it attempts to carve out an alternative explanation for making sense of the everyday realities of this court. The following section introduces the notion of judicial diplomacy.

2.6 Judicial Diplomats in a Strategic Space

Like their domestic counterparts, international courts operate within certain political, social, legal and economic boundaries. Therefore, international judges exercise "bounded discretion" (Ginsburg 2004) in lawmaking to help states to order their behaviour. In essence, international courts must take state interests into account in order to be effective (Posner and Yoo 2005a; Ginsburg 2004). Otherwise, states may opt out of the jurisdiction of the IC, an option not available at the national level. They may ignore the decisions of these courts, seek to overrule the court's interpretation by amending the treaty regime, or simply pushback or attack the courts in several ways (Ginsburg 2004, 28).

As witnessed in the early days (the 1960s) of the Court of Justice of the European Union (CJEU), member state politicians "were clearly unsettled by the legal precedents" issued by the CJEU as they fought to protect their national sovereignty over growing EU jurisprudence (Alter 1998, 132). Consequently, the CJEU struggled to assert its authority in its initial years amidst national courts' rejection of the supremacy of EU law over national law, which resulted in marginal regional jurisprudence (ibid., 132). The exercise of caution by judges who exhibit astute legal and diplomatic skills has been linked with advancing European integration, with the CJEU being labelled the "unsung hero" of the process (Burley and Mattli 1993, 41). Related considerations were observed in the European Court of Human

54 I base my understanding of the term on Gidden's concept of agency, which attributes to the individual actor the capacity to process social experience in nuanced ways, monitoring their actions and those of others to devise means of coping even in times of coercion (Giddens 1984, 5–11).

Rights (ECtHR) during its formative years, upon which Mikael Madsen coined the term "legal diplomacy" (Madsen 2011, 44). Legal diplomacy is a strategy of legal interpretation in which ECtHR judges exhibit a measured amount of legal and diplomatic skills, carefully balancing legal principles with political sensitivity towards the Member States. This cautiousness in judging, which presents itself, especially during the early years of ICs, has also been observed in the Caribbean Court of Justice (Caserta and Madsen 2016).

ICs generally tend to display heightened cautiousness and restraint in their decision-making when grappling with their own legitimacy and lack wider public support. The EACJ, which is only two decades old, is no exception. It was met with a drought of cases in its first five years of operation. This predicament was worsened when, in its first controversial case, *Anyang' Nyong'o*,[55] the vulnerability of the new judicial institution and its judges was laid bare through the backlash that ensued (Onoria 2010). Moreover, REC judges face a quandary as the legal guardians of the REC Treaty – with a delegated authority to oversee the legality of the integration process – who lack the "active power"[56] to assert their authority and enforce compliance with their rulings. Thus, they walk the tightrope between judicial deference to partner states' executives, who still employ them at home, and judicial activism set by predecessors to build legitimacy for the REC body.

Although the court did not initially exercise restraint in its decision-making, its future trajectory would be marked by the persistent need to navigate a strategic space. All judges interviewed in this study mentioned the *Anyang' Nyong'o* case and were highly aware of its implications for regional court interventions. Through several subtle and overt signalling tactics. For instance, judges were cautioned to steer clear of intervening in matters of national sovereignty when harsh Treaty amendments widened the possibilities for removing judges from office. As such, judges were subtly kept in check by the revised rules on judicial misconduct, which introduced new grounds for judicial suspension. Furthermore, an Appellate Division

55 See *Anyang' Nyong'o, supra* note 5.

56 Drawing on a definition of judicial power that perceives it as a combination of *active* power and *potential* power (Kapiszewski and Taylor 2008, 750). *Potential* power is conceptualised as a combination of the breadth of the Court's jurisdiction (where courts *can* rule) and judicial discretion (judicial decision-making and its related constraints). On the other hand, *active* power combines judicial assertiveness (*when* courts check powerful actors) with authoritativeness (compliance with decisions/accountability).

was created to oversee the decisions in the trial Court. States have also controlled the bench through the appointment processes. The EACJ has had a fair share of appointment irregularities where its member states have been accused of using appointments to reward loyal judicial cadres or to position political cronies (Stroh and Kisakye 2024). Additionally, regular pushback emanating from their domestic and international networks, as well as backlash to their decisions, is also often factored into decision-making.

Thus, given the multifaceted, often opposing, and fragile politics of national sovereignty and regional integration within which REC courts are positioned, judges have to manoeuvre political resistance. As the previous section showed, this work perceives judges as neither trustees nor controlled agents. Instead, they have been vigilant in resisting threats to their autonomy by carefully navigating their *strategic space* and have become proactive agents in their own empowerment through the exercise of *judicial diplomacy*.

2.6.1 Defining Judicial Diplomacy

Theresa Squatrito uses the concept of *judicial diplomacy* in international court relations to refer to "a set of practices that are planned and organised by an international court, whereby it represents itself and claims authority through non-adjudicative interfacing with external actors" (Squatrito 2021, 66). This usage of judicial diplomacy is directly linked to the legitimisation of ICs, especially newly created ICs in their formative stages. It is exclusively restricted to most, but not all, off-bench activities in which ICs may be involved.[57] Most importantly, it is only considered as such when it *does not* form part of the adjudication process. Moreover, these non-judicial activities are explicitly perceived as "strategic political behaviours that support a court's judicial roles" (ibid., 65). Thus, by this understanding, judicial

57 Squatrito also adopts a socialisation lens to explain how ICs employ judicial diplomacy to socialise actors into adopting legal norms through norm internalisation and acceptance (Squatrito 2021, 68–69). She details how ICs target their desired audiences (such as government officials, national judges, and civil society organisations) by communicating "norm-referential narratives" about the courts (Squatrito 2021, 83). Such critical constituencies are purposively socialised into the ICs' norms, rules, and procedures in a deliberate move to inspire compliance and effectiveness of these courts.

diplomacy would encompass the breadth of judicial off-bench mobilisation activities[58] that are centred around building compliance constituencies, socialisation of actors and the court's stakeholders into its international legal norms, and, generally speaking, take into account all relations that build support systems for the IC bench.

In the context of national apex courts, Law (2015) extends the idea of *judicial diplomacy* to constitutional courts. The concept refers to various activities[59] in which courts engage without the intent of writing stronger opinions or appeasing domestic audiences but which "constitute strategies for competing or cooperating with other courts in pursuit of political, economic, and diplomatic objectives" (Law 2015, 943). Most importantly, these activities and practices are only distantly related to the adjudication process.

Judicial diplomacy has also emerged within the context of senior judges in the UK (Davies 2020). Perceived as a multi-faceted idea that covers a wide array of judicial relationships – from belonging to international judicial associations, participating in bilateral and multilateral meetings with other judiciaries, engaging in law reform projects and providing support to judiciaries in developing countries" (Davies 2020, 77–78). While the diplomatic relations were limited between judges, the paper traced the political relevance of these meetings since the advent of Brexit. It argued that judicial diplomacy by senior judges in the UK had taken on greater significance as judges used it to pursue jurisprudential and strategic aims.[60]

The studies above limit the understanding of judicial diplomacy to relations off-bench. However, during fieldwork for this study, it became clear that judicial diplomacy, as employed in the REC court, involves the adjudication process. An interview with the head of the EACJ revealed that:

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58 As previous research has shown, IC judges engage a range of actors outside of the court through "out-of-court judicial diplomacy" (Madsen, Cebulak, and Wiebusch 2018, 214) for various reasons. Either as part of a legitimation strategy to socialise actors into their legal regimes (De Silva 2018b), mobilise compliance constituencies through judicial diplomacy (Squatrito 2021, 68), or take part in resilience strategies to counter growing resistance to their intervention (Madsen, Cebulak, and Wiebusch 2018; Caserta and Cebulak 2021a).

59 Like the translation of their own opinions, citation of foreign law and engagement with international organizations.

60 Jurisprudentially, judges "sought to improve the quality of judicial decision-making at the domestic and supranational levels," whereas "strategically they have striven to maintain robust inter-institutional relations and maximise their influence at the supranational level" (Davies 2020, 79).

> "An international judge is not only writing judgments; you must also be doing diplomacy. Not political, not economic; for us, we are dealing with judicial diplomacy. You know, we are dealing with the Partner States. So, if a case comes from Rwanda, for example, it is not only a matter of hearing it and writing a judgment. Like yesterday, we had a critical matter involving the government and the citizens. About billions of dollars! So, it's not a matter that the government of Rwanda is not represented, and then you dismiss it. You may say, 'I know the rules. The rule says that the Court may dismiss the matter if the appellant does not appear.' For us, you don't have to dismiss it because it is the government. That is the government! So, we must also be informed by judicial diplomacy! We must be careful with an international court that, at least, let us give them an opportunity. You know, those are the creators of the Court. So, those are issues where we must be guided by judicial diplomacy."[61]

Unpacking the judges' words reveals that judicial diplomacy is broad, hard to grasp, and perhaps even more challenging to articulate in non-contradictory terms. For the judge, judicial diplomacy is neither political nor economic, and yet, from his description, judges have taken on diplomacy in its broadest sense. The leading scholars on diplomacy define diplomacy as:

> "A claim to represent a given polity to the outside world. Pitched at this level of abstraction, the concept reduces to three key dimensions: first, diplomacy is a process (of claiming authority and jurisdiction); second, it is relational (it operates at the interface between one's polity and that of others); and third, it is political (involving both representation and governing)" (Sending, Pouliot, and Neumann 2015, 5).

By this definition, the term diplomacy has three vital aspects: it is *processual*, *relational* and *political*, facets that we do not usually identify with judging and judicial decision-making processes. As observed in the EACJ and as the layout of the study illustrates, judicial diplomacy is *processual*. The EACJ successive benches have been distinct in their approach to forging institutional power, claiming authority and jurisdiction, and in their attempts to behave diplomatically. The pioneer bench started by claiming its broad jurisdiction to encompass human rights issues without much caution and guardedness in reading the Treaty. However, the second bench, having witnessed backlash to the pioneer bench's ruling, started to tread

61 Interview, Honourable Justice Nestor Kayobera (EACJ judge President), November 9, 2021, Bujumbura, Burundi.

carefully, recognising that while it would build upon the earlier established jurisdiction, it would have to be very vigilant in assuming broad jurisdiction outside of human rights. Realising that their authority was constantly being negotiated, especially with the dawn of the appellate division, judges became even more cautious of their decision-making in relation to partner states.

Equally, all EACJ benches have perceived their role as *relational* to their colleagues, partner states, court users and the international legal community. Judges are judicial representatives of their home governments to the REC body. Member state executives appoint them in a mostly informal process that thrives on the judges' relational attributes – merits, ties and efforts – that enhance the chances of individuals being selected by the appointer at the national level (Stroh and Kisakye 2024). For instance, direct ties to the head of state suggest a relational advantage over other candidates in the regional bench selection process. Upon appointment, judges find themselves on a collegial bench with its own relational norms. For example, successive benches have informally arranged to issue decisions by consensus so as to speak with a unified voice and create a shield for each other and the institution. Judges generally devise ways to create an atmosphere of judicial collegiality whenever the ad-hoc Court is scheduled to sit, in a bid to foster a shared sense of belonging to the bench and to learn, strengthen and liaise against any outside pressures that may be directed at them. Likewise, judges know that their power emanates from how they are perceived by the court users and, as such, tend to cater to their image within the broader public and international arena.

Lastly, judicial diplomacy is overtly *political*. As the Judge President clearly states, doing their job at an international court entails meticulous and cautious navigation of the politics at the sub-regional level. Decision-making is not merely taken at face value – where judges simply interpret and follow the confines of the law as legalistic approaches to decision-making suggest (Segal 2010; Leiter 2010). Instead, an array of strategic-realist considerations informs their choices (Posner 2010; Baum 2010). Recall that REC judges either sit concurrently on the national and regional court benches or remain in public service at the national level, posing a quandary of "double agency" (Taye 2020, 352). As double agents of their state and REC bodies, regional judges working in relatively new institutions that seek to establish their power, build legitimacy, and at the same time partake in regional institution-building find themselves playing a highly politically diplomatic role.

Throughout my fieldwork, it became clear that the judges see themselves as *legal mediators* who employ various tools to negotiate with the partner states, such as engaging in dialogue with state attorneys and navigating the decision-making process with utmost care. In essence, they not only interprete the law and impose limitations on States. This is both relational and political, as per the definition above. Judges cautiously handle the sub-regional court process as a negotiation with relevant stakeholders, such as engaging state lawyers and informally asking them to intervene in matters of high political relevance instead of simply issuing punitive orders to member states upon failing to comply with legal procedures in the court. The fact that judges are willing to go beyond the technicalities of cases to protect the court through informal judicial negotiations and balanced tactical decision-making illustrates the peculiarity of working on supranational courts.

The EACJ Judge President of the third bench, Honourable Justice Nestor Kayobera, has been vocal about using "judicial diplomacy" as one of his three *guiding principles* since the start of his tenure.[62] The other principles – *Teamwork*[63] *and Good Faith*[64] – are a means of executing the Court's man-

62 "Speech by Hon. Justice Nestor Kayobera." Judicial Symposium for the Celebration of the EACJ 20th Anniversary. November 4, 2021. Bujumbura. Available on file with author.
Note: The EACJ held a 20-year anniversary celebration and Judicial Symposium on November 4–5, 2021, at the Royal Palace Hotel in Bujumbura under the theme "EACJ@ 20: Upholding the Rule of Law in the integration agenda towards the EAC we want." Hereafter EACJ Symposium.

63 *Teamwork* is understood as cooperation, mutual respect and support between the Court, heads of Organs and Institutions of the EAC, and partner states to further regional integration objectives. The judge believes that in his leadership role, the Court would only further its interests if it was a team player in the general politics of the REC body.

64 By *good faith,* the Court leader referred to an honest, open and mutually considerate working relationship between the EACJ and its stakeholders. Broadly conceptualised, the judge referenced good faith as a necessary characteristic for intra- and extra-court judicial relations. Intra-court relations entail how court staff and judges hailing from various member states – with legal backgrounds and political, social, religious and economic cultures – would work with each other. Justice Kayobera spoke of good faith in judicial decision-making as judges had to decide on cases emanating from their countries of origin as well. Moreover, extra-court judicial relations of good faith seemed not to be so different from the earlier-mentioned acts of teamwork.

date alongside the overarching exercise of judicial diplomacy.[65] Likewise, the judicial leader emphasised the concept of judicial diplomacy, even as the new Deputy Registrar was sworn in, urging her to embrace it as the way forward for the court.[66]

The judge President maintained that the defunct EAC "died only after ten years because of bad faith."[67] He believed that the former leaders of the Community did not work well together and in good faith to further the regional integration agenda. Through the careful exercise of judicial diplomacy, judges consider the regional integration contextual factors in judicial decision-making. Interviews reveal intricacies of this judicial diplomacy when judges expressed concerns that making decisions that do not cater to their specific contexts could cause more turmoil in these countries, provoke a backlash and even risk decisions being seen as merely "academic"[68] if they are not easily enforceable. Take this judicial statement by a former second bench judge, for instance:

> "In our deliberations, as judges, we are very conscious that while we are here to administer justice as our primary responsibility, we must administer it in a contextual way. We deal with countries that are not as developed administratively, economically, politically, or financially. So, we ask ourselves, 'Do we keep hitting on them and causing more upheaval within the body politic?' or say, 'You are wrong in manner ABCD, and we simply make it a declaration?'"[69]

For this judge, decision-making ought to factor in much more than the legalities of the case. Unlike the legalistic view of judicial decision-making, which assumes judges are apolitical individuals (Segal 2010; Leiter 2010), context specificity and other considerations influence and steer judicial rulings. Likewise, the attitudinal models emphasise judges' viewpoints and personal convictions as essential facets of judicial decision-making and behaviour (Segal and Spaeth 1993; 2002; Epstein and Segal 2005), which cannot explain the considerations at hand. Strategic accounts, on the

65 East African Community. 2022. "EACJ Judge calls for Administrative and Financial autonomy of the regional Court." October 25. https://www.eac.int/press-releases/2623-eacj-judge-calls-for-administrative-and-financial-autonomy-of-the-regional-court.

66 East African Community. 2022. "New Deputy Registrar as East African Court of Justice sworn in." May 6. https://www.eac.int/press-releases/2425-new-deputy-registrar-as-east-african-court-of-justice-sworn-in.

67 Interview, Justice Kayobera, *supra* note 61.

68 Interview, Ugandan Lawyer, 5 October 2021, Kampala.

69 Interview, EACJ judge, September 29, 2021, Kampala, Uganda.

other hand, highlight the relevance of the preferences of different actors and the surrounding institutional environment in judicial deliberations (Baum 1994; 2006; Epstein and Knight 2017).[70] Strategic accounts are more closely aligned with the judge's reasoning in the quote above. However, even though explanations for judicial behaviour may differ, they tend to converge in their assumption of a rational process in which the judges follow personal policy preferences – whether attitudinally or strategically motivated. Besides, as the strategic and attitudinal models acknowledge, extra-legal factors are essential in judicial decision-making. Unlike the legalistic approach, which assumes constraints by only existing legal norms and doctrines, judges worldwide do not mindlessly interpret the law but rather balance and weigh other extra-legal factors.

The literature has advanced beyond debating these three models to investigating the limitations of formal institutions in structuring judicial behaviour (Dressel, Sanchez-Urribarri, and Stroh 2017). Undeniably, judges act as social beings whose everyday social engagements and personal and professional relations matter in constructing their power and autonomy. We already know that judges are part of self-selected, historically and spatially contingent networks (Slaughter 2003; Trochev and Ellett 2014; Ingram 2016; Stroh 2018; Dressel and Inoue 2018). In addition, judges are cognizant of the political limits on their authority – operating in a strategic space where they face informal political signalling[71] through various avenues. Thus, they ought to cater to the "global community of courts" (Slaughter 2003) while advancing the commitment of member states to their core objectives (Voeten 2007; 2009). This trilemma, while not unique to the EACJ, is heightened by the fact that judiciaries in the EAC usually operate in illiberal democratic to autocratic regimes,[72] where respect for the rule of law remains merely an aspiration in national constitutions and regional Treaty agreements. To that end, judicial decision-making in these courts involves simultaneous calculations: providing justice tailored to the litigants' needs whilst catering to the fragile, weakly democratic, economically disempowered and politically unstable contexts in which governments operate.

70 For a summary of these perspectives, see Epstein and Knight 2017.

71 States employ "informal signalling devices" to warn ICs that surpass politically palatable limits of authority (Helfer and Slaughter 2005, 930).

72 The study acknowledges the role of law in contemporary global contestations over democracy. It does not imply that this phenomenon is unique to the EAC, or only to the Global South. For debates on the role of law in democratic erosion, see Scheppele 2018; Gargarella 2022; Huq and Ginsburg 2018; Keck 2023; Rakner 2021; Waldner and Lust 2018; Dixon and Landau 2021.

Judges in the EACJ are attuned to providing justice tailored to the litigants' needs whilst catering to the fragile, weakly democratic, economically disempowered and politically unstable contexts in which EAC governments operate. Thus, they delicately consider the orders they issue, preferring declaratory orders over mandatory orders to limit backlash and ensure that enforcement is feasible. Judges also carefully consider the types of remedies they issue while considering the fragile political environments in which they operate. Especially in deciding human rights claims in the EACJ over which the court does not have an express mandate, judges have issued declaratory judgments rather than mandatory ones to achieve two things. Rather than dismissing the cases altogether, judges encourage litigants to pursue human rights litigation and grant them legal avenues to judicialise obvious political questions (Ebobrah and Lando 2020). Secondly, this strategy avoids confrontation with authoritarian governments, which are easily threatened by the language of human rights. This careful navigation of judicial behaviour involves them partaking in strategic, politically motivated dialogue with executives to advance their agenda.

In essence, REC judges are savvy political actors and judicial diplomats who carefully balance their judicial role with the existing realities of their political surroundings. Indeed, judges working in international courts must deal with the challenges of "shrewdly balancing their responsibilities as interpreters of the law and as global professionals" (Terris, Romano, and Swigart 2007, xxi). As judicial diplomats to the REC body, judges become negotiators of REC agreements, mediators of conflict in the REC body and behave relationally to their colleagues, their appointing states, and the international "global community" (Slaughter 2003) of law. Understood this way, EACJ judges would serve as *international political diplomats* with overt political considerations to enhance the Community's commitment to the regional integration agenda. In illiberal democratic to autocratic regimes, where respect for the rule of law remains merely an aspiration in national constitutions and regional Treaty agreements, it is challenging for judges to assert themselves, given the impending backlash and fragile conditions in which the court operates.

Unlike work that delimits judicial diplomacy in international courts to off-bench activities, emphasising that it is "separate from the process of adjudication" (Squatrito 2021, 67), my findings indicate otherwise. Contrary to this understanding, my use of judicial diplomacy in this context draws on my fieldwork, where I observed the term being used not only to refer to off-bench mobilisation but also encompass the breadth of judicial decision-

making practices. Thus, the study defines judicial diplomacy as *a delicate balancing of the relational and political aspects of international adjudication in threatened and economically constrained (sub-regional) courts*.[73] As witnessed in the EACJ, judicial diplomacy is an essential guiding principle for international adjudication. Sub-regional court judges perceive their role *not only* as neutral arbiters who merely stick to the confines of the law but are also engaged in diplomacy both *on-bench* and *off*-bench.[74] The Judge President has also explicitly used judicial diplomacy to refer to judicial outreach and mobilisation of judicial constituencies, calling it a "critical linkage between what the court does and how the people look at it."[75]

Without reducing the role of these judges to mere political diplomacy, they are qualified jurists whose fidelity to the law is also observed, even when under threat. REC judges are aware that they are the only judiciary whose mandate and operations are not directly controlled by national governments, which is the genesis of their autonomy. Thus, judges understand their role in these courts as supranational and beyond the direct control of their home governments and assume a supranational watchdog role over the partner states through a delicate balance of political, social and economic contexts. Judges are aware that their decisions can affect entire polities. It emerged strongly in my fieldwork that IC judges adopt a political role – not merely interpreting and applying regional Treaty laws but also delicately and craftily balancing regional politics, national interests and their diverse relational attributes to shield them from direct attacks, improve access to justice and grow the political relevance of the court. Aside from carefully navigating decision-making, they engage in strategic

73 The term ‚sub-regional' is in brackets to prevent limiting the concept to sub-regional courts only. The author acknowledges that similarly positioned national courts in Africa meet this definition as well. See (Widner 2001; Ellett 2013) for examples of how judicial diplomacy plays out in national courts in Africa. However, it is essential to note that sub-regional courts and newly created courts present additional constraints and thus operate in a more complex strategic space. Special thanks to Dr Rachel Ellett for bringing this to my attention and making this suggestion.

74 Off-bench judicial relations, broadly perceived, refer to "the social, political, cultural and other links that judges maintain outside the court" (Dressel, Sanchez-Urribarri, and Stroh 2018, 576). These relational off-bench activities, as used in this study, generally embrace all "more than law-centred activities" (Trochev and Ellett 2014, 71) and a much broader range of other non-legal actions in which judges are involved as a tool for constructing their power.

75 Parliament of the Republic of Uganda. 2022. "Among promotes EACJ as a rule of law enabler." July 12. https://www.parliament.go.ug/news/6006/among-promotes-eacj-rule-law-enabler.

dialogue to build compliance constituencies, forge alliances, create informal institutions and nurture relations that empower and build support systems for the bench.

2.6.2 Theoretical Take of Thesis

Although broad IR theories reveal important attributes of African REC courts, they have usually favoured state-driven compliance processes as a measure of performance, which understates the peculiarities in which REC courts operate. The study draws more directly from the liberalist and critical streams of thought to raise some common themes that emerge in my research on African ICs, influencing the choice of concepts, epistemological leanings and direction of study. Understanding REC court judges as judicial diplomats in a strategic space, this study develops the concept of *judicial diplomacy* to interrogate how REC judges behave on and off the bench to resist interference, grow their support networks and alter domestic, regional and international politics.

This study merges multidisciplinary approaches from IR, political science and international law to broaden the lens through which dominant scholarship has assessed the impact and performance of ICs. It argues that taking an actor-centred perspective in the analysis of ICs provides much-needed explanations and empirical observations that can be further used to refine the dominant rationalistic theorisation of ICs. The chapter has argued that REC judges are neither controlled agents nor fully autonomous trustees. Instead, they ought to be viewed as judicial diplomats operating in, moulding, contesting or even, at times, succumbing to the strategic space.

Correspondingly, this approach privileges the stance of the less visible but central actors who hold the potential to drive or hamper processes of regional integration on the continent, complementing the existing legal accounts of the role of RECs in promoting regional integration in Africa. By asking new questions about the roles played by judges and other relevant groups at the national and regional levels, right from the appointments of regional judges at the national level to their off-bench activities, this work intends to offer a better understanding of the connection between judicial processes at the REC level and the overall aim of regional integration by emphasising the agency of the actors and arguing that judicial processes are complex social and political endeavours.