8. Judicial Diplomacy – Regional Integration Nexus

It is widely acknowledged that effective regional integration can only occur if a solid legal foundation for economic and political integration has been firmly initiated. The experience of the Court of Justice of the European Union (CJEU) has shown that regional courts have a critical role to play in fostering integration processes (Alter 1998; 2003; Burley and Mattli 1993; Carruba, Gabel, and Hankla 2012; Vauchez 2008a). Described as the "unsung hero" of European integration, the CJEU laid the legal foundation for the economic and political integration of Europe (Burley and Mattli 1993, 41–42). In view of this, scholars have examined whether an emulated institutional design may engender a similar effect on integration in other regional settings (Alter 2012; Alter, Helfer, and Saldias 2012; Alter and Helfer 2010). Even if the CJEU has furthered integration, this comparison should be approached with caution, as focusing on institutional emulation as the sole basis for measuring IC contribution is inconclusive on its own (Alter and Helfer 2017).

In the African context, previous scholarship has usually used the CJEU as a benchmark for evaluating the functioning and legitimacy of REC courts (Fanenbruck and Meißner 2015; Osiemo 2014; Van der Mei 2009). These authors have argued that the courts ought to carve out their own path and transcend the adoption of the EU's institutional framework if they are to achieve the same level of success in deepening regional integration on the continent. However, recent work urges scholars to move beyond Eurocentric comparisons, rejecting compliance and effectiveness measures that rely solely on the experience of the CJEU as a benchmark for measuring the performance of international courts (Gathii 2020a). Instead, systematic research, which underscores how African REC courts have localised the institutional framework to suit their regional settings, is urgently required. Against this backdrop, this study has highlighted the relevance of assessing African REC courts in their own right as relatively new international legal regimes operating between complex, often opposing, and delicate national sovereignty and regional integration politics. Thus, the study, on a macro level, considered the extent to which regional judges influence or are influenced by regional integration dynamics to offer a nuanced assessment of the general contribution of REC courts to the regional integration process in Africa using the East African Court of Justice (EACJ) as a case study.

The empirical chapters foregrounded the key actors in judicial empowerment in the EACJ and provided descriptions and explanations of the court's evolution across the three benches. This chapter analyses the cross-cutting themes in the previous chapters and sets the stage for the concluding chapter.

8.1 The Significance of Appointments

In the East African Community (EAC), the judicial organ's primary function is to contribute towards furthering the *operational*[733] and *fundamental principles*[734] to which the partner states committed. To achieve this, the latter ought to refrain from any measures likely to jeopardise the objectives of the EAC and the implementation of the Treaty. Nevertheless, states regularly violate Community objectives and infringe upon EAC citizens' rights by closing borders[735], expelling residents[736], and restricting inter-state trade without apparent justifications.[737] These are some examples of the wide range of issues that the court has jurisdiction over and that have been litigated at the EACJ.

For judges to hold states accountable, they must commit to the task and even risk dismissal or backlash. Otherwise, the court could be captured by regional autocrats who may leverage the regional court to consolidate their regimes.[738] The study draws on judicial career trajectories and biographies to assess judicial attitudes and strategies they adopt to work within a strategic space. It acknowledges that individual judges have varied reasons for taking up the job at the REC court and consequently for fighting for or against court empowerment at the REC organ. Given the diversity of judges on the bench – some are career judges, lawyers, public servants, and

733 Art. 7 EAC Treaty.
734 Art. 6 EAC Treaty.
735 Ruth Anderah. 2022. "EAC Court condemns Rwanda for closing border with Uganda." *The Daily Monitor*. June 24. https://www.monitor.co.ug/uganda/news/national/eac-court-condemns-rwanda-for-closing-border-with-uganda-3858266.
736 The International Justice Resource Center (IJRC). 2016. "East African Court: Community must investigate Tanzania's expulsion of Migrants." https://ijrcenter.org/2016/05/09/east-african-court-community-must-investigate-tanzanias-expulsion-of-migrants/ (Accessed July 27, 2022).
737 East African Court of Justice. 2019. "Court decides that Uganda's excise duty imposed over goods imported within East Africa is a violation of the Treaty." https://www.eacj.org/?p=3490 (Accessed 27 July 2022).
738 See Scheppele 2018 for a discussion on autocratic legalism.

academics – all emerging from different countries in the EAC, personal motivations vary.

First-hand interview reflections provide fascinating insights into some of these motivations. For some, serving on a regional court is a prestigious appointment outside of their national jurisdiction. For others, this appointment is a chance to pursue a judicial career, whereas some may have already retired from the national judiciary. For the latter, a chance to continue their career beyond retirement, moreover, at a prestigious supranational court, is an opportune venture. Junior judges in top domestic courts see it as a pathway for professional development. Across the board, interviewees pointed out the lucrative compensation and allowances associated with the REC position.[739] Indeed, judges receive a comfortable allowance while on duty in Arusha. In addition to the gratuity package at the end of their regional career (1,000 U.S. Dollars for each month of service), judges receive other attractive benefits.[740] The monetary benefits are good incentives for judges to seek appointments to the EACJ, even though this does not necessarily speak to how they later behave while on the bench.

Given the divergent rationales for taking up an appointment at the EACJ, we can deduce that the judges' intervention in court empowerment would be as diverse as those motivations. For instance, the younger judges are typically still in the middle of a successful judicial or public service career in their home countries. In fact, most of them went on to hold prestigious positions within their national governments. The former principal judge Monica Mugenyi was elevated to the Court of Appeal while at the EACJ and later to the Supreme Court bench in Uganda. Similarly, Justice Lenaola from Kenya was appointed to the Supreme Court after his service at the EACJ. Rwandan judge Faustin Ntezilyayo was appointed Chief Justice upon leaving the EACJ. In contrast, his colleague, Dr Emmanuel Ugirashebuja, became Minister of Justice and Attorney General of Rwanda upon exiting the REC bench. Interviews revealed that younger judges were more attuned

739 Save for the permanent judicial leaders, the other judges get to sit in Arusha at most quarterly and may experience this time as a "mini vacation away from their duties at home" (Interview, EALS official, February 19, 2022, Arusha, Tanzania).

740 Each judge receives a full-time chauffeur-driven car, reimbursement of all travel costs, a robe allowance of $300 per annum, a daily sitting allowance of $200 for the duration of the ad-hoc bench's sessions, in addition to a per diem of $300 per day. This is in addition to their salaries at the national level. These computations are from 2007 (see 5th Extraordinary Summit of the East African Community Heads of State, Kampala, Uganda, June 18, 2007). It is highly likely that judges receive much more than this amount almost two decades later.

to exercising judicial diplomacy – in all its facets – as their career interests were still intertwined with their national domestic politics and interests. For these judges, there were tangible consequences for their behaviour on the regional bench as they would later face the prospect of promotion within their national jurisdictions. Thus, amidst building court power at the EACJ, these judges may have used their time on the bench to boost their reputation, carve out a niche for themselves or even develop leadership skills that would later prove advantageous to their future careers.

Judges' career considerations and political loyalties heavily impinge on the regional court's willingness to challenge partner states. For instance, those who end up on the bench in the twilight of their career and, therefore, do not have to protect their future careers proved less fearful and more willing to mobilise against political interference, while younger ones do not enjoy the same protection. 48 % of EACJ judges were at the tail-end of their judicial careers, with the majority of older judges sitting on the pioneer bench. For the older judges, a career at the EACJ may be their final step in active service, and thus, they may harbour different incentives than their younger counterparts. While promotion may no longer be an issue, their judicial legacy could carry more weight. For them, service at the EACJ may be their last chance to create a lasting impact on the regional bloc and to serve their countries in such a distinguished capacity. Here, the examples of pioneer EACJ judges Nyamihana Mulenga and Sinde Warioba come to mind, who previously held prestigious offices that shaped their perceived judicial independence and earned them acclaim for their boldness.

Judicial appointments to the EACJ also provide a window into understanding the attitudes of EAC political leaders toward the court. Take the pioneer bench, for instance. Given that the court was new and its power was yet to be identified, trusted members of the judiciary were selected primarily because of their reputation or professional norms as trusted representatives of their country (Stroh and Kisakye 2024). Judges were then left with a certain leeway and independence, but were later sanctioned following the contentious *Anyang' Nyong'o*[741] ruling when they issued an unfavourable ruling. This would resonate with constrained independence theorists (Helfer and Slaughter 2005), who posit 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

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

and discursive controls to thwart judicial overreaching.[742] Selecting judges primarily based on their reputation or professional norms – especially their expertise in regional integration – seems to have been a requirement in EACJ pioneer appointments. For instance, Uganda's long-serving president, Yoweri Museveni, appointed two judges – Joseph Mulenga and Solomy Bossa – with a strong background in regional integration initiatives,[743] clearly signalling his commitment to the EAC regional integration project, as noted in the literature (Welz 2016). As constrained independence would suggest, EAC executives took solace in appointing such judges with the assurance that they could be controlled using subtle techniques if needed. Hence, at the time, judges were solely entrusted with deepening the regional integration agenda, and it mattered that they possessed direct links to regional integration processes.

Later appointments, however, following the *Anyang' Nyong'o* fiasco – which exposed the potential, boldness and strength of the new court – leaned towards less transparent selection mechanisms in all the original EAC states. They went from more transparent and inclusive to "tap on the shoulder" appointments following a learning opportunity by selectors who had been keen observers of the growing dynamics at the court and hence sought to manage the selection process more closely (Kisakye and Stroh 2024). Ugandan appointments, for instance, took a different turn, making considerations for regime stability. Museveni's hold on power started to wane, so he prioritised commercial legal expertise over the broader regional integration agenda.[744] He paid more attention to political loyalties, ensuring that the appointed judges were not deemed "activists"[745] or problematic but instead sought long-trusted allies who had served extensively under his leadership. In neighbouring Kenya, Uhuru Kenyatta was also accused of using appointments as a reward for regime loyalists whom an interviewee dubbed "Kenyatta's boys."[746]

742 See Chapter Two for details on the underlying theoretical frameworks that inform the study.

743 E.g., Mulenga was Minister for Regional Cooperation, while Bossa was active in co-founding and chairing civil society organizations, such as the East African Law Society and Kituo cha Katiba, which were significant players in founding the EAC.

744 All judges appointed after 2008, with the exception of Justice Ogoola, in Uganda, are not overtly integrationist in their training or career, but share a common thread of commercial legal knowledge in their appointments.

745 Online interview, Professor of Law, Makerere University, August 8, 2020.

746 In reference to Justice Nyachae's appointment in 2018 (Interview, Former EALS CEO; March 3, 2022, Arusha, Tanzania). Nyachae's political links to the former

Likewise, as claimed by the East Africa Law Society (EALS), the late President John Pombe Magufuli was making questionable appointments in Tanzania as well.[747] Appointing an already retired judge from the national judiciary was not well-received by the regional watchdog. EALS expressed grievances over the lack of public participation, fairness, accountability and the politicisation of judicial appointment processes to remedy their opacity and bolster the institutionalisation of the EACJ.[748] The pertinence of the informal and opaque process of appointments to the EACJ was underscored at the EACJ's 20-year-anniversary celebrations held in November 2021.[749] Attendees, cognizant of the regulatory gaps, admitted to their opacity and argued to establish a uniform, independent, professional and transparent mechanism for appointing judges. However, this peculiarity is not unique to the EACJ. International judicial nomination and selection processes are often opaque and "shrouded in mystery" (Terris, Romano, and Swigart 2007, 15).

In sum, appointments to the EACJ paint a more complex picture, one that mirrors the states' commitment to regional integration, political assessment of the respective regional organisation, and perceptions of the courts' relevance and ambitions. As such, appointments are not arbitrary, unintentional or even static. As we have shown, the analysis of the court's historical and contextual developments in relation to the career trajectories and professional experiences of appointees suggests that personal, historical and contextual relations shape the appointment decisions in REC courts (Kisakye and Stroh 2024). This study affirms that appointers have adapted the process to the changing context and historical development of the courts. Thus, the effects of learning, adaptation and dynamic relations between appointing member states and judicial candidates demonstrate that judicial agency matters.

president are public knowledge. See Ochieng, Abiud. 2018. "Charles Nyachae lands judge post at East African Court of Justice." *Daily Nation*, February 23. https://nation.africa/kenya/news/charles-nyachae-lands-judge-post-at-east-african-court-of-justice-15796.

747 *Mjasiri, supra* note 610.

748 Ibid., 3–5.

749 Notes from participant observation, EACJ Symposium, *supra* note 62.

8.2 Regional Judicial Diplomats

The empirical chapters traced the judicial usage of "judicial diplomacy" as an essential guiding principle for international adjudication. Unlike national judicial institutions, the REC courts' mandate and operations are not directly controlled by national governments. Thus, sub-regional court judges understand their role in these courts as *supranational*, albeit susceptible to resistance, which is the genesis of their autonomy. Judges also recognise that their decisions can affect entire polities and thus walk a tightrope of delicately balancing the political, social and economic contexts in which they operate. Therefore, they adopt a *political role* – not merely interpreting and applying regional Treaty laws but also skilfully 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.

Throughout judicial interviews and observations of court proceedings, it became clear that judges perceive *simply* reading and interpreting the law as insufficient. Owing to the objectives of the EAC and the volatile nature of keeping it together, the judges consciously consider *the effect* that certain decisions may have on the integration agenda: they *should* enhance rather than discourage integration processes. Even though it is not a REC court, the example of Tanzania's withdrawal of the right of individuals and NGOs to file cases against the state directly before the African Court on Human and Peoples' Rights illuminates the volatile nature of international judiciaries in Africa (De Silva and Plagis 2020). In the REC court context, the case of the SADC Tribunal stands out as an extreme example of what could befall these courts if they do not walk that tightrope. Thus, the fear of pushing partner states further away from the judicial arm of the EAC looms large. Additionally, judges must be cautious about intervening in and adjudicating high-stakes cases to avoid undue pressures and blatant attacks, as well as withdrawals from the supranational court's mandate or even an early demise, as was the case in SADC.

As the study maintains, it does not reduce the role of these regional judges to political diplomacy only. It acknowledges that they are qualified jurists whose fidelity to the law is also observed, even when under threat. However, REC judges are mindful of how 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 international, regional, and national inter-

ests while catering to their own interests. Thus, unlike previous scholarship that restricts the usage of the term judicial diplomacy to off-bench mobilisation, this study employs the term to encompass the breadth of judicial decision-making practices. Therefore, it contended that judicial diplomacy is a combination of both *on* and *off*-bench judicial activity.

8.2.1 Judicial Diplomacy On-bench

Chapter Five introduced the pioneer bench (2001–2007), its judges, and their practices of judicial diplomacy both on- and off-bench. Dubbed a "bold" bench by many interviewees, the pioneer bench heard only five cases as it did not receive any matters within the first five years of operation. Issuing two landmark rulings which set the ground for politically salient jurisprudence and human rights jurisprudence at the EACJ, this bench's boldness seemed to be a combination of the judicial exposure to human rights movements (Gathii 2013, 260) and the existence of a robust network of civil society and human rights NGOs "who influenced the bold decisions of the EACJ" (Taye 2020, 351). With the help of judicial allies, the new court's judges and registrar demonstrated remarkable resilience and presented a united front to fend off resistance from partner states. The pioneers set the tone for judicial resourcefulness and creativity through intentional practices and empowerment strategies, which have shaped the EACJ's role as an important political actor in REC politics.[750]

In its early years, when it was fresh and untested, judges expansively and purposefully interpreted the EAC Treaty without much concern for backlash. However, this strategy waned following growing resistance to the judicial arm's bold intervention. With succeeding benches and as EAC states' governments become even more autocratic, judges adapted to the circumstantial demands. Since the creation of an appellate division in the

750 Because courts rely on judicial precedents, it was helpful that the pioneers were bold and assertive, as this approach is easier to uphold than to initiate. If the pioneers had not been "bold," perhaps the EACJ as we know it today would be as politically restrained as the COMESA Court. This section does not attribute the trajectory of the court to *a single* bench but acknowledges the significance of the pace set by the predecessors. Moreover, the literature reminds us of how judges operate and respond to the "global community of courts" (Slaughter 2003). In essence, pioneer judges on the EACJ were not only advancing human rights in isolation, but they were responding and engaging judicial audiences beyond the East African Community.

second bench (2008–2014), we have witnessed that judges delicately weigh the magnitude of the social, economic and political repercussions of their decisions, assess their enforceability, and generally take on the role of negotiator between aggrieved litigants and the partner states to survive severe backlash and early demise. When overtly threatened, they have formally recorded intimidations and resulting pressures in their judgments and set the record straight (see Section 5.4.1). They may also avoid politically salient questions by drawing on existing statute limitations or offer vague and unclear rulings to evade interference.

The pioneer bench set the stage for an expansive interpretation of legal principles. From its first controversial case,[751] which provoked tremendous backlash, to its final case,[752] the judges have continued to expansively and purposively interpret the EAC Treaty. In *Katabazi,* the judges repurposed existing legal tools to address human rights disputes innovatively. While the EACJ may not have express jurisdiction in this area, it repurposes its fundamental and operational principles in the Treaty to find recourse.

This approach was adopted by the second bench, particularly the trial bench, which dared to rule against partner states for their human rights violations, earning them the label "human rights court." However, the newly created appellate division displayed judicial restraint in adjudicating human rights cases. The judges took a stricter interpretation of the two-month time limitations and the non-declaration of the official human rights jurisdiction to engage in judicial diplomacy. As highlighted in *Chapter Six*, this rule was made with the consideration of limiting access to the EACJ. The fact that the appellate judges were unwavering in exercising this rule could be understood as deference to political institutions and processes by declining to adjudicate certain questions, especially those of political significance. This could explain why the second bench ruled in favour of applicants, primarily in matters that challenged the functioning and institutionalisation of the EAC. These cases were not controversial but offered the new court a chance to clarify its role and position vis-à-vis national courts and to put the appellate jurisdictional misperception to rest. It also pronounced itself on the process of attaining the EAC Political Federation, clarified the role of other EAC organs and emphasised the centrality of the Secretariat as the pivot of integration. Through these decisions, the judges demonstrated their interest in and appeared to be agents of regional integration.

751 *Anyang' Nyong'o vs Attorney General of Kenya, supra* note 5.
752 *James Katabazi, supra* note 282.

For the more politically salient cases, successive benches have mostly avoided adjudicating them through dismissal, primarily on the grounds of time and jurisdictional limitations. As a result, the number of such dismissals has increased over time. The dismissal rate more than doubled, starting at only 20 percent of the general caseload of the pioneer bench to 51 percent by the second bench. Meanwhile, the third bench (2015–2021) appears to have followed the previous bench's path, dismissing 61 percent of its total caseload. While the dismissal rate is not the only decisive factor in avoidance, it highlights the mood surrounding decision-making in the third bench – the careful consideration of remedies issued and the implications of those decisions. Acting as *legal diplomats* who occupy an intermediary role between the East African Community (EAC) politicians and citizens, judges have delicately considered the orders they issue – treading the thin line between activism and avoidance – especially as the court dives further into overtly politicised jurisprudence.

On the activist spectrum, they have exhibited bold interpretation and intentionality that go beyond jurisdictional limitations, as seen in the emergence of robust human rights jurisprudence. They have dared to render decisions beyond mere declarations – simply suggesting to states what the best course of action could be – to actively craft mandatory orders where they deem necessary. This study finds that the latter are only issued when they do not risk destabilising the Community. On the other hand, judges exercise caution to curb threats to judicial independence in the EACJ. All benches have been consistent in issuing decisions by consensus so as to speak with one voice for unity of the court and uniformity of jurisprudence. It also protects individual judges against attacks. With *only* two dissents in over two decades, the bench has maintained a united front that has shielded successive benches from resistance, especially to judges from more vulnerable states who would be prone to personalised attacks. This strategy is also attributed to the network that emerges – one that is relational and mutually shielding from attacks – as judges develop camaraderie and solidarity within the special network of regional judges.

Likewise, to encourage litigants and to mitigate the restrictions brought on by the Treaty amendments following the *Anyang' Nyong'o* ordeal, another practice that has emerged in the EACJ is judicial leniency in formal proceedings. Judges have even been willing to go beyond the rigidity of court procedures to limit potential backlash and carefully navigate enforcement and compliance with decisions issued.

Reading the empirical chapters – which explored how the EACJ judges and their constituencies structure, construct, exercise and negotiate their institutional and political relevance – highlights that focusing on the REC courts reveals intricate details about the political, economic and legal integration processes in Africa. It shows that sub-regional judges are *proactive proponents* in constructing their power, employing an array of on-bench tactics to negotiate jurisdictional limitations and insecure tenure while consciously growing their jurisprudence and political relevance. Judges engage in legal diplomacy to fend off pushback and to grow their constituencies while balancing regional integration initiatives. Conceptually, the chapters advance debates on international adjudication, which have touched on legal diplomacy, especially within African REC courts. Serving as an intermediary in the regional integration process presents an additional challenge to these courts, where they ought to navigate a strategic space between having a delegated mandate and overseeing integration initiatives whilst catering to the contextual dynamics of dealing with member state governments.

8.2.2 Judicial Diplomacy Off-bench

The study also elucidated judicial mobilisation to encompass the breadth of activities in which judges go off-bench to build compliance constituencies and forge alliances, create informal institutions and nurture relations that empower and build support systems for the bench. EACJ pioneer judges partook in publicity trips around East Africa and visited other international courts to build their capacity. They also endeavoured to build the court's legitimacy, visibility, and acceptability within the revamped EAC regional bloc by engaging relevant stakeholders, especially mobilising critical allies in the legal fraternity. Likewise, they raised awareness of the court's mandate amongst its potential users through outreach or sensitisation programs with its internal, external, national and international stakeholders to socialise actors into adopting legal norms. All these off-bench judicial relations were vital tools in forging the court's pathway toward self-actualisation.

Serving on an ad hoc basis, the pioneer bench judges resided in their home countries and only met at most four times a year to conduct court business. The second bench was the first to have judicial leaders reside permanently in Arusha and was fully dedicated to court work. It also saw the opening of EACJ Sub-Registries in various partner states. The court

leaders and Sub-Registry staff embraced off-bench activities to build judicial constituencies, grow caseloads, and strengthen the Court's legitimacy within the region. As the study sustains, REC judges operate within a multitude of authoritative decision-makers and thus have the additional burden of mobilising alliances amongst those different groups to enable them to conduct their work without interference. While the pioneer bench set the groundwork by mobilising judicial allies and raising awareness of the court's mandate amongst its potential users, the second bench judicial leaders were involved in several empowerment activities off-bench that contributed to it becoming a human rights bench. In addition to purposefully and expansively interpreting the EAC Treaty, it drew on the support of human rights-oriented judicial allies to grow their human rights jurisdiction. They sought inspiration from the global network of lawyers like the East Africa Law Society (EALS). EALS provided legal guidance in its submissions and rallied behind the EACJ to circumvent limitations in its jurisdiction, independence and performance.

Furthermore, the second bench started to adopt digital technology – such as filing and processing cases online and holding hybrid court sessions coupled with live streaming – to enhance judicial transparency and equalise access to justice for all EAC residents. Consequently, ICT usage has facilitated easy access for all the court's stakeholders so that EACJ does not become a court for the few privileged EAC citizens and residents. Without idealising the role that court publicity may play in judicial empowerment, there is good reason to postulate that the socialisation of actors in ICT usage not only brings justice closer to the people but also creates a cultural change in how judicial work is done. It ceases to be a secretive task that judges – secluded in their chambers – partake in and instead becomes an object of interest for all.

However, despite these developments, by 2018, the court was still physically[753] and functionally invisible (East African Court of Justice 2018, 17–18). This poses a challenge to its utility amongst EAC citizens, legal practitioners, and judicial officers. Functionally, it lacks financial and administrative[754] autonomy from the EAC Secretariat despite its pleas for operationalising its financial autonomy (East African Court of Justice 2022, 32). Moreover, placing the EACJ in jeopardy, the court's role and place in

753 The EACJ "does not have a Permanent Seat, has minimal media coverage and lacks a full-fledged communications department" (East African Court of Justice 2018, 17).

754 The delay in passing the EACJ Administration of Justice Bill 2016 (East African Court of Justice 2022, 32).

the EAC institutional structure have not been fully appreciated. Partner states and relevant policymakers have created "parallel dispute-resolution mechanisms" and are not keen on enforcing or complying with the court's decisions (East African Court of Justice 2018, 17).

Given these looming threats, the EACJ judicial leadership, by the third bench, took on off-bench judicial diplomacy head-on. Judicial leadership embraced judicial diplomacy to tackle these obstacles, aggressively lobbying for funding and pursuing the end of ad hoc judicial service. They even introduced annual rotational court sessions where EACJ judges conduct hearings open to the public at the various national courts. Most importantly, they made several courtesy calls to the various EAC political heads, engaging in strategic dialogue to pre-emptively circumvent conflicts with the relevant stakeholders in the EAC and lobby for their political and financial support. With the growing number of EAC partner states, EACJ judges have also participated in activities that enhance awareness among the new partner states. Through these activities, EACJ judges behave as *judicial diplomats* who carefully balance their on-bench judicial role with the existing realities of their political surroundings by being proactive in cultivating alliances that would shield them from attacks and fighting to justify the EACJ's relevance and its place within the EAC's integration agenda.

Although part of the official mandate of court leadership, these courtesy visits to political figures may risk tarnishing the judicial reputation and independence and spark questions about their impartiality (Squatrito 2021). However, as we know, these visits are purposive, strategic, and vital in targeting potential compliance constituencies. These off-bench activities with various stakeholders aim to cultivate legitimacy and build influential networks, which in turn will protect the court against undue interference. These actors assume various roles, but this study focuses on the activities performed by the allies *intentionally* or *strategically* in a bid to support the court in overt empowerment practices. This stance, as adopted by the court, defies rationalist assumptions of the role of ICs, which posit that ICs play a utilitarian function to the powerful state. The study has shown that accounting for judicial preferences, the effects of backlash and any unexpected behaviour arising from judicial practices highlight the more complex role that judges engender to empower themselves in threatened landscapes.

Tracing threats to judicial empowerment in African REC courts and situating these concerns within the broader theoretical and conceptual de-

bates highlights the resilience of judges. Rather than focusing on the state's reactions to the rulings or how compliance partners rally behind ICs, it interrogated existing political configurations of power by centring judicial narratives. The chapters draw on a novel usage of the notion of judicial diplomacy to elucidate how African ICs respond to multiple audiences and decision-makers amidst the increased pressures of the job. Only by seriously engaging in their everyday practices that stray from the legal norms and formally codified rules of judicial practice can we move beyond the structural constraints to achieving the rule of law in Africa and understand judicial decision-making when judges operate in fragile environments.

Conceptually, the chapters advance debates on the more neglected informal networks and relations outside the courtroom that inform, propel and, at times, undermine judicial empowerment. The study invites scholars of ICs in weakly democratic conditions, economically disempowered and politically unstable contexts, where judicial independence remains rather frail, to think through their role as judicial diplomats. It posits that a comprehensive understanding of judicial diplomacy should include the careful considerations that judges make in the adjudication process and off-bench relations. This expansive outlook could shed light on the often-overlooked role of sub-regional judges as proactive proponents in shaping their authority.

8.2.3 On the Role of Allies

VonDoepp warns about oversimplifications that may arise from purely functionalist understandings of CSOs' involvement in political life in Africa, as they are sometimes "not autonomous of the state and are closely embedded in donor interests" (VonDoepp 2019, 372). Indeed, he suggests narrowing the scope of inquiry to account for specific elements of CSOs, such as their internal governance structures, the extent of donor funding, technical skills and power politics with executives, and considering their political role could be much more yielding (VonDoepp 2019, 373–74). Following this advice, the previous chapters identified specific areas of jurisdiction in which the CSOs have been involved and shed light on how they intentionally aided the EACJ in constructing, forging, and expanding its autonomy. Throughout the study, the unequivocal role of judicial support networks in shaping the future trajectory of the court was highlighted.

In the EAC, prominent human rights CSOs were criticised for their dependence on Western donor ideologies, state dependence and a lack of

"local moral and financial support" (Mutua 2013, 5). Thus, it is no surprise that Arusha, as the diplomatic hub of the EAC, has been "flooded with donor funding" (Gathii 2013, 281) since the rebirth of the EAC. This donor funding specifically targeted the new court as well, seeking to carve out its path as an avenue to adjudicate human rights. Indeed, we cannot speak of the rise of human rights discourse in the EACJ separate from donor funding. However, we would need to contextualise the leadership of the CSOs that pioneered this approach, understand their motivations alongside donor interests, and juxtapose those with state interventions.

While well-funded interest groups, like the East Africa Law Society (EALS), have fulfilled donor-driven discourse by using the EACJ as a "pressure point" for advancing human rights (Gathii 2013, 262; Taye 2020), they have also empowered the court. It would be reductionist to attribute judicial allies' intervention to donor interests only. Take the EALS, for example. It has been the court's ally from its establishment, holding public engagements to elicit support against threats to the court, providing judicial training, and advocating for court publicity. Subsequently, as the court gained prominence, aside from being repeat litigants who have embraced public interest litigation, EALS has appeared as amicus curiae, informally supported the filing of cases, and provided direct support to the court's operational capacity.

However, after this first cluster of leaders left the EALS, the activism towards the bench from the regional Bar stalled. As one of them confirmed in an interview, EALS went through a "bureaucratic"[755] period where they were involved in typical membership organisational duties[756] for its members without overtly taking the allyship of the court as the pioneer leadership did. The interviewee believes that this stance was reflected in the types of questions that EALS litigated at the time in the EACJ. For long-term observers, cases like the one challenging the appointment of Justice Mjasiri[757] do not seem to empower the court. Instead, they may alienate the Bar from the bench, in effect ruining the great allyship built over time. For them, the EALS should have done more work at the national level and engaged various stakeholders beforehand rather than waiting for an appointment to complain.[758] They maintain that it was unfortunate that

755 Interview, Former CEO EALS, March 2, 2022, Arusha, Tanzania.
756 Like organising conferences, trainings and workshops.
757 Mjasiri, *supra* note 610.
758 Interview, Former EALS official, March 1, 2022, Arusha, Tanzania.

this lawsuit was initiated following the disputed appointment of a female judge. Observers argue that the EALS should have engaged much more robustly with the opacity of appointments from the outset. Some judges felt disempowered by the lawsuit as it left a bad taste in their mouths; some even construed it as a "gendered attack" on the person of Justice Mjasiri.[759] Expectedly, the case infuriated the First Instance bench judges so much so that they directed costs to be borne by the applicant. This move is rarely done in public interest litigation in the EACJ.[760] EALS perceived this remedy as punitive and a deterrent to other concerned members of the public who may have wished to intervene. To remedy the sour relationship with the regional Bar, in the subsequent appeal, the judges reversed the order of costs, with each party bearing its own costs, upholding the informal arrangement of not awarding costs in matters of public interest litigation.[761]

Some activities of the EALS that may not necessarily be viewed as empowering may, in effect, serve that purpose. Interviews highlighted that former EALS board members were unwilling to take on the matter when they perceived the EACJ as a fledgling and volatile institution.[762] By filing the *Mjasiri* case, the litigating lawyers maintain that they sought to preserve the legitimacy and trust in the EACJ by advocating for transparency and accountability in judicial appointments.[763] Moreover, EALS officials, in their pleadings and submissions, drew from best practices for appointing judges worldwide and suggested practical measures to improve the appointment processes.[764] While they regret that it was perceived as an attack on the court, with Justice Mjasiri simply being the sacrificial lamb in the experiment, they reasoned that the outcome, rather than the process, was a win for the REC court and the Community as a whole. The case drew attention to the politicisation of judicial appointments, raising the alarm

759 Interviews, EACJ Judge (EA07), September 29, 2021, Kampala, Uganda.
760 Interview, EALS official, February 19, 2022, Arusha, Tanzania.
761 *East African Law Society vs The Attorney General of the United Republic of Tanzania & Secretary General of the East African Community,* Appeal No. 2 of 2021, page 41. https://www.eacj.org/wp-content/uploads/2022/09/Appeal-no-2-of-2021.pdf.
762 Interviews, Former EALS officials, March 2022, Arusha, Tanzania.
763 Interview, Former CEO of EALS, March 29, 2022, Nairobi, Kenya.
764 Such as having ad hoc interview panels composed of representatives from various organs of the EAC, civil society organisations, media, and members of the public (Interview, Former EALS official, March 29, 2022, Nairobi).

among the court's stakeholders[765] and bringing the issue of a lack of public participation in the appointment processes to the fore.

Additionally, placing the interventions within their context and relevant historical currents reveals that the EALS, in addition to donor preferences, has, by and large, adjusted to the realities of the day. While the earlier generation of regional lawyers perceived the court as young and in need of protection against the impending backlash, the latest generation does not seem to share that concern, at least not to the same extent. This is because the pioneer benches and EALS leaders set the tone: they experimented with expansive jurisdiction, called out autocratic governments and faced their wrath but remained standing, albeit with lasting modifications to their operations. The current cohort of regional lawyers is convinced the EACJ would not face the same fate as in *Anyang' Nyong'o*. They believe the court to be able and within its capacity to handle the matters raised, despite their lack of political currency and threatened judicial independence. As the former CEO responded, with a hint of exasperation, to my inquiry on why they deliberately task the EACJ to deal with politically salient cases:

> "No, Diana, we are not experimenting! This is not a test tube! We are inviting the court to exercise its powers. Unlike the SADC tribunal, which was patronised by the partner states, the EAC is member-driven. It interfaces with the public; that is how the Treaty was designed. So, it is the people who are supposed to push the organs and the agencies of the Community to work. The court must go back and check, 'What exactly is the Treaty and who is the beneficiary?' Our interpretation is simple. The beneficiaries are the people. Not the governments, partner states or the head of state; it is the people. The people will stand up with the EACJ. This is how they stand up, and that is what we as individuals and civil society must continue pressing, ensuring that even if the courts feel a bit handicapped, they may not dismiss the matter."[766]

For this new brand of allies, empowerment can take various forms – it challenges the court to assert itself without fear of repercussions. Their

765 The pertinence of these irregularities in appointments was underscored at the EACJ Symposium (*supra* note 62). Attendees, cognisant of the regulatory gaps, admitted to the opacity of the selection process and argued in favour of establishing a uniform, independent, professional and transparent mechanism for the appointment of judges to the Court under the rubric of an East African Judicial Service Commission.

766 Interview, Former CEO of EALS, Hanningtone Amol, March 29, 2022, Nairobi, Kenya.

concern is shaping the conversation around pertinent issues on good governance and the rule of law and enforcement and signalling to states and EAC institutions that they are being monitored through the burgeoning megapolitical jurisprudence at the EACJ. By litigating such cases in the EACJ, EALS seeks accountability in decision-making processes in the EAC and at the partner states' level – in effect, mobilising to shape policy and stimulate citizen participation and engagement, thereby empowering the court as an authority in the region.

While the use of the EACJ as an avenue for mobilisation has already been acknowledged (Gathii 2020b), the deliberate move by judicial allies to empower the court has not yet been captured. Repeat players in the EACJ not only advance human rights, the rule of law and good governance in the regional court, but they also *intentionally* and *strategically* build the judicial arm of the REC body, as former EALS CEO Donald Deya reminded me in an interview:

> "The only counter which will be there is how we, the people, mobilise, organise and demand better. So that, for me, will be the turning point. So, we invested a lot of time in trying to build people's movements and coalitions. Because we do not yet have a critical mass, even in engaging EAC, we have a vocal minority but not a critical mass. We need a critical mass of people engaging the EAC General and the EACJ, and then a division of labour. Those that worry about the quality of appointments, quality of jurisprudence, quality of processes, and those that engage in terms of creating landmark cases, trend-setting cases, breaking new barriers."[767]

For Deya and other like-minded judicial allies, the strength and eventual power of the regional body need not only lie with the judges or the partner states that confer authority on the judicial arm of the REC body. Instead, it is the court's alliances – in their diversity and multiplicity of interventions – which should strive to push the empowerment of the EACJ and eventual judicial autonomy. Moreover, the court does not have a robust judicial support network at the moment. As earlier stated, the reliance on donor funding has hampered the growth and trajectory of intervention by regional CSOs in court-related activities. It appears that their points of intervention are donor-driven and tend to fade with the termination of

767 Interview, March 2, 2022, Arusha, Tanzania.

funding. As such, developing a critical and devoted bunch of allies has not been an easy task.

The study acknowledges that not all repeat players in the EACJ are perceived as judicial allies by the judges themselves[768] or other members of the legal complex. For instance, some repeat players have been noted as notorious for insulting judges and abusing the court's autonomy.[769] In the same light, though well-meaning, some judicial allies may burden the court by pushing the bench into severely politicised cases that would be better solved in non-judicial ways. In an interview, a notable repeat player mentioned that it behoves the lawyers to protect the new court by weighing the types of remedies they may seek.[770] To bypass burdening the fragile court, long-term judicial allies of the EACJ have devised strategies for litigating the more overtly human rights-oriented cases to the African Court on Human and Peoples' Rights while reserving only those cases within the jurisdiction of the REC Treaty for the EACJ. Such intentional mobilisation requires knowledge of the court's mandate and history, as well as the repercussions that could arise if the litigating lawyers make demands that could potentially "scare" the court into dismissing the matter on mere technicalities.[771] For these allies, a crafty approach is required to draft cases that simultaneously document the violations committed by partner states in a manner that does not endanger the fragile institution, whilst advancing regional jurisprudence and achieving other symbolic wins.

Indeed, the role of judicial allies in aiding the court in constructing its power cannot be overstated. Judicial allies mobilise to grow the power of the judicial arm of the EAC, with the ultimate goal of furthering the regional integration agenda. Following the first controversial case in the EACJ, *Anyang Nyong'o*, the court was painted as an antagonist to regional integration initiatives. The resultant backlash and institutional restructuring triggered a range of reactions from critical judicial allies whose strategic litigation sought to intervene in jurisdictional limitations and streamline EAC institutions to save the institution and advance the integration agenda.

768 Interview, EACJ judge (EA07), September 29, 2021, Kampala, Uganda.

769 Interview, Former CEO EALS, March 2, 2022, Arusha, Tanzania.

770 "Lawyers ought to have a long-term view of the court where they tread carefully and weigh the types of orders that they may present to these fragile new international institutions that we are building as we go along. It is a young court negotiating its legitimacy. So, you cannot ask for such drastic orders" (Interview, Donald Deya, March 2, 2022, Arusha, Tanzania).

771 Interview, Former CEO EALS, March 2, 2022, Arusha, Tanzania.

This section illustrates that EACJ has exhibited vast adaptability in its institutionalisation process. As the court matured, it gained wider support networks and increased its on-bench and off-judicial diplomacy while carefully responding to new conditions and challenges.[772] The regional court has evolved in tandem with the political, social and economic conditions within the REC body. Having had the last two decades to test the limits of its authority and learn from its initial backlash, EACJ judges have responded to the numerous challenges by adapting their resistance strategies, repurposing legal tools, and explicitly going off-bench to forge alliances and nurture relations that empower and build support systems for the bench. Thus, judicial agency matters in the institutionalisation process of REC courts, especially if the role of regional judges as political actors is taken seriously.

8.3 Unexpected Interventions

International politics and scholarship highlight the ever-increasing role of African sub-regional courts as key social and political actors shaping regional integration politics. The EACJ has expanded its jurisdictional reach through purposive lawmaking. Even though the member States have denied expanding the EACJ's mandate to include express human rights jurisdiction, the court has craftily circumvented these limitations in its jurisdiction, much to the dismay of its creators. As argued by Alter et al. (2013) in the ECOWAS case, the EACJ seems to have been a case of "redeployment" where the actors fundamentally reoriented an institution in a new direction while still retaining its original mandate (Alter, Helfer, and McAllister 2013). This study joins this scholarship to demonstrate that the EACJ engenders similar experiences. The courts are emerging as adjudicators of politically sensitive matters that were initially left to the confines of the elected branches of government, handling sensitive issues of human rights, and are even becoming part of public discourse on electoral and environmental rights. Yet, these courts remain largely unused by traders and the business community across the board.

Given that the EAC integration project is explicitly human development-oriented, aspiring to close ties in social, cultural, political, and technologi-

772 See the introduction for a discussion of institutionalisation that draws on Huntington 1968.

cal sectors for sustainable development,[773] we would expect judges to drive economic and political cooperation initiatives. The primary integration commitments – aiming at integrating the EAC economies – that have advanced so far are a Customs Union and Common Market, whereas negotiations for a Monetary Union and a Political Federation are underway.[774] However, over the past twenty years, there has been a dearth of cases involving EAC market integration commitments, to which we can reasonably associate the EACJ with enhancing the credibility of regional integration commitments. As the previous chapter illustrated, in the first 15 years, the judges were hesitant to adjudicate favourably on economic-related disputes. Instead, the court became an attractive avenue for more politically salient cases than economic and trade issues. Perhaps a reflection of the broader political aspirations of the Community and the need for an independent avenue for opposition politicians to air their grievances.[775]

Under the constrained independence theory, we would expect the EACJ to provide ambitious interpretations of the Treaty only when those rulings enhance the overarching and long-term interests of the East African Community (EAC) integration agenda. In this sense, the EACJ experience contradicts the constrained independence assumptions. Moreover, despite the slow-paced growth of the court's economic orientation, the third bench actively worked toward reversing this trend. Judges dynamically engineered economic integration jurisprudence, as in the BAT[776] and Kioo[777] cases, to move the bench toward its primary integration agenda. The court has only started to tease out its potential in steering regional trade, cross-border justice, and investment. By handling cases involving larger multinationals that invest in EAC and awarding pecuniary damages to commercial litigators, the EACJ has expanded its reach beyond its prominent intervention in human rights jurisprudence. Accordingly, the court has made tremendous strides in encouraging business actors and large businesses in the region to advocate for their rights in the regional court, fulfilling the Community's wish for economic integration. All factors considered, business actors have more reason to challenge the court to exercise its jurisdiction over trade, investment, and monetary issues, paving the way for the court's intervention in promoting trade and economic links among the partner states.

773 See East African Community 2007, 12; Art. 5 (1).
774 Ibid., Art. 5 (2).
775 See, for instance, Maombo 2022.
776 *British American Tobacco (U) Ltd v Attorney General of Uganda*, *supra* note 552.
777 *Kioo Limited (TZ) v Attorney General of Kenya*, *supra* note 567.

Even though the EACJ is endowed with formal authority to advance regional integration initiatives, it has only amassed authority in adjudicating human rights disputes, as argued in previous chapters. It lacks authority in economic intervention, remains largely invisible and underappreciated, has faced intense backlash and suffers imminent pushback. And yet, puzzlingly, it is growing in political relevance. Scholars point to its being used as an avenue for political mobilisation (Gathii 2020a), and it remains functional and operational (unlike the SADC Tribunal) under various constraints. This study finds that there is hope that the EACJ may play a more significant role in ensuring that trade regimes in the partner states are consistent with EAC law. The EACJ has evolved in handling trade-related matters in the region. It has evolved from a formalistic legal interpretation, where cases are dismissed on technicalities, to engaging with cases on their merits, daring to issue monetary damages, and issuing rulings that prompt changes in legislation. It has also highlighted its role in upholding the promises of the EAC Customs Union and Common Market Protocols. Perhaps future engagement could help move the court toward adjudicating economic-oriented cases so as to shed the image of a human rights court.

Relating the EACJ experience to similarly positioned REC courts provides some insights into the implications of the approach taken by the EACJ. Set up under REC Treaty agreements, the four African Union-sanctioned REC courts emphasise the developmental nature of regional economic integration. It is no surprise that regional member states and the international community hoped for these courts to become potential drivers of regional economic integration, thereby fostering development processes. In the same manner, Member States envisioned them as docile law interpreters within the RECs whose fundamental intervention would be economically inclined. However, Africa's REC courts, specifically the ECOWAS, SADC and EAC Courts of Justice, have carved out new niches for themselves. Before its early demise, the SADC Tribunal had a brief but impactful human rights role (Moyo 2009). In its landmark ruling in *Mike Campbell v. Zimbabwe* (2008), the court addressed property rights violations and racial discrimination in Zimbabwe's land reforms, affirming the Tribunal's willingness to tackle politically sensitive human rights issues (Achiume 2017). In ECOWAS, the Court of Justice was granted human rights jurisdiction, marking a significant turning point in the court's history (Ebobrah 2007). ECOWAS judges went on to address a wide range of human rights violations, including "judgments against Niger for condoning modern forms of slavery and against Nigeria for impeding the right to free basic education

for all children" (Alter, Helfer, and McAllister 2013, 737). Beyond human rights, the ECCJ has emerged consequential in dealing with megapolitical jurisprudence (Akinkugbe 2020). It has even carved out a niche in subject areas where jurisdiction is officially limited (Gathii 2013), defying leading rationalist expectations.

While it may seem that the EACJ's experience is not unique, there are some substantial differences in the experiences of the three REC courts. Unlike the EACJ, the ECOWAS court judges did not need to craftily forge a human rights competence because member states had expressly given the court jurisdiction to review and remedy human rights violations (Ebobrah 2007). Crucially, West African governments conferred this jurisdiction on the ECCJ for reasons internal to the REC body rather than extraversion tactics (Alter, Helfer, and McAllister 2013). Thus, the member states have avoided opportunities to narrow the court's authority when the ECCJ's early rulings generated opposition from some governments (Ibid, 738). Therefore, the manner in which these courts acquired human rights competence is both legally and politically consequential (Alter, Helfer, and McAllister 2013). *Politically*, EACJ judges do not have a "political buffer" for adjudicating state violations of human rights (ibid, 779) because they were not expressly granted the explicit delegation of human rights authority as in the ECOWAS court. Like the SADC Tribunal, the EACJ claimed human rights competence for itself via judicial lawmaking – through careful judicial diplomacy, expansive reading of the Treaty and careful navigation of the limitations to its jurisdiction. Even though the EACJ may not suffer the extreme fate that befell the Southern African Tribunal, it still risks backlash from member states and government officials as it struggles to legitimise its approach to human rights. Through my research, it became clear that some EACJ judges, especially the most recent appointees, were wary of such an expansive reading of the Treaty to issue human rights, as it could endanger the court.

Legally, the court still struggles to assert its authority as a human rights adjudicator despite boasting huge developments in its human rights docket (Possi 2018). As seen in Chapter 6, even though the EACJ was forging relevance as a human rights bench, the court was still struggling to assert itself as such. In fact, the EACJ First Instance Division judges had been accused of practising "judicial activism" (Possi 2015, 213), an indicator that its legal basis for interpretation was highly in question. For judges who are still employed in public office or on the bench in their national jurisdictions, the activist label is not usually appreciated as it may pose a

threat to their judicial independence. Moreover, as the study shows, the fact that the court lacks an express human rights mandate but relies on the craftiness of individual judges means that the change of judges every seven years may shift the bench in a different direction. Even if the judges create precedents that can be simply followed, the next set of judges may set different priorities and risk undoing the work of the previous benches.[778] Alternatively, as in the case of the third bench, judges may seek to distance themselves from the "activist" label and redirect the image of the court to that of an economic court.[779]

In addition to the legitimacy questions that arise from venturing into the realm of the unexpected, African REC courts still struggle with the enforcement of their judgments, which remains unsatisfactory and erodes public confidence in the courts. In ECOWAS, despite apparent support from Member States, only five had appointed a competent national authority to enforce the judgments of the ECCJ by 2019.[780] While this is not unique to the African international courts but witnessed in ICs everywhere (Garrett and Weingast 1993; Gibson and Caldeira 1995; Howse and Teitel 2010; De Silva 2016), it poses an even greater threat when the ICs must rely on uncooperative domestic courts. In the EAC, the court does not have the power to implement its decisions on its own but works hand in hand with the national courts as it relies on national legal systems to enforce its decisions. However, recent developments in the Kenyan Supreme Court underline the "supremacy battle"[781] between national apex municipal

778 This is not to imply that the developments in jurisprudence only depend on judges. The study has acknowledged how extrajudicial relations shape, inspire, influence or even disrupt the jurisprudential trajectory of the bench.

779 Interviews and observations with judges who served on both the second and third benches seemed to suggest that they saw issues of business and commerce as the core mandate of the court. Chapter 7 highlighted the discrepancy in how judges strategically disregarded politically salient issues and human rights in favour of commercial disputes, which they deemed the core mandate of a regional integration court.

780 Guinea, Nigeria, Burkina Faso, Mali and Togo while the remaining ten Member States (Benin, Cape Verde, Cote d'Ivoire, the Gambia, Ghana, Guinea-Bissau, Liberia, Niger, Senegal and Sierra Leone), were yet to comply with this Treaty obligation (ibid.). In 2024, Niger, Burkina Faso, and Mali announced their withdrawal from the bloc (see Vicky Wong. 2024. "Ecowas: Niger, Mali and Burkina Faso quit West African bloc." BBC News, 28 January. https://www.bbc.com/news/world-africa-68122947.)

781 Harrison Mbori. 2024. "Hidden in plain sight: Kenyan Supreme Court Shooting its own Foot on Merits Review and Appellate Jurisdiction in Continuing Supremacy

courts. In a recent advisory opinion, the highest court in Kenya challenged the authority of the EACJ, which has set a dangerous precedent for the regional court.[782] This decision reaffirms one of the prevailing issues with African REC courts: the lack of support from national domestic courts. With such developments, the future of the EACJ remains uncertain, especially as potential allies prove to become foes.

This study proceeded from the backlash to international courts (ICs) due to the increasing judicialisation of politics and the emerging forms of resistance to political interference to investigate how African REC courts resist backlash and forge institutional and political relevance. Drawing on a wealth of ethnographic material and case mapping, it highlighted that REC courts are newly created regional institutions with the additional burden of building legitimacy and awareness amongst litigants and navigating the strategic space imposed by economic, social, cultural and political constraints. Especially given the existing compliance and financial problems coupled with the limitations of building judicial autonomy, these ICs are not simply fending off attacks but also forging judicial power. Thus, they must send explicit signals to potential litigants and member states through judicial diplomacy to build judicial legitimacy and reputation, clarify, and establish jurisdictional issues.

While the study focuses on the role of judges and how they shape and influence the political relevance of the court, it also acknowledges how extrajudicial relations structure, inspire, sway or even disrupt the jurisprudential trajectory of the bench. This chapter reminds us of the relevance of the relational dynamics of judges and their constituencies (extrajudicial relations). Most importantly, it has underscored the crucial role of judicial agency and illustrated the changing contextual dynamics within the court and the regional body to which the court has adapted through learning effects, relational dynamics and unwavering judicial diplomacy.

Battle with the East Africa Court of Justice (EACJ)." *AfronomicsLaw*, June 3. https://www.afronomicslaw.org/category/analysis/hidden-plain-sight-kenyan-supreme-court-shooting-its-own-foot-merits-review-and.

782 *Attorney General (On Behalf of the National Government) v Karua* (Reference E001 of 2022) [2024] KESC 21 (KLR) (31 May 2024) (Advisory Opinion). https://kenyalaw.org/caselaw/cases/view/290499/.