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Diana Kisakye

Judicial Diplomacy in African REC Courts

Navigating the Strategic Space in the East African Court of Justice

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Abbreviations and Acronyms

Abbreviation	*Explanation*
AD	Appellate Division
AfCHPR	African Court on Human and Peoples' Rights ("African Court")
AU	African Union
BAT	British American Tobacco
CCJ	Common Market for Eastern and Southern Africa Court of Justice
CJEU	Court of Justice of the European Union
CMJA	Commonwealth Magistrates and Judges Association
COMESA	Common Market for Eastern and Southern Africa
Council	Council of Ministers
CSOs	Civil Society Organisations
DRC	Democratic Republic of Congo
EAC	East African Community
EACA	East Africa Court of Appeal
EACJ	East African Court of Justice
EACSOF	East African Civil Society Organisations' Forum
EADB	East African Development Bank
EALA	East African Legislative Assembly
EALS	East Africa Law Society
EAMJA	East Africa Magistrates and Judges Association
ECCJ	Economic Community of West African States (ECOWAS) Community Court of Justice
ECHR	European Court of Human Rights
ECOWAS	Economic Community of West African States
EU	European Union
EU Charter	European Union (EU) Charter of Fundamental Rights
FID	First Instance Division
FTA	Free Trade Agreement
GIZ	Deutsche Gesellschaft für Internationale Zusammenarbeit

ICC	International Criminal Court
ICs	International Courts
ICT	Information and Communications Technology
IDLO	International Development Law Organisation
IGAD	Intergovernmental Authority on Development
IL	International Law
IMLU	Independent Medical Legal Unit
IR	International Relations
KAS	Konrad Adenauer-Stiftung
NGO	Non-Governmental Organisation
NSSF	National Social Security Fund
NTBs	Non-tariff Barriers
PALU	Pan African Lawyers Union
REC	Regional Economic Community
RWI	The Raoul Wallenberg Institute of Human Rights and Humanitarian Law
SADC	Southern African Development Community
SADCT	Southern African Development Community (SADC) Tribunal
Summit	Summit of Heads of State
UNESCO	Scientific and Cultural Organisation
UNICTR	United Nations International Residual Mechanism for Criminal Tribunal
URA	Uganda Revenue Authority

1. Introduction

With the rising "judicialisation of politics" worldwide, courts are increasingly involved in resolving matters previously reserved for overt political channels (Yepes 2007, 49–50).[1] For international courts (ICs), veering into the realm of overtly politicised, socially contentious or politically divisive issues has prompted counterattacks – in various forms (Alter and Madsen 2021) – due to the nature of ICs. ICs are usually newly created international legal regimes operating "in a context of regime complexity" with multiple authoritative and competing decision-makers (Alter, Helfer, and Madsen 2016, 35) In this landscape, ICs frequently find themselves in a very delicate position. The legal, constitutional, or political constraints to judicial decision-making in ICs have been referred to as a "strategic space" (Steinberg 2004)[2] or "bounded discretion" (Ginsburg 2004).[3] Given these constraints, international judges must take state interests into account to be effective. Unlike domestic courts, which are embedded within the sovereign legal structure of a single nation, ICs face the unique vulnerability of states opting out of their jurisdiction. This is not merely a theoretical concern; the threat of state withdrawal from the jurisdiction of ICs is well documented (Brett and Gissel 2020). Member states may also ignore the IC rulings or seek to overrule the court's interpretation by amending the treaty regimes. Therefore, addressing politically salient issues heightens the plight of ICs by exposing them to harsh criticism, hostile reactions and potentially harmful backlash.

1 Ran Hirschl has referred to this phenomenon as the transition towards a "juristocracy" (Hirschl 2004), leading to courts' proliferation in adjudicating "mega-politics" (Hirschl 2008). Mega-political disputes are "core moral predicaments, public policy questions, and political controversies" that have the potential to divide countries or societies (Hirschl 2008, 94).

2 Drawing on the experience of the World Trade Organisation (WTO)'s Appellate Body, political constraints include using appointment politics to shape the bench, overt or subtle threats to the IC, delegitimising or signalling through diplomatic statements, defying its rulings or, at worst, exiting the authority of the IC (Steinberg 2004).

3 Ginsburg speaks about international courts wielding "*interdependent* lawmaking power, meaning that their interpretations of international law are constrained by the preferences between states and other actors" (Ginsburg 2004, 3).

Building on this, extant scholarship links the backlash against ICs to their mounting involvement in adjudicating controversial and overtly politicised matters (Caserta and Cebulak 2021b; Gathii and Akinkugbe 2021; Helfer and Ryan 2021; Martinsen and Blauberger 2021). In the African context, for instance, the early demise of the Southern African Development Community (SADC) Tribunal is an extreme example of the fatality of counterattacks on ICs.[4] Equally, the East African Court of Justice (EACJ) did not go unscathed following its first major case, *Anyang' Nyong'o vs Attorney General of Kenya,*[5] which saw the creation of an Appellate Division and explicit threats of disbanding the court (Onoria 2010; Gathii 2013; Alter, Gathii, and Helfer 2016; Possi 2018).[6] On the contrary, despite facing its harshest backlash from the Gambia, which sought to challenge its human rights jurisdiction, the Economic Community of West African States (ECOWAS) Court of Justice successfully braved the criticism (Alter, Gathii, and Helfer 2016).

The varied outcomes of the threats to judicial independence in African ICs have been explained by differences in the availability of robust networks of key allies[7] from whom courts derived support. Crucially, these networks not only empower courts directly but also influence the political cost calculations of governments. By altering these calculations, allies enhance the ability of ICs to withstand political pressures. The EAC and ECOWAS courts drew on the backing of their supporters to defend themselves against blatant threats of disbandment and substantially curbing their powers (Gathii 2013; Alter, Gathii, and Helfer 2016). Conversely, the

4 Formally dissolved in 2011, there is consensus that the suspension of the SADCT was a direct result of the Tribunal's ruling in favour of white farmers in disputes over land seizures in Zimbabwe (Ndlovu 2011; Nathan 2013; Hansungule 2013; Lenz 2012; Alter, Gathii, and Helfer 2016; Achiume 2017; Brett 2018b; Brett and Gissel 2020). See *Mike Campbell (Pvt) Ltd and Others v. Republic of Zimbabwe*, Case No. SADCT 2/2007, November 28, 2008 (Filed October 11, 2007). https://www.saflii.org/sa/cases/SADCT/2008/2.html.

5 *Prof. Peter Anyang' Nyong'o & 10 others v. Attorney General of Kenya and 5 others*, Reference No. 1 of 2006. East African Court of Justice, November 27, 2006. Hereafter *Anyang' Nyong'o*. https://www.eacj.org//wp-content/uploads/2006/11/EACJ_rulling_on_injunction_ref_No1_2006.pdf.
A subsequent judgment was delivered on March 30, 2007. https://www.saflii.org/ea/cases/EACJ/2007/6.pdf. Hereafter *Anyang' Nyong'o* 2007.

6 Chapter 4 provides details of this case and contextualises the institutional constraints and pressures the EACJ faces.

7 This study constructs judicial allies to be any groups of actors that support the court, in a range of ways.

absence of a robust network of supporters illuminates the collapse and dissolution of the SADC Tribunal – succumbing to executive interference (Alter, Gathii, and Helfer 2016).

Although there is ample evidence for the relevance of judicial networks in IC contexts in Africa, focusing solely on the necessity of robust networks of "compliance partners"[8] for IC empowerment downplays the agency of individual judges. This perspective suggests that judges are 'weak' and need the support of allies to assert themselves. The conventional wisdom emphasises the role of domestic compliance partners through litigation and subsequently exerting pressure on governments to comply with IC rulings (Alter 2014; Alter, Gathii, and Helfer 2016; Alter and Helfer 2017; Gathii 2020b). Accordingly, the empowerment of ICs depends on the presence, breadth, organisational power and influence of carefully mobilised domestic compliance partners.

However, instances of judicial entrepreneurship, such as in the EACJ, highlight how judges can leverage their agency even in challenging circumstances. Judges and the court registrar were not mere bystanders who waited for threats to materialise following backlash to its first controversial ruling in *Anyang' Nyong'o*.[9] Instead, they were proactive in forging judicial autonomy and court legitimacy, which has not gone unnoticed by scholars. In his subsequent works, Gathii has explicitly drawn scholarly attention to judicial agency in the EACJ, citing the "entrepreneurship, resourcefulness, and creativity of the judges and registrar" who "have engaged in earnest efforts to develop, cultivate, build, and justify the EACJ's relevance and its place within the EAC's integration agenda: in essence, building its political legitimacy" (Gathii 2013, 259–61; 2016b; 2020b).

Nevertheless, despite such apparent acknowledgement, judges' proactive involvement in strategically forging political relevance has not translated into scholarly enterprises that account for judicial agency and strategies of resilience amidst the strategic space. While Alter, Gathii and Helfer (2016) provide the most systematically engaging analyses of the divergent approaches taken by African ICs in resisting political backlash, their paper does not privilege the actors – judges, registrars and lawyers – nor

8 Compliance partners or "constituencies" are those political actors that ICs mobilise to achieve compliance their rulings (Alter 2014; Alter, Helfer, and Madsen 2016). They vary across professional categories – usually national groups of lawyers, judges, and law professors, who "provide an internal solution to international law's democratic politics conundrum" (Alter 2014, 357).

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

does it centre the actors' hands-on efforts in mitigating these pressures. Likewise, recent political science work exploring backlash against African sub-regional courts has mostly taken a state-centric perspective (Alter, Gathii, and Helfer 2016; Brett and Gissel 2020). So, while we know how governments have mobilised politically – sometimes collectively – against the sub-regional courts they created, contesting these institutions' authority and legitimacy, there is an imminent gap in how judges themselves respond to these ever-looming threats within which they operate. As litigants push these Regional Economic Community (REC) courts[10] to exercise their judicial muscle, and as pushback and backlash[11] accrue, judges ought to devise means to navigate the strategic space. They strive to strike a balance between meeting the needs of the regional integration agenda and avoiding confrontation with the executive sovereigns whilst protecting the bench's legitimacy.

Against this backdrop, this project aims to prioritise the actors behind the legal decisions by centring their agency as they embark on the institutionalisation of the sub-regional court. Through an in-depth study of the EACJ, this dissertation seeks to examine how African ICs[12] forge political influence within limits to their autonomy. In doing so, it aligns with broader debates on judicial behavior by engaging with comparative theories that explore how courts globally navigate their political environments. By integrating these theoretical frameworks, the study not only enhances understanding of the EACJ's unique strategies but also situates its findings

10 The thesis uses the terms sub-regional courts, REC courts or simply regional courts synonymously.

11 According to Madsen et al. (2018), resistance to ICs does not carry equal weight and should be distinguished as either backlash or pushback. Pushback is understood as "ordinary resistance occurring within the confines of the system but with the goal of reversing developments in law" (Madsen, Cebulak, and Wiebusch 2018, 203). In contrast, backlash is understood as "extraordinary resistance challenging the authority of an IC with the goal of not only reverting to an earlier situation of the law but also transforming or closing the IC" (ibid.).

12 Even though there are eight active ICs in Africa (Gathii and Otieno Mbori 2020), only four have compulsory jurisdiction and offer access for non-state actors to initiate litigation, falling under the "new-style" ICs category (Alter 2014)Thus, this study limits itself to referencing and making comparisons within the four African new-style ICs, namely the Common Market for Eastern and Southern Africa (COMESA) Court of Justice, the East Africa Court of Justice (EACJ), the Economic Community of West African States (ECOWAS) Court of Justice, and the Southern African Development Community (SADC) Tribunal. All four courts are established within the rubric of the eight Regional Economic Communities (RECs) that are recognized by the African Union (Karangizi 2012).

within a larger context, thereby appealing to an audience interested in judicial agency beyond the African setting.

The author draws inspiration from Samuel P. Huntington's (1968) definition of institutionalisation as: "the process by which organisations acquire value and stability. Any political system's institutionalisation level can be defined by the adaptability, complexity, autonomy, and coherence of its organisations and procedures" (Huntington 1968, 12). *Adaptability* refers to an institution's ability to respond flexibly to new conditions and challenges. An adaptable institution can evolve, while a rigid one becomes obsolete. Adaptability can be measured in terms of age, generational age and functional terms (Huntington 1968, 12). The *complexity* dimension focuses on the extent to which an institution has a differentiated and complex structure. Highly institutionalised systems tend to have diversified units – differentiated hierarchically and functionally (Huntington 1968, 12). *Autonomy* measures the "extent to which political organisations and procedures exist independently of other social groupings and methods of behaviour" (Huntington 1968, 12). Autonomous institutions are independent of external actors or social forces, such as personal interests or political influence. Lastly, institutions with *coherence* have unified goals and internal discipline without struggles with factionalism or conflicting objectives. A coherent and effective organisation "requires, at a minimum, substantial consensus on the functional boundaries of the group and on the procedures for resolving disputes which come up within those boundaries" (Huntington 1968, 12).

For Huntington, institutionalisation involves developing adaptable, complex, autonomous, coherent political organisations and procedures. If these criteria can be identified and measured, political systems can be compared in terms of their levels of institutionalisation. Thus, it is possible to measure increases and decreases in the institutionalisation of organisations over time. For Huntington, the more an organisation exhibited these traits, the more institutionalised it was. As an organisation becomes institutionalised, it becomes more adaptable, flexible and has a higher chance of surviving in a changing environment (Huntington 1968, 12). In essence, institutionalisation is perceived as essential for political stability and order, particularly in the context of developing nations facing modernisation.

For the remainder of the dissertation, I refer to institutionalisation as the growing complexity of the EACJ characterised by the development of hierarchically and functionally differentiated units, changes in functions, jurisprudence, and general adaptability of the institution. The concept also

encompasses the notions of judicial autonomy, court legitimacy and power as it addresses the various aspects of how newly created judicial institutions grapple with undue interference and contested authority in various dimensions, in an effort to establish institutional relevance.

1.1 Research Questions

Thus, the thesis is underpinned by a broader, central research question that it seeks to address: *how do African sub-regional courts navigate the strategic space and forge institutionalisation?* In seeking to respond to this question, the study engages the conceptualisation of the notion of strategic space to develop an understanding of the less understood dynamics of judicial decision-making at the level of African regional courts. Also drawing on a novel usage of the notion of judicial diplomacy, the study elucidates how REC judges respond to multiple audiences and decision-makers amidst the increased pressures of the job. It explores the various manifestations of judicial diplomacy in the EACJ, revealing concrete judicial tactics for negotiating limitations to their independence. The study further breaks down the main question into complementary sub-themes, each representing a vital and understudied element of the role of REC court judges in empowering newly created ICs, with the following sub-questions:

1. What strategies do judges employ to deal with political resistance and to prevent backlash and pushback against the court?
2. How do extra-judicial relations enable judges to navigate the strategic space?
3. What can we glean about the role of REC courts in advancing regional integration in Africa through the investigation of the strategic space and judicial diplomacy?

The first two sub-questions complement each other in the sense that they seek to examine how regional judges navigate the strategic space from various angles. Sub-question 1 illustrates the diverse ways (when and where do these strategies emerge) in which REC judges alter the contexts in which they operate. They devise strategies to deal with undue interference and prevent backlash against the court whilst forging institutionalisation. Thus, judges are perceived as politically savvy actors who employ different sets of

resistance strategies – both on and off-bench[13] – to avert, quash, or concede interference from political actors. This could enlighten our understanding of the complex, multi-faceted relational dynamics of the adjudication process in regional settings. In addition to off-bench "judicial diplomacy" (Squatrito 2021), the dissertation explores practical and strategic on-bench practices to address how EAC judges negotiate the limitations of fragile national sovereignty and regional integration politics. Such complex, entangled, and multi-directional power relations must also include a reflective analysis of the impacts of the strategic behaviour of sub-regional judges.

Sub-question 2 investigates the nature of support networks and relations that foster the building of such judicial alliances. In turn, it examines the types of impact these alliances have on fostering judicial empowerment. Indeed, African ICs do not act in isolation but in concert with well-organised judicial constituencies who are often willing to mobilise legal resources for change. For instance, organised constituencies have supported opposition parties in filing cases against the dominant parties in EAC member states where organisational rights are much more suppressed (Gathii 2020a). Similarly, judicial allies have used the ECOWAS court to advance their moral obligations to underprivileged people by adjudicating human rights cases (Okafor and Okechukwu 2020). To systematically account for judicial alliances, I draw on debates on informal judicial networks and individual and collective judicial agency in the Global South (Widner 2001; Helmke and Ríos-Figueroa 2011; Trochev and Ellett 2014; Dressel, Sanchez-Urribarri, and Stroh 2017; Ellett 2019) to explore how judges build alliances that provide support against undue interference.

Sub-question 3, which will be inherently answered in all chapters, is explicitly explored in the concluding sections of the dissertation. Despite having existed twenty years, Africa's REC courts remain in an ambiguous position within the national judicial hierarchy. They are in a delicate balance between supranationality on issues of the Treaties and their interpretation, with their role and relevance constantly questioned. The dissertation seeks to explore how judicial diplomacy can illuminate the broader implications of REC courts in the integration agenda.

13 The use of "off-bench resistance" refers to instances when individual judges conduct "more than law-centred activities and a much broader range of non-legal actors" (Trochev and Ellett 2014, 71), whereas on-bench refers to judicial decision-making practices (adjudication).

1.2 Project Rationale

African sub-regional courts have not received enough critical engagement in political science. Dominant works, mostly legal leaning, conceptualise these courts as formal institutions, prioritising access to justice (Banjo 2010) and exploring their legal obligations (Oppong 2011; de Wet 2013; Oppong 2018), legitimacy (Helfer and Alter 2013; Oppong 2014) or human rights jurisprudence (Nwogu 2007; Ebobrah 2007; 2009; 2010; Murungi and Gallinetti 2010; Alter, Helfer, and McAllister 2013; Gathii 2016b). Another strand of the literature compares REC courts to the Court of Justice of the European Union (CJEU) as a benchmark for evaluating their effectiveness and performance (Van der Mei 2009; Osiemo 2014) or contribution to regional integration (Kefa 2008; Ruppel 2009; Van der Mei 2009; Lenz 2012; Osiemo 2014; Fanenbruck and Meißner 2015; Kleis 2016). Nevertheless, none of these studies paid attention to the actors behind these interventions. Only recently have scholars started to take judicial agency seriously – either as agents of socialisation (De Silva 2018b) or engaging in off-bench judicial diplomacy (Squatrito 2021). This study makes a case for conceptualising the judges as actors with agency who operate within existing power configurations and whose diverse relational attributes potentially shape and influence regional integration processes. It combines judicial politics scholarship on judicial agency to investigate how these newly created international legal regimes resist undue political interference and forge authority amidst uncertainty.

Studies have started interrogating judicial agency in resisting undue political interference at the national level (Šipulová 2021; Tew 2021; Dent 2021) and in hybrid courts (Wiebelhaus-Brahm 2020). Individual judicial resistance, especially in situations where democracy and the rule of law are under threat, has also been explored (Widner 2001a; Graver 2023). Likewise, as more attacks against judiciaries in authoritarian regimes (Ginsburg and Moustafa 2008) occur, courts have transformed into sites of active and collective judicial resistance (Moustafa 2007; 2014). Nevertheless, understanding this phenomenon, especially in the context of ICs, is still only taking shape (Madsen, Cebulak, and Wiebusch 2018; De Silva 2018b; Voeten 2020; Caserta and Cebulak 2021a; Squatrito 2021). Of the emerging works on judicial empowerment in ICs, the judicial agency of IC judges in Africa has been recognised, albeit from a performance-based analysis. Such studies have revealed that IC judges may develop strategies beyond formal adjudication processes to act as agents of socialisation to their con-

stituencies to influence their performance (De Silva 2018b). They may even undertake a broad range of non-judicial activities in a strategic attempt to enhance their legitimacy and performance (Squatrito 2021). Expanding on these findings, the literature recognises judicial efforts in conducting non-judicial activities that actively mobilise "compliance constituencies" (Alter 2008, 46–47) on whom ICs draw for support to exert pressure on states to comply with their rulings and garner political leverage over appointing states. This has consequently sparked interest in the off-bench dynamics of judges, urging scholars to prioritise judicial agency in this regard. Building upon this literature, this study aims to understand how asymmetrical power relations and political processes shape, steer and influence the functioning, practice and performance of African ICs.

It is imperative to acknowledge that the view positing judges as active agents who shape their own autonomy is not new. Some authors have argued for the conceptualisation of judges as creative proponents in judicial development (VonDoepp 2009). Likewise, in their work on judicial autonomy through off-bench resistance, Trochev and Ellett emphasise that "judges have individual and collective agency beyond the strategic rendering of judgments from the bench and simply pleasing judicial audiences" (Trochev and Ellett 2014, 85). In the same vein, with the increasing judicialisation of politics, an appreciation of judges as protectors of their autonomy is necessary, and the first step toward this is acknowledging judges as "social and political actors" (Trochev and Ellett 2014, 68). The idea that judges are social and political actors is supported by instances where African judges have played a central role in initiating bids for greater judicial independence. Using the judicial career of Francis Nyalali, the former Chief Justice of Tanzania, as her point of reference, Widner's biographical study highlights the role of judicial actors in shaping political realities in periods of political and economic uncertainty in Africa (Widner 2001a). By treating court activism as a lens through which to understand the role of individual actors in advancing constitutionalism, Widner sets the stage for studies that seek to probe judicial relations.

At the international court level, judges face numerous challenges while conducting their work because they must navigate a context of "multiple authoritative decision-makers", even if, on paper, they are imbued with the formal mandate to decide on these matters (Alter, Gathii, and Helfer 2016, 4). Puzzlingly, African REC courts have been used to clarify and settle megapolitical disputes previously left to the confines of the legislative and executive branches (Akinkugbe 2020; Akinkugbe and Gathii 2020).

They even 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 (Gathii 2020b, 12–18). African sub-regional courts have become "social control mechanisms" (Hirsch 2020, 195) that must consider how different global, regional, geopolitical and domestic contexts help or hinder their creation, operation and longevity to build and maintain their authority. Their growing intervention in regional politics presents an interesting puzzle because REC courts occupy a weak position between complex, often opposing, and delicate national sovereignty and regional integration politics. Indeed, as these courts delve further into overtly politicised jurisprudence, the need to understand their decision-making processes, institutional constraints, and the agency of individual judges becomes increasingly relevant.

Thus, the EACJ represents a significant instance of building and forging judicial autonomy, given that it has faced severe backlash and emerged even more potent than other African "New-style" international courts (Alter 2014). It continues to interpret the Treaty proactively and to issue landmark rulings in a wide array of areas, including but not limited to human rights (Gathii 2013; Taye 2019; 2020; Ebobrah 2009; 2012; Gathii 2016b; Possi 2015; Oppong 2014) and environmental protection (Gathii 2016a). Moreover, most EAC judges usually act as "double agents" of their national governments and the REC bench – either sitting simultaneously on both benches or actively involved in public service at the national level (Gathii 2013, 273). The former makes for an interesting arrangement, given that no robust recusal rules exist.[14] This setup places REC judges in a 'special tension' between serving as IC judges and being agents of their appointing governments – adding another layer of complexity to the IC judicial setup. Thus, the project foregrounds judicial agency as a window into understanding the complex, multi-faceted relational dynamics of the adjudication process in African sub-regional settings.

14 EACJ judges are considered impartial to their appointing states, and they only seek their own recusal when necessary, or on "application by a party if there are circumstances that are likely to undermine, or that appear to be likely to undermine (their) impartiality in determining the cause" (East African Court of Justice 2020, 159).

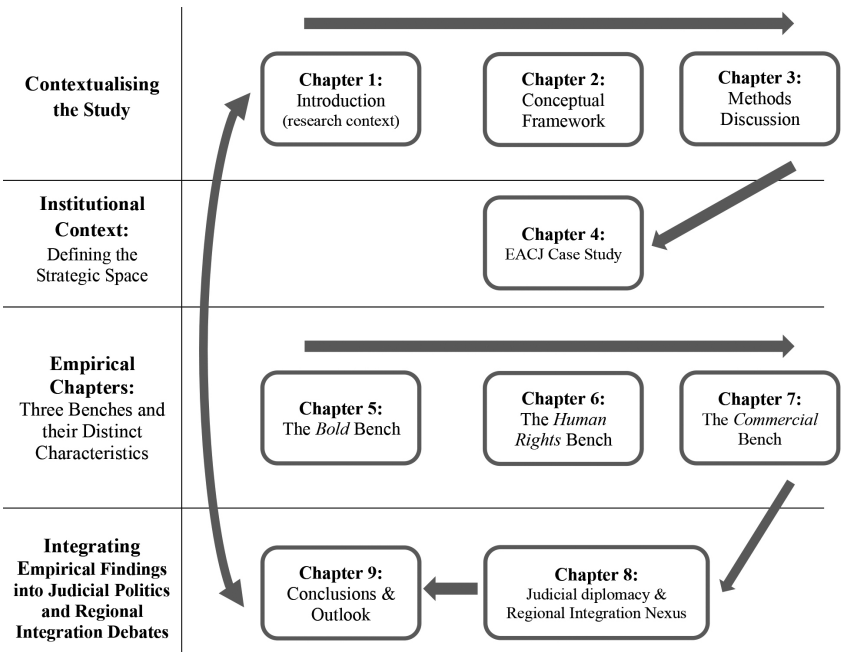
1.3 Project Aims

Even though Africa has proven to be fertile ground for testing international legal regimes (Alter 2014; Brett 2018a), we hardly know much about the judges on these courts and how they strategically navigate opposing and fragile national and regional integration politics. The study seeks to get closer to understanding judicial empowerment in African ICs by taking an actor-centric approach to investigate judicial politics. *Conceptually*, it develops the notion of judicial diplomacy to explain how REC court judges behave as judicial diplomats in a strategic space. It also explores judicial on-bench and off-bench strategies of resistance and mobilisation of support networks to shed light on how ICs alter domestic, regional and international politics. It argues for centring judicial agency, instead of institutional constraints, to better understand the peculiarities of judicial empowerment in Africa's ICs, thereby merging political science debates on judicial institutions in hybrid regimes with socio-legal discussions on ICs. *Methodologically*, the author draws on semi-structured interviews with judicial and legal elites, participant observation, and court document analysis to systematically assess the intrinsic motivations of relevant actors and explain how Africa's RECs navigate impending threats to their authority, subsequently constructing judicial power. Most importantly, the study takes informal encounters and observations in the field seriously to fill gaps where formal interviews may not tell us the entire story.

1.4 Dissertation Outline

The dissertation is structured as follows. *Chapter 1* introduces the study, highlights the research problem, articulates the research questions and underscores the rationale of the study. *Chapter 2* reviews existing literature on international court adjudication and considers the diverse theoretical explanations. The chapter argues in favour of taking an actor-centred perspective in the analysis of ICs because it provides much-needed explanations and empirical observations that can be further used to refine theoretical arguments in judicial politics. *Chapter 3* presents a reflexive "research openness" (Kapiszewski and Wood 2022) that discusses the collection of evidence supporting the study's arguments while accounting for the epistemological approach and its implications for the study. It expounds on the methods used, justifies the case selection, delves into the research design, and con-

cludes by reflecting on researching courts as political avenues, pondering research ethics, positionality, and the peculiar circumstances of studying legal elites in close-knit circles. *Chapter 4* provides the contextual, historical and political background of the EACJ. It also situates the court's structural and institutional constraints and provides the rationale for investigating the strategic space. It then delves into the EACJ framework and identifies jurisdictional, enforcement, and compositional challenges, situating its operation in the relevant historical and structural factors that heavily influence judicial agency.



Chapters 5 through 8 explore the diverse facets of judicial diplomacy in a strategic space. They do so across time and space, as exhibited by successive benches. The study differentiates the benches in the first two decades of the court's existence. Describing three distinct benches, each separated by a seven-year interval, to assess context and developments over time. *Chapter 5* presents the pioneer bench, which sat from 2001 until 2007. This bench has been lauded as bold, audacious, brave and trailblazing. Given the backlash against the pioneer bench's earliest decision-making, it is worth

exploring how judges exercised agency to forge ahead amidst crumbling judicial authority.

Chapter 6 delves into the transition from the initial bench to the "human rights" second bench, which was appointed after the contentious Anyang' Nyong'o case was decided. A watershed in the history of the EACJ, this case highlighted the potential political muscle of the new judicial organ. As a result, the first appellate bench was created to oversee the activist judgements of the trial court. The chapter examines how the creation of an appellate chamber affected the workings of the court. It traces the trajectory of human rights jurisprudence and the contributions of the second bench, clarifying how the evolution of the EACJ as a human rights court was shaped by successive appointments, the precedent set by the pioneer bench and off-bench activities that garnered support for human rights jurisprudence. Court leaders were proactive in constructing a fertile ground for human rights jurisprudence, employing off-bench strategies and drawing on the support of judicial allies.

Chapter 7 zooms in on the third bench,[15] specifically distinguishing it from its predecessors, to explain why it intends to shed the human rights image and forge a commercial bench. It explores the various manifestations of judicial diplomacy in the EACJ. The chapter reveals concrete judicial tactics for negotiating limitations to their independence. By taking both on-bench and off-bench judicial diplomacy seriously, the chapter illustrates that judges perceive their role as more than neutral arbiters who merely stick to the confines of the law. Thier role also entails carefully balancing their judicial duties with the existing realities of their political surroundings. Throughout chapters 5 to 7, the study considers the crucial role of judicial support networks. It explores how those alliances – such as national courts, governments, NGOs, professional lawyers and law associations – support judicial empowerment. By situating the interventions within their context and relevant historical currents, the chapters tease out the intricacies of divergent ally interventions to reveal the complex dimensions that judicial empowerment may take.

The final part of the dissertation is presented in two chapters. These investigate the broader implications (see Research Question 3) of the investigation of the strategic space and judicial diplomacy. *Chapter 8* traces the link between judicial agency, court empowerment and regional integration processes in Africa. In conclusion, *Chapter 9* highlights the study's contri-

15 As explained in the methodology section, the study delimits itself to the judges who served during the period in which I conducted fieldwork (until July 2022).

butions to *law and courts* research and studies on regionalism in Africa. It also identifies gaps in the study and suggests recommendations for future research endeavours.

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.

3. Researching Judges as Political Actors

> "Different paradigms lead us to ask different questions, use different methods to study those questions, analyse our data in different ways, and draw different types of conclusions from our data. They are so powerful and often taken for granted" (Willis, Jost, and Nilakanta 2007, xx).

The above extract highlights the often-overlooked influence of research approaches. In the field of *Law and Courts*, long-standing debates on objectivity, subjectivity, and the universality of research have teased out the complexities of conducting ethical, valid and reliable studies (Trubek and Esser 1989; Silbey and Sarat 1987; Sarat 1990; Halliday and Schmidt 2009). Even though epistemological leanings have not converged, there is a consensus that researchers ought to explicitly articulate their underlying methodological assumptions. Indeed, the entire research process is epistemologically driven, and it behoves the researcher to clearly state the epistemological understanding behind their methodology, as it gravely influences the study's findings.

This chapter offers a reflexive "research openness" (Kapiszewski and Wood 2022), which discusses the collection of evidence that supports the arguments raised in the study whilst accounting for the epistemological approach and its implications for the study. It follows suggestions for reporting on selecting research participants, interview attributes, transcription rules, and analysis used to develop categories (Kuckartz 2014, 155–58). The chapter justifies the case selection and delves into the research design and data collection methods. It concludes by reflecting on researching courts as political avenues, pondering research ethics, positionality, and the peculiar circumstances of studying legal elites[76] in close-knit circles. A notable contribution of the chapter is that it draws on the author's field[77] experience to

76 The elite category is not a monolith, even if it remains useful in articulating the peculiarities of speaking with educated and authoritative individuals as research participants, recognising that these experiences are "fraught with variable challenges related to positionality (Glas 2021, 438).

77 I use the term "field" here very loosely, cognizant and appreciative of debates that debunk the idea of the field that is "out there," citing an ambiguity in the boundary between the field and home (Amit 2000, 8). The boundaries of the field are as elastic, mobile, and intermittent as the prevailing circumstances surrounding it. I am

highlight the potential of the informal dimension of fieldwork – "hanging out" – in traversing some of the limits of researching legal and judicial elites.

3.1 Case Selection

The selection of the East African Court of Justice (EACJ) is predicated on recognising that not all Regional Economic Communities in Africa possess or maintain a functional judicial body. The African Union (AU) recognises eight Regional Economic Communities (RECs)[78] as building blocks in accelerating the establishment of the African Economic Community (AEC).[79] The eight RECs acknowledge the *economic* aspect of integration as their principal objective, which distinguishes them from the plethora of similar organisations on the continent, whose explicit security and political agendas are more pertinent. Out of the eight RECs, only four effectively operate permanent judicial organs, namely the East African Court of Justice (EACJ), the COMESA Court of Justice (CCJ), the ECOWAS Community Court of Justice (ECCJ), and the SADC Tribunal (SADCT).[80]

As alluded to in the introduction, these REC courts have trodden different paths, with the SADC Tribunal suspended and later dissolved prematurely after facing fatal backlash (Ndlovu 2011; Lenz 2012; Nathan 2013; Alter, Helfer, and Madsen 2016; Brett and Gissel 2020). Since its dissolution, it was transformed into the SADC Administrative Tribunal (SADCAT) in

cautious of the demarcation between the field and "home," especially as the binary does not suit my circumstances.

78 The Arab Maghreb Union (AMU), the Common Market for Eastern and Southern Africa (COMESA), the Community of Sahel–Saharan States (CEN–SAD), the East African Community (EAC), the Economic Community of Central African States (ECCAS), the Economic Community of West African States (ECOWAS), the Intergovernmental Authority on Development (IGAD) and the Southern African Development Community (SADC).

79 "The Community shall be established mainly through the coordination, harmonization and progressive integration of the activities of regional economic communities" (Art. 88 (1) AEC Treaty). This goal is meant to materialise "gradually in six (6) stages of variable duration over a transitional period not exceeding thirty-four (34) years" (Art. 6 (1) AEC Treaty).

80 The AMU Tribunal/Maghreb Court of Justice, despite being established by the community's founding treaty of 1989, is still "inactive" while CEN-SAD and IGAD do not provide for a permanent judicial organ (CEN-SAD, IGAD) due to their strictly intergovernmental character (Gathii and Otieno Mbori 2020, 344).

2014, which is no longer politically influential as it only handles SADC employee grievances.[81] Thus, this case would not be suitable for the question raised in the study, as it seeks to examine the emerging political relevance of Africa's REC courts through a close analysis of their judicial empowerment strategies. Likewise, the CCJ has tended to adjudicate disputes between COMESA and its employees and thus lacks overt political relevance (Gathii 2018).

On the other hand, both the ECCJ and EACJ have emerged as outstanding examples of politically relevant sub-regional jurisdiction (Gathii 2020b) and have even amassed support networks to defend themselves against blatant threats of disbandment (Alter, Gathii, and Helfer 2016). Similarly, both courts have emerged consequential in dealing with megapolitical jurisprudence (Akinkugbe 2020; Gathii 2020a), defying leading rationalist expectations. Both courts have an impressive human rights record (Ebobrah 2009; Gathii 2013). However, while the ECCJ was granted human rights jurisdiction in 2005 (Ebobrah 2007) following mobilisation by judicial allies (Alter, Helfer, and McAllister 2013), the EACJ has had to craftily forge its human rights (Possi 2015; Gathii 2016b; Taye 2019). While both courts remain relevant, the EACJ has adjudicated a range of matters from human rights (Taye 2019) despite not having an express mandate to do so, has adjudicated environmental disputes (Gathii 2016a), survived backlash and emerged even more politically vibrant (Alter, Gathii, and Helfer 2016; Gathii 2020b).[82]

Even though these international judiciaries could be understood as specialised REC courts with similarities in composition, jurisdiction and finality of judgements, there are distinct differences in structural, economic, jurisdictional and support-network constraints within which they operate. Scholars have shown that among these four international judiciaries, the EACJ stands out as one of the most robust courts in terms of its jurisprudence, fighting off interference and forging political relevance given its structural, jurisdictional and support-network limitations (Gathii 2013; Alter 2014; Alter, Gathii, and Helfer 2016; Madsen, Cebulak, and Wiebusch 2018). The EACJ's evolution, survival amid backlash, and emerging as even more politically relevant amidst challenges imposed by REC developments

81 South African Development Community (SADC). n.d. "About SADC. SADC Institutions: SADCAT." https://www.sadc.int/institutions/sadc-administrative-tribunal-sadcat (Accessed August 2, 2021).

82 See Kleis (2016) and Murungi and Gallinetti (2010) for more details.

make it a suitable case study for understanding the evolution of African REC courts.

Furthermore, researching sub-regional court relations in multilevel systems of judicial governance warrants a focus on the national-level systems. The EACJ is based in Arusha, Tanzania, where only the President (chief of the Appellate Division) and the Principal Judge (chief of the First Instance) reside; however, all other judges serve on an ad hoc basis. Therefore, accessing serving and former judges and relevant national actors across multiple sites in selected EAC countries was crucial. Consequently, I followed the court from Tanzania[83] to Kenya, Uganda and Burundi to allow for comparative dimensions within the single case study.[84] Except for the latter, all other EAC countries have a common law background, are classified as hybrid regimes, and have had a longer interaction with the court, having been part of its inception from the outset. Thus, the inclusion of Burundi served as a least similar case, providing insights that would not have been achieved otherwise.

Given the scope of fieldwork, especially one conducted during an unprecedented health pandemic, exhaustive fieldwork across multiple sites was only possible with one REC court. Given that African countries usually belong to overlapping regional bodies, research in one country often yielded insights about another REC judicial institution. Moreover, as countries belonging to more than one REC, they would have to select judges for more than one regional court, adding an extra analysis lens to the study. Take the example of Tanzania, which sends judges to the EACJ and the SADCT (not the CCJ), while Uganda, Burundi, and Kenya send judges to the CCJ and the EACJ, respectively (not the SADCT). Thus, the selection of the EACJ favoured multi-sited research so as to understand the factors that affect institutional complexities and actors' preferences across REC judiciaries as well.

83 I also visited the EACJ headquarters in Arusha, where I conducted extensive research with judges and court staff, used the court library and searched for relevant documents.

84 At the time of research, the EAC comprised only six countries (between September 2021 and June 2022). Currently, the EAC comprises eight partner states. Except for Burundi and Kenya, which were not part of the initial research plan, all others have a Common Law background, are classified as hybrid regimes and each of them sends judges to two of the courts under study: Burundi, Uganda and Kenya (to the COMESA court and the EACJ but not the SADC Tribunal) and Tanzania (the EACJ and the SADC Tribunal – not the COMESA court since they left COMESA in 2000).

3.2 Multi-methods Research Design

Since the crux of the research problem is to generate meaning and describe and interpret the attitudes, perceptions, practices, and strategies of the social construction of judicial power, the study relies *primarily* on qualitative methods to collect, interpret, and analyse data. It draws on political scientists whose work is interpretivist with sympathy for critical paradigms(Willis, Jost, and Nilakanta 2007; Ellett 2011; 2015; Fujii 2012; 2017; Bourke 2014; Yanow and Schwartz-Shea 2015; Glas 2021). Like these scholars, I reject the "detached" researcher narrative and advocate for a reflexive research process that understands that "total control is an illusion" (Fujii 2017, 91).

The research design follows an "empirical-descriptive methodology" (Lauer 2021, 43) whose goal is not to generalise but to generate meaning and make sense of political phenomena. As such, the study employs a qualitative research design that combines relational interviews (Fujii 2017) with participant observation and its variations alongside archival and secondary sources.

Table 1: Types, Functions, and Sources of Original Data

Type of original data	**Functions**	**Sources**
Universe of EACJ Case Mapping Dataset	Identify repeat lawyers, the types of cases the court handles, and observe trends in jurisdiction across benches and across time	Online case law database of the EACJ and other certified legal databases
Semi-structured relational interviews with judges, legal elites, REC, government officials, and issue area experts	Provide narratives of EACJ litigation, actors' perspectives, attitudes and strategies for (dis)empowering the EACJ within a strategic space	Six months of fieldwork in selected EAC states (between Sept 2021- June 2022); online interviews (June 2020 – Aug 2021)
Archival data: newspaper records, EACJ documents, reports and judicial CVs	Corroborate and complement interview data on how judges navigate the strategic space and forge institutionalisation	Libraries of the EAC, EACJ, newspaper archives, EACJ website
Participant observation: relevant EACJ events and court sessions	Observe decision-making processes and activities to reveal the dynamics of judicial diplomacy	About two months in Bujumbura and Arusha (Sept 2021- July 2022)

Source: Author's compilation (following Pavone 2022, 28)

Taken together, in-depth relational interviews, participant observation at relevant court events, and relevant court documents permit a multifaceted

understanding of the attitudes, perceptions, and strategies of the social construction of judicial power in the EACJ. The following sub-sections will justify the choice of each method.

3.2.1 Case Mapping

The author conducted a thorough case-mapping exercise[85], considering all cases brought to the EACJ from its establishment in 2001[86] to July 2022. The study limits itself to judicial leadership (judges) and, by extension, the court's output until July 2022 for methodological reasons. Firstly, fieldwork for the project was conducted between September 2021 and July 2022. For that reason, the work defines its scope as covering judges who had served on the court before and during the time that fieldwork was completed.[87] Secondly, the work prides itself on referencing judicial experiences with *only* those judges, court leadership, and registrars with whom I engaged, without extending the study experiences, findings, and analysis beyond its original scope. Thirdly, twenty years is an opportune and *ample* time frame within which to assess variations and evolution in the court's progress.

To systematically record all cases, a comprehensive list of all cases found in the EACJ databank,[88] was compiled in an Excel document.[89] Each row in the dataset consists of a single case and its corresponding information. For each case, we collected *primary data* such as case number, date of filing, date of delivery, the applicant(s), the respondent(s), country of origin and document length. *Legal Representation data* was also specified. *Court-specific data* like the EACJ division, case type, presiding judicial

85 I am grateful to the student assistants, Charlotte Rohrer and Amanda Rachel Ainengonzi, for their research assistance in compiling this dataset.

86 The court did not receive any cases until the first one was filed in 2005.

87 Leonard Gacuko and Bonny Cheborion Barishaki, appointed in July and August 2022, respectively, are omitted. Similarly, Kasanda Ignace Rene Kayembe and Omar Othman Makungu, appointed in May and June 2023, respectively, are not included in the study for similar reasons.

88 Missing cases were found in EACJ case reports, the African Legal Information or the African Human Rights Law Case Analyser databanks, providing viable alternatives for case file retrieval.

89 The spreadsheets are labelled as follows: the *Cover Page* offers a detailed description of the entire dataset, *Coding Rules* delineate relevant variables, acronyms, and additional pertinent information, and subsequent tabs include relevant statistical computations.

data,[90] and the related Treaty Articles and Rules were also collected. Lastly, the *case outcome data*[91] was also recorded. As will be elucidated, a close examination of the entire universe of cases that the EACJ has issued whilst paying attention to politically salient cases that generated high socio-political attention at the national level reveals how the EACJ is forging political relevance.[92] The dataset was also used to identify and observe trends in jurisdiction across benches and time, as well as to identify judicial constituencies by highlighting the "repeat lawyers,"[93] civil society organisations, national governments, and REC body representatives.

3.2.2 Interviews

> "Interviewing is not simply a mode of secondary fact-checking or validation, but rather it is critical at every stage of the research process and can also corroborate information and reconstruct events" (Ellett Forthcoming, 19).

90 Instead of recording all judges on the case, I opted for the leaders of the court at First Instance, the Principal Judge or Vice Principal Judge and at Appellate, the Judge President or Vice President. This is because court leaders direct the bench in the adjudication of cases, including distributing cases amongst judges as well as presiding over all hearings. Consequently, a discernible correlation can be established between the presiding judge and the nature of rulings rendered by the bench. The same approach was employed in coding the lawyers involved in a case, particularly when Applicants or Respondents enlisted multiple lawyers. In such instances, the database records only the name of the first lawyer mentioned in the case documentation. This practice aligns with the hierarchical culture inherent in legal proceedings, where names are traditionally organized based on seniority, reflecting leadership roles and their consequential impact on the presentation of the case.

91 In the First Instance Division (FID), the respondent was almost always the partner state governments or institutions or the EAC itself, whereas applicants vary from private litigants to employees of the EAC. For the respondent to win at the FID, cases were coded for reasons like "no treaty violation" or "no procedural irregularities" or the action by the government was "neither discriminatory nor a violation "of the Treaty. Whereas, for the applicant to win, explicit declaratory orders to Treaty violations by member states were stated using words like "unlawful" or "violated" the Treaty, among others and at times even issuing mandatory orders. A similar approach was taken to cases at the appellate division.

92 See Table 13 in the Appendix for a summary of the 264 decisions across divisions and benches, as mapped in the EACJ Cases Dataset (available with the author).

93 I draw on his concept of "repeat players" (McGuire 1995) to refer to reputable and influential lawyers who frequently litigate in the EACJ and have played a huge role in influencing judicial decision-making and expanding the reach of the court.

Interviews are undoubtedly vital tools for collecting, situating, and corroborating data throughout the research process, especially in judicial research. Judicial interviews shed light on whom the judges rely upon for support, unravel the subtleties of how judges tactfully respond to interference, and unearth the circumstances under which judges exercise their agency to fend off this interference and avoid potential backlash. Thus, to understand the motivations and rationale of relevant actors in the construction of judicial power in the EACJ, relational interviewing (Fujii 2017) was the preferred approach. Relational interviews are an *interactive form of interviewing between the researcher and the interviewee*, grounded in a *'humanist' ethos* that prioritises "the ethical treatment of all participants and continuous *reflexivity*" (my emphasis, Fujii 2017, 22). When understood this way, the benefit of interviews can be found not only in the information gathered during the interview process but also in the conclusions drawn from the interactions themselves – how we engage our research participants, how we position ourselves, and how we make sense of our own role in these interactions.

In this study, interviews proved helpful in getting closer to the situated knowledge that reveals the perceptions and meanings judges and their constituencies attach to the performance and role of the REC court. Specifically, to understand how they actively negotiate the limitations and challenges they face and how that shapes the current realities of the court. After all, "the real additive value of elite interviews is to uncover the informal or hidden processes" (Tansey 2007, 767), which may not be readily observable. Thus, interviews help us better understand the judges' socio-political embeddedness in networks and provide contextual support, which promises new insights into the court's political role in regional integration processes.

Interviews were used in process-tracing (George and Bennett 2005) key events such as the treaty-making process, establishment of the EACJ, and understanding key points of litigation and their aftermath. Interviewing first-hand participants in these events was vital in obtaining information about key political actors primarily involved in setting up, institutionalising, and empowering the EACJ. Moreover, during interviews, participants shared documents that they deemed relevant to explaining the phenomenon at hand, and at times, lawyers even shared confidential submission documents to enlighten my understanding of resulting judgements. These documents were usually reserved for internal deliberation and are not part of publicly available information at the court. They proved helpful as additional information about individual cases, thereby supplementing,

throwing insights, and expounding the discussions I witnessed in the publicly recorded court sessions and resulting judgements.

3.2.2.1 Selecting Research Participants

As an organ of the East African Community, the EACJ has its roots in regional integration processes, and its primary aim is to aid the partner states in applying and interpreting the Treaty.[94] Thus, it is a *supranational* court that serves partner state institutions[95], the Community and its employees[96], and private individuals[97] in pursuit of dispute resolution pertaining to matters of the Treaty. For the EAC, the rule of law is not only a means to achieving integration but also an end in itself, as it is envisioned to consolidate democracy and enhance the bloc's ambitions to achieve a political federation (Ruhangisa 2011). Therefore, to understand the rationale of relevant actors in constructing the institutional and political relevance of the REC judicial arm, the study considers *key* actors in the court and regional integration processes. Interviewees were categorised by their occupations, with a specific focus on levels of governance, namely, national or sub-regional levels, since this is central to the analysis. I sought diverse actors across the two levels of governance to achieve a balanced view of how they mobilise and strategically empower the court. Serving and former judges and their key constituencies were central to the study. As mentioned earlier, key judicial constituencies were identified by analysing the entire universe of cases the court has handled. Some of these actors included repeat lawyers, civil society organisations, national governments, and REC body representatives. The study also included national judges to understand how they may be involved in empowering the REC court.

For purposes of relational interviewing, a researcher is not restricted by sampling requirements but is free to select research participants intentionally and purposefully based on already-set or developing research criteria (Fujii 2017). In this kind of selection, the researcher allows themselves the freedom to "learn more about the setting and the actors in it" and thus include participants as the study develops to reflect the "constraints, obstacles, and opportunities" that come with the research process (Fujii

94 Art. 27 (1) EAC Treaty.
95 Art. 28 EAC Treaty.
96 Art. 29; 31 EAC Treaty.
97 Art. 30 EAC Treaty.

2017, 38). Likewise, understanding how power emerges in REC courts using relational interviewing is not so concerned with sampling for generalisation purposes but instead perceives interview material as a product of the circumstances surrounding and producing the exchange. The resulting interpretation ought to take the interview context into account (Lynch 2013, 33).

While the study uses relational interviewing, which is not preoccupied with notions of validity and universalist reliability ideals (Fujii 2017, 91), this is not to say that the study did not strive to corroborate interview information. On the contrary, I relied on interviewing a diverse range of informants (based on their experience and expertise) and triangulating the data through multiple methods, as well as cross-validating interview information with field observations to circumvent limitations from unreliable individual responses and to achieve a representative picture of the phenomenon. Consider, for instance, the problem of "exaggerated roles" (Berry 2002, 680), where research participants tend to speak hyperbolically about their involvement in certain situations or simply provide unverifiable information. Informal conversations with similarly positioned individuals were also used to remedy the issue.

3.2.2.2 Interview Methods Appendix

The entire interview process was thoroughly documented, from the preparation for interviews to conducting and analysing them (Kuckartz 2014, 155–58). Detailed information about individual interviews was recorded in an "Interview Methods Appendix" (Bleich and Pekkanen 2013).[98] Interview formats varied but mainly followed a semi-structured format, starting with the introduction of the project aims and a clear explaination of the research agenda. Predominantly, open-ended questions were raised to elicit longer and more open-ended answers. Conducting relational interviews involves cautiously framing questions while remaining open to the messiness of the interview process.[99]

98 An excerpt of the "Interview Methods Appendix," containing a descriptive list of interviews conducted and all vital aspects of the interviews, is available in the Appendix. The complete "Interview Methods Appendix" is available on file with the author.

As part of ethical considerations, seeking the participant's informed consent was essential (MacLean 2006). Entirely voluntary, a consent form[100] was available in print, and participants were given the option to sign one or offer their consent verbally.[101] Interviews were tape-recorded, and concurrent notes were taken. Where possible, supplementary notes were taken within the hour. On average, interviews lasted one hour, primarily drawing on pre-set questions but also freely withdrawing from the structure and following the flow of the respondents' thought process.

3.2.2.3 Interview Summary

I conducted 103 semi-structured interviews with REC judges, national judges, lawyers, REC and government officials, and issue area experts.[102]

Since my study does not intend to be generalisable, it also avoids the pitfalls of representativeness. However, since it sets out to capture a comprehensive picture of how respondents perceive judicial strategies of empowerment in a strategic space, I conducted purposive sampling to interview an illustrative sample of research participants across categories from each of the selected partner states. For instance, EACJ judges interviewed in Tanzania comprised 66.66 % of the total number of judges from that country who served at the REC court; in Burundi, 60 %; and in Uganda, 57 %.[103] In sum, the aim of the interviews was not to produce generalisable

99 Thus, unstructured or informal conversations were often preferred to protect confidentiality or if research participants were uncomfortable with the seriousness of the interview situation.

100 Developed in agreement with the European Union's General Data Protection Regulation (GDPR) legal regime, which came into effect on May 25, 2018. The project takes the legal requirements to ensure the protection of personal information and participants' identities under the EU's GDPR seriously. See https://gdpr.eu/what-is-gdpr/.

101 Initial interviews revealed that verbal consent was preferred, and the author continued to use this approach.

102 While the study focuses on Eastern Africa, the author also conducted interviews in Malawi as part of a joint project of which the study was part. See "Multiplicity in Decision-Making of Africa's Interacting Markets" (MuDAIMa) project. https://www.politik.uni-bayreuth.de/en/research/mudaima/index.html.

103 Percentages are calculated with regard to the total number of *living* EACJ judges that have ever served on the court. Kenya was only included on a whim to expand the comparison to all three original EAC partners. I spent only two weeks in Nairobi; hence, only 33.3% (2/6) of the living judges were interviewed. Malawian interviews included here are part of the larger project design (see *supra* note 103).

findings about all actors, but to interview the most relevant political players who participated in the political events under study (Tansey 2007, 766).

Table 2: Interview Summary

Country	REC judges	National judges	Lawyers	Academics	REC Officials	CSO Reps	Gov't Officials	Interviews
Uganda	4	4	8	3	6	2	3	30
Tanzania	5	3	7	3	2	4		24
Kenya	2	1	5	1	2	2		13
Malawi	4	7	2	4	2		3	22
Burundi	3	1	2	1	1	1		9
SSD	1	1	2	1				5
Total	19	17	26	13	13	9	6	103

Source: Author's compilation.[104]

3.2.3 Participant Observation

In addition to semi-structured interviews, I conducted participant observation[105] at relevant court events. My entry point into participation with the intention to build rapport was an invitation from the court registrar and president to visit the court and its stakeholders at an exclusive event: the High-Level Judicial Symposium in Bujumbura.[106] This event, commemorating twenty years of EACJ existence, would be the first time the court would sit outside Arusha to hold court sessions. This invitation came at an opportune moment when entrée into the legal and judicial space was proving more cumbersome than I had anticipated. I seized the opportunity to follow the court to Bujumbura, where I attended the Symposium, alert to chances for rapport building. Formal events led by former and

104 The number of interviews is more than the number of interviewees because legal elites usually occupy various roles, a clear distinction of functions is not clear-cut in some cases, and some individuals may appear in different capacities here. I sometimes interviewed the same individual for different reasons (e.g., once as a litigating lawyer before the EACJ and the second time as the head of a civil society organisation). Also, EACJ judges are usually also serving at the national level.

105 At times, I was a "direct non-participant observer" (Portillo et al. 2013, 7) with a passive role in the engagement.

106 EACJ Symposium, *supra* note 62.

current EACJ judges and court staff advanced my understanding of the court's mandate, its role in promoting the rule of law, cross-border trade and investment, and its growing jurisprudence through broad, bold, and intentional interpretation of the EAC Treaty. Likewise, I was granted access to formally organised social gatherings, which paved the way for a deeper understanding of the people behind the formalistic legal profession and challenged my assumptions of them through one-on-one conversations. For instance, I was invited to the judicial farewell dinner for former EACJ judges,[107] which provided an opportunity for participants to interact informally. Over dinner, without being consumed by research-oriented questions, I could foster working relationships that would later open up room for investigating those queries.[108]

Similarly, I strategically positioned myself where I could get close to litigating lawyers in the EACJ. After gaining visibility within the judicial and legal circles, I negotiated my way into legal public talks, conferences, professional meeting points, and other gatherings that would get me in the same room as my desired interviewees. One such memorable event is the one-day lawyers' trial advocacy course.[109] Through an interview, I learnt about an upcoming workshop that the East Africa Law Society (EALS) would host to instruct lawyers on litigation before regional courts and tribunals, focusing on practice before the EACJ. Even though the event was closed to non-members, I managed to secure a place to attend.[110] As a participant observer, I participated in practical exercises intended to provide the delegates with "a first-hand feel of actual litigation" before the

107 Held at Kiriri Gardens Hotel, November 5, 2021, Bujumbura. Images taken during this event remain confidential.

108 Amidst participation in social interactions of "hanging out", I regularly wrote "field notes" (Sanjek 1990) in diverse forms, ranging from audio phone recordings made after a night out to handwritten notes taken a few days later. My interactions served the critical role of building connections, first and foremost, and the notes taken were intended only as general reflections or clarifications of aspects pertaining to the formal interview process.

109 East Africa Law Society capacity building: Trial Advocacy Training for Regional Courts 2021. The EACJ and the Uganda Law Society hosted a one-day course on trial advocacy before regional courts and tribunals for EAC lawyers with a focus on practice before the EACJ. October 20, 2021. Skyz Hotel, Kampala. https://twitter.com/ealawsociety/status/1452632041158291467.

110 I reached out to the EALS headquarters in Arusha via telephone and convinced them that I was an interested member of the public: a researcher who cared to learn more about the practice before the EACJ. Again, my positionality and privilege opened up this space. I leveraged my connections to the facilitators and was granted access, even after meeting a deadlock with the organisers in Kampala.

EACJ. We were taken through the court's jurisdiction and admissibility of applications, written proceedings, preparation and filing of pleadings, their amendment, withdrawal, and practical exercises in drafting, preparing, and filing documents. Such formal activities provided an extra avenue for gathering supplementary data.

Even though I took part in all these very instructive, albeit unfamiliar legal proceedings, with keen interest, the most enlightening aspect was becoming privy to the pragmatic questions that participants asked, listening to the rationale given by the trainers (who themselves were "repeat lawyers" at the court) on what types of cases they decide to litigate, and how legal elites tactfully confront and mitigate pressures from the executive upon filing politically salient claims. Attendance of the training provided raw insights into the legal, economic, social, and political considerations that lawyers who appear before the court grapple with in their daily routine. Most rewarding were the informal conversations during the breaks – when questions, doubts, and reflections were shared. Such informal interactions allowed me to introduce myself, explain my research objective and seek the research participants' consent and participation in more formalised interviews.

Finally, although I had met with judges and lawyers on separate occasions, attending EACJ court sessions in Bujumbura[111] and Arusha[112] was also essential. Steady attendance of these sessions in different locations made me a regular figure at the court, aided in building rapport with legal elites and litigants, and familiarised me with court processes. Conversations with the court staff as they set up and cleared the courtroom before and after sessions offered a "behind the scenes" view of court processes. At such opportunities, I inquired into different aspects of courtroom formality and protocol, chatted informally about the concluded sessions, and became aware of personal anecdotes on lawyers' and judicial courtroom behaviour and its implications. Even if it remains confidential, this information broadened my perception of the court and its constituencies. Observing courtroom dynamics enabled me to understand the core questions before the

111 In November 2021, the EACJ held court sessions at the Supreme Court in Bujumbura. The fact that we were all visitors and not in their familiar territory came with a certain sense of freedom that I imagine played in my favour – it brought a shared sense of camaraderie and gave me a chance to speak to the relevant legal elites who were rather open to engaging a researcher.

112 While at the seat of the EACJ in Arusha, February-March 2022, I also frequently "hang out" in places that potential interviewees frequent in a bid to cross paths and initiate an informal conversation that would result in an interview opportunity.

court, go beyond the formality, and engage the lawyers and litigants after the sessions to clarify issues raised in the hearings and arrange interviews. These methodological considerations, which go beyond the formalised interview and take informal encounters seriously, promise new insights into explaining judicial power in underexplored ICs in Africa.

3.3 Navigating Access Limitations

Having commenced the research during the COVID-19 epidemic, travel was heavily restricted and almost impossible for the first year of my research project. Within this time, the project drew on our existing professional capital – colleagues based in Bayreuth[113] and elsewhere[114] to make initial contacts with research participants across multiple locations. I also conducted introductory online meetings to garner contacts for future research and establish early connections with research participants. Amidst travel restrictions, I was unable to undertake the "pilot trip" as intended. Instead, I conducted preliminary interviews with judges, lawyers, and experts on different issue-areas to gain initial insights and orientation on the study. However, sometimes access was much more complicated than in person. The process was time-consuming and, at times, proved impossible. Conducting in-depth interviews with participants posed challenges, especially those we did not know. Aside from the expected internet connectivity issues, a figurative firewall prevented participants from opening up to a stranger about their journey, especially in judicial interviews where protocol, formality, and hierarchical relations are core values. In sum, though insightful, online research was not as fruitful as fieldwork, where we could go beyond formal interviews to appreciate informal encounters, which made for a comprehensive and consistent analysis of socio-political structures in REC court processes.

113 I am appreciative of Prof. Thoko Kaime for his guidance while preparing to enter the field, for taking an interest in our research, and for opening his networks to us at the relevant research sites.

114 Likewise, I am grateful to Professors James Thuo Gathii and Chris Maina Peter, who indulged my curiosity at the start of the project, suggested very practical ways in which I could conduct the study despite the challenges brought on by the pandemic, and whose encouragement and wisdom still guide my thoughts in this PhD journey. I am beholden to my academic mentor, Dr. Rachel Ellett, for her guidance, connections and insights throughout the entire research journey.

Despite the pandemic, such initial contact established "working relationships" (Fujii 2017, 90), granting me access to the region's closed judicial and legal elite circles. A working relationship entails taking human participants' expert knowledge seriously and imbuing them with respect, dignity, and gratitude for their time. For instance, I conducted an online meeting with the former Registrar of the EACJ, and we continued regular email exchanges before my trip to Kampala. Upon arrival in the field, this working relationship proved helpful when my attempts to access judges and lawyers were met with silence or rejection.[115] Recognising the challenges posed by my positionality, I drew inspiration from informal techniques that draw on ethnographic approaches (Geertz 1998). For a profession that thrives on formality and discretion, the cold email approach would not bridge the hierarchy or create the rapport I needed to ask the types of politically sensitive questions I intended to pose to the supposedly apolitical judges. I needed to spend extended periods following judges across multiple locations while engaging in informal and sociable interactions outside the professional realm. Rather than the formalised interviews where I had to go through several judicial gatekeepers to access the judges, who were often isolated in their chambers, the setup of a bar, restaurant, cocktail gathering or hallway dissipated the researcher-judge constellation, allowing for rapport-building.

Equally, my experience researching judges and other legal elites has shown that rapport is not an end in and of itself, not necessarily to create room for the formal interview as the researcher would wish, but it certainly opens communication lines with participants that may yield other desired results. Take, for example, my visit to a Tanzanian judge who seemed interested in my topic but did not grant me an interview. We established a good rapport and chatted informally several times. He always asked about the progress of my work and even referred me to his colleagues, who granted me formal interviews. Of course, our informal conversations

115 I am indebted to His Worship Yufnalis Okubo, whose readiness to assist in my research, ample kindness and genuine interest in my work have not only opened doors in the usually closed legal networks but have also spurred my confidence in my project, knowing that it behoves me to tell this story respectfully and critically. I choose to disclose the identity of this interlocutor for four reasons: 1) because I have his consent to do so, 2) he would have been identified anyway given that only he held that position at the said time, 3) because of the public manner in which he intervened in my research (on social media), and 4) to show gratitude for that intervention as I view him as a co-producer of knowledge that should be acknowledged publicly.

proved valuable in providing contextual information and furthering my access. This encounter highlighted the importance of informal encounters and conversations for a comprehensive and consistent analysis of socio-political structures and processes. My experience shows that while these informal approaches have been underestimated, especially in qualitative judicial research, they have proven more fruitful as they highlighted the role of the informal in a predominantly formalistic judicial culture. I discuss this approach at length in a working paper (Kisakye 2023) and blog entry (Kisakye 2024), where I draw attention to the advantages of "hanging out" while studying "up." The reflections on my field experience exemplify the messy, unpredictable, and challenging route of studying "up" and highlight the role of the informal in researching individuals in a predominantly formalistic professional culture.

3.4 Analytic Approach

This study perceives data collection and analysis as interrelated processes that employ a reflexive approach to data management (Corbin and Strauss 1990). Interview data were collected through an iterative process of analysis while incorporating new questions and issues that emerged in subsequent interviews (and participant observation). Once collected, the data was transcribed and stored on a password-protected computer; only my research project team[116] could access it.

Likewise, given that my study focuses on a small pool of elites in East Africa's legal arena, I deemed it necessary to keep my interview partners anonymous unless it was relevant to the argument to identify them. For most interview participants, anonymity was important, even if certain individuals may have chosen not to be anonymous. This is because, as Ellett reminds us, when looking at a small pool of elites, people tend to know each other (Ellett Forthcoming, 18). As such, I used pseudonyms or an anonymised short description of the interviewee's function, which cannot be used to identify the particular individual (e.g., Ugandan commercial lawyer). As the profession, country of origin, references to university education, and career history are relevant to the contextual background of my study, I have chosen to include them unless otherwise instructed. I kept the relevant biographical details and only obscured them if necessary. However,

116 The Political Science team of the MuDAIMa project, *supra* note 103.

for the REC judges who informed the crux of the study and whose personal and professional information is relevant to the study's argument, I obtained informed consent to quote them and use their interview data.[117]

A vital aspect of the analysis was to generate patterns and draw logical arguments from the diverse strands of collected data. For the thematic analysis of interview data, I relied on the analysis software MAXQDA to import audio recordings and written transcripts, analyse developing trends, categories, and code for themes (Kuckartz and Rädiker 2019). Categories were coded through an inductive and data-driven thematic analysis (Silver and Lewins 2014, 23–33) based on the study objectives and particular emphasis on answering the research questions. This type of analysis, primarily thematic, is intended to identify common concepts from the data to generate meanings and interpret findings and, thus, does not necessitate verbatim transcription (Halcomb and Davidson 2006, 40). Since interviews were usually audio-recorded while taking concurrent notes, I either transcribed in summary form (excerpt transcription) or took verbatim notes (complete transcription) where I had already identified analytical relevance.

As such, interviews were analysed two-fold: first, through a closer reading of interview notes (containing critical points raised in interviews), which were used to supplement the transcripts or interview summaries. Additionally, a critical appraisal of crucial interview transcripts was conducted, accompanied by listening to the audio recordings to identify major themes systematically. Recognising terms and concepts that recurred, tracking relationships between actors, and paying attention to "silences" in the data to decode people's explanations for why something happened the way it did (Fujii 2017, 78) were also fundamental at this stage. Notes from the field and observations were also crucial to developing patterns, identifying gaps and making sense of the data. Since analysis occurs in tandem with theoretical and conceptual reflexivity, I coded the emergent themes along three key aspects (judicial agency, extrajudicial agency, and judicial allies) and other sub-themes that inform the study. These ideas emerged through observation, transcription, coding, and later analysis. Questions related to pressures, backlash, strategies of resistance, and implications for regional integration had already been raised, paving the way for further analysis.

Content analysis of archival data (newspaper records, EACJ documents, reports, and social media content) was done to corroborate and complement interview data and reveal evidence of strategies in the social construc-

117 Similar reasons apply to the registrars and lead judicial allies, such as heads of the East Africa Law Society.

tion of court power. Moreover, such data presented appropriate examples of practical strategies for judicial empowerment and could be systematically coded to support the earlier identified themes. As previously stated, while field observations enabled me to understand the core questions being brought before the court, archival documents, such as bar association reports, EACJ reports, and social media content provided context, clarified legal terminology, and offered practical insights into the construction of judicial power.

Lastly, an iterative process of analysing the universe of cases was done in several stages. Initially, this was meant to identify "repeat lawyers" and organisations I wanted to contact for data collection. Later, the data was analysed using Excel data analytics, such as pivot tables, charts, graphs, and simple formulas, to identify the types of cases the court handles and observe trends in jurisdiction across benches and over time.

3.5 Reflections on Positionality

Previous scholarship explicitly states that "judges dislike being measured and ranked by academics who do not understand anything about what qualities make for a truly great judge" (Knight and Gulati 2017, 2). Indeed, the hurdles of researching judges are intensified for *Law and Courts* field investigators, where the profession's cherished virtues – protocol, hierarchy, and decorum – may impede access to interviewees. Conducting research within elites presents unique methodological challenges (Beckmann and Hall 2013), despite some scholars problematising the elite-non-elite binary (Fujii 2012; 2017; MacLean 2006; Smith 2006). However, if we nuance the location of power during interviews as relational, multi-directional and complex, it is worth advancing discussions on methodological considerations in the study of *Law and Courts* to offer a reflexive account of researching members of the secretive and supposedly 'apoliticised' judicial profession.

Interpretivist political scientists agree that the relational dynamics between interviewer and interviewee significantly impact research (Fujii 2012; 2017). Above all, the challenges of researching legal elites, particularly for early-career women scholars, are widely acknowledged (Ortbals and Rincker 2009; Ellett Forthcoming). Active reflexivity is a virtue because all research interactions are "rooted in power and social relationships"

(Mosley 2013, 9).[118] Positionality theory recognises that people have multiple overlapping identities, and knowledge production is not devoid of those identities; rather, meaning-making is a result of various aspects of human identity (Bourke 2014). Undeniably, a researcher's positionality influences who accepts being interviewed, and their access determines what information participants are willing to share and directly bears on "the knowledge claims the researcher can advance" (Fujii 2017, 15–16).

Accordingly, I reflected on my positionality during the collection and analysis of interview material to factor in the impact that my subjectivity will bear on my research project findings.[119] Even if my experience emerges while studying "up" amongst mostly legal elites, it resonates with the experiences of other early-career female scholars navigating the field (Debele 2017). In my experience, reflexivity enriched the research process and stressed what I had already sought – the coproduction of knowledge with the human participants I studied.

118 I use reflexivity to imply "sustained reflection on how the researcher and her positionality affect evidence generation, on the implications of ethical principles in the research setting, and on the consequences of both for research practices and the research process" (Kapiszewski and Wood 2022, 950).

119 For a separate and more detailed account of this discussion on positionality, see a previously published working paper (Kisakye 2023).

4. EACJ Politics & Pressures

As the first two chapters highlight, African Regional Economic Community (REC) courts operate within a strategic space, and only by understanding the REC courts' *raison d'être* and position within the EAC infrastructure can we begin to comprehend why these courts must draw on judicial and extrajudicial agency to build and forge their power. This chapter makes the case for investigating strategies of empowerment by situating the East African Court of Justice (EACJ) within its historical, contextual, and structural constraints. It examines the EACJ from the inside out, starting with the formally transcribed rules of court composition, judicial tenure and leadership before providing a brief history of the formation of judicial institutions in the EAC. It historicises the developments that led to the creation of the EACJ courts by taking a bird's-eye view of the past and current developments of the EAC court. It then provides an overview of the broader constellation of factors and strategic space within which the EACJ operates. The chapter also illustrates how such factors limit the courts' authority and autonomy, emphasising the relevance of judicial resilience and the need for strategic empowerment. The goal of the chapter is to provide an illustrative depiction that delineates the boundaries, complexities, and dynamic nature of regional integration courts in Africa, as drawn from the experience of the EACJ.

4.1 East African Court of Justice

Rooted in regional integration processes, the EACJ[120] is the judicial arm of the East African Community (EAC).[121] The court became operational following its inauguration on November 30, 2001, by the Summit of EAC Heads of State.[122] The duty of the EACJ is specified as ensuring "adherence

120 Also simply referred to as "the court."

121 Established under Article 9 (1) (e) of the EAC Treaty.

122 Six judges, two from each of the three founding partner states (Kenya, Uganda, and Tanzania) were sworn in together with the pioneer Registrar. Among the first tasks undertaken by the new court was the drafting and adoption of its Rules of Procedure. See Art. 42 of the EAC Treaty.

to law in the interpretation and application of and compliance with" the EAC Treaty.[123] Thus, settling disputes that may arise as the EAC implements its core objectives is its primary duty. The court can be accessed by the EAC partner states, the Secretary-General of the Community, legal or natural persons and EAC employees in pursuit of dispute resolution pertaining to matters under the Treaty.[124] EACJ conducts its hearings and delivers rulings in public sessions.[125]

4.1.1 EACJ Mandate

International courts (ICs) generally have differently delegated powers and specific jurisdictions, which are, at times, not entirely clear-cut. The EACJ has a broad mandate, but it does not include the jurisdiction granted to partner state organs by the Treaty.[126] Moreover, the EACJ's broad jurisdiction[127] has been limited in its application since its inception. The Council of Ministers has not operationalised the court's mandate to confer appellate and human rights mandate over two decades later.[128] Even though the decision to extend this jurisdiction was made in November 2004 (Ruhangisa 2011, 26), its subsequent protocol remains unresolved.

Despite several efforts undertaken by the pioneer[129] and successive[130] benches to relevant bodies in the EAC seeking to expand the EACJ's jurisdiction, partner states remain unyielding in their refusal to grant it. Partner states have justified their reluctance to confer human rights jurisdiction by reasoning that human rights claims should be pursued through the African Court on Human and Peoples' Rights (Ebobrah and Lando 2020, 185). However, this reasoning might be unsubstantiated due to the withdrawal of

123 Art. 23 (1) EAC Treaty.
124 Art. 23 (1); 28; 29; 30; 31 EAC Treaty.
125 Art. 35 (1) EAC Treaty.
126 Art. 27 (1) EAC Treaty.
127 Broadly stated to involve all matters pertaining to the interpretation and application of the EAC Treaty (Art. 27 (1) EAC Treaty). The EACJ also has arbitration jurisdiction, under arbitration clauses and special agreements (Art. 32 EAC Treaty), to act as an arbitral tribunal upon request. It also has jurisdiction over matters of trade, investment, as well as the EAC Monetary Union, which was granted but is awaiting a Protocol to operationalise it (Otieno-Odek 2017, 468).
128 See Art. 27 (2) EAC Treaty.
129 Online interview, EACJ Pioneer Judge, Solomy Balungi Bossa, June 10, 2020.
130 Online interview, EACJ Appellate Judge, Geoffrey Kiryabwire, June 18, 2020.

some EAC partner states from the African Court.[131] Other overtly political motivations for the hesitation have been put forward, such as the partner states' fear of vesting another IC with human rights jurisdiction.[132] Another explanation is that partner states defer this issue until an EAC political federation is attained.[133] Nevertheless, despite these limitations, the EACJ has craftily built its human rights jurisprudence with the assistance of judicial allies (Alter, Gathii, and Helfer 2016; Taye 2019).[134]

4.1.2 Composition and Leadership

The EACJ has a First Instance Division (FID) and an Appellate Division (AD),[135] with a maximum of fifteen judges. Ten and five judges sit on the respective benches.[136] Only two judges should hail from the same partner state.[137] Judges are in office for a seven-year, non-renewable term and can serve their full terms until the age of 70.[138]

The court is headed by the president, who is the administrative head of the court[139] and the head of the Appellate Division.[140] The Vice-President assists the President, and both are appointed by the Summit of Heads of

131 Other observers perceive the "concurrent" jurisdiction with the African Court on Human and Peoples' Rights as misdirected (Ruhangisa 2011, 34).

132 They point to the indictment of the former Kenyan president and his Deputy at the International Criminal Court (ICC) and Tanzania's withdrawal of its declaration permitting individual petitions to the African Court as some such discouraging scenarios.

133 Speech, Hon. Justice Nestor Kayobera, EACJ President, Judicial tripartite forum, June 7–29, 2022, Hotel Verde, Zanzibar. https://www.african-court.org/wpafc/east-african-court-of-justice-remarks-by-hon-justice-nestor-kayobera-president-of-east-african-court-of-justice-during-a-judicial-dialogue-between-regional-and-sub-regional-courts-in-africa/.

134 See *Chapter 6* for a detailed account of this.

135 Once single-tiered, the court was split following the 2007 amendments to the Treaty. At the time, the court comprised six judges from each of the original three partner states.

136 Art. 24 (2) EAC Treaty.

137 For a detailed account of all major structural elements and appointment criteria, see the relevant international regulations available online at: https://doi.org/10.15495/EPub_UBT_00007471.

138 Art. 25 (1) (2) EAC Treaty.

139 Responsible for the administration and supervision of the court pursuant to Art. 24 (7a) and Art. 24 (10) EAC Treaty.

140 Represents the AD, regulates the disposition of the matters brought before the court and presides over its sessions as stipulated in Art. 24 (7b) EAC Treaty.

State.[141] The office of the president is held in rotation among the partner states after the completion of any one term.[142] Likewise, the Principal Judge is the head of the First Instance Division (FID),[143] assisted by the Deputy Principal Judge, both of whom are appointed by the Summit.[144] Moreover, all four court leaders ought to hail from different partner states.[145]

The Registrar oversees court administration and performs other duties stipulated under the Treaty and court rules.[146] All three court leaders – President, Principal Judge and Registrar[147] – reside and work permanently in Arusha. Because the other judges continue to reside in their respective home countries and only assemble for scheduled hearings by sessions, the bulk of the empowerment activities to be explored in the following chapters has fallen on the shoulders of the court leadership.

4.2 EACJ within the Integration Project

Regional integration efforts in East Africa can be traced back to early British colonial times. At the time, the colonial agenda was to build an economic bloc in an effort to achieve greater political control over British East Africa. The first integration project was anchored in shared supranational institutions, infrastructure, and services. The Kenya-Uganda Railway was constructed between 1897 and 1901 to provide a gateway from the coast to the hinterland (Masinde and Omolo 2017, 15). On the economic front, a single regional currency,[148] the establishment of a Customs Collection Center for Uganda in Mombasa in 1900, a Currency Board, and a Postal Union (in 1905) were also created. These developments were followed by the creation of a justice system, the Court of Appeal of East Africa (EACA)[149], in 1909, to protect the advances in regionalisation and a Customs Union in 1919 (ibid., 15). A significant step in the early integration process was

141 Art. 24 (4) EAC Treaty.
142 Art. 24 (9) EAC Treaty.
143 The Principal Judge directs the work of the FID, represents it, regulates the disposition of the matters brought before the court and presides over its sessions, as spelt out under Art. 24 (8).
144 Art. 24 (5) EAC Treaty.
145 Art. 24 (6) EAC Treaty.
146 Art. 45 (4) EAC Treaty.
147 Upon the retirement of the second Registrar in January 2023, the Community hired a Deputy Registrar to take over the daily administration of the court.
148 The East African Shilling was used in the three countries by 1905.
149 EACA served as an appellate court for all the East African territories.

the establishment of the East African High Commission in 1948, aimed at establishing a "quasi-federation" between Uganda, Kenya, and Tanganyika (Kasaija 2010, 25). The High Commission comprised "the three territorial governors, with a Secretariat manned by technocrats with a region-wide outlook and expertise, coordinated the common services" (ibid., 25). Laws issued by its legislative organ, the East Africa Central Legislative Assembly, were enforceable in all three countries.

Following the independence of all three countries, an umbrella organisation to coordinate existing cooperation in terms of a regional trade agreement rather than a political federation took shape with the coming into force of the Treaty for East African Cooperation, establishing the East African Community (EAC) in 1967 (Kasaija 2010, 27). Although the EAC was already quite advanced, with a common market, common services, and a judicial arm and was considered "a model of regional integration and development" at the time, the EAC collapsed in 1977 (Masinde and Omolo 2017, 15).[150] The collapse of the defunct EAC followed the end of some of its institutions, including the EACA. After long contemplation and deliberation, the East African Community was revived on 30 November 1999, with the signing of the EAC Treaty.

The current EAC is a regional intergovernmental organisation comprising eight partner states.[151] As outlined in its *fundamental*[152] and *operational*[153] principles, the new EAC integration project is explicitly human development-oriented, aspiring for closer ties in social, cultural, political, and technological sectors to achieve sustainable development. The EAC seeks incremental economic integration, having established a Customs Union[154] and Common

150 The collapse is attributed to several reasons, including its "strong intergovernmental (interstate) structure" and the "ideological differences between the leaders of the Member States" (Masinde and Omolo 2017, 16).

151 The original three members – Kenya, Tanzania, and Uganda – signed the Treaty in 1999, and it entered into force in July 2000. Burundi and Rwanda became full members in July 2007. South Sudan became a full member in September 2016, whereas the Democratic Republic of Congo (DRC) and Somalia achieved the same in July 2022 and March 2024, respectively.

152 Art. 8 EAC Treaty.

153 Especially, the operational principle that "the Partner States undertake to abide by the principles of good governance, including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights" as stipulated in Article 7 (2) of the EAC Treaty.

154 In force since 2005, this established free trade for intra-EAC goods and services and agreed on a Common External Tariff amongst EAC states (Art. 75 EAC Treaty).

Market[155] and is in the process of establishing a Monetary Union.[156] Most strikingly, the EAC's ultimate objective is establishing a political federation, which is currently being fast-tracked as a confederation.[157] Scholars are not optimistic about the EAC states' realisation for the political federation as historical motivations for integration (Pan-Africanist agenda), and current realities (national sovereignty interests and enlargement of the EAC) outweigh the conscious efforts to federate (Makulilo, Stroh, and Henry 2018).

The revamped EAC aims at deeper integration than its predecessor envisioned while avoiding the mistakes that led to the latter's failure. It drew inspiration from the European Union (EU) for its institutional and legal frameworks (Ugirashebuja et al. 2017), establishing Organs and Institutions to accelerate the implementation of these objectives. Aside from its judicial arm, the EAC has six other governance structures, with the executive arm strongly represented in its organs (the Secretariat, Council and Summit) and one legislative arm. The Summit of Heads of Government of partner states is the overall executive head of the EAC. It "drives the integration agenda and provides the general direction" to achieve regional objectives (Khadiagala 2016, 177). The Council of Ministers (the Council) comprises Ministers responsible for regional cooperation and the Attorneys General of each partner state.[158] As the primary policy organ,[159] the Council serves as the central decision-making and governing body of the EAC.[160] The East African Legislative Assembly (EALA) is the legislative arm of the Community.[161] It comprises nine elected members from each partner state, seven ex-officio

155 In force since 2010, the Common Market allows for free movement of people, capital, labour, services, and the right of establishment and residence within the EAC (Protocol on the Establishment of the East African Community Common Market. Done at Arusha, November 20, 2009).

156 The East African Monetary Union Protocol was signed on November 30, 2013, and it "allows the EAC Partner States to progressively converge their currencies into a single currency in the Community" (East African Community. n.d. "Monetary Union." https://www.eac.int/monetary-union (Accessed May 28, 2023).

157 East African Community. n.d. "Political Federation." https://www.eac.int/political-federation (Accessed May 28, 2023).

158 Art. 13 EAC Treaty.

159 Art. 14 (1) EAC Treaty.

160 The Council initiates and submits Bills to the EALA and considers the budget, among others (Art. 14 (3) EAC Treaty). The third organ, the EAC Coordination Committee – which reports directly to the Council – is made up of the permanent secretaries responsible for regional cooperation in the partner states and coordinates the activities of various Sectoral Committees.

161 Art. 49 (1) EAC Treaty.

members, Ministers responsible for regional cooperation, the Secretary-General, and the Counsel to the Community.[162] EALA debates and approves the Community budget and recommends to the Council how to proceed with decision-making.[163] The Secretariat conducts EAC administration activities and manages the Community's finances, including submitting the budget to the Council for consideration.[164] Whenever the court (EACJ) has specific requirements – whether financial, staff-related, or jurisdictional – they must go through the Secretariat, as it is solely responsible for forwarding bills to EALA through the Coordination Committees, managing strategic planning and monitoring of EAC programmes[165] as well as staff recruitment. Hence, the court is institutionally dependent on the Secretariat and other organs. Scholars have critiqued this governance model of the EAC, arguing that it "does not sufficiently reflect the principles of separation of powers and judicial independence, thereby posing a threat to the democratic advancement of the Community" (Mwanawina 2018, 95).

In addition to institutional dependence, grievances in the executive arms of the EAC have adversely affected the court's performance and institutionalisation. In the past few years, several intra-EAC conflicts have cost the Community revenue,[166] led to border closures and stagnated regional trade,[167] and postponed the Summit.[168] The Council has also faced criticism for delaying the ratification of the regional protocols.[169] The postponement of the Summit and Council meetings affects the activities of the Communi-

162 Art. 48 (1) EAC Treaty.
163 Art. 49 (2) EAC Treaty.
164 Art. 66 (1); 71 (1) (i) (j) EAC Treaty.
165 Art. 71 (1) (c) EAC Treaty.
166 For example, Burundi and Tanzania stalling their contributions to the EAC. See Nantulya, Paul. 2017. "The Costs of Regional Paralysis in the Face of the Crisis in Burundi," *Africa Center for Strategic Studies*, Spotlight, August 24. https://africacenter.org/spotlight/costs-regional-paralysis-face-crisis-burundi/.
167 The closure of the Uganda-Rwanda border in early 2019 is a remarkable example. See Ashaba, Ivan and Gerald Bareebe. 2019. "Closed Borders and Fighting Words: Rwanda and Uganda's Deepening Rift," *African Arguments*, March 12. https://africanarguments.org/2019/03/closed-border-fighting-words-rwanda-uganda-rift/.
168 South Sudan and Burundi have been the biggest culprits in non-attendance. See East African Community. February 22, 2020. "21st Ordinary Meeting of the Summit of the EAC Heads of State postponed to a later date" and New Vision. November 30, 2018. "EAC Summit postponed due to absence of Burundi." https://www.newvision.co.ug/news/1490531/eac-summit-postponed-absence-burundi.
169 Sabiiti, Daniel. 2022. "EALA: Regional Council of Ministers blamed on integration setback." *Kigali Today*, October 31. https://www.ktpress.rw/2022/10/eala-regional-council-of-ministers-blamed-on-integration-setback/.

ty as a whole and the court in particular.[170] Case in point, court activity came to a standstill in November 2020 when seven of the judges' tenures expired, leaving the court without a quorum for over five months.[171] Even though the EAC had staggered the initial appointments, catering to institutional memory and continuation, this hiccup undid that superb arrangement. As a result, newer judges did not undergo the usual orientation to be socialised into the court's jurisdiction.[172] Other aspects of the court's staffing are also eroding. Since the retirement of the former Registrar, Yufnalis Okubo, over a year ago, there has not been a replacement; instead, a deputy Registrar has been installed.[173] Interestingly, while Okubo served, he did not have a deputy Registrar; now it is vice versa.

4.2.1 Meagre Budget Allocation

Financial resources to run the court are planned and approved as part of the annual EAC budget. For the last nine financial years,[174] the EAC budget average has been 102,346,275 US Dollars ($), with at least 55% of that amount being contributed equally by partner states (or solicited from other avenues). The rest is usually expected to be sourced from the bloc's Development Partners.[175] The EAC and EACJ budgets have gradually

170 Anami, Luke. 2020. "EAC Bills, budget waiting for quorum at summit." *The East African*. February 29. https://www.theeastafrican.co.ke/tea/news/east-africa/eac-bills-budget-waiting-for-quorum-at-summit-1437738.

171 Anami, Luke. 2021. "Long wait for justice draws to a close as Summit set to appoint judges." *The East African*. February 23. https://www.theeastafrican.co.ke/tea/news/east-africa/summit-set-to-appoint-judges-3300064.

172 Interview, Former EACJ Registrar, October 1, 2021, Kampala, Uganda.

173 Sabiiti, Daniel. 2022. "Christine Mutimura-Wekesa is new Deputy-Registrar of EAC Court of Justice." *Kigali Today*, May 7. https://www.ktpress.rw/2022/05/christine-mutimura-wekesa-is-new-deputy-registrar-of-eac-court-of-justice/.

174 In-depth research did not yield any reliable data from the first decade of the court's existence.

175 The leading and most consistent development partners of the EAC are the Federal Republic of Germany and its agencies – *Deutsche Gesellschaft für Internationale Zusammenarbeit* (GIZ) and the *Kreditanstalt für Wiederaufbau* (KfW), the Swedish International Development Agency (SIDA) and the People's Republic of China; the United States of America and its United States Agency for International Development (USAID), the European Union (EU), the African Development Bank (AfDB) and the World Bank (East African Community 2019, 56). Unfortunately, further research into all EAC Budget Speeches – and other relevant documents – does not

been reducing since 2016 and have only started to pick up in the last two financial years.

Table 3: EACJ vs EAC Budget

Financial Year	EAC Budget ($)	EACJ Budget ($)	% EAC budget
2015/2016	110,660,098	4,301,551	3.89
2016/2017	101,374,589	4,286,477	4.23
2017/2018	110,130,183	4,140,166	3.76
2018/2019	99,770,715	3,982,446	4.00
2019/2020	111,450,529	4,225,241	3.80
2020/2021	97,669,708	3,970,406	4.06
2021/2022	91,784,296	3,791,723	4.13
2022/2023	91,579,215	3,803,836	4.15
2023/2024	103,842,880	4,450,488	4.28
2024/2025	112,984,442	4,858,553	4.30
Average	102,346,275	4,185,636	

Source: Created by the author from publicly available EAC budget speeches.[176]

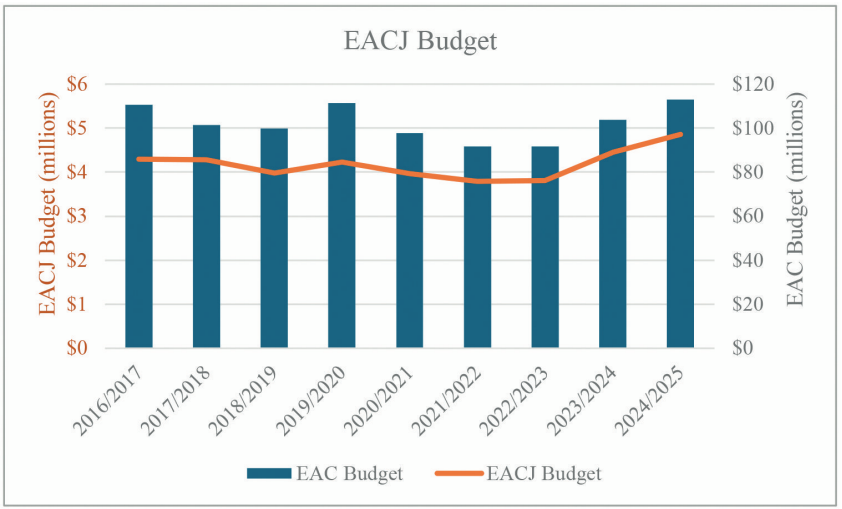
The reduction in the overall EAC budget is due to several factors. Firstly, reliance on development partners has led to a steady decline in budget allocation due to the phasing out of funds for some projects (East African Community 2015, 87). Secondly, as donor support for the budget dwindled, partner states' contributions did not increase. Instead, some partner states derailed the budget-making process, whereas others have not met their contributions since joining the REC bloc.[177] Moreover, even those countries that meet their contributions struggle with irregular remittances and financial instability.[178]

yield much in terms of relative donor contributions. It appears that the EAC does not avail this information.

176 See EACJ Budget Speeches (East African Community 2015; 2016; 2017; 2018; 2019; 2020; 2021; 2022; 2023; 2024).

177 Kamurungi, Elizabeth. 2023. "EAC budget crisis: TZ, Congo reject $103m supplementary." *The Daily Monitor*, August 16. https://www.monitor.co.ug/uganda/news/national/eac-budget-crisis-tz-congo-reject-103m-supplementary--4337416.

178 Starting off with a positive trend, the Republic of Somalia – which only joined recently – has already paid its full budgetary contribution for the financial year 2024/25. See Anami Luke. 2024. "Somalia pays $7.8m towards EAC budget." *The*



Given the funding challenges in the REC bloc, the EACJ, which does not have financial autonomy, has explicitly expressed dissatisfaction with the funding it receives. The court reports a "systematic annual reduction of budgetary allocation" and cites a lack of appreciation for its role within the Community (East African Community 2022, 31). However, focusing on the reduction of EAC the budget in isolation could be misleading. For instance, the EACJ received 4%, 4.13% and 4.28% of the EAC budget in the 2018/2019, 2021/2022 and 2023/2024 financial years, respectively (East African Community 2018; 2021; 2023). And yet, the EAC Secretariat received 47%, 47.78%, and 49% of the EAC budget. In contrast, the East African Legislative Assembly (EALA) received 13.4%, 16.8% and 17% of the EAC budget for the same financial year (East African Community 2018; 2021; 2023). Indeed, the court has been allocated a lower budget than other EAC organs and institutions[179] despite its growing caseload and consequent backlog (East African Community 2023). While there has been no notable increase in its budget, there has also been no reduction. On average, the EACJ has been allocated only 4% of the EAC budget across time.

East African, July 06. https://www.theeastafrican.co.ke/tea/news/east-africa/somalia-pays-7-8m-towards-eac-budget-4681534.

179 The Inter-University Council for East Africa and the Lake Victoria Basin Commission also receive more budgetary allocation than the EACJ – 12 and 9 percent of the EAC budget, respectively (East African Community 2021, 38).

Unlike the EALA and the Secretariat, the EACJ seems to be systematically financially disenfranchised. While the other two organs have seen a steady and gradual increase in their budget allocation, the court has not been as privileged. It is important to note that the East African Community and all its organs are largely financed by contributions from member states, although some of their projects are funded through resource mobilisation from external development partners.[180] However, due to the financial and administrative dependence on the Secretariat, the court has missed out on opportunities for support from development partners, whose funding rules did not allow them to channel monies in a joint EAC account (East African Court of Justice 2023, 46-48).

The graph above shows that the EACJ budget mirrors the overall state of funds available to the EAC. As the general budget decreases, so does the EACJ budget allocation. It is worth noting that financial constraints, as experienced by the EACJ, are not unique to the court but reflect the financial deficit faced by the REC body. Thus, it is essential to consider the EACJ budget, not in isolation, but in relation to funds availed to other REC organs and institutions. Likewise, the court has grown in caseload, in number of staff and judges, and as such, would like to receive a budget that is befitting of its stature. Hence, the court operates in a financial strategic space, and as the rest of the study will show, judges have had to mobilise for funding.

4.2.2 Ad hoc Service and Double Agency

Tied to the financial burden is the ad-hoc nature of judicial service, which heavily impacts the court's performance.[181] As mentioned in the court's 2018–2023 Strategic Plan, despite its existence for two decades, it still faces difficulties with institutionalisation (East African Court of Justice 2018, 16). EACJ judges continue to work on an *ad-hoc* basis,[182] with only the court leadership residing and working permanently in Arusha.[183] This setup, where judges continue residing in their respective home countries, proved to be a challenge in the composition of judicial panels required for the

180 Art. 71 (1) (h) EAC Treaty.
181 Ibid.
182 Ibid., 6.
183 Arusha is the temporary seat of the court until the EAC Summit of the Heads of States determines its permanence.

Court to hear a matter.[184] To remedy the issue, the court resorted to hearings by sessions instead of continuous sittings.

> "The EACJ sessions are held quarterly a year due to the ad hoc nature of service of the Judges. With the exception of the President and the Principal Judge who serve full time, the rest of the Judges service on a *temporary* basis."[185]

As such, the EACJ has at least three sessions per annum, depending on funding availability.[186] The infrequent assembly delays the "disposal of cases and hinders efficiency" (Otieno-Odek 2017, 485). While the temporary nature of the court was sensible in its early years due to a lack of workload and visibility, this arrangement seems inappropriate given the increasing caseload. Judicial interviews and participant observation at relevant court events epitomised the urgent need for full-time judges, which heavily impacts court performance.[187] Usually explained away in terms of scarcity of EAC funding, EACJ administrators interviewed in the study insisted that it is indicative of the lack of prioritisation of the court by the regional judicial body.

Furthermore, because EACJ judges only work part-time, they retain their positions in public service or the national judiciaries. This bifurcation of responsibility has been referred to as "double agency" (Taye 2020, 352), as judges become regional judicial actors who still maintain ties to their governments. The pressures of being a double agent for the REC body and one's appointing government and employer are heightened. The EACJ perceives this setup as challenging its perceived independence and political legitimacy (East African Court of Justice 2018, 16). As explored in the empirical chapters, the question of who ends up on the bench bears implications for judicial decision-making.

4.2.3 Opaque Judicial Appointments

Conventional wisdom suggests that IC judges are already at risk of interference from their appointers, who may use recontracting politics to influ-

184 The bench is considered to have quorum with three or five judges (Rule 69 of EACJ Rules of Procedure 2019).
185 Speech by Hon. Justice Nestor Kayobera, *supra* note 62.
186 Online Interview with Former EACJ Registrar, March 9, 2021.
187 See *Chapter 3*.

ence the court (Alter 2008) or subtler signalling techniques to curb their activism (Helfer and Slaughter 2005). The fact that EACJ judges serve concurrently on the REC bench and in their home countries poses an even greater risk of influence. Assumptions that member states may control the appointments by drawing on personal connections, affiliations, and other personal relationships to heavily influence and steer these appointments abound.[188]

Judicial selection to ICs worldwide remains "shrouded in mystery" (Terris, Romano, and Swigart 2007, 15). With a few notable contributions emerging from the European Court of Human Rights (Voeten 2007), the International Criminal Court, the International Court of Justice (Mackenzie et al. 2010) and the Appellate Body of the World Trade Organization (Elsig and Pollack 2014), we hardly know how and why judges arrive on international benches. In our investigation of appointments to African REC courts, we found that selecting judges for African courts at the regional level is even harder to grasp (Stroh and Kisakye 2024). The formal rules on the selection of judges are thin, stating that the Summit appoints judges from persons recommended by the partner states.[189] The Treaty remains silent on the processes of picking the candidates at the national level. Moreover, there are no written rules of selection at the national level, no specifications on the duration of appointments, and, at times, even the responsible nominating body is unknown.

As such, informality emerges in the form of relational informality (Dressel, Sanchez-Urribarri, and Stroh 2017) to complement regulatory gaps.[190] Thus, regional selection processes do not follow national procedures for judicial appointments, usually occurring under the guidance of the Judicial Service Commission (JSC) in East African Community (EAC) common-law countries. Instead, the process for EACJ judicial appointments is opaque, informal and in the hands of a few selectors who have much leeway in the selection process (Kisakye and Stroh 2024). We argue that because African sub-regional courts are relatively new entities, judicial appointments have been rare opportunities undertaken by various governments, which has hindered institutionalisation. Nevertheless, the opacity in

188 Interviews by author, September 2021- July 2022, Eastern Africa.

189 Art. 24 (1) EAC Treaty.

190 The idea that formally codified rules guarantee professionalism or, at least, the fair representation of diverse points of view on the bench is prominently included in assessments of de jure judicial independence (Melton and Ginsburg 2014). However, formal appointment rules never tell the entire story.

regulations leaves much room for the states to make political appointments that threaten the court's legitimacy (Ruhangisa 2011).[191]

4.2.4 Not an Appellate Court!

The EACJ is also still haunted by ghosts from its past. During interviews for this study, judges occasionally reflected on their role in integration, often differentiating their approach, mandate, and intervention from those of their predecessors. Unlike the East African Court of Appeal (EACA), which was the judicial organ of the defunct EAC (1967 to 1977), the EACJ has not been granted appellate jurisdiction.[192] EACA had its roots in the first integration project, which was anchored in shared supranational institutions, infrastructure and services and functioned as an appellate court of all British East African territories.[193] With the independence of Tanganyika, Uganda, and Kenya, the newly independent states decided to "keep and maintain" EACA, but its powers and jurisdiction were to be determined by the Parliament of each partner state (Katende and Kanyeihamba 1973, 44). Essentially, this development stripped powers from EACA and placed them in the hands of municipal courts in the new states. As explored in the rest of the thesis, judicial decision-making in the EACJ aligns with REC initiatives due to a fear of the collapse of the REC body.

Moreover, litigants sometimes confuse the jurisdiction of the EACJ, believing it to be an appellate court. The EACJ neither oversees decisions of the highest courts in the EAC partner states nor does it assume that role.[194] Noteworthy, though, is that domestic courts in partner states are not excluded from hearing disputes involving the Community unless jurisdiction is expressly conferred on the EACJ with respect to that matter.[195]

191 Studies on African national courts also hold appointments responsible for their legitimacy and performance deficits mainly due to the informal role of politicians in the selection process (Fombad 2014).

192 Art. 27 (2) EAC Treaty.

193 Even though it started out tending to the British Central African Protectorate (Malawi) as well, it was reconstituted in 1910 to include Tanganyika and Zanzibar within its jurisdiction and terminated its jurisdiction over Malawi (Katende and Kanyeihamba 1973, 43).

194 "There is a need for much sensitisation about community law and practice at the EACJ as some still confuse it with being an appellate court" (Interview, EACJ Judge, June 18, 2020).

195 Art. 33 (1) EAC Treaty.

Nonetheless, decisions of the EACJ on the interpretation and application of this Treaty have precedence over decisions of national courts on similar matters.[196] The EACJ falls under Alter's "New-Style ICs,"[197] whose experience is largely modelled on the Court of Justice of the European Union (CJEU).[198]

However, unlike the CJEU, which was built on preliminary reference procedures initiated by member states (Cuyvers 2017), the EAC has not had the same success with national courts. National courts are mandated to request a preliminary ruling on any question of law related to the interpretation, application, or validity of treaty provisions and other Community texts from the EACJ to aid them in determining cases before them.[199] Member states' municipal courts – both higher and lower – have hardly sought their counsel in this regard, with only one *preliminary reference procedure*[200] to date.[201] The apparent lack of engagement by national courts is somewhat puzzling, given that most EACJ judges continue to serve actively in their national judiciaries. Interviews hint at a level of interest from national judges, albeit a mostly an informal one:

> "The colleagues from the civil and commercial division of the High Court are especially interested in what we do. Of course, not all, but there'll be colleagues I continually chat with when we go back. Occasionally, our decisions come out in the media because some come from the local courts. So, they get interested and sit down and engage in professional conversation. But there's no formal or day-in-day-out or regular engagement on, you know, our discussion. But informally, you get people who are interested in what you're doing. The principal judge, specifically.

196 Art. 33 (2) EAC Treaty.

197 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). Such actors include international commissions, institutional actors, and private litigants.

198 Albeit "with a local flavour" as its Rules draw heavily on the old Rules of the EACA (Online interview with the EACJ Appellate Judge, June 18, 2020).

199 Art. 34 EAC Treaty.

200 Case Stated No. 1 of 2014. *Attorney General of Uganda vs Tom Kyahurwenda.* Appellate Division, July 31, 2015. https://www.eacj.org/wp-content/uploads/2015/08/PRELIMINARY-REFERENCE-CASE-STATED-ON-01-OF-2014-FINAL.pdf.

201 Likewise, EAC organs are also barely requesting the court's Advisory Opinion. An advisory opinion, determined by the appellate chamber, can be requested by The Summit, Council of Ministers and or partner states regarding questions of law arising from the Treaty (Art. 36 EAC Treaty).

> We chat with him every now and every time we come back; he knows. The Chief Justice, too, will know when I am coming here, and he will occasionally ask how things are going."[202]

A few vital points emerge from this interview excerpt: the leaders of the top courts – such as the Principal Judge and Chief Justice – tend to show an interest in the judges, but perhaps mostly at an administrative level. Because these judges must leave their chambers at the domestic courts, court leaders ought to plan and reallocate cases to other judges promptly before REC judges set off for Arusha. As such, court leaders tend to ask about the court at an informal level to aid in planning or personal curiosity rather than formally. Were they to wish to support the EACJ, they would opt for feedback sessions with EACJ judges, judicial training on EAC law that elucidates the preliminary reference procedures and enforcement of EACJ rulings, both of which are the most direct avenues that domestic courts can lease with regional courts. While international courts (ICs) speak law to power and can influence governments to alter their behaviour, they cannot force governments to comply with their rulings. Relatedly, the EACJ does not have the power to implement its decisions on its own. It must work hand in hand with the national courts as it relies on national legal systems to enforce its decisions.[203] In contrast, the Council of Ministers or the partner states implement non-pecuniary commitments.[204] As such, the conditions for enforcement of its rulings leave the compliance question at the mercy of the partner states and policy organs of the Community.[205]

Other than hosting EACJ sub-registries, my research did not find other direct avenues of cooperation with the REC court. Additionally, the excerpt hints at national judges being hardly interested in the EACJ, except for when the REC court reviewed their decisions or if they raised media attention. Moreover, High Court judges at the civil and commercial divisions – those interested in being appointed at the EACJ – tended to engage the REC judges more. This is unsurprising. However, the fact that there does not seem to be much dialogue with national judiciaries indicates the lone

202 Interview, EACJ judge, Justice Wabwire Wejuli Richard, November 11, 2021, Bujumbura, Burundi.

203 Art. 44 EAC Treaty.

204 Art. 38 (3) EAC Treaty.

205 This is not unique to the EAC, as judgements of regional courts are not readily or easily enforceable, posing a challenge to the legitimacy and authority of ICs everywhere (Garrett and Weingast 1993; Gibson and Caldeira 1995; Howse and Teitel 2010; De Silva 2016).

journey that REC judges must tread, and it emphasises the urgent need for mobilising judicial allies as a regional court.

4.3 Resistance in a Strategic Space

In addition to the institutional constraints above, the most pressing limitation on the operation of the regional court is executive resistance to its decision-making. Scholars have noted that the relatively small size of RECs, coupled with the "tradition of strong executive branches, weak judiciaries, and citizens who share a deep post-colonial distrust of external interference and, relatedly, a reluctance on the part of political leaders to openly challenge the actions of other African governments" (Alter, Gathii, and Helfer 2016, 296) places REC courts in a predicament. Similarly, there is a lack of political willingness of those in power to abide by decisions, as the former EACJ Registrar points out:

> "It appears that Partner States still wish to remain sovereign while they subscribe to the integration objectives that require them to cede a certain amount of their sovereignty. This state of uncertainty being expressed by the Partner States is not healthy for the integration agenda. Partner States cannot eat their cake and at the same time demand to have it" (Ruhangisa 2011, 33).

Strong executives sanctioned the judges upon issuing regime-defying judicial interventions in its first major case, *Anyang' Nyong'o vs Attorney General of Kenya*.[206] As detailed in Chapter 5, the partner states responded to the impugned ruling by hastily amending the Treaty. The Treaty amendments significantly tampered with the court's structure, jurisdiction, and access rules. Structurally, the unitary court was split into two, creating an Appellate Division with the power to review the decisions of the First Instance.[207] Moreover, new grounds were added to ease the procedure for removing judges from office. The Treaty was heavily revised to include conditions such as misconduct, bankruptcy, dishonesty or fraud as reasonable grounds

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

207 Report of the 4th Extraordinary Summit of Heads of State (Ref EAC/SH/EX/4/2006). December 14, 2006. Nairobi, Kenya (available with author), pages 3–4.

for judicial dismissal.[208] New grounds also allowed partner states to appoint temporary judges in the place of suspended judges.

As already clarified, EAC judges typically hold judicial or public office in their home countries, and the new provisions aimed at making any judicial allegations of misconduct in the partner state count at the sub-regional level.[209] This provision takes on more weight, considering that the Kenyan government had already started blatant attacks on the two judges. Unlike in their national counterparts, where political interference over the judiciary has been abundant (Ellett 2013), in the EACJ, *Anyang' Nyong'o* was the first and remains the only major backlash on the EACJ judges. It certainly set the groundwork for the succeeding benches, which were now aware of the fragile nature of the sub-regional level judiciaries.

Unlike the SADC Tribunal, the EACJ has faced a different fate: constantly threatened but still going strong. It presents an exciting puzzle: How do African ICs survive looming threats to their independence and grow their political relevance in the region? We do not know much about the threats and *strategic calculations* that judges in other *surviving* African RECs face. We do not know how they manoeuvre these looming threats, and much less is known about how they approach decision-making to build, negotiate, and maintain their power, relevance, and political standing. Drawing on the EACJ experience and splitting the bench into three distinct phases, the study investigates how individual and collective judicial agency operates with the historical and structural forces at play in Africa's ICs. The SADC Tribunal's demise is a case of the vulnerability of African ICs, but it is not the only story to tell.

The study differentiates judicial leadership in the first two decades across three benches, with a six-year time difference, to assess the context and developments over time. The demarcation into three benches is not only because of the seven-year judicial tenure that EACJ judges serve but also because of the significant critical junctures that brought about changes to the court. As such, the *pioneer bench* sat from the court's establishment in 2001 until 2007, when all the pioneer judges left the bench. The *second bench* was appointed after the contentious *Anyang' Nyong'o* case was decided. A watershed in the history of the EACJ, this case highlighted the potential political muscle of the new judicial organ; consequently, the first appellate bench was created to oversee the activist judgements of the trial

208 Art. 26 (1) (a) (c) (d) EAC Treaty.
209 Report of the 4th Extraordinary Summit (*supra* note 207, 7).

court. This bench served seven years until the appointment of the current *third bench*.[210] The following chapters will elaborate on the changes that occurred and explain the institutionalisation of the court across these three benches.

210 A visualisation of key actors in judicial empowerment in the EACJ, foregrounding the judges, registrars and court leaders across the three benches, is presented in a table (See Table 14) in the Appendix.

5. The "Bold" Pioneer Bench

> "Look at the first bench; they may not have been at the pinnacle in their own countries, but they were exceptional. They were all, in my opinion, integrationists. So, you are not just a judge. You also have some views on what integration is or should be like at the ideological level" (Repeat lawyer, March 1, 2022, Arusha, Tanzania).

The first set of judges was lauded as being legally sound and attuned to regional integration dynamics. As my interviewee explained, judicial biographies are inextricably linked to the performance, collective decision-making ability, and perceived legitimacy of the pioneer regional bench. This chapter explores how the pioneer judges set the pace for navigating the strategic space and forging the political and institutional relevance of the new court, which is the core question that this study seeks to address.

The chapter starts by foregrounding pioneer judges as crucial actors in their own judicial empowerment. It traces their trajectories to reveal the types of "powerhouses" that occupied the first bench. Section two explores the initial years of the bench before it received any cases to appreciate how it shaped its empowerment. Through partaking in a range of activities beyond judicial decision-making, so-called off-bench activities, the first bench set the groundwork for what would later become known as a "bold" bench. Part three examines the first set of cases leading up to the court's initial backlash. The last sections explore the strategies and practices that judges and the Registrar have assumed to resist undue interference and forge power amidst crumbling judicial authority. Close attention is paid to the pivotal role of the East Africa Law Society (EALS) in advocating for the new judicial organ. In the concluding section, the chapter elucidates why, even if the first bench has only handled two landmark rulings, it is deemed audacious, brave and trailblazing.

5.1 Judicial Biographies

As noted in the opening quote, Pioneer appointments indicated a renewed commitment by EAC leaders to the revamped integration agenda. All six pioneer judges were highly qualified legal personalities who had served

in various capacities in their countries' highest courts before their appointment to the regional bench. Table 4 summarises the pioneer bench members and their professional trajectories.

Table 4: Pioneer Bench Judges

Judges		Nationality	Short Bio
President	Moijo Ole Keiwua	Kenya	Court of Appeal Judge; High Court judge; State Counsel
Vice-President	Joseph Nyamihana Mulenga	Uganda	Supreme Court judge; Minister for Regional Cooperation; Minister of Justice and Attorney General; State Attorney
Members	Augustino Ramadhani	Tanzania	Acting Chief Justice of Tanzania; Court of Appeal Judge; Chief Justice of Zanzibar; Deputy Attorney General
	Jackson Kasanga Mulwa	Kenya	High Court judge; Member of Parliament; Advocate
	Joseph Sinde Warioba	Tanzania	International Tribunal for Law of the Sea (judge); Minister of Regional Administration and Local Government; Prime Minister; Minister of Justice
	Solomy Balungi Bossa	Uganda	High Court judge; Lecturer in Law; Co-founder and Chair of East African Law Society; Human rights activist; Chair of Law Council; Member of several global women judges' organisations
Registrar	Dr John Eudes Ruhangisa	Tanzania	Legal Academic, Registrar (High Court of Tanzania)

Source: Author's compilation from publicly available data and judicial CVs

Pioneer EACJ President Moijo Ole Keiuwa was a Kenyan national who had started in the Attorney General's Office and climbed to the Court of Appeal of Kenya before his appointment to the regional bench.[211] Jackson Kasanga Mulwa, the other Kenyan judge on the inaugural bench, was a High Court judge at the time of his appointment. Unlike Keiwua, a career judge, Mulwa had overt political exposure through his previous role as a Member of Parliament for Makueni Constituency (1969–1983).[212] Comparable to this trajectory is Vice President Joseph Nyamihana Mulenga, who had held

211 Standard Media, Kenya. 2020. "Court of Appeal judge Justice Keiwua succumbs to cancer." July 3. s://www.standardmedia.co.ke/busia/article/2000044480/court-of-appeal-judge-justice-keiwua-succumbs-to-cancer.

212 Nzia Daniel. 2015. "Former top judge takes final bow." *The Standard*. https://www.standardmedia.co.ke/article/2000155023/former-top-judge-takes-final-bow.

various leadership positions, both political and judicial at the national, regional, and continental levels before his appointment. Mulenga had served his homeland, Uganda, in various political positions. First as a Minister of Justice and Attorney General, then as Minister of Regional Cooperation (1986–1989), before joining the Supreme Court of Uganda in 1997.[213] He is also commended for his interest in endowing the EACJ with jurisdiction similar to that of the former East African Court of Appeal (Nsekela 2012, 2).

The other Ugandan on the bench, Solomy Balungi Bossa, was a judge of the High Court at the time of her appointment. The only woman and youngest judge on the bench, Bossa had no overt political exposure to second her appointment. Instead, she brought a wealth of experience and networks from human-rights-oriented civil society organisations. For instance, she co-founded the East African Law Society (EALS) and *Kituo cha Katiba*,[214] which were significant players in founding the EACJ.[215] Bossa was also a bar leader at national and regional levels, a human rights activist, and a member of many international, national, and regional women judges' organisations.[216]

Meanwhile, Tanzanian judge Augustino Ramadhani was the Acting Chief Justice of Tanzania (1999) when he ascended to the EACJ. Previously, he had served in various judicial capacities – as a Justice of Appeal at the Court of Appeal of Tanzania (1989–1999), as Chief Justice of Zanzibar (1980–1989), and as Deputy Chief Justice of Zanzibar (1978–1979). In addition to his judicial duties, Ramadhani was involved in academic work at the University of Dar es Salaam (1986–1989), was Vice-Chairperson of the National Electoral Commission of Tanzania (1993–1999) and was well-versed in other legal traditions through his numerous conferences, seminars and

213 African Court on Human and Peoples' Rights. Former Judges. "Justice Joseph Nyamihana Mulenga – Uganda." https://www.african-court.org/wpafc/justice-joseph-nyamihana-mulenga-uganda/.

214 A regional civil society organisation with observer status in the EAC and think tank based in Kampala, Uganda, that addresses East African governments' respect for constitutionalism, good governance and democratic development. See https://www.kituochakatiba.org/about-us.

215 United Nations International Residual Mechanism for Criminal Tribunals. Judge Solomy Balungi Bossa. https://www.irmct.org/en/about/judges/judge-solomy-balungi-bossa (Accessed November 1, 2022).

216 These organisations include the International Commission of Jurists, the International Association of Women Judges, the East African Judges and Magistrates' Association, FIDA Uganda, the National Association of Women Judges, and the Uganda Association of Judges and Magistrates. https://www.irmct.org/en/about/judges/judge-solomy-balungi-bossa (Accessed July 29, 2021).

study tours abroad and at home.[217] Fellow countryman Joseph Sinde Warioba had been a judge at the International Tribunal for the Law of the Sea (1996–1999), prior to his appointment to the EACJ.[218] He also participated in the drafting of the Organisation of African Unity (OAU) Charter on Human and People's Rights and was conversant with human rights provisions, governance and international law, broadly conceived. Additionally, Warioba was politically astute, having served as a Member of Parliament (1990–1995), Prime Minister and First Vice President of the Republic of Tanzania (1985–1990), and as Attorney General and Minister of Justice (1976–1985).

In summary, the pioneer bench was populated by judges whose judicial prowess had been tested at the national level. These judges had all been serving at crucial political junctures in their home countries, and as previous research shows, East African domestic courts were already forging judicial power at the time (Ellett 2013). Moreover, some individuals had expertise in human rights and previous experience in regional integration processes. Except for Moijo and Bossa, the bench had overt political exposure while all possessed judicial leadership at either national, regional, or continental levels. Through these associations, the judges garnered personal networks, friendships, and social capital at regional and national levels, which made them suitable for serving as representatives on the top regional bench. As we have argued elsewhere, the lack of experience with the new REC bench – its powers yet to be identified – did not pose a threat to the political appointers who likely perceived the courts as a prestigious space suitable to signal a commitment to international cooperation by sending judges with a background in regional integration dynamics (Stroh and Kisakye 2024). Thus, trusted members of the judiciary were selected primarily because of their reputation or professional norms as trusted representatives of their country. They were then left with a certain leeway and independence, but were later sanctioned following the contentious *Anyang' Nyong'o* ruling when they issued an unfavourable ruling. The first bench's judges seem to follow what Alter terms the trusteeship model (Alter 2008). In this case, the judges' delegated authority allows them to act relatively autonomously and, therefore, are less prone to manipulation tactics (Alter 2008, 35–40). However, states may employ "rhetorical" and "legitimacy politics" and other legal avenues (such as refusing to consent to jurisdic-

217 Curriculum Vitae (CV), Augustino Stephen Lawrence Ramadhani. All judicial CVs are on file with the author.

218 CV, Joseph Sinde Warioba.

tion) to send signals to defiant ICs (Alter 2008, 42–43). Thus, these actors employ "politics" to either persuade, delegitimise, or exercise contracting power over trustees (Ibid.). As the section on the bench's initial backlash elucidates, the judges were sanctioned heavily following a controversial ruling.

Aside from the judges, the pioneer registrar, Dr John Eudes Ruhangisa, was a fundamental force in shaping, developing and realising the EACJ. Preceding his appointment at the regional bench, he was lecturing at the Faculty of Law, University of Dar es Salaam (1998 – 2001). The inaugural Registrar, who participated in the debates on the treaty-making of the EAC, had previously assumed the role of founding Registrar of the Commercial Division of the High Court of Tanzania, where he played a central role in establishing this business bench. Thus, he was a suitable pick for the newly created REC bench. Although judicial tenure is limited to seven years, registrars typically serve for longer periods. Ruhangisa worked for the REC bench as its administrative head for the first 15 years and is praised for his role during the pioneer bench's initial backlash.

Ruhangisa was instrumental in setting up the court from scratch – from drafting its rules of procedure (East African Court of Justice 2019) to swearing in and training judges. With previous academic[219] and legal professional practice, Ruhangisa was fundamental in establishing the new court, as he states in an interview:

> "The first thing I did was to formulate – to get the design in my mind – what sort of international court I would like it to be. I had to put in place the Rules of Procedure to create the gateways of how people would approach the court. I singularly formulated the Rules of Procedure pending approval by the court when the judges would be appointed later. I was EACJ staff number one. I did so many things: when you start from plain paper, and you have to draw things, it all depends on your creativity."[220]

In addition to administrative work, especially the financial administration of the court, REC court registrars are responsible for court records, publications, and overseeing the functioning of all national sub-registry offices. While these are the official duties, registrars take on a unique role in

219 He holds a PhD from the School of Oriental and African Studies (SOAS) at the University of London, UK.

220 Online Interview, EACJ Pioneer Registrar, Prof. John Eudes Ruhangisa, August 25, 2020.

the case of newly created REC courts. They also serve as public relations officers and negotiators on behalf of judges when they face backlash or interference. Ruhangisa persistently negotiated for the judges to reside permanently in Arusha and to have them regularly engage the court and its potential users in the hope that it would attract cases (Ruhangisa 2011, 24–25). However, he only succeeded partially, and in July 2012, the President and Principal Judge finally assumed office full-time in Arusha.[221]

5.2 Judicial Off-bench Engagements

In the early years of the bench, between 2001 and 2005, amidst its initial setup and operation, the EACJ did not receive any cases, mainly due to a lack of visibility and familiarity with the new judicial organ. The lack of visibility is not unique to the EACJ as it is a familiar obstacle in international courts (ICs) in the Caribbean and elsewhere (Caserta 2017b; Caserta and Cebulak 2018; 2021a). ICs are usually newly created international legal regimes, unlike their counterparts in national settings, and thus have considerable pressure to build their own constituency by virtue of their perceived different impact and legitimacy. Moreover, by the very nature of their positioning and ambiguous hierarchy within the national legal system, sub-regional courts need to seek and create their visibility and liaise with the existing "legal complex" (Halliday, Karpik, and Feeley 2007).

During this time, the pioneer judges and Registrar busied themselves with developing the operational, judicial and administrative needs of the new court, partook in publicity trips around East Africa, visited other international courts to build their capacity, and sought the help of regional allies like the EALS to engage members of the Bar.[222] All these off-bench judicial relations were vital tools in forging the court's pathway toward institutionalisation.

221 "EACJ Judge President, Principal Judge now full-time in Arusha." July 2, 2012. https://www.eacj.org/?p=397 (Accessed March 30, 2023).

222 Interview, Pioneer EACJ judge, Joseph Sinde Warioba, March 11, 2022, Dar es Salaam, Tanzania.

5.2.1 Mobilising Judicial Allies

Perhaps most essential, but often overlooked, is the role the pioneer judges played off-bench. Judges act off the bench using formal and informal channels to build allies "who might help them apply *allied pressure* on the government by using supranational law tools or political or public pressure" (Šipulová 2022, 8). Especially in the case of ICs, where they must cater to the needs of varied audiences – without the institutional cushions available to their national counterparts[223] – they have the additional burden of mobilising alliances amongst those different groups to enable them to conduct their work amidst the strategic space. Engaging and mobilising "compliance constituencies" (Alter 2008)[224] and judicial "allies" (Trochev and Ellett 2014) is an essential step in the social construction of judicial power. Building judicial alliances could increase public trust, social legitimacy and perceived judicial independence by the court's stakeholders. For instance, in the EACJ, the regional Bar has fought alongside the court to protect it against executive interference and facilitated trainings and workshops that educate the public about the role of the court. Through such deliberate acts of court empowerment, allies could be the missing link between the regional court and the broader public.

The types of alliances vary, and this section is not exhaustive. However, they typically range from regional and national Bar Associations, civil society organisations (CSOs), organs of the EAC, national and international courts, academia, development partners, litigants, and the media to fight for its place amidst several threats to its performance and independence. This study prioritises judicial support networks as "compliance constituencies" or members of the "global community of courts"[225] on whom the court relies for litigation and other empowerment-related support. Only those CSOs that engage the court beyond filling cases and essentially mobilising for its empowerment – broadly conceptualised – are considered.

223 For instance, member states can withdraw from the jurisdiction of ICs, which is not possible at the national level.

224 These are actors on whom IC judges draw for support to exert pressure on states to comply with IC rulings and garner political leverage over appointing states (Alter 2008, 46–47).

225 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 (Slaughter 2003, 192).

The pioneer judges sought to build the court's legitimacy, visibility, and acceptability within the revamped EAC regional bloc by engaging relevant stakeholders, especially by mobilising critical allies in the legal fraternity. The pioneer judges – who were members of various legal organisations, including the East Africa Law Society, *Kituo cha Katiba*, and the Law Societies of the three original partner states – drew on their existing networks to call attention to the new court. Pioneer judges travelled to these legal associations, met their leaders and actively sought their alliance with the new court. For instance, Justice Bossa's proximity to civil society organisations in the EAC proved helpful in establishing links to these key players in regional integration politics. Bossa, having served as both the president of the Uganda Law Society and the East Africa Law Society, had links to prominent national and regional actors whom they called and engaged in mobilising support for the new court.[226] By and large, the pioneer bench was occupied by individuals with high-reaching personal and professional networks at regional and national levels, which supported their work in publicising the new court and vouching for its place in the regional bloc. The next two sections delve into the specific ways in which the new bench mobilised allies and explore avenues of mobilisation.

5.2.2 Legal Norm Socialisation

Since its inception, the EACJ has needed to raise awareness of its mandate amongst its potential users through outreach or sensitisation programs with its internal, external, national and international stakeholders.[227] By and large, key stakeholders of ICs (lawyers, government officials, NGOs, and academics) may need to familiarise themselves with a new Court's mandate, and the role of judges and Court staff in this regard cannot be underestimated. The pioneer bench also held sensitisation workshops throughout the EAC partner states. EACJ judges, Court staff, and Registrar actively participate in and direct legal trainings organised by its allies, especially the regional Bar Association. As the pioneer registrar stated:

> "The Court worked very closely with the members of the Bar both at national and regional levels through their respective professional asso-

226 Online Interview, Pioneer EACJ judge, Solomy Balungi Bossa, June 10, 2020.

227 'East African Court of Justice 20th Anniversary Report, 2001–2021'. Arusha, Tanzania: East African Court of Justice. https://www.eacj.org/wp-content/uploads/2022/11/THE-EAST-AFRICAN-COURT-OF-JUSTICE-Final-Report-letter.pdf. Page 37.

> ciations. Occasionally, we receive invitations to attend their meetings or workshops and make presentations about the court, among other things" (Ruhangisa 2011, 23).

EALS leadership still laments that the court lacks sufficient publicity amongst regional lawyers, and thus, they have not stalled their work on raising the court's profile.[228] EALS still prioritises capacity-building initiatives for lawyers through its "East Africa Law Society Regional Practice Series."[229] In these training workshops, EALS leadership invites repeat lawyers, EACJ partner states sub-registries, court staff and the Registrar to train lawyers on the court's mandate and offer practical exercises that provide a "first-hand feel of actual litigation before the Court."[230] The court also expounds on its arbitration mandate and rules of procedure and shares "soft skills for effective trial advocacy."[231]

I observed one session in person and noted how the Registrar supported lawyers who attended the event by answering their questions, empowering them, and providing guidance on all issues that may arise. He noted that lawyers were unaware of the necessary procedure for approaching the court and urged them to participate in such trainings to learn the practice and increase the number of cases brought to the court. Additionally, he emphasised the lack of a requirement to exhaust local remedies and urged them to litigate cases lost at the national level but frame them as a different subject matter relating to the Treaty. The Registrar also advised the potential litigants that any government that violates its laws *is* breaching the EAC Treaty and thus can be sued at the EACJ.

These trainings on international legal norms usually target practitioners and potential litigants at the EACJ, where court staff proactively instructs lawyers on the court's mandate, imploring them to redirect issues of cross-border trade away from national jurisdictions to the EACJ and give guide-

228 As an EALS official reiterated, the regional Bar has not ceased to grow the Court's publicity because it is still neither well-known nor understood amongst regional lawyers (Interview, February 19, 2022, Arusha).

229 Conducted as on-site training within the EAC partner states, which offer training to lawyers on practice before regional courts. By the time of this writing, five of these trainings had been done in five partner states (East Africa Law Society 2020, 9).

230 The EALS and the Uganda Law Society hosted a one-day course on trial advocacy before regional courts and tribunals for EAC lawyers with a focus on practice before the EACJ, in which I participated. See East African Court of Justice, Twitter post, October 25, 2021, 3:44 pm. https://twitter.com/ealawsociety/status/1452632041158291467.

231 Ibid.

lines on how to navigate limits to the court's jurisdiction. In its annual reports, the court takes pride in reaching hundreds of lawyers across the region through these trainings.[232] Moreover, the court also targets various national State Attorneys in its trainings, socialising them into understanding and accepting its role, jurisdiction and functioning.[233] Furthermore, the court also targets the next generation of lawyers, seeking to familiarise them with its mandate.[234] Through training workshops and moot courts for young lawyers, which it hosts at its premises and presides over, EACJ socialises the younger generation of legal experts in the region into "deepening" their understanding of the court and the application of principles of international law so that they can comfortably litigate before the court (East African Court of Justice 2021, 46).

The court perceives these activities as "engagement platforms that have created great opportunities for the Court to reach out to many people to learn, comprehend and fully understand its mandate and functioning."[235] EACJ, through its information-sharing and legal norm sensitisation activities, is generating awareness of its role, jurisdiction, procedures and operations. Rather than "shaming of non-conforming state behaviour or praising of their norm conformity" (Squatrito 2021, 69), EACJ judges have employed non-judicial activities to promote norms and prevent apparent deficits in adherence to legal norms, rather than socialising actors after norms are violated.

The first bench sought to elucidate the court's jurisdiction, including the lesser known arbitral function, as an interview with a pioneer judge reveals:

> "We also listened to the Chambers of Commerce and even sold itself to them about arbitration. It offered that if they had any problem, the court was available, and it had the jurisdiction to do so. Therefore, we met several stakeholders, held several seminars across the region, and were able to sell the court to them. We also addressed the difference between the national courts and this court by telling them it would not be like the

232 It reports attracting over 600 lawyers from the region (East African Court of Justice 2021, 43).

233 80 State Attorneys in Bujumbura (East African Court of Justice 2021, 38), in Kigali, 15 senior State Attorneys, 45 State Advocates were trained on the Rules of Procedure of the Court (Ibid, 40).

234 For instance, a training workshop for young lawyers on tracking the status of implementation of EACJ decisions, was held in Nairobi (Ibid, 39).

235 Ibid., 37.

> former East African court, an Appeal Chamber from criminal decisions in national courts."[236]

The bench was also aware of the misconceptions about its relation to its predecessor, the former East Africa Court of Appeal (EACA), which it endeavoured to clarify. Indeed, the EACJ does not have appellate jurisdiction over decisions of national courts. However, it has precedence over national courts in matters of Treaty interpretation.[237] Clarifying the limits of the court's jurisdiction was also an issue that the pioneer judges had to confront repeatedly, and almost two decades later, the same issue kept resurfacing.

In sum, the collective biographies of the pioneer bench – having well-connected former politicians with links to executives in the partner states and individuals with close ties to regional civil society organisations – was an asset to the court's earlier outreach efforts. The former politicians were well-versed in the political landscape in the EAC, understood the regional bureaucracy, and were well-respected and connected individuals within the judicial and executive branches. Their backgrounds were valuable assets to furthering the legitimisation efforts of the embryonic court. Moreover, these efforts were instrumental in helping the new court to gain visibility as an additional avenue for addressing disputes resulting from regional integration initiatives.

5.3 From "Legal Cocoon" to Initial Backlash

The first bench only worked ad hoc, residing in their home countries, which could explain why, for the first five years of operation, the EACJ was still relatively unused. As the pioneer registrar recounted in an interview:

> "It was tricky and frustrating when you have the court, but no case is coming. That is why, at one point, I had to speak to the judges and say, 'I think we shall have to get out of this legal cocoon of waiting for cases to come. Let us go out there and educate people about the existence of this court.' […] We had to do many outreach programs for publicity purposes. We visited the capitals of all the countries and interacted with the law societies, civil societies, business communities, and all possible

236 Online Interview, Pioneer EACJ judge, Solomy Balungi Bossa, June 10, 2020.
237 Art. 33 (2) EAC Treaty.

> stakeholders – people who are potential clients – so they could get to know that the court was there. You can imagine the kind of campaign we were running then."[238]

However, despite judicial off-bench interventions, no cases were coming to the bench until 2005. Some pioneer judges even left the bench without hearing a case.[239]

The EACJ's maiden case, *Calist Andrew Mwatela and 2 Others v. East African Community*[240] was filed by members of the East African Legislative Assembly (EALA) who challenged the Council of Ministers' (the Council) decision to delay the presentation of Bills to EALA, the Council and Secretariat's role in assuming control over Assembly-led Bills, and the validity of the meeting of the Sectoral Council on Legal and Judicial Affairs (Ruhangisa 2017b). The Council had assumed control over the policy-oriented Bills because they "had implications on the partner states sovereign interest" (Ruhangisa 2017a, 233). Upon the court's intervention, the Treaty was amended to legalise the status of Attorney Generals in the Sectoral Council for Legal and Judicial Affairs by formally recognising them as members of the Council, among other areas, to streamline decision-making in the EAC (ibid., 233). Despite such an impact, the *Mwatela* case, which was significant in opening up the court for business, did not gain much recognition in the regional media or amongst the courts' litigants.

It was the second and first major controversial case, *Anyang' Nyong'o vs Attorney General of Kenya,*[241] which prompted a backlash against the new court and saw the filing of similar cases at the EACJ. Filed in 2006 by opposition politicians Prof Anyang' Nyong'o and ten others, the court rendered decisions that almost led to its early demise. The premise of contention was that the court, in its interim ruling, rejected Kenya's representatives to the East African Legislative Assembly (EALA), citing irregularities in the electoral process. Instead of electing the representatives to the EALA,[242]

238 Online Interview, EACJ Pioneer Registrar, Prof. John Eudes Ruhangisa, August 25, 2020.

239 Online Interview, Pioneer EACJ judge, Solomy Balungi Bossa, June 10, 2020.

240 *Calist Andrew Mwatela & 2 Others vs The East African Community*, Reference No. 1 of 2005. October 10, 2006. https://www.eacj.org/wp-content/uploads/2020/11/Reference-No.-1-of-2005-Calist-Andrew-Mwatela-2-Others-Vs-East-African-Community.pdf. Hereafter *Mwatela.*

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

242 As is prescribed in Article 50 of the Treaty for the Establishment of the East African Community (EAC Treaty). See East African Community 2007.

Kenya's National Rainbow Coalition (NARC) party had merely appointed its nine representatives to EALA from its dominant political party, the National Alliance Party of Kenya (NAK), ignoring nominees from the Liberal Democratic Party (LDP) wing of the ruling coalition, and the opposition party, Orange Democratic Movement (ODM).[243] Aggrieved by this exclusion, members from the LDP and ODM dragged the Kenyan government to the EACJ, alleging that the EALA members from Kenya had not been lawfully elected. The opposition politicians saw this move as an attempt for the ruling party to "control the domestic legislative agenda" (Alter, Gathii and Helfer 2016, 301).[244] In its interim ruling, the court granted an order barring Kenya's candidates from being recognised as EALA members until the case was finalised. The ruling left the EAC without Parliament for over six months,[245] incensing the Kenyan government and triggering a wave of reactions, including a "campaign to kill the sub-regional court and exert greater control over its judges" (ibid., 302).

The interim injunction in *Anyang' Nyong'o* was issued on November 27, 2006, preventing Kenya's EALA members from taking office, pending the determination of the main reference. One day later, in an apparent reaction to the interim order, the EAC Council of Ministers, in their meeting, "considered the implications of the interim order and decided to recommend to the Summit that the matter be referred to the Sectoral Council on Legal and Judicial Affairs to study the jurisdiction of this Court and other related matters and advise on the way forward."[246] On November 30, 2006, the Summit, comprising the three EAC presidents, endorsed the Council's recommendations to reconstitute the EACJ as a two-tier court – with First Instance and Appellate Divisions.[247] It also expanded the procedures for the removal of judges from office and "directed that a special Summit be convened very soon to consider and pronounce itself on the proposed amendments of the Treaty."[248] A week later, on December 7, the Kenyan Attorney General chaired a meeting to consider the draft proposal, which

243 *Anyang' Nyong'o* 2007 (*supra* note 5), 5–6.
244 For extensive discussions on this case, see Onoria 2010; Gathii 2013; Alter, Gathii, and Helfer 2016.
245 Online Interview, EACJ Pioneer Registrar, Prof. John Eudes Ruhangisa, August 25, 2020.
246 *East African Law Society (EALS) & 4 Others v. Attorney General of Kenya & 3 Others,* Reference No. 3 of 2007. August 31, 2008. https://www.eacj.org//wp-content/uploads/2012/11/Ref-3-of-2007.pdf. Page 3.
247 Ibid., 3.
248 Ibid., 3.

he had prepared, for approval to submit to the Summit (Alter, Gathii, and Helfer 2016, 304).

On December 9, 2006, the Secretary-General of the EAC, Ambassador Juma Mwapachu, wrote to the three ministers responsible for EAC Affairs, requesting their cooperation in expediting the partner state's consideration of the proposals.[249] He asked them to submit their comments within two days, citing the urgency of the matter, so that he would submit the proposals to the Summit for consideration and adoption. The partner states' ministers obliged in due time, and on December 14, 2006, Kenyan President Mwai Kibaki, also Chairperson of the EAC, hosted the extraordinary Summit, which saw the signing and adaptation of the proposals by Council to amend the Treaty. It is remarkable that within less than a fortnight after the interim ruling, amendments to the Treaty had been adopted and ready for ratification. Consequently, by March 2007, the amendments to the Treaty came into effect following ratification by the partner states (Onoria 2010, 91). By March 30, 2007, when the court rendered its decision on the main reference, the controversial amendments to the Treaty had already been adopted.

EAC executives, led by Kenyan President Mwai Kibaki, sanctioned the judges upon issuing regime-defying judicial interventions by significantly tampering with the court's structure, jurisdiction, and access rules. The court's jurisdiction was curtailed to exclude any jurisdiction conferred on or matters reserved to organs and institutions of the partner states.[250] Furthermore, the amendments also imposed strict time restrictions on individual litigants, with complaints meant to be lodged before the EACJ "within two months of the enactment, publication, directive, decision or action" that breaches the Treaty or "of the day in which it came to the knowledge of the complainant."[251] Failure to meet these requirements means that it is time-barred. This limitation was introduced to curb access to the court. Repeat lawyers in the EAC, who have met the restrictions brought on by this "draconian" rule, echo sentiments that the two-month rule is "contrary to the spirit of the EAC Treaty pertaining to sustaining the rule of law and social justice" (Possi 2018, 15). Evidently, the amendments to the Treaty were made with the consideration of limiting access to the EACJ, as litigants usually get turned away on time restrictions. As shall be explored in

249 See Annex II of the Report of the 4th Extraordinary Summit (*supra* note 207).

250 See amendments to Articles 27 and 30 of the EAC Treaty. A proviso to Art. 27 was inserted. Also, a new paragraph was added to Art 30.

251 Art. 30 (2) EAC Treaty.

subsequent chapters, the repercussions of this impediment are encroaching on the court's ability to conduct its duties as a potential guardian of the EAC Treaty.

Structurally, the unitary court was split into two, creating an Appellate Division with the power to review the decisions of the First Instance.[252] Moreover, new grounds were added to ease the procedure for removing judges from office.[253] The Treaty was heavily revised to include conditions such as misconduct,[254] bankruptcy,[255] dishonesty or fraud[256] as reasonable grounds for judicial dismissal. New grounds also allowed partner states to appoint temporary judges in the place of suspended judges. As already clarified above, judges at the EACJ operate on an ad-hoc basis, which implies that they usually hold judicial or public office in their home countries. The new provisions were aimed at ensuring that any judicial allegations of misconduct in the partner state are considered at the sub-regional level.[257] This provision takes on more weight when considering that the Kenyan government had already launched blatant attacks on the two Kenyan judges, Justice Kasanga Mulwa and the then-president of the Court, Moijo Keiwua.[258] Allegations were charged against them in Kenya, and they were subsequently removed from office.

5.4 Judicial Resistance

Unsatisfied with dismissing the judges at home, the Kenyan government sought to have them removed from the EACJ bench as well. However, despite several intimidation attempts issued to the Registrar, who was ordered to dismiss the judges or else it would taint the court's integrity, the judges continued serving their terms until completion.

252 Report of the 4th Extraordinary Summit (*supra* note 207), 3–4.
253 Ibid.
254 Art. 26 (1) (a) EAC Treaty.
255 Art. 26 (1) (c) EAC Treaty.
256 Art. 26 (1) (d) EAC Treaty.
257 Report of the 4th Extraordinary Summit (*supra* note 207), 7.
258 Okwembah David. 2003. "Kenya: Judges to Face Graft Tribunals named." *Daily Nation,* December 2, 2003. https://allafrica.com/stories/200312020489.html.

For Ruhangisa, there was no question about the court's integrity or supposedly diminishing legitimacy, as he explains:

> "It was really unfortunate! The Kenyan government took that opportunity to punish the judges from Kenya. They started unearthing, excavating some – whatever – thoughts they had back home for suspending them. And there were so many pressures. I used to receive several phone calls asking me if these judges' integrity was questioned back home. 'How do you retain them? Aren't you lowering the integrity/ fabric of the court itself?'"[259]

In a show of solidarity and bravery, the Registrar and judges resisted succumbing to the threats and pressures issued by Kenyan officials. Despite the obvious threats, the judges and Registrar did not budge. The following sections elucidate the various strategies that the pioneer bench devised to forge ahead despite the unfavourable political climate.

5.4.1 Formally Recording Pressures

The immediate strategy adopted was to document the executive interference formally. Analysing the various rulings following the *Anyang' Nyong'o* case provides a starting point for understanding judicial reactions to the attacks. For the Kenyan government, this ruling was seen as unwarranted interference in highly sensitive domestic politics. The new court was perceived as siding with the opposition at the expense of the ruling party. The President, Mwai Kibaki, and his aides were displeased by the court's intervention, which prevented their preferred candidates from being sworn in as EALA representatives. Framing their frustration as the court undermining state sovereignty,[260] Kenya challenged the court's position that its interpretation of the Treaty is binding on national courts wherein private litigants are not required to exhaust local remedies.[261]

259 Interview, EACJ Pioneer Registrar, Prof. John Eudes Ruhangisa, February 18, 2022, Moshi, Tanzania.

260 *Attorney General of the Republic of Kenya vs Prof. Anyang' Nyong'o & 10 Others,* Application No.5 of 2007. February 6, 2007. https://www.eacj.org/wp-content/uploads/2007/02/Application-No.-5-of-2007-The-Attorney-General-of-the-Republic-of-Kenya-Vs-Prof.-Anyang-Nyongo-10-Others.pdf. Hereinafter *AG Kenya vs Anyang' Nyong'o.*

261 *AG Kenya vs Anyang' Nyong'o*, 21.

By drawing on formal court processes to intimidate the court, the Kenyan government sought a legitimate way of demanding the suspension of the Kenyan judges on the EACJ bench from reviewing the case. The two judges, Moijo Ole Keiwua and Jackson Kasanga Mulwa were direct targets of the Mwai regime even before the case arose. On October 15, 2003, Justices Mulwa and Keiwua were suspended from their functions as Judges of Appeal in Kenya following a pending investigation into their alleged involvement in corruption and unethical practice.[262] By throwing the judges off the case, Kenya hoped to prevent an unfavourable final decision (following the undesirable interim ruling) that would increase the opposition's power in the EALA. Nevertheless, the two judges denied Kenya's request to have them disqualify themselves from further hearing the case.[263] During the hearing, however, the application for recusal against Justice Mulwa was withdrawn by the applicants, claiming it was "an error" to include him and was thus limited only to Justice Keiwua.[264]

Most importantly, the bench resisted these attacks and kept serving their terms at the EACJ whilst emphatically responding to them, as evidenced in the language used in the final reference:

> "The court must guard against litigants who all too often blame their losses in court cases to bias on the part of the judge [...] we note that clearly the amendment is a direct reaction to the impugned ruling of the Court."[265]

> "While we are anxious to refrain from commenting on the merits and/or demerits of the process of amending the Treaty in reaction to an interim Court order, we are constrained to say that any reasonable court would conclude as we are inclined to do, that this application was brought more out of a desire to delay the hearing of the reference than a desire to ensure that the applicant receives a fair hearing. In our view, this is tantamount to abuse of court process, and we would be entitled to dispose of the application on that finding alone."[266]

In addition, the two judges were supported by their colleagues – the bench presented a united front – who assertively ruled against the prayer to

262 Ibid., 3.
263 Ibid., 26.
264 Ibid., 11.
265 *AG Kenya vs Anyang' Nyong'o*, 21.
266 Ibid., 23.

suspend them by calling out the government of Kenya for blaming their loss on judicial bias and only bringing up their objections and seeking judicial recusal upon the loss.[267] The judges also noted that the government of Kenya filed several applications following the impugned ruling, only to delay the delivery of justice. In these reactions, we see a bench that interviewees usually referred to as "bold and assertive" because they would not succumb to the intimidation but instead fought back using their decisions.

Equally, when the government of Kenya resorted to discrediting the court, claiming that the failure of judges to recuse themselves would affect "the integrity of the Court and undermine the confidence of East Africans in the Court",[268] the judges refuted this accusation. Instead, they declared the consensual nature of the court, highlighting the unity of the bench as a body of justice that would not simply cave to the harassment tactics and instead asked the accusing government to refrain from attacking individual judges.

> "A reasonable and informed person, knowing that the judge sits in a panel of five judges, trained and sworn to administer justice impartially, would not in our view, perceive that the judge would skim to single-handedly deny the applicant a fair hearing or justice. We think a reasonable, informed, and fair-minded member of the public, appreciating the subject matter and nature of the reference, would credit the judge with sufficient intelligence not to indulge in futile animosity."[269]

In the same judgement, the judges did not hesitate to declare that the process of amending the Treaty was "a direct reaction to the impugned ruling of the court."[270] The court, even though unable to intervene in the hastened decision to amend the Treaty by the Summit, through the persuasion of the Kenyan government, still made it clear, in writing, that they disagreed with the partner states' interventions and the final amendments to the Treaty. Correspondingly, the EAC bench used the subsequent rulings to record other personal attacks on the two judges. For instance, the Solicitor General called Justice Keiwua on the morning of January 22, 2007, seeking to intimidate him rather than elicit "a response to the alleged apprehension concerning his impartiality."[271]

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267 Ibid., 21- 22.
268 Ibid., 3.
269 Ibid., 25.
270 *AG Kenya vs Anyang' Nyong'o*, 22.
271 Ibid., 14.

The court in *Anyang Nyong'o* used the chance to underline its *raison d'être* and to remind the partner states of their commitment to regional integration, highlighting that the court is not a mere bystander but an active participant:

> "One of the cardinal rules in the doctrine of the Rule of Law is respect of court decisions. If that rule is deviated from then the principle becomes hollow and remains on paper only. In the case of the Community, the Treaty and all it seeks to achieve will stand on sinking sand."[272]

In that one ruling, the judges addressed the issue of a lack of respect for court decisions and made explicit links to the perils of undermining its authority. For the new court, such explicit language and direct expression of its discomfort could be read as recording injustices it faced as a direct response to its political interference. The judges understood that their power lay with their on-bench tactical responses because, as one judge noted:

> "In a judgement, you are writing to multiple audiences and telling the parties they are right and wrong for these reasons. You are telling the law students that this is what the independence of the judiciary should be like. This is what the interface between the EACJ and national courts should be like. You are telling the policymakers that there are gaps here that you need to fill. Then you are telling whoever cares to listen – donors and all – that we are not going with the donor's agenda or the politician's agenda, or the leadership's agenda. We are simply going to do our job as best as we know how. Then you leave it for them to decide."[273]

By framing all judicial responses to the backlash from the Kenyan government in legal reasoning and not mincing their words in the subsequent rulings, the pioneer bench sought to formally record the intimidation threats and inform future audiences of the manner in which the partner states had mishandled the new judicial organ of the Community.

Not only limited to attacks initiated by the executive, but judges have also reprimanded lawyers who lavished the judges with threats and personalised attacks. For instance, repeat lawyer Mabirizi – who describes himself as a "self-styled civically active Ugandan"[274] – has garnered fame and disdain

272 Ibid., 27.

273 Interview, EACJ Judge, September 29, 2021, Kampala, Uganda.

274 *Male H. Mabirizi K. Kiwanuka vs The Attorney General of the Republic of Uganda.* Reference No 6 of 2019. September 30, 2020. https://www.eacj.org/wp-content/uploads/2020/09/Reference-No.-6-of-20191.pdf. p. 2.

from endlessly filing cases at the national and regional court,[275] and has been at the receiving end of judicial scolding.

> "Not only do we consider with disdain Mr Mabirizi's snide remarks with regard to judges and the Uganda judiciary; we categorically state here that should that *modus operandi* have been employed to exert any manner of pressure, blackmail or threats upon this Court, that misadventure has most certainly been an exercise in futility [...] There is no space in courts, this Court inclusive, for belligerence and bigotry in the guise of the enforcement of legal rights."[276]

Indeed, EACJ judges have consistently used their rulings to speak on threats to their independence. These strategic judicial reactions indicate that judges are attempting to protect their fragile independence rather than being associated with the patronage networks that generated this case in the first place.[277]

5.4.2 Reactive Scholarly Engagement

The judges and Registrar also used academic writing as a strategic means to resist interference, call out the perpetrators of the attacks, and mobilise support amongst various stakeholders while addressing the courts' future constituencies. Registrar Ruhangisa presented several papers at workshops, authored articles on the role and functioning of the EACJ, and co-authored and edited a book on EAC law with former EACJ president Emmanuel Ugirashebuja (Ugirashebuja et al. 2017). To illustrate the depth of his resistance through publications and other writing, Ruhangisa explicitly criticised the

275 Buwembo Joachim. 2024. "To get Mabirizis off your backs just take your duties seriously." *The East African*, April 29, 2024. https://www.theeastafrican.co.ke/tea/oped/comment/to-get-mabirizis-off-your-backs-just-take-your-duties-seriously--4605258.

276 *Male Mabirizi vs Attorney General of Uganda*, 71.

277 As far as the author knows, there was no particular interest on the part of Kenyan judges in deciding against their government other than the fact that they were persuaded by the submissions presented to them. Neither did it become apparent that the two Kenyan judges on the case instigated the accusations against Kenya, as may have been assumed. An interview with a Kenyan repeat lawyer at the EACJ (who later appeared as amicus in the case) clarified his own involvement in activating the proceedings against Kenya (Interview, Repeat Lawyer, March 2, 2022, Arusha, Tanzania).

backlash following *Anyang Nyong'o* in one of his paper presentations, emphasising that the Court "experienced and survived what can be termed as apparent intimidation" (Ruhangisa 2011, 15) following this ruling. He further reiterated the events leading to the Treaty amendments, reminding the audience that EAC Heads of State had convened an emergency meeting where they hastily amended the Treaty,[278] including widening the horizons for the procedure for the removal of judges from office. In this paper, the Registrar took the chance to highlight the pressures on the court, as the workshop aimed to facilitate public participation in drafting "recommendations and resolutions, which will be tabled before the EAC policymakers."[279] At this event, the court gathered members from the EAC Secretariat, the East African Legislative Assembly (EALA), other EAC Institutions, members of national judiciaries, chambers of the Attorneys General, EAC ministries, Bar Associations, civil society organisations and human rights commissions in a bid to raise support and fight the unnecessary pressures they were facing. In an interview, the Registrar confirms:

> "These judges were *really* attacked. The *Anyang' Nyong'o* case was not good – and I have never spoken well on it – it was a direct attack on the judges simply for performing their role. That was the feeling. And the subsequent papers that I went around preparing, writing and presenting – I did not mince my words!"[280]

This type of reactive scholarly engagement to mitigate backlash has also been seen in other ICs elsewhere (Caserta and Cebulak 2021a, 761). Engaging in extra-judicial communication through writing takes various forms. It can be through speeches at universities, where they hope to provide the necessary legal education for the regional bench. Judges can also give informative judicial interviews or publish scholarly work across various platforms. Scholars have highlighted the primary objective of extra-judicial judicial communication as the need to instil public confidence in the judiciary (Mallory and Tyrrell 2024, 15). Engaging the public through writing can speak directly to judicial transparency, enhance public knowledge of

278 Joint Communiqué of the 8th Summit of EAC Heads of State, 30 November 2006, Arusha, Tanzania, p. 12.

279 East African Court of Justice. 2011. "EACJ to hold sensitization workshop on its role in the EAC integration." https://www.eacj.org/?p=404 (Accessed March 30, 2023).

280 Online Interview, EACJ Pioneer Registrar, Prof. John Eudes Ruhangisa, August 25, 2020.

the legal system, and contribute to the institutional legitimacy of the courts and judiciary.

Judges can speak against practices or developments in the courts to the broader "global community of courts" (Slaughter 2003) and the "legal complex" (Halliday, Karpik, and Feeley 2007).[281] By writing to other judges and legally trained members of the public, judges can raise topical concerns. For example, Justice Solomy Bossa's academic piece on the Zero Draft Protocol (Bossa 2006) sought to advance the dialogue on the extension of the jurisdiction of the EACJ. Describing the history and trajectory of the draft protocol (zero draft) for the extension of EACJ jurisdiction to provide for a human rights and appellate mandate for the EACJ, Bossa critiqued the combination of jurisdiction of the EACJ as both a Court of Justice and as a Human Rights Court. She also pointed out that the proposed draft lacked clarity on applicable law. As a result, the draft protocol was amended even though the desired outcome – extending the jurisdiction – had not yet been actualised (Possi 2018).

5.4.3 Expansive Interpretation of Legal Principles

Table 5: Pioneer Bench (2001–2007) Judgements

Year filed	Case Type	Case Name	Verdict in favour of
2005	EAC Political affair	Calist Andrew Mwatela & 2 Others *vs* The East African Community	Applicant
2006	Electoral dispute	Prof. Peter Anyang' Nyong'o & 10 Others *vs* AG of Kenya	Applicant
2007	EACJ Jurisdiction	EALS *vs* Attorney General (AG) of Kenya	Applicant
	Electoral dispute	Christopher Mtikila *vs* AG of Tanzania and others	Dismissed
	Human Rights	James Katabazi & 21 Others *vs* Secretary General EAC & AG Uganda	Applicant

Source: compiled by the author from the EACJ Case Mapping dataset (with the author on file).

281 The "legal complex" is defined as "the system of relations among legally trained occupations which mobilise on a particular issue" (Halliday, Karpik, and Feeley 2007, 6–7). The legal complex can involve judges, lawyers (including those affiliated with bar associations), prosecutors, civil servants, and/or legal academics, and may extend beyond legally trained members of society.

Building on *Anyang' Nyong'o,* the bench's final case, *James Katabazi*[282] was a trailblazer in human rights adjudication. In *Katabazi*, Uganda was dragged to court over interfering with preparing bail documents for 14 individuals released on bail in the High Court.[283] These individuals were rearrested, jailed, and thereafter prosecuted before a military tribunal. The Uganda Law Society challenged the interference at the Constitutional Court, which ruled in their favour.[284] Despite a favourable ruling, they were not released from detention, prompting them to seek the EACJ. Consequently, the EACJ ruled in favour of the applicants, establishing that even though it did not have express human rights jurisdiction, it could not abdicate its responsibility to hear these cases.[285] However, legal experts on EAC law have criticised the court for its "ambiguous" role in adjudicating human rights disputes (Possi 2018, 33).[286]

Furthermore, in all five judgements issued, the court ruled in favour of the applicants except for *Mtikila,*[287] which was dismissed on jurisdictional grounds. The court was clear that the issue raised was on membership to the EALA, which they saw as "the province of the High Court of Tanzania and not of this Court."[288]

Even if the pioneer bench only heard five cases, it is hailed as a trailblazing cohort. This is because they issued two landmark rulings – *Anyang Nyong'o* and *Katabazi* – which set the ground for politically salient jurisprudence and human rights jurisprudence at the EACJ, respectively.[289] These cases, as explained by legal experts, were "a major part of the strategy of its judges and its registrar to escape the court's initial obscurity within the EAC and to overcome its severe institutional weaknesses" (Gathii 2013,

282 *James Katabazi & 21 Others vs the Secretary General of the EAC and the Attorney General of Uganda*, Reference No. 1 of 2007. November 1, 2007. https://www.eacj.org//wp-content/uploads/2012/11/NO._1_OF_2007.pdf. Hereinafter *Katabazi.*

283 Ibid., 1–2.

284 Ibid., 2.

285 See Gathii 2013, 254–56 for details on this case.

286 Even though Possi argues that the EACJ lacks legitimacy in adjudicating human rights matters, he acknowledges the relevance of human rights in the EAC integration project and the role played by the EACJ in adjudicating these matters (Possi 2018).

287 *Christopher Mtikila vs the Attorney General of Tanzania & others*, Reference No. 2 of 2007. April 25, 2007. https://www.saflii.org/ea/cases/EACJ/2007/4.pdf. Hereafter *Mtikila*.

288 *Mtikila*, 11.

289 These cases have been extensively discussed in the literature and will not be reiterated here. See Gathii 2013; 2016b; Taye 2019.

259). For judges who operate on an ad hoc basis, all of whom were serving in some capacity at the national level, this was a daring move that, as already illustrated, almost brought the court to a close. Expectedly, the new and "bold" court ruffled a few feathers with the EAC partner states, which resulted in the first backlash through hasty amendments to the Treaty.

5.5 East Africa Law Society to the Rescue

While the previous sections focused on judges, this section pays attention to the crucial role of the regional Bar – the East Africa Law Society (EALS) – which assisted the bench by filing submissions, protecting the new bench from backlash and providing tools to tackle complex legal questions of political importance. Still in reference to the pioneer bench and its rulings (see Table 5 above), this section reveals the "other" vital players behind making the pioneer bold bench.

> "Before the first cases, we deliberately, as EALS, workshopped the bench, the registry, and the Counsel to the Community extensively across the region, brought them to every annual conference from late 2002 through 2004, just telling them, 'Look here, the Bar has also got your back. We have no doubt there will be pushback from when your first decisions come out, but we will be there to back you.' And we ensured that we did so when it happened."[290]

The East Africa Law Society (EALS) was the court's earliest ally,[291] playing an active role right from its inception. It was instrumental in framing the EAC Treaty and looking out for the interests of the new regional judiciary.[292] The EALS was instrumental in the formation of the court, through its institutionalisation, to appearing as amicus (providing evidence and fact-finding) and later joining the fight for compliance with the court's decisions.

290 Interview, Former CEO EALS, Donald Deya, March 2, 2022, Arusha, Tanzania.

291 The EACJ draws on a diverse array of allies to counter threats to its performance and independence. These actors assume various roles, but this study limits itself to those activities performed by the allies *intentionally* or *strategically* in a bid to support the court in overt empowerment practices. These may include regional and national Bar Associations, civil society organisations (CSOs), organs of the EAC, national and international courts, academia, development partners, litigants, and the media.

292 Interview, EALS official, February 19, 2022, Arusha, Tanzania.

Founded in 1995 amidst prevailing currents of reviving the EAC, the regional Bar has prioritised fast-tracking the revamped regional integration agenda.[293] Furthermore, EALS has consciously built its national law societies to be more regionally oriented, allowing for institutional and individual membership. This arrangement has established legitimacy among various national legal fraternities and has provided resources, both financially and in terms of networking.[294]

The regional law society's first President, Justice Solomy Balungi Bossa, was appointed as one of the pioneer judges of the EACJ. The second President of EALS, Prof. Frederick Ssempebwa, also hailing from Uganda, led the regional Bar at the time of the inauguration of the new regional court.[295] Not only was Ssempebwa involved in drafting the Treaty for the Establishment of the East African Community, but he has also been involved in a string of public interest litigation at the EACJ and is credited with initiating and successfully arguing the first case before the EACJ.[296] A professor of law at Makerere University, former president of the Uganda Law Society, and former minister of the government of Uganda,[297] Ssempebwa has vast experience in constitutional drafting, having participated in various constitutional reviews.[298]

In the same manner, the first CEO of the EALS post-court establishment, Donald Omondi Deya, who served from June 2002 to December 2009,[299] established the EALS Secretariat in Arusha[300] and was influential in mobilising litigants to use the new court. He has remained one of the most influential figures in EALS' involvement with the court in its early days. As he clarified in an interview, the regional Bar worked alongside judges and court staff to proactively instruct lawyers on the new court's mandate, imploring them to redirect issues of cross-border trade away from national jurisdictions to the EACJ:

293 East Africa Law Society. n.d. "East Africa Law Society at a glance." https://ealawsociety.org/ (Accessed March 12, 2023).
294 Ibid.
295 Refer toTable 15 in the appendix for a list of all EALS leaders since its establishment.
296 *Mwatela, supra* note 240.
297 https://www.kats.co.ug/attorney/prof-efs/.
298 For instance, the constitutions of Uganda (1995), Kenya (2010), and Tanzania (2015). See https://tanzaniaelectionswatch.org/2020/09/23/prof-fredrick-ssempebwa/.
299 https://www.linkedin.com/in/donald-deya-19b02632/?originalSubdomain=tz.
300 Interview, Former CEO EALS, March 2, 2022, Arusha, Tanzania.

> "In the early days, we workshopped corporate lawyers and told them: 'This is your court – for those representing clients that do cross-border work. Think of it this way: there are cases you keep filing in national courts or subject to arbitration or political negotiations, which would move substantially if you used this court, and half the time, all you need to do is file. After you file, the state that wants to keep a good reputation will most likely negotiate them out of court.'"[301]

EALS has empowered the court by publicising its work amongst the "legal complex" (T. C. Halliday, Karpik, and Feeley 2007). These authors define the "legal complex" as "the system of relations among legally trained occupations which mobilise on a particular issue" (Ibid, 6–7). They note that the "legal complex" may extend beyond legally trained members of society. In the EACJ, national and regional bar associations, as well as legal academics, have actively contributed to building the court's constituencies. As earlier mentioned, in the court's first five years, it did not receive any cases due to a lack of visibility. As the pioneer judges and Registrar busied themselves with developing the operational, judicial and administrative needs of the new court, partook in publicity trips around East Africa, and visited other international courts to build their capacity. Meanwhile, EALS stepped in to engage with members of the Bar.[302] The EALS leadership and its affiliated coalition organisations[303] mobilised to create visibility for the court and enhance awareness of its mandate.

The regional Bar also reinforced the court by approaching the bench as amicus curiae[304] in several politically salient cases. As amicus, the regional Bar has availed evidence and assisted the court in fact-finding, especially in unfamiliar territory or politically sensitive topics. In the court's early years, the pioneer leadership understood that the court was struggling to stamp its visibility and authority within the EAC. Rather than burdening the young court by litigating "contentious cases directly" (Taye 2020, 357), EALS appeared as amicus right from the EACJ's maiden case, *Mwatela*.[305] As the EALS President and lead Counsel on the case explained, the premise of contention was the lack of role division between the Council of Ministers

301 Interview, Donald Deya, March 2, 2022, Arusha, Tanzania.
302 Interview, Former EACJ judge, March 11, 2022, Dar es Salaam, Tanzania.
303 Such as the East African Civil Society Forum and Kituo Cha Katiba.
304 EACJ defines amicus curiae as "a person who is not a party to a proceeding in the Court but who petitions the Court or is invited by the Court to file a brief in the proceeding because he has an interest in the subject matter" (EACJ Rules 2019, 9).
305 *Mwatela, supra* note 240.

and the East African Legislative Assembly (EALA) – which seemed to share the legislative role – as Bills to EALA would be initiated by both Council and members of EALA.[306] The discord led to a near disruption of working relationships between the two organs of the Community. Prof. Ssempebwa represented the applicants at the hearing, whilst then-President Tom Nyanduga and CEO Don Deya appeared as amici curiae.[307] In its ruling, the EACJ judges noted that they were aided by the submissions from the amicus in reaching their decision.[308] The judgement clearly shows that the judges drew from the EALS' amicus briefs and that the latter greatly influenced the decision in *Mwatela*. Moreover, the EALS submitted pleadings enabling the new court to make informed decisions in *Anyang Nyong'o*.[309]

Without necessarily appearing as amicus or filing a case directly, EALS has also been a critical player, albeit informally, in supporting the creation and filing of cases at the EACJ. In the aftermath of *Anyang Nyong'o*, they have also encouraged opposition politicians and other aggrieved members of the public to sue for violations of the Treaty to hold notoriously autocratic governments accountable. For instance, following the *Anyang' Nyong'o* cases, members from EALS guided the Kenyan opposition party, ODM, by "secretly" working with their lawyers, helping them draft their pleadings, and appearing as amici:

> "We are the ones who went and told the opposition party then (ODM) that they could sue. First, I told one guy when they went and called a secret meeting over the top ODM lawyers, and I showed them exactly how to sue. Then I sat down with my law classmate and good friend, one of the ODM lawyers, and we did the pleadings. Then I left them alone and came here and pretended that nothing had happened [...] after they had filed, we went to court the next day and said, 'We hear a case has been filed. We want to be amicus.'"[310]

Drawing on jurisdiction alone, it is already clear that litigants are highly influential in supporting the navigation of the legal strategic space – they actively reframe questions pertaining to human rights as claims and issues

306 Interview, Professor Frederick Ssempebwa, October 21, 2021, Kampala, Uganda.
307 (East African Court of Justice 2015, 4).
308 Interview, Prof. Ssempebwa, October 21, 2021, Kampala, Uganda.
309 EACJ. Application 1 of 2006. *Prof. Anyang' Nyong'o & 10 others v. The Attorney General of Kenya and 5 others*. November 27, 2006. Available at https://www.eacj.org/?cases=eacj-application-no-1-of-2006.
310 Interview, Former EALS official, March 2, 2022, Arusha.

regarding the interpretation of the Treaty and frame the issues around Article 6(d) and 7(2) that explicitly mention the rule of law and good governance, which are well within the express jurisdiction of the EACJ.

The role of judicial allies in the court's attempts to forge institutional and political relevance can also be seen through "repeat lawyers" and civil society organisations that bring claims to the court, seeking to intervene directly in their limited jurisdiction. For instance, EALS sought to remedy the curbing of the court's already limited jurisdiction in *East African Law Society & 4 Others v. Attorney General of Kenya & 3 Others*[311] when they challenged the legality of Treaty amendments following *Anyang' Nyong'o*. They also pursued an interim order against the formulation, publication, enactment, ratification, or implementation of the proposed amendments to the Treaty in *Application No. 9 of 2007*.[312] In filing this case as public interest litigation,[313] EALS cited "irreparable injury, particularly to the East African Court of Justice"[314] if the amendments were to be implemented. As argued by EALS, excluding the EAC public in the amendment constituted an infringement of the Treaty, with which the court agreed.[315] However, the amendments were expedited in an extraordinary summit held in December 2006,[316] and by the time of the interim ruling, the court resignedly stated that "what has been done so far, even if it were unlawful, cannot be undone in these interlocutory proceedings. Whatever remains to be done by way of operationalisation can be rectified if the amendments are in the end declared illegal by this court."[317] In the final decision, the EACJ, despite this slight pushback against the amendments, still shied away from calling the impugned infringement "a conscious one,"[318] thereby substantively acquiescing to political interference (Alter, Gathii, and Helfer 2016, 305).

The regional Bar also strived to empower the regional court by directly intervening in its limited jurisdiction in economic and trade-related issues. In *East African Law Society v. Secretary General of the East African*

311 *East African Law Society (EALS) & 4 Others v. Attorney General of Kenya & 3 Others* (Reference No. 3 of 2007).

312 *EALS & 4 Others v. Attorney General of Kenya & 3 Others*, Application No. 9 of 2007, July 11, 2007. https://africanlii.org/sites/default/files/judgment/ea/east-african-court-justice/2007-eacj-2//2.pdf. Page 3.

313 Ibid., 8.

314 Ibid., 4.

315 *EALS v. Attorney General of Kenya (*Reference No. 3 of 2007), 43.

316 See Report of the 4th Extraordinary Summit (*supra* note 207).

317 *EALS v. Attorney General of Kenya (*Application No. 9 of 2007), 8.

318 Ibid., 43.

Community,[319] the EALS challenged the EAC[320] on specific provisions in the Common Market Protocol and Customs Union Protocol.[321] EALS, represented by Prof. Ssempebwa, argued against excluding the EACJ from adjudicating matters of economic and trade-related issues, which would inevitably downplay the court's role in furthering the integration agenda.[322] Despite limited success in this intervention, a repeat EACJ lawyer and active EALS member, Mr Francis Gimara, continued the battle against the impugned Treaty amendments and the limited jurisdiction in trade-related issues in *East African Center for Trade Policy and Law vs Sec. Gen. EAC*.[323] The judges, in their ruling, agreed with the applicant, opining that the EACJ had broad jurisdiction before these amendments and that the amendments excluded the EACJ, where partner states organs take precedence on specific issues, albeit vaguely stating what those "organs" are, thereby making provisions in the Treaty that undermined the supremacy of the EACJ.[324] The judges seized the opportunity to emphasise that the amendments encroached on the court's previously broad jurisdiction and excluded the EACJ, where partner state organs take precedence on specific issues, which could render the EACJ "powerless" over partner state institutions.[325]

A look at the case's content alone, without examining the actors who brought it, would obscure an essential aspect of the role of judicial allies in the court's attempts at navigating its strategic space. Such strategic legal mobilisation, as illustrated here, elucidates that judicial allies intentionally pressed charges that address limitations in the court's jurisdiction to support the court when they believed the partner states were circumventing

319 *East African Law Society v. Secretary General of the East African Community*, Reference No. 1 of 2011. February 14, 2013. https://www.eacj.org//wp-content/uploads/2013/09/FI_EastAfricanLawSociety_v_EastAfricanCommunity.pdf.

320 The Community is sued under the Secretary-General, who is the principal executive and accounting officer of the Community, head of the Secretariat and the Secretary of the Summit.

321 *EALS v. Secretary General of the EAC* (Reference No. 1 of 2011), 3.

322 Ibid., 25.

323 *The East African Center for Trade Policy and Law vs Secretary General of the EAC*, Reference Number 9 of 2012. May 9, 2013. https://www.eacj.org//wp-content/uploads/2013/09/FI_EACommunity-EACTPL.pdf.
This case prioritised the amendments to Article 27(1) and Article 30(3) of the Treaty and the dispute settlement mechanisms provided for in the Customs Union and Common Market Protocols, arguing that they "limit/deny original jurisdiction to the EACJ by transferring matters reserved for the EACJ under the Treaty to Partner State institutions and organs" (Ibid, 4–7).

324 Ibid., 29.

325 Ibid., 27.

their allegiance to protecting the rule of law in the EAC. Additionally, these cases outline avenues where the judges' rulings acknowledge the hindrances that the Treaty amendments pose to the court's attempt to construct and expand its power. Thus, cases involving Treaty amendments provided a safe avenue for judges to challenge partner state interventions that curbed their authority, thereby giving the court an opportunity to construct and expand its power.

In sum, the pioneer bench was assisted by the regional Bar's submissions in enforcing the rule of law amidst pressures and backlash. Given the regional Bar's watchdog role, the EALS took on cases of direct relevance to the development of the Community whilst strategically protecting the new bench from backlash. The regional Bar has actively shaped the institutionalisation of EAC organs and fought to expand its political reach. By appearing as a friend of the court to aid in providing tools to tackle complex legal questions of political importance or by aiding in the filing and creation of questions that would expand the reach of the regional court, EALS proved its role as an ally to the new bench.

5.6 The Makings of a "Bold" Bench

One of the pioneer judges indicated that, even though they have been dubbed bold, activist or assertive, the pioneer bench did not perceive themselves in this way. Instead, they were simply performing their judicial duty to the best of their ability:

> "I have heard that our bench was a bold one. But that was our responsibility. Our decision was based on that. We just followed the law. So, the challenge was that the Attorney General of Kenya insisted that the court had no jurisdiction in this issue. They expected that we would not continue with the case and that we would rule that 'yes, we do not have jurisdiction.' So, we just performed our duties. And that was a good start for the court" (Pioneer judge, EA25, March 11, 2022, Dar es Salaam)

Although the judge emphasised the supremacy of the law and maintained that one was merely doing one's duty, as per regulations that govern the court, in the same breath, one can deduce the resolve that the judges exhibited throughout the entire process. The fact that the interviewee phrased the legal question as a "challenge" posed by the Kenyan government, which expected the judges to back off meekly and surrender, the bench kept its

resolve and went ahead to "simply perform its duty," wherein it knowingly paved the way for future judicial resolve to triumph. The phrasing "that was a good start" could signal taking a firm and purposive stance toward future decision-making. In the context of new judicial institutions, judges are not only making judgements but are also setting the tone for future jurisprudence. The early years are crucial in helping to establish an institutional reputation, reaching out to future litigants through an expansive interpretation of principles, and thereby developing jurisprudence.

With no cases coming to the bench until 2005, the pioneer bench only issued five judgements, two of which were landmark rulings in *Anyang' Nyong'o* and *Katabazi*. Moreover, with the exception of *Katabazi*, the earliest cases centred on streamlining EAC institutions – especially addressing administrative questions – which would not seem to carry much political weight. The chapter argues that a combination of factors has contributed to the nostalgic reference of the pioneer bench as the "bold" model bench for regional jurisprudence.

Firstly, this bench is credited with demonstrating an apparent capacity and willingness to declare states in violation of the law, even in the face of looming pushback and backlash. The fact that the backlash, even though motivated by reasons of regime survival, was "legitimated with reference to both sovereignty and the need to protect a historically fragile EAC" (Brett and Gissel 2020, 109), the EACJ's pioneer bench was highly threatened. The *raison d'être* of the judicial organ – sustaining the survival of the regional bloc – was quickly put into question. Judges could have recoiled in fear of such exaggerated accusations, especially since they still served in their national jurisdictions. However, they stood their ground, formally recorded the intimidation attempts, wrote extensively and presented to various audiences, stating categorically that they had been threatened, silenced and verbally abused by officials in the Kenyan government. They also mobilised support amongst various stakeholders whilst addressing the courts' future constituencies. As the section on the regional Bar illustrates, a robust network of allies who strengthened the court amidst its initial backlash was also fundamental to its progression into a bold bench.

The first bench was not deterred by executive interference as it continued on its path to an expansive interpretation of the EAC legal principles. The pioneer bench's two landmark rulings – *Anyang Nyong'o* and *Katabazi* – set the ground for politically salient jurisprudence and human rights jurisprudence at the EACJ, respectively. For judges who operate on an ad hoc basis, all of whom were serving in some capacity at the national level,

this was a daring move that, as already illustrated, almost brought the court to a close. Such overt on-bench judicial bravery is an actively strategic and intentional means of forging institutional relevance by the judges and their Registrar, who intended to escape the court's initial legal cocoon and political insignificance within the EAC.

The pioneer bench was mostly populated by senior judges in the twilight of their careers, who were either close to retirement or had already retired after leaving the bench. For these judges, the threat of career insecurity or career suicide through bold decision-making was not apparent. 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. Pioneer leader Nyamihana Mulenga and his colleague Sinde Warioba are perfect examples of the "legacy" judge. Relatedly, all six judges were highly qualified legal personalities who had amassed significant political and social capital through their previous roles in their countries' highest courts and governments. Except for Moijo and Bossa, the bench had overt political exposure while all possessed judicial leadership at either national, regional, or continental levels. With two former ministers of regional administration and cooperation, one former Member of Parliament, and a former Acting Chief Justice, the bench possessed a collective political prowess that has not yet been matched in succeeding benches. In conclusion, the judicial composition of the first bench, coupled with the support of the regional Bar, could shed light on why the first bench was deemed bold.

6. The "Human Rights" Second Bench

The apparent expansive interpretation of the EAC Treaty to include human rights was an issue of concern at the inaugural East African Court of Justice (EACJ) *Judicial Symposium*[326] in Bujumbura.[327] In one of the sessions, a third bench judge raised a question to the panellists, who were concerned about the legal implications of interpreting human rights cases in the EACJ, despite not having the mandate to do so. The judge was anxious about the ambiguous nature of human rights jurisprudence by previous benches, wondering why, despite the lack of an express jurisdiction to render these disputes justiciable, the judges had pronounced themselves on human rights cases. Retired Justice James Munange Ogoola, a former EACJ judge on the second bench, took the chance to set the record straight on how his bench navigated the contentious issue of human rights adjudication:

> "You judges are lucky we already set the tone. The patriots already said, 'We will face the bull notwithstanding that it has an element of human rights.' Therefore, there is every reason to interpret this Treaty expansively, purposively, and historically and not be restricted to narrow grammatical interpretation. […] A matter is coming to us, even though it has some colouring of human rights elements that will not stop us from entertaining it. That is a big opening; if it is a window, make it a door! Make your intellect work as hard as you can. So, I say to myself, 'what is in a name?' That, what they call human rights, could by any other name sound as sweet."[328]

The quote above provides a window into the mindset of the second bench judges' attitude to deliberating on human rights disputes despite the existing jurisdictional challenges. This is a glimpse into the calibre of judges who dared to push the EACJ into a progressive human rights interpretation. For the former judge, who has been perceived as principled and is widely celebrated in the international community, the third bench judges

326 Participant observation, EACJ *Judicial Symposium*, *supra* note 62.

327 It became the topic of lengthy exchanges between legal actors, regional executives, EACJ judges and many judicial allies during the two-day pioneering event.

328 Speech by Retired Justice James Ogoola, November 5, 2021, EACJ Symposium, *supra* note 62.

only needed to follow the precedent set by the older benches and dare to be as expansive in their interpretation as their predecessors were.

As the previous chapter demonstrated, in some instances, the pioneer bench proved to be expansive and purposeful in interpreting legal principles, as in *Katabazi*[329] and *Anyang Nyong'o,* which laid the groundwork for politically salient jurisprudence and human rights jurisprudence at the EACJ, respectively. This chapter will delve into the evolution of human rights jurisprudence in the EACJ by tracing the development of the makings of a human rights bench.

6.1 Becoming a Human Rights Bench

As the previous chapter expounded, the pioneering human rights case of *Kabatazi* set the wheels of human rights jurisprudence in motion. The EACJ judges maintained that:

> "While the Court will not assume jurisdiction to adjudicate on human rights disputes, it will not abdicate from exercising its jurisdiction of interpretation under Article 27(1) merely because the Reference includes allegation of a human rights violation."[330]

Instead, the bench drew on existing Treaty provisions to adjudicate human rights issues by framing these violations as general elements of the rule of law, good governance and democratic principles over which the EACJ has express jurisdiction. Following *Katabazi*, the court continued its proactive interpretation of human rights claims, while the litigants also adopted the same strategy to circumvent the limitations brought on by the lack of explicit jurisdiction. This trend has been followed by succeeding benches. As explained by the latest EACJ President, Hon. Justice Nestor Kayobera, the court relies on Articles 6, 7(2), 8(1) (c), 23 and 27(1) of the EAC Treaty to justify its jurisdiction over cases involving human rights.[331] By repurposing the *fundamental*[332] and *operational*[333] founding principles of the EAC, especially the principles of good governance, including adherence to the principles of democracy, the rule of law, social justice and the maintenance

329 *Katabazi, supra* note 282.
330 Ibid., 16.
331 Speech by Hon. Justice Nestor Kayobera, *supra* note 133.
332 Art. 8 EAC Treaty.
333 Article 7 (2) of the EAC Treaty.

of universally accepted standards of human rights, the EACJ has exhibited bold interpretation and intentionality that goes beyond jurisdictional limitations. It is worth mentioning that the EACJ became the preferred avenue for accessing human rights even though the African Court on Human and Peoples' Rights (AfCHPR) had already been established.[334] This court was created to complement the African Commission on Human and Peoples' Rights in promoting and protecting human rights on the African continent but was limited in its jurisdiction (Ebobrah 2011). Restrictions were placed on the court's personal jurisdiction to hear cases brought by individuals, communities, and Non-Governmental Organizations (NGOs).[335]

In the EACJ, on the other hand, rather than shying away from confrontational issues of human rights, judges found recourse in existing legal tools so as to manoeuvre challenges to their limited remedial mandate innovatively. This is the purposive interpretation that Ogoola alluded to in the quote above. It is, thus, no surprise that the second bench avoided narrowly sticking to the semantics of the legal problem but instead drew on various sources to claim human rights and other jurisdiction. Whereas it is not unique to the EACJ, integration courts that start off being ignored could opt for expansively interpreting the legal rules, as was the case in the ECOWAS Court of Justice in relation to the standing of NGOs and the exhaustion of national remedies requirement (Alter, Helfer, and McAllister 2013).

6.1.1 Drawing Inspiration from Other ICs

Justice Ogoola also spoke of a historical interpretation, one that draws on understanding the source of the EAC Treaty. In his speech, he reminded the judges that the pioneers had already set the pace for an expansive reading of the Treaty, drawing on the CJEU, and that they only had to follow suit:

334 The AfCHPR began operating in November 2006, eight years after the Protocol to the African Charter on Human and Peoples' Rights had been adopted by the Organization of African Unity (OAU), due to an apparent lack of states' commitment to appointing judges and finding a seat for the court (De Silva 2018a).

335 NGOs with observer status at the African Commission and individuals can file cases directly at the court, provided the State that they are suing has deposited the Article 34(6) declaration recognizing the jurisdiction of the court to accept cases from individuals and NGOs (Plagis 2021).

> "There's also the source from which we got this Treaty, especially the source from which we designed the EACJ. It's common knowledge that we went to the European Union. And we took the provisions that govern their organs in that union and domesticated them here, so to speak. What does the European Court of Justice do? It doubles in human rights. In fact, the choice there is to go to the European Court of Human Rights or go to the European Court of Justice. And you find recourse in there."[336]

The EACJ judge's remarks confirm that the regional court has sought inspiration from the European Court of Justice (CJEU), an older and more established regional court which, in his words, "doubles in human rights." Even though some authors explicitly refer to it as a "human rights adjudicator" (De Búrca 2013, 169–70), the CJEU is *not* a human rights court per se (Rosas 2022). Its primary function is to interpret and apply EU law, but it has recognised fundamental rights as general principles of EU law since the 1970s, drawing on the constitutional traditions of EU member states and international human rights instruments (Rosas 2022). However, since the adoption of the European Union (EU) Charter of Fundamental Rights,[337] the CJEU has grown into adjudicating fundamental and human rights. An important distinction is that the CJEU only deals with human rights in the context of EU law, even though it often aligns its decisions with those of the European Court of Human Rights (ECtHR),[338] which addresses broader human rights violations by states even outside of EU legal matters. Thus, the CJEU plays a critical role in upholding human rights within the framework of EU law, which is the sentiment that the quote above shares. It is noteworthy that in Europe, "member states later ratified the CJEU's jurisprudential advances" instead of shutting down that initiative (Alter, Helfer, and McAllister 2013, 776).

In West Africa, the ECOWAS Court was not established primarily as a forum for human rights litigation, but a new opportunity was presented to the ECOWAS Court in 2005 when its protocol was revised to empower

336 Speech by Retired Justice James Ogoola, November 5, 2021, EACJ Symposium, *supra* note 62.

337 The EU Charter is the "principal source of law applied and interpreted by the CJEU to guarantee fundamental rights rather than human rights" (Rosas 2022, 208).

338 The ECtHR enforces the European Convention on Human Rights, promoting coherence in the protection of fundamental rights across Europe.

it to hear human rights complaints (Ebobrah 2010).[339] This human rights jurisdiction was acquired as the result of "a coordinated campaign in which bar associations, NGOs, and ECOWAS officials–in addition to ECOWAS Court judges themselves–mobilised to secure member states' consent to the transformation" (Alter, Helfer, and McAllister 2013, 738). At the time, observers saw the "unrestrictive requirements" of the ECOWAS human rights system as a potential "gold mine for rights realisation" (Ebobrah 2007, 313). Lawyers have started to turn to the court for resolution of issues dealing with arbitrary detention and free and socio-economic rights. Surprisingly, even though the member states granted the ECOWAS Court a broad human rights jurisdiction, they have eschewed opportunities to narrow the Court's authority when its early rulings generated opposition from some governments.

In Southern Africa, the Southern African Development Community (SADC) Tribunal played a brief but impactful role in human rights (Moyo 2009) before its suspension in 2010. The Tribunal initially had jurisdiction over cases involving the SADC Treaty, which included references to human rights, democracy, and the rule of law. 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 sum, with the evolution of the CJEU as a "human rights adjudicator" (De Búrca 2013; Rosas 2022) and the same wave sweeping across African REC courts, it is no surprise that the newly created REC court sought inspiration from other similarly positioned international courts in regional integration projects.

339 This agreement was put into effect with the adoption of the 2005 Supplementary Court Protocol (Ebobrah 2007, 313). The ECOWAS Court also has broad access and standing rules that permit individuals and nongovernmental organizations (NGOs) to bypass national courts and file suits directly with the court (Alter, Helfer, and McAllister 2013, 737).

6.1.2 Mapping the Human Rights Trajectory

Table 6: Human Rights Jurisprudence (Second Bench)

Year Filed	Case Name	Case Content	Verdict in favour of	Reason for Dismissal
2010	Plaxeda Rugumba v. Attorney General of Rwanda	Arbitrary arrest and detention without trial	Applicant	n/a
	Emmanuel Mwakisha Mjawasi & Others v. Attorney General of Kenya	Defunct EAC employees (pension & benefits)	Struck out	Non-retrospective application of the Treaty
2011	Attorney General of Kenya v Independent Medical Legal Unit (IMLU) v	Murder, torture, and inhumane treatment	Dismissed	Time barred
	Prof. Nyamoya Francois v. Attorney General of Burundi	Unlawful arrest and detention	Dismissed	Non-observance of the Rules of Procedure and time limitations
	Samuel Mukira Mohochi v. Attorney General of Uganda	Denial of entry and refusal of a fair hearing	Applicant	n/a
	Mbugua Mureithi wa Nyambura v. Attorney General of Uganda	Violation of free movement	Dismissed	Time barred
2012	Independent Medical Legal Unit v. Attorney General of Kenya	Forceful disappearance, torture and execution of Kenyans (2006 – 2008)	Dismissed	Time barred
	Hilaire Ndayizamba v. Attorney General of Burundi	Wrongful arrest, condemnation and life imprisonment	Dismissed	Time barred
	Attorney General of Uganda & Other v. Omar Awadh Omar & 6 Others	Unlawful arrests, extradition, tortured and arraigned on terrorism charges	Dismissed	Time barred
	Attorney General of Rwanda v. Plaxeda Rugumba	Arbitrary arrest and detention without trial	Respondent	n/a
2014	Attorney General of Uganda v. East Africa Law Society & Other	Walk-to-work protests (Uganda 2011 General Elections)	Respondent	n/a

Source: compiled by the author from the EACJ Case Mapping dataset (with the author on file).

Within its seven years, the second bench had heard and fully decided 12 human rights-oriented cases across a varied array of topics. Given that only 35 judgements were issued, the majority (slightly over a third) of these cases favoured human rights issues. Even if a third of the cases do not seem like a significant amount, note that the other category of cases that featured prominently, albeit expectedly, were cases that sought to rectify institutional affairs. Thus, for a non-human rights bench, this was rather impressive. Moreover, the first commercial, environmental, and property rights issues were also raised during this time, which will be explored in subsequent sections.

Before exploring the human rights cases of the second bench, it is important to highlight that half of the human rights cases that were litigated during this time were dismissed. Most strikingly, almost all of these dismissals were justified by the time limitations that will be further explored in detail in the proceeding sections. Likewise, the difference in interventions across the two chambers will also be examined.

The first human rights case, *Plaxeda Rugumba vs The Secretary General of the EAC and Attorney General of Rwanda,*[340] touched on the arbitrary arrest and detention of political prisoners in Rwanda. It raised human rights violations committed by the Kagame government. The applicant, Plaxeda Rugumba, complained that the Rwandan government had committed human rights violations when they arrested and detained her brother, Seveline Rugigana Ngabo, without a fair trial. Ngabo, a Lieutenant Colonel in the Rwanda Patriotic Front (RPF), was arrested in August 2010 and held incommunicado without justification for this arrest or availing any information to his immediate family. The First Instance Division (FID) issued a declaration stating that Ngabo's detention by the agents of the Rwandan government was in breach of the fundamental principles of the Community under Articles 6 (d) and 7(2) of the EAC Treaty. Borrowing from the pioneer bench, which unequivocally stated that even though it would not "assume jurisdiction to adjudicate on human rights disputes, it will not abdicate from exercising its jurisdiction of interpretation under Article 27(1) merely because the reference includes allegation of human rights violation."[341] The judges took the chance to clarify their intervention,

340 *Plaxeda Rugumba vs The Secretary General of the EAC and Attorney General of Rwanda*, Reference No 8 of 2010. December 1, 2011. https://www.eacj.org//wp-content/uploads/2012/11/Plaxeda-Rugumba-2010-8-judgment-2011.pdf.

341 Ibid., 16.

categorically stating that their interventions were merely putting the two articles to their envisioned use:

> "It would be absurd and a complete dereliction of this Court's Oath of Office to refuse to do so as long as the two Articles are in the Treaty. There is no doubt that the use of the words '*Other original, Appellate, Human Rights and Other Jurisdiction …*' is merely in addition to, and not in derogation to, existing jurisdiction to interpret matters set out in Articles 6(d) and 7(2). That would necessarily include determining whether any Partner State has '*promoted*' and '*protected*' human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights and the Applicant is quite within the Treaty in seeking such interpretation and the Court quite within its initial jurisdiction in doing so and it will not be shy in embracing that initial jurisdiction."[342]

While the pioneer bench set the tone for reading the two articles expansively and issuing orders regarding human rights, the second bench stressed its mandate in adjudicating human rights and proclaimed the Court's authority in this area. For these judges, it would have been incongruous and an utter disregard of their judicial duty to avoid confronting the issue of human rights simply because the Council had not yet conferred explicit jurisdiction on the EACJ to do so. By avoiding the use of human rights violations but clearly linking these violations to EAC states breaching their commitments to adhering to principles of good governance and the rule of law, the second bench continued the successful interpretation of human rights without necessarily stating it as such. Instead, they ruled that "Partner States shall be bound by principles of inter alia, good governance and the rule of Law"[343] and, as such, called Rwanda out on these transgressions. Shortly after this ruling, Colonel Ngabo was "produced by the Rwandan authorities and presented to his family."[344]

As legal scholar Ally Possi explained, the FID judges had taken a "greater judicial activist approach" than that adopted by the pioneer bench in the *Katabazi* case, "simply by directly exercising its interpretation jurisdiction of human rights provisions without linking human rights with a violation of the rule of law." (Possi 2015, 206). Likening their intervention to the SADC Tribunal, Possi emphasised the fundamental difference between the mandates of the two courts: international courts can make reference to

342 Ibid., 16–17.
343 Ibid., 31.
344 Interview, Former EACJ registrar, October 1, 2021, Kampala, Uganda.

human rights in a constitutive instrument of other international courts so as to directly interpret human rights provisions in their own treaties and to make findings in relation to human rights violations if they do not possess strict limitations to doing so (ibid, 207). In this case, the EACJ was restricted by the fact that the Council and the partner states had not yet concluded the protocol that would extend its jurisdiction. This predicament would, in Possi's view, disqualify the bench from assuming that jurisdiction; otherwise, it would be perceived as "activist."

This progressive interpretation was sustained by the FID in *Independent Medical Legal Unit vs Attorney-General of Kenya*[345] when it acknowledged that it had jurisdiction to interpret provisions regarding human rights by proactively and progressively interpreting its jurisdiction and ruling against Kenya. The case against the Kenyan government brought to light instances of murder, torture, and inhumane treatment committed by its security forces during the post-2007 election violence in the Mount Elgon region between 2006 and 2008.[346] It was alleged that the Kenyan government had failed to prevent, investigate and apprehend the perpetrators of the election violence, which led to thousands of civilian deaths in the region. The FID ruled that the Court had jurisdiction to entertain human rights violations, citing *Katabazi*.[347]

Crucially, and proving the second bench's trial court as activist, it did not stick to a restricted reading of the two-month rule, as had been imposed by the Treaty amendments following *Anyang' Nyong'o* in its ruling in *Independent Medical Legal Unit*. Recall that the amendments enforced authoritarian time restrictions on individual litigants, with complaints meant to be filed before the EACJ within two months of the occurrence of the grievance. Failure to meet these requirements meant that the case was time-barred. Drawing instead on the concept of continuous violation – a widely recognised principle in international human rights law – the bench categorically declined to consider the time limitations, siding with the applicant's Counsel, who posited that the "matters complained of are criminal in nature and concern the rule of law, good governance and

345 *Independent Medical Legal Unit vs Attorney-General of Kenya*, Reference No. 3 of 2010. June 29, 2011. https://www.eacj.org/wp-content/uploads/2020/11/Reference-No.-3-of-2010-Independent-Medical-Legal-Unit-Vs-The-Attorney-General-of-the-Republic-of-Kenya-4-Others.pdf.
346 Ibid., 2.
347 Ibid., 4–5.

justice which do not have any statutory limits."[348] Moreover, the judges disregarded the time constraint as a mere inconvenience in the pursuit of justice and emphasised that the gravity of Kenya's alleged violations "cannot be limited by mathematical computation of time."[349] In essence, they were of the view that such violations could not be simply overlooked owing to the two-month time limitation.

While the FID judges were convinced that adhering to a strict computation of time would go against the interest of justice, the Appellate Division (AD) did not exhibit the same level of judicial activism. Instead, the AD opted for a more restrained approach to interpreting human rights violations through a more stringent interpretation of the two-month time limitations. Case in point, the AD bench reversed the trial court's decision in *Independent Medical Legal Unit vs Attorney-General of Kenya*.[350] The AD dismissed the complaint as time-barred and argued against an expansive reading of that Article, arguing that:

> "There is no enabling provision in the Treaty to disregard the time limit set by Article 30(2). Moreover, that Article does not recognise any continuing breach or violation of the Treaty outside the two months after a relevant action comes to the knowledge of the Claimant; nor is there any power to extend that time limit."[351]

The appellate bench maintained that the EACJ judges did not have any power to disregard the limitations enacted by Article 30(2), thereby disagreeing with the trial court's recognition of continuing breaches or continuous violations, which would, in effect, grant the EACJ express or implied jurisdiction to extend the time set in the Article above. Instead, the AD judges chose to highlight the significance of adhering to the rule.

Keeping with this dynamic, the AD displayed a strict reading of the two-month rule in *Attorney General of Uganda vs Omar Awadh Omar & Others*.[352] In this case, the claimants – suspected of involvement in the 2010 Kampala bombings – contended that both Kenya and Uganda had

348 Ibid., 9.
349 Ibid., 10.
350 *Attorney General of Kenya v. Independent Medical Legal Unit*, Appeal No. 1 of 2011. March 15, 2012. https://www.eacj.org/wp-content/uploads/2012/11/appeal-no-1-of-2011.pdf.
351 Ibid., 16–17, as quoted in Possi 2018, 16.
352 *Attorney General (AG) of Uganda and AG of Kenya vs Omar Awadh Omar & 6 Others*, Appeal No 2 of 2012. April 15, 2013. https://www.eacj.org//wp-content/uploads/2013/09/AG_Uganda_v_Omar_Awadh_and_6_Others.pdf.

breached their rights and the rule of law when they were arrested in Kenya and forcibly transferred to Uganda, where they were illegally detained and charged with terrorism charges. In its ruling, the AD reiterated that the EAC Treaty makes no room for continuous violations, arguing that they do not have the power to "extend, to condone, to waive, or to modify the prescribed time limit for any reason."[353]

The Appellate Division appeared to be adopting a more cautious stance, employing a strict interpretation of the two-month rule and the non-declaration of the official human rights jurisdiction to avoid human rights interventions. Ironically, though, it dismissed Kenya's appeal from the *Anyang Ny'ong'o* decision on the grounds of time limitations, yet the former is a creation of the Treaty amendments following this very case.[354] This stance, as assumed by the appellate bench, could also be traced in their off-bench engagements. In his speech at the opening of the sub-registry in Kampala, EACJ President Harold Nsekela urged the Bar Associations, business actors and academic institutions to embrace the Court with careful adherence to the two months' time limitations (Nsekela 2012, 8).

The Appellate Division's strict interpretation trickled down and is reported to have "influenced" the FID in *Prof. Nyamoya Francois vs Attorney General of Burundi*,[355] dismissing the case for not satisfying the time frame, even if the applicant was still held in detention. Scholars worried that the EAC governments' explicit efforts to tame the activist trial bench – by creating a politically restrained appellate bench – were beginning to pay off (Taye 2019, 372).

The FID reversed this worrying trend in *Samuel Mukira Muhochi vs. Attorney General of Uganda.*[356] Mr Mohochi, a Kenyan citizen, instituted proceedings against the government of Uganda for discrimination by airport immigration in Uganda, which denied him freedom of movement, followed by arbitrary arrest and detention.[357] In their response to the accusations,

353 Quoted in Possi 2018, 15.

354 *Attorney General of Kenya vs Prof. Peter Anyang' Nyong'o & 10 others*, Appeal No 1 of 2009. August 2010. https://www.eacj.org/wp-content/uploads/2020/11/Appeal-No.-1-of-2009-Attorney-General-of-Kenya-Vs-Prof.-Peter-Anyang-Nyongo.pdf.

355 *Prof. Nyamoya Francois vs Attorney General of Burundi,* Reference 8 of 2011. February 28, 2014. https://africanlii.org/akn/aa-au/judgment/eacj/2014/84/eng@2014-02-28. *Hereafter Nyamoya.*

356 *Samuel Mukira Muhochi v. Attorney General of Uganda,* Reference No. 5 of 2011. May 17, 2013. https://caselaw.ihrda.org/en/entity/t0eoy29e6yyfxsonrgv9ggb9?page=1. Hereafter *Muhochi.*

357 Ibid., 3.

Uganda argued that the EACJ was "not in a position to answer such a 'political question' since it involved a treaty provision that was 'futuristic and progressive in application' and required the Court to resort to political rather than legal determination" (Odermatt 2018, 231). However, the FID rejected these arguments. Once the applicant met the strict time limitations, the Court heard the case and ruled in favour of the applicant. It held that the Ugandan authorities had denied Mohochi due process by denying him entry into the country without reason and refusing a fair hearing.[358] As Taye rightly states, adjudicating human rights disputes in the EACJ is possible,[359] as set out in *Katabazi*, and has carried on since then; however, "one has to run against time to satisfy the requirement of the two-month rule" (Taye 2019, 371).

In sum, following the opening of the floodgates in *Katabazi* by the first bench, the EACJ's second bench – especially the trial court – adopted an expansive reading of its jurisdiction and continued to decide human rights-oriented disputes, despite frustrationsfrom the appellate bench, which sought to undo its progressive stance. This demonstrates that the punitive response by states in amending the Treaty and creating the appellate court has partially succeeded, helping to tame the "activist" stance in human rights adjudication and general decision-making powers of the court. As the FID judges emphasised in *Prof. Nyamoya Francois v. Attorney General of the Republic of Burundi,*

> "We wish to reiterate what this Court has consistently maintained/ held that the mere inclusion of allegations of human rights violations in a Reference will not deter this Court from exercising its interpretative jurisdiction under Article 27 (1) of the Treaty."[360]

The trial bench did not merely dismiss cases because they were labelled as human rights allegations. Instead, they continued in the footsteps of the pioneers, expansively interpreting the Court's mandate to include human rights decisions. Observers at the time hailed the EACJ as an alternative forum for addressing the rule of law and protecting human rights.[361] While focusing on the agency of individual judges is fundamental, it would not

358 *Muhochi,* 56.

359 Even though the EACJ has continuously maintained that it is not a human rights court, it has decided these issues, disguising them as violation of Art. 6 (d) and 7(2).

360 *Nyamoya*, 17.

361 Batros, Ben. 2012. "Case Watch: East Africa's Fledgling Court Feels its Way." *Open Society Justice Initiative*, February 26. https://www.justiceinitiative.org/voices/east-africas-fledgling-court-feels-its-way.

capture the entire story of the resilience that the EACJ has exhibited, nor would it provide a complete picture of the forging of human rights jurisprudence in the region. Thus, the next one will highlight the role of judicial allies in shaping human rights jurisprudence.

6.2 The Role of Allies in Shaping Human Rights Jurisprudence

Judicial allies played an active role right from the Court's setup by participating in the framing of the EAC Treaty and helping to negotiate the new Court's jurisdiction. Members of the legal complex and human rights-oriented civil society groups were invited to aid in the drafting of the Community's new Treaty (Taye 2020). The regional Bar was instrumental in framing the EAC Treaty – alongside other Civil Society groups[362] – and in looking out for the interests of the new judicial organ.[363] As the former EACJ registrar wrote many years ago:

> "People of East Africa, particularly the business community and law societies, have been agitating for appellate jurisdiction of this Court so that it becomes the apex court in the region. Albeit for different reasons, the East African Magistrates and Judges Association (EAMJA**)** has also joined EALS, the Bar Association, to demand the East Africa Court of Appeal" (Ruhangisa 2011, 26).

It is reported that, during the negotiations, there was "controversy" over the nature and jurisdiction of the Court (Taye 2020, 342). Taye suggests that legal professionals and human rights groups advocated for an appellate court that would not only be similar to the previous Community's Court of Appeal for East Africa (EACA)[364] but also have an extensive jurisdiction that includes human rights. While their efforts were tremendous, they were unsuccessful in both endeavours.[365] However, my interviews showed that

362 Interview, EALS official, February 19, 2022, Arusha, Tanzania.

363 Ibid.

364 Following the "positive mark" that the CAEA left in the region, the participating groups sought to have a similarly authoritative institution that could serve as an appellate body of the region (Taye 2020, 342).

365 The EAC Treaty "explicitly left human rights outside the jurisdiction of the EACJ without closing the future possibility of extension of jurisdiction on human rights" (Taye 2020, 342). Instead, "the Partner States considered the EACJ an economic court" (ibid.).

not all legal professionals were in favour of an appellate court with human rights jurisdiction:

> "When we were discussing its setup, many lawyers wanted an appellate court. I argued that we do not need an appellate because that will turn out to be a court for states, and states could manipulate by withdrawing jurisdiction here and there. So, we got a regional court, and one of the advantages of having a REC court is that you have a court detached from the business of national courts."[366]

For this seasoned lawyer and academic, who argued in favour of a regional court, the status quo is preferable to having an "appellate model," which would imply the requirement to exhaust local remedies. To complicate the issue further, as partner states had not granted the REC court a human rights mandate that would bind them to their Treaty commitments, the EACJ would "often have to delve into the merits resulting from national law and possibly be hampered by domestic restraints and clawbacks" (Ssempebwa 2021, 11). Moreover, Ssempebwa foresees an impending challenge if the EACJ were granted exclusive human rights jurisdiction as the "total surrender, by the States, of judicial sovereignty over their transgressions, though welcome, can hardly be envisaged" (ibid., 11).

While the EALS pursued the extension of jurisdiction to include human rights, some negotiators sought to protect the newly created regional court from becoming overburdened with human rights affairs because, at its core, it is an integration court. Thus, to make a compromise, judicial allies (the Ugandan Judicial Education Committee (UJEC) and the EALS) proposed including a provision in the new EAC Treaty referring to the African Charter on Human and Peoples Rights (African Charter), which was adopted in Article 6(d) of the EAC Treaty (ibid.,11). Likewise, realising that the wish for appellate and human rights jurisdiction would not materialise, other CSOs "proposed the broadening of the principle of good governance to include the principle of accountability and transparency," which successfully influenced the EAC Treaty provisions in Article 7(2) of the EAC Treaty (Taye 2020, 343).

Having succeeded in negotiating the core *fundamental* and *operational* principles of the Community,[367] these two articles became the basis of

366 Interview, Senior Counsel and Academic, Prof. Ssempebwa, October 21, Kampala, Uganda.

367 Articles 6 (d) and 7 (2) of the EAC Treaty.

most of the litigation at the EACJ. Thus, civil society groups and regional lawyers played a crucial role in the formative stage of the EACJ by actively participating in and influencing the trajectory of the jurisdiction during the process of drafting the Treaty. Following the judicial allies' role in the creation of the EAC Treaty, they have also walked beside the court in its attempts at institutionalisation. As Njiru notes, civil society in the EAC has been "aggressive in holding the partner states accountable for the violations of human rights" (Njiru 2021, 511). The rest of the section critically engages how the court's two most prominent allies – East Africa Law Society (EALS) and the Pan African Lawyers' Union (PALU) – have been influential in steering the EACJ in a human rights-oriented direction and dared to push the court to establish its place in the REC.[368]

6.2.1 Evidence and Fact-finding Assistance

As witnessed in the pioneer bench, EALS supported the court by emphasising its implied human rights jurisdictional mandate by appearing as amicus to provide evidence and assist in fact-finding.

Table 7: EALS as Amicus

CEO	President	Case Name	Area of Intervention
Donald Omondi Deya (2002 – 2010)	Prof. Frederick E Ssempebwa (2002–2004)	Calist Andrew Mwatela & Others v Secretary General East African Community, Application No. 1 of 2005	Political affair (Legislative Power EAC)
	Commissioner Bahame Tom Nyanduga (2004–2006)	Prof. Peter Anyang' Nyong'o & 10 Others vs AG of Kenya & 2 Others, Application No. 1 of 2006	EALA Election Procedure
	Prof. Tom Ojiende (2006–2008)	EALS in matters of advisory opinion by the Council, Application No. 2. of 2009	Principle of variable geometry & consensus in EAC Decision-making
	Dr Alan M. Shonubi (2008–2010)	Attorney General of Kenya *v* Independent Medical Legal Unit, Appeal No. 1 of 2011	Human rights jurisdiction

Source: compiled by the author from the EACJ Case Mapping dataset (with the author on file).

368 Interview, Former CEO of EALS, March 2, 2022, Arusha, Tanzania.

Given the court's limited research capacity and noting that funding deficiencies constrain its research apparatus, the regional Bar has stepped in to fill the void as its former CEO expounded:

> "We help the court avoid embarrassment by deepening the case, giving them comparative jurisprudence, and bringing out international law principles that they would not otherwise have easily accessed because their research function is not as deep. And if there is a landmine, we guide them, so I think we have got more respect for that role than from the cases of litigants where we were litigants."[369]

Through these interventions as amicus curiae, EALS has earned respect and recognition from the court as a trusted ally whose "very useful and helpful submissions"[370] and guidance were explicitly appreciated. For instance, in *Attorney General of Kenya v. Independent Medical Legal Unit*, EALS advised the court on matters of jurisdiction regarding human rights violations.[371] EALS, in its capacity as amicus curiae, continued to underscore that the EACJ had already pronounced itself on this issue in *Katabazi*.[372] Deliberate engagement by activist lawyers of the regional Bar continues to inform the human rights jurisdiction of the court. It is now standard practice in the EACJ for lawyers to widely interpret and frame human rights violations as resulting from the misapplication of the rule of law and a failure to adhere to principles of good governance (Articles 6(d) to 7(2) of the Treaty).[373]

However, in later years, there has been little intervention as amici, owing to the change in leadership on the FID.[374] As of February 2023, without including pending cases, the EALS had filed four amicus briefs.[375]

The type of cases and the activist role of the regional Bar can only be attributed to the individuals who pushed for the court's interests, especially legal professionals and civil society organisations that were actively

369 Interview, Former CEO of EALS, March 2, 2022, Arusha, Tanzania.
370 *Mwatela, supra* note 240.
371 *Attorney General of Kenya v. Independent Medical Legal Unit*. Appeal No. 1 of 2011. March 15, 2012. https://www.eacj.org/wp-content/uploads/2012/11/appeal-no-1-of-2011-2.pdf. Page 12.
372 Ibid., 8–9.
373 Interview, Former Registrar, October 1, 2021, Kampala, Uganda.
374 Interview, Former EALS official, March 2, 2022, Arusha, Tanzania.
375 Unlike previous research, which lists six amicus cases where the EALS appeared, my search did not verify two of the cases that he presents and are excluded from this analysis (Taye 2020, 357).

preoccupied with the advancement of human rights, the rule of law and good governance in the region. The forerunner president, Ssempebwa, for instance, was involved in drafting several pieces of legislation in the region, participated in the early negotiations and eventual drafting of the EAC Treaty, and thus was well-suited to understand the pressures on the new court and its position in these early years.[376] Likewise, EALS pioneer CEO Donald Deya was influential in steering the new court in a human-rights-oriented direction. He was already a seasoned human rights lawyer in Kenya and the region, who was well respected,[377] passionate about the new organ of the Community, and whose decisions on empowering the court would not be easily swayed by the board.[378] In his own words, the EALS was "activist"[379] and sought to challenge the injustices in the region through the newly established court as an avenue for legal and political mobilisation. Deya was a key player in most of the public interest litigation brought to the EACJ during that time. Even after he left office at the EALS, his commitment to the EACJ did not waver, as he continued engaging the court by mobilising legal scholars and practitioners to support it against the backlash.[380]

Moreover, as of this writing, Deya was the CEO of another critical partner of the EACJ, the Pan African Lawyers Union (PALU). PALU describes itself as a "continental membership forum of and for individual African lawyers and lawyers' associations in Africa."[381] The EALS and PALU are the

376 Interview, Professor Frederick Ssempebwa, October 10, 2021, Kampala, Uganda.

377 Deya's history in legal mobilisation can be traced back to his role as "Deputy CEO and Deputy Secretary of the Law Society of Kenya (LSK) during the peak of its multi-pronged pro-democracy struggle against a one-party dictatorship in the 1990s" (Gathii 2013, 278).

378 Interview, Donald Deya, March 2, 2022, Arusha, Tanzania.

379 The involvement of EALS has been dwindling over the years as different leadership took on the organisational work at the Secretariat. As the pioneer CEO recounted, after 2010, EALS went through a "bureaucratic" period where they were involved in typical membership organisational duties, like organising conferences, trainings and workshops for its members, without overtly taking a stance on the allyship of the court.

380 For example, at the Inaugural Colloquium of legal scholars on the African Human rights system, PALU raised concerns about "the attacks on the independence, jurisdiction and effective operations" of the EACJ following *Anyang' Nyong'o*, the ECOWAS Community Court of Justice (2009), and the suspension of the SADC Tribunal (2010).

381 The Pan African Lawyers Union (PALU). February 28, 2020. https://www.lawyersofafrica.org/wp-content/uploads/ABOUT-PALU_ENG.pdf. Page 3.

most critical allies of the EACJ, as they not only initiate litigation but go beyond legal avenues to empower the court. For example, in conjunction with the East African Civil Society Organisations Forum (EACSOF)[382] and the Open Society Initiative for East Africa, PALU held a consultation on facilitating a common civil society organisation's "position on proposals for an international criminal jurisdiction for the EACJ."[383] Thus, it is not surprising that the PALU has also appeared as amicus in other politically salient cases to continue the work started while Deya was still with the regional Bar.

Likewise, Deya was important in publicising the court to the international community through his engagement with various donor country initiatives. As already stated in Chapter 4, the EACJ primarily receives its funding from EAC partner states through their contributions to the overall EAC budget. However, like many regional bodies in Africa, the EACJ has also received financial and technical support from foreign donors and development partners to supplement its budget and support specific activities or capacity-building initiatives. Key foreign donors and partners that have provided funding or technical support to the EACJ include the African Development Bank (AfDB), the World Bank; the United States of America and its United States Agency for International Development (US-AID), the European Union (EU), the Federal Republic of Germany and its agencies – *Deutsche Gesellschaft für Internationale Zusammenarbeit* (GIZ) and the *Kreditanstalt für Wiederaufbau* (KfW), the Swedish International Development Agency (SIDA) and the People's Republic of China (East African Community 2019, 56).

Through its engagement as amicus, PALU mobilised against violations of freedom of speech and the press through unlawful media regulation in

382 EACSOF is an umbrella body for Non-Governmental Organizations (NGOs) and civil society organisations (CSOs) in East Africa, and it seeks, among others, to "ensure that East African citizens and their organisations work together to play a more effective role in the integration process" through creating empowered and emboldened CSOs that demand accountability from the Community's leaders. It thus specifically caters to issues affecting citizen participation in regional integration initiatives. See East African Civil Society Organizations' Forum (EACSOF). https://eacsof.net/EACSOF/.

383 PALU Newsletter. "CSOs Discuss Extension of the Jurisdiction of the East African Court of Justice." September – October 2012. Pages 3–4. https://www.lawyersofafrica.org/wp-content/uploads/PALU-Newsletter-6-September-andOctober.pdf.

Burundi,[384] where the applicants sought to repeal or amend the Burundi Press Law. Even though the court maintained that it had no jurisdiction to grant those orders, it issued a declaratory judgement citing violations of the Treaty and directed Burundi to implement those changes through its internal legal mechanisms.[385] The relevance of the involvement of CSOs as amicus in politicised cases in the region was clearly articulated in the application for admission as amicus curiae, where Mr Deya unequivocally stated that the role of an amicus curiae would significantly enhance the jurisprudence of the court, as witnessed in the past in proceedings.[386] Equally, he underlined the importance of their involvement in, increasing public participation in court proceedings, which inevitably advances the performance of the court.[387] The judges agreed with Mr Deya, admitting that EACJ was in the "process of settling its jurisprudence" and would highly benefit from "experts and groups with relevant experience and expertise in relevant areas of law" permitting them to engage the cases despite an apparent lack of comprehensive statements of interest from the applicants.[388]

6.2.2 Initiating Strategic Litigation

The regional Bar and other interest groups have purposefully supported the EACJ bench as a human rights court through the initiation of strategic litigation.[389] Strategic litigation in the EACJ has been part of a well-defined, structured, and deliberate attempt by various stakeholders to hold EAC partner state governments accountable. The EALS, PALU, and other hu-

384 Nine NGOs, including PALU, joined the case. However, their role was limited to filing submissions. *See Burundian Journalists Union v. The Attorney General of Burundi and several amici curiae*, Reference No. 7 of 2013. May 15, 2015. https://www.eacj.org//wp-content/uploads/2015/05/Reference-No.7-of-2013-Final-15th-May-2c-2015-Very-Final.pdf.

385 Ibid., 41–42.

386 *Burundi Journalists Union versus the Attorney General of Burundi*, Application No. 2 of 2014. August 15, 2014. https://www.eacj.org/wp-content/uploads/2014/08/RULING-IN-APPLICATION-NO-2-OF-2014-Final-REVISED-3.pdf. Page 4.

387 Ibid., 4.

388 Ibid., 9.

389 Strategic litigation is a contested concept, with various working definitions, but it is seldom defined (Barber 2012, 412). For the purposes of this work, it is understood to involve claiming rights in court, with the hope of bringing about legal and social change (unlike Barber who also refers to non-legal methods as part of strategic litigation).

man rights NGOs[390] have filed before the EACJ. While the court's caseload has grown exponentially over the past two decades, from an empty docket to a backlog, there is a need to emphasise the context in which cases arise, the long-term progress of court records, and the litigants' relations and rationale for engaging the court. A brief dive into the most prominent cases lodged by the court's leading allies provides a starting point for appreciating the intentionality behind the filing of these overtly human rights-oriented cases.

Take the *East African Law Society vs Attorney General of Uganda and Secretary General of the East African Community*[391] case, for instance. The EALS raised concerns against Uganda and the EAC Secretary General over violating fundamental human rights during the peaceful 2011 walk-to-work protests in Uganda. In April 2011, various Ugandans protested the rising costs of fuel, transport and living expenses through peacefully organised walk-to-work protests throughout the capital city.[392] Despite seeking police clearance, the police declined to authorise the unarmed protests and instead violently and brutally attacked the participating citizens with the help of the military. Hundreds of protesters were injured, and over ten people died, including two children. Several others were arrested and detained for unlawful assembly, including a violent attack on the leading opposition politician at the time, Dr Kiiza Besigye.[393] Represented by leaders of the EALS, including Prof. Ssempebwa, the regional lawyers' association argued that Uganda's actions violated not only its constitution but also the human rights of its citizens.[394] Even though the case was dismissed (Katungulu 2018), it added to the several cases that would help the court assert itself as "*a court of human rights*"[395]despite not having express human rights jurisdiction.

390 These include, but are not limited to, the Tanzanian NGOs: the Legal and Human Rights Centre (LHRC), the Tanzania Human Rights Defender's Coalition (THRDC), and the Center for Strategic Litigation (CSL).

391 *East African Law Society vs Attorney General of Uganda & Secretary General of the East African Community*, Reference No. 2 of 2011. March 28, 2018. Page 6. https://www.eacj.org/wp-content/uploads/2020/11/Reference-No.-2-of-2011-East-Africa-Law-Society-vs-the-Attorney-General-of-the-Republic-of-Uganda.pdf.

392 Ibid., 4.

393 Ibid., 5.

394 EACJ. 2011. "Uganda given two weeks to respond in 'Walk to Work' case." https://www.eacj.org/?p=448 (Accessed September 21, 2023).

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

Continuing the string of human rights cases against legally disobedient member states, EALS took on Kenya and Uganda in *East African Law Society v. Attorney General of Uganda and 2 others.*[396] The judicial allies sued to support Kenyan nationals *Omar Awadh and Six Others*[397] who had been arrested in Kenya and delivered to Uganda, where they were charged with various criminal offences related to the terrorist bombings in Kampala. However, the regional Bar was not successful in its endeavour. This is the result of the opposing directions taken by the two chambers of the court. While the First Instance Division (FID) has been more permissive in circumventing the statute of limitations as imposed on private litigants in the Treaty amendments, the Appellate Division (AD) adopted a stricter stance. Despite the contradictory approaches taken by the two benches, these cases illustrate that the EALS intervened in the human rights violations against EAC citizens, albeit to no avail in both cases. Nonetheless, despite the dismissal of the cases, the involvement of the regional bar association in contentious human rights violations against Member States illustrates their commitment to mobilising against breaches of the rule of law.

Similarly, EALS dragged Burundi to court over illegally disbarring its then President of the Burundi Bar Association, Mr Isidore Rufyikiri, from the Roll of Advocates by the Burundian Court of Appeal without following the proper procedures and due process over holding a Press Conference in which he made declarations that Burundi considered to be against "the rules, State security and public peace."[398] Burundi also prosecuted Mr Rufyikiri before the Anti-Corruption Court and further prohibited him from travelling outside the country, breaching Articles 6(d) and 7(2) of the Treaty (EACJ Law Reports 2012–2015, 467–8). The court agreed with the applicant and issued a declaratory order directing the Secretary

396 *East African Law Society v. Attorney General of Uganda & 2 others*, Reference No. 3 of 2011. September 4, 2013. Page 2. https://www.eacj.org/wp-content/uploads/2020/11/Reference-No.-3-of-2011-East-Africa-Law-Society-Vs-The-Attorney-General-of-Uganda-2-Others.pdf.

397 *Omar Awadh and Six Others v. Attorney General of Kenya, Attorney General of Uganda, and Secretary General of the EAC,* Application No. 4 of 2011. November 1, 2011. https://www.eacj.org//wp-content/uploads/2013/09/Ruling-in-Application-no-4-of-2011-28th-February.pdf.

398 *East Africa Law Society v. the Attorney General of the Republic of Burundi, and the Secretary General of the East African Community*, Reference No. 1 of 2014. May 15, 2015. https://www.eacj.org//wp-content/uploads/2015/05/REFERENCE-NO-1-OF-2014-EAST-AFRICAN-LAW-SOCIETY-ISIDORE-RUFYIKIRI-15-MAY-2015-Final-1.pdf. Page 3.

General of the EAC to "immediately operationalise the Task Force set up on January 15, 2014, to investigate alleged violations of Treaty provisions by the Republic of Burundi", among other measures.[399] Additionally, EALS went to court in another case,[400] requesting the Court to issue a "quashing order and a stay of the decision"[401] of the Court of Appeal of Bujumbura that has the earlier-mentioned effects on Mr Rufyikiri. The EACJ dismissed the application and preferred to deal with the issues in the main reference.[402] By intervening in Rufyikiri's affliction, EALS joined the conversation around human rights violations in Burundi and also sought to protect its members by initiating these cases at the EACJ.

In the same manner, PALU has been a repeat litigant, filing several cases on various core fundamental principles of the EAC, as stipulated in Articles 6(d) and 7(2) of the EAC Treaty.[403] Continuing the work he started with EALS, PALU CEO Deya continues to challenge the EACJ to advocate for good governance, justice, and the protection of human rights across the EAC through litigation. The judicial ally has recently taken on politically salient cases in Tanzania (land rights among the Maasai population) and South Sudan (arbitrary arrests of citizens).

On behalf of Maasai communities, PALU filed a case[404] in September 2017, challenging their unlawful and forceful eviction from their village land in Loliondo Division, which borders the Serengeti National Park.[405] Filing at the EACJ was intended to order the restitution and reinstatement

399 Ibid., 41.

400 *East African Law Society v. Attorney General of the Republic of Burundi and the Secretary General of the EAC*, Application No. 3 of 2014. August 15, 2014. https://www.eacj.org/wp-content/uploads/2014/08/APPLICATION-NO-03-OF-2014-THE-EAST-AFRICAN-LAW-SOCIETY-AG-BURUNDI-15-AUGUST-20141.pdf. Hereafter *Rufyikiri*.

401 Open Society Justice Initiative. 2015. Case Digest: Human Rights Decisions of the East African Court of Justice (May 2015). https://www.justiceinitiative.org/uploads/8e03c4f9-2950-484b-96a2-be903b9665e8/case-digests-eacj-20150526.pdf. p. 13.

402 *Rufyikiri*, 11.

403 See Table 17 in the Appendix for all cases involving PALU, either as litigant or amicus.

404 *Ololosokwan Village Council & 3 others v. the Attorney General of Tanzania*, Reference No 10 of 2017. September 30, 2022. https://www.eacj.org/wp-content/uploads/2022/11/Reference-No.-10-of-2017.pdf. Hereafter *Loliondo*.

405 The government of Tanzania, claiming that these communities occupied the Serengeti National Park, began violently evicting them from their homes in the Loliondo Game Controlled Area. See https://www.lawyersofafrica.org/court-delivers-judgment-on-loliondo-case/ (last accessed September 21, 2024).

of the property, as well as to obtain monetary compensation for the damages caused.[406] However, the case was unsuccessful at the trial court. An unfavourable judgement from the FID resulted in an appeal, *Appeal No. 13 of 2022*,[407] where the Masaai communities finally received their "vindication."[408] The Appellate Division sided with the Appellants, underscoring that the trial court erred on points of law by failing to examine and consider the evidence presented in support of the case, among others. PALU called the ruling a "significant milestone in the court's jurisprudence and a triumph in a prolonged and closely watched legal dispute."[409] It also perceived the judgement as setting "a powerful precedent for future cases" on a similar matter.[410]

PALU also intervened in the arrest of a South Sudanese citizen, Mr Kerbino Wol Agok,[411] who had been arrested without due process of law.[412] They sought orders to reverse the confiscation of his personal and corporate bank accounts as well as the closure of his businesses. The applicants also filed a Certificate of Urgency, requesting that the EACJ instruct the South Sudanese government to release Mr Agok.[413] Unfortunately, before his case could be finalised at the EACJ, Agok – who was accused of overthrowing the government of Salva Kiir – was shot and killed by the South Sudanese army.[414] Nonetheless, the case was unsuccessful at trial as the applicant failed to adduce the necessary evidence that would point to

406 *Loliondo*, 8.

407 *Ololosokwan Village Council & 3 others v. the Attorney General of Tanzania*, Appeal No 13 of 2022. November 29, 2023. s://africanlii.org/akn/aa-au/judgment/eacj/2023/12/eng@2023–11–29/source.pdf.

408 PALU: Press Statement. November 30, 2023. "Maasai Communities Vindicated by the Appellate Court." https://www.lawyersofafrica.org/press-statement-maasai-communities-vindicated-by-the-appellate-court/.

409 Ibid.

410 Ibid.

411 *Garang Michael Mahok vs The Attorney General of South Sudan*, Reference No. 19 of 2018. June 24, 2022. https://www.eacj.org/wp-content/uploads/2022/06/Reference-No.-19-of-2018-Garang-Michael-Mahok-v.-The-Attorney-General-of-the-Republic-of-South-Sudan.pdf.

412 Ibid., 2–6.

413 *Garang Michael Mahok vs The Attorney General of South Sudan,* Application No. 20 of 2018. December 5, 2019. https://www.eacj.org/wp-content/uploads/2020/02/Application-No.20-of-2018.pdf.

414 Waakhe Simon Wudu, 2020. "South Sudan army kills leader of new rebel group." VOA News, June 15. https://www.voaafrica.com/a/africa_south-sudan-focus_south-sudan-army-kills-leader-new-rebel-group/6191151.html.

the government's violation of Articles 6(d) and 7(2) of the EAC Treaty.[415] Relatedly, PALU took on the South Sudanese government for another unlawful arrest, detention and disappearance of its national, Mr Morris Mabior Awikjok Bak.[416] Mr Mabior's arrest is linked to his criticism of the government's governance mechanisms.[417]

Despite the result of the case – whether they win or not – judicial allies have filed overt human rights abuses in the EACJ in search of an additional avenue for political and legal mobilisation (Gathii 2020b). Through their mobilisation efforts, EALS and PALU have directly influenced the emergent human rights jurisprudence of the EACJ. Several authors have attributed the burgeoning chain of human rights litigation to the EALS (Alter, Gathii, and Helfer 2016; Ebobrah and Lando 2020; Taye 2020). Indeed, EALS has proactively mobilised to encourage the court to decide human rights cases, which, in turn, draws inspiration from that "mutually supportive relationship [] to successfully overcoming the court's limited jurisdiction and institutional weaknesses" (Gathii 2013, 283). By setting a precedent in human rights jurisprudence at the EACJ, judicial allies are contributing toward the complexity and adaptability dimensions of the institutionalisation of the court (Huntington 1968). By enabling the court to go beyond its limited jurisdiction, it is being challenged to adapt and evolve into a more differentiated and complex structure. For the EACJ to become highly institutionalised, it ought to be adaptable and go beyond the limitations that were set for it.

Likewise, when they appeared as amici, EALS and PALU assisted the court by providing evidence and legal arguments that enabled them to make decisions. Recall that EALS initially limited its role to appearing as amicus. However, in response to developments following the court's first and most contentious case, *Anyang' Nyong'o,* the regional Bar called for more direct involvement as a litigant.[418] Since then, EALS has supported

415 *Garang vs Attorney General of South Sudan* (Reference No. 19 of 2018), 24.

416 PALU: Press Statement. February 25, 2023. "PALU seeks Urgent Interim Orders at the East African Court of Justice (EACJ) against the Governments of South Sudan and Kenya for the production of Mr Morris Mabior Awikjok Bak." https://www.lawyersofafrica.org/palu-seeks-urgent-interim-orders-at-the-east-african-court-of-justice-eacj-against-the-governments-of-south-sudan-and-kenya-for-the-production-of-mr-morris-mabior-awikjok-bak/.

417 Mohammed Yusuf. Voice of America (VOA). "Lawyers Seek Release of Missing South Sudanese Activist." https://www.voanews.com/a/lawyers-seek-release-of-missing-south-sudanese-activist/6988466.html (last accessed September 21, 2024).

418 Interview, Former Registrar, February 18, 2022, Arusha, Tanzania.

the court through litigation under its "public interest advocacy"[419] initiative, daring to challenge human rights violations, rule of law breaches and injustices in the region through the newly established court as an avenue for legal and political mobilisation.[420] Even though EALS has only explicitly appeared as an amicus or applicant 17 times,[421] going by numbers alone would obscure the role that EALS played. EALS, together with the national bar associations,[422] sought to intervene and protect the EACJ from executive meddling, among other interventions. Their strategic and intentional involvement in furthering the court's human rights mandate can be understood as a means of empowering the court.

6.3 Beyond Human Rights Jurisprudence

Beyond human rights jurisprudence, the second bench also covered topics outside the realm of human rights discourse. A case mapping exercise by the author reveals that the second bench issued 62 decisions – one advisory opinion, 26 interim rulings[423] and 35 final judgements.[424] This section will focus on judgements only as interim orders serve as provisional legal measures designed to address specific aspects of a case pending its final resolution. Twenty-three judgements spanned diverse topics, which will be explored here.

419 East Africa Law Society. "Public Interest Advocacy." https://ealawsociety.org/public-interest-advocacy/ (Accessed June 4, 2021).

420 See Table 16 in the Appendix for all the cases mentioned above.

421 As of February 2023, the EALS had filed 13 cases. See Table 16 in the appendix for a summary of the cases in which the EALS filed a case as an applicant.

422 Throughout the thesis, I focus on the regional Bar rather than individual national Bar associations because EALS has consciously built its national law societies to be more regionally oriented, allowing for both institutional and individual membership. This arrangement implies that the same active members of the national Bar tend to be the most active at the regional level.

423 Also referred to as interim orders. An interim order or decision, as stipulated in Article 39 of the Treaty, empowers the court to issue provisional directives or orders in any case brought before it. Such issuance is contingent upon the submission of an application supported by an affidavit. These interim measures are deemed necessary and desirable by the court and are imposed on terms it deems appropriate (East African Court of Justice 2019, 52).

424 Includes any decision, ruling or order made by the court (East African Court of Justice 2019, 10).

6.3.1 Streamlining EAC Institutions

Continuing its role as an arbiter in the institutionalisation of the East African Community (EAC), the Court resolved matters pertaining to its disputed jurisdiction and employment grievances within the regional bloc. It primarily dealt with political affairs amongst EAC organs. For instance, in its first advisory opinion, the EACJ was tasked with clarifying the application of the principle of variable geometry vis-à-vis the requirement for consensus in decision-making by the Council of Ministers.[425] This advisory opinion was symbolic at the time as it solidified the Court's role as the Community's judicial organ.[426] The Court was being called upon to guide the process of decision-making in the EAC, especially in regard to the institutional development of the Community's organs.[427] Indeed, the judicial arm needed to assert its place and take the lead in guiding the Community on "whether or not the principle of variable geometry and decision-making by consensus are in conflict."[428] The Court advised that the two principles are in harmony and that the former can apply to guide the integration process alongside consensual decision-making.[429] As an organ that is meant to ensure compliance with the EAC Treaty so as to drive regional integration, this case was an essential contribution to expanding the Court's authority within REC processes.

Similarly, when the 13th Summit of Heads of State's decided to mandate the Secretariat to undertake the necessary steps in operationalising the Customs Union, Common Market, Monetary Union and the proposed action plan for the EAC political federation, a Tanzanian journalist *Timothy Alvin Kahoho*[430] challenged this decision before the EAC court. Even if the bench disagreed with the applicant's concerns, it used this case to highlight and defend the role of the EAC Secretariat and other organs within the

425 *In the Matter of a request by the Council of Ministers of the EAC for an Advisory Opinion*, Application No. 1 of 2008. https://www.eacj.org/wp-content/uploads/2019/03/Advisory-Opinion-No.-1-of-2008-The-Council-of-Ministers-of-the-East-African-Community.pdf.

426 Ibid., 6.

427 Ibid., 6.

428 Ibid., 10.

429 Ibid., 41.

430 *Timothy Alvin Kahoho v the Secretary General of the East African Community*, Reference No. 1 of 2012. May 17, 2013. https://ealaw.eastafricalaw.org/wp-content/uploads/2021/02/TIMOTHY-ALVIN-KAHOHO-v-THE-SECRETARY-GENERAL-OF-THE-EAST-AFRICAN-COMMUNITY.pdf.

political integration agenda.[431] Similarly, although the EACJ acknowledged the role of the other organs that work part-time (the Summit, the Council of Ministers, the Coordination Committee and Sectoral Committees), the EACJ emphasised the centrality of the Secretariat as the "fulcrum on which the wheels of integration rotate."[432] Likewise, the bench also saw the chance to pronounce itself on the process of attaining the EAC Political Federation. The judges maintained that the process leading to a Political Federation is "not exclusive to the Council, and all Organs must work together to attain it."[433] Besides, the centrality of the participation of EAC citizens was emphasised.[434] Through these cases, the once-threatened but not dissolved Court took the opportunity to address the objectives of EAC regional integration and, at the same time, the institutionalisation of EAC organs.

Still dealing with streamlining EAC institutions, another case, *Legal Brains Trust Limited,*[435] arose from Uganda, challenging whether a Member of the EALA can only hold office for a maximum of two terms. The Court ruled that, indeed, two terms were the maximum duration.[436] In the same case, the applicants raised the issue that the Attorney General of Uganda had not sought an advisory opinion of the EACJ. Even though the Court ruled that it was not a breach of the Treaty if the Attorneys General did not seek an advisory opinion, it used the chance to communicate to EAC officials across the board that:

> "We, however, strongly advise that before any Attorney General or official of any Partner State of the Community makes such a decision or does such an act, he or she should always warn himself or herself of the ramifications of the real possibility of five different interpretations of an Article of the Treaty (from the five Partner States). We therefore find it imperative to remind the Partner States, particularly Attorneys General that the need for consistency in interpretation of Treaty provisions should make it imperative for them to refer questions of interpretation of the Treaty to the EACJ, the organ established, inter alia, for that purpose."[437]

431 Ibid., 22.
432 Ibid., 22.
433 Ibid., 26.
434 Ibid., 26.
435 *Legal Brains Trust Limited v A.G. of Uganda*, Reference 10 of 2011. March 30, 2012. https://africanlii.org/akn/aa-au/judgment/eacj/2012/6/eng@2012-03-30/source.pdf.
436 Ibid., 28.
437 Ibid., 34.

Unsatisfied with the trial court's solution, the applicant advocated for the necessity of an advisory opinion in a subsequent appeal.[438] The appellate bench, which had already been noted to be less progressive, reasoned that the matter was not worth exploring as the question raised was "clearly hypothetical, academic, abstract, conjectural and speculative" in nature and declined to entertain it over a lack of locus standi.[439]

The Court has persistently declined to invalidate the decisions of the EAC Summit, Council or even the Secretariat. Take the cases raised by judicial allies who were seeking the Court to decide whether the amendments to the Treaty, following *Anyang' Nyong'o*, could be stopped. In *East African Law Society and 4 Others v. Attorney General of Kenya and 3 Others*,[440] the applicants challenged the unusual, hasty and the improper nature of the treaty amendment process. The regional Bar argued that the process excluded other EAC Organs (except the Summit), national governments, and the people of East Africa and tasked the Court with invalidating the amendments. While the regional Bar sought to empower the Court, the EACJ declined to invalidate the amendments, emphasising prospective[441] over retrospective annulment. The bench claimed that the infringement of the Treaty "was not a conscious one" and that "after this clarification of the law on the matter, the infringement is not likely to recur."[442] In other words, they excused the lapse in judgement by the Summit. As the former Registrar aptly puts it, "the Court hesitated to nullify the impugned amendments but warned the Partner States not to repeat the same mistake in future" (Ruhangisa 2017a, 235). Instead, the Court "avoided confrontation with the partner states" (Taye 2019, 373) but offered a "strong" recommendation that the amendments be "revisited at the earliest opportunity of reviewing the Treaty."[443]

438 *Legal Brains Trust Limited v A.G. of Republic of Uganda*, Appeal 4 of 2012. May 19, 2012. https://africanlii.org/akn/aa-au/judgment/eacj/2012/9/eng@2012-05-19/source.pdf.

439 Ibid., 16.

440 *East African Law Society (EALS) & 4 Others v. Attorney General of Kenya & 3 Others,* Reference No. 3 of 2007. August 31, 2008. https://www.eacj.org//wp-content/uploads/2012/11/Ref-3-of-2007.pdf.

441 Ibid., 44.

442 Ibid., 43.

443 Ibid., 45.

The Court adopted the same approach in another case filed by the East Africa Law Society,[444] which challenged the Common Market Protocols and the Customs Union Dispute Settlement Mechanisms, arguing that they deny original jurisdiction to the EACJ to handle disputes arising from these Protocols.[445] The EACJ did not share the EALS worries, at least not entirely. The court emphasised that it "remains the final authoritative forum" on Treaty interpretation, taking precedence over decisions of the national judiciaries on matters pertaining to the Treaty.[446] However, it argued that since the partner states are "the main users" of these protocols, they ought to bear the "primary responsibility to implement community legal instruments", and thus, national courts are most suited to entertain Common Market and Customs Union disputes.[447]

However, judges, at times, also dared to speak out against the decisions of the EAC's top organs, as seen in the *East African Center for Trade Policy and Law*[448] case. This case also challenged the Treaty amendments, the Common Market Protocol and the Customs Union Dispute Settlement Mechanisms.[449] The judges agreed with the applicant, opining that the said amendments provided a window for partner states to conclude the protocol for the extended jurisdiction of the court, but instead, they made provisions in the Treaty that undermined the supremacy of the EACJ.[450] The judges reiterated that the amendments encroached on the court's previously broad jurisdiction and excluded the EACJ, where partner state organs take precedence on specific issues, which could render the EACJ "powerless" over partner state institutions.[451] Concerning the dispute resolution mechanisms, the bench perceived them as "merely alternative dispute resolution of trade disputes by experts in technical and specialised areas."[452] These arguments are in line with the statements made in the previous case, which

444 *East Africa Law Society vs Secretary General of the EAC*, Reference No 1 of 2011. February 14, 2013. https://www.eacj.org//wp-content/uploads/2013/09/FI_EastAfricanLawSociety_v_EastAfricanCommunity.pdf.
445 Ibid., 7.
446 Nsekela 2010, 4.
447 *East Africa Law Society vs Secretary General of the EAC* (supra note 444), 27–28.
448 *The East African Center for Trade Policy and Law vs the Secretary General of the EAC*, Reference No 9 of 2012. May 9, 2013. https://www.eacj.org//wp-content/uploads/2013/09/FI_EACommunity-EACTPL.pdf.
449 Ibid., 6.
450 Ibid., 29.
451 Ibid., 27.
452 Ibid., 39.

touch on a similar subject matter. It became clear that the court did not see these alternative dispute resolution mechanisms as a threat to its power. Instead, they were seen as "allies" of the court who took on cases to prevent the EACJ from being "bogged down with the nitty-gritty of disputes such as those in the area of trade, customs immigration and employment that are bound to arise on a regular basis as the integration process deepens and widens as a result of the implementation of the Protocols."[453] This progressive stance is a further testament to the quality of judges who occupied the pioneer and second benches.[454]

Perhaps most daring was the second bench's decision in *Honorable Sitenda Sibalu v. Secretary General of the EAC and 2 others*, which challenged the delay in implementing the appellate jurisdiction of the EACJ.[455] The EACJ declared that the delay or failure to operationalise the extended jurisdiction of the EACJ was an infringement of the Treaty.[456] It also declared that "quick action" should be taken by the EAC to remedy the issue.[457] Upon the Council of Ministers' failure to implement the judgement and the subsequent non-payment of the directed costs, the EAC was dragged to the EACJ for contempt.[458] The second bench, FID, under Justice Butasi, declared that the Council had breached the EAC Treaty by failing to comply and ordered the Secretary-General to take necessary action to achieve compliance with the previous ruling.[459] The EAC was also slapped with costs up to US$ 52.534.10 that it had to pay.[460] It is interesting to note that the trial court of the second bench not only made declarations but also issued monetary compensation.

To sum up, it is essential to note that the court was still relatively young – barely a decade old – and was still grappling with its institutional, jurisdictional, and structural roles amongst the other organs, national courts and its general perception within the regional bloc and the international sphere.

453 Ibid., 39.
454 See the previous chapter on judicial biographies.
455 *Honorable Sitenda Sibalu vs. Secretary General of the EAC, Attorney General of Uganda, Honorable Sam Njumba, and the Electoral Commission of Uganda*, Reference No. 1 of 2010. June 30, 2011. https://www.eacj.org//wp-content/uploads/2012/11/No-1-of-2010.pdf.
456 Ibid., 50.
457 Art. 27 EAC Treaty (ibid., 51).
458 *Honorable Sitenda Sibalu vs. Secretary General of the EAC,* Reference No. 8 of 2012. November 22, 2013. https://www.eacj.org//wp-content/uploads/2014/02/REFERENCE-NO-8-OF-2012.pdf.
459 Ibid., 38.
460 Ibid., 39.

Therefore, the cases on Treaty amendments provided a safe avenue for judges to challenge partner state interventions in curbing their authority, thereby giving the court a chance to construct and expand its power. These cases enabled the bench to flex its judicial muscle amidst the uncertainty and lingering threats to its authority. The bench went beyond declaratory orders and issued pecuniary damages, as in the *Sitenda Sibalu* case above, which shows that the judges were not afraid to go above and beyond to assert and reclaim their authority.

6.3.2 Judicial Diplomacy in Politically Charged Matters

Since the second bench, judges have operated in vulnerable conditions in which judicial independence is constantly threatened. As litigants push the court to exercise its judicial muscle, and as pushback and backlash accrue, judges must strike a balance between meeting the needs of the regional integration agenda and avoiding confrontation with executive sovereigns, whilst protecting the bench's legitimacy.

As argued by legal scholars, EACJ judges have routinely preferred legal diplomacy over confronting the partner states directly (Taye 2019), especially when deciding on controversial cases with political implications. Interviews revealed the intricacies of the legal diplomacy involved in decision-making, with judges expressing concerns about the potentially harmful impact of their decisions on the fledgling EAC institutional regimes.

> "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. Of course, as an international court, you must also be aware of the politics. You must be careful about the decision because the purpose of the court is stability, order, and integration. It is not only a matter of reading the Treaty. It is a matter of measuring whatever you do. The court is mandated as an organ of the Community and contributes to the integration agenda. So, we do not make decisions that can dismantle the Community tomorrow."[461]

An interview with the judicial head of the third bench confirmed that he views his role as more than simply writing judgements. For this judge and his colleagues, "*judicial diplomacy*" is an essential guiding principle for

461 Interview, EACJ judge, Bujumbura, November 17, 2021.

international adjudication, and sub-regional court judges perceive their role not only as neutral arbiters who merely stick to the confines of the law but are engaged in diplomacy *on* and *off*-bench. IC judges *are* political actors who carefully balance their judicial role with the existing realities of their political surroundings. Thus, judges have taken on a diplomatic role, in its broadest sense (Sending, Pouliot, and Neumann 2015), attuned to providing justice tailored to the litigants' needs whilst catering to the fragile, weakly democratic, economically disempowered and politically unstable contexts in which governments operate. This careful navigation of judicial behaviour involves them partaking in strategic, politically motivated dialogue with executives to advance their agenda.

As the interviewed judge maintains, doing their job at an IC 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, strategic-realist considerations inform their choices (Baum 2010; Posner 2010). For instance, judges consider the court's role within the EAC, prioritising the fact that it is meant to resolve and adjudicate disputes and ensure adherence to the rule of law within the Community. That way, all decision-making ought to take the well-being of the EAC into account, ensuring that they do not pass decisions that may hamper the progress of the regional bloc or have the opposite effect of integration. The extent to which they can achieve that is not the point of emphasis here, but rather *the intent behind the strategy*. Thus, this usage of the term judicial diplomacy *differs* from studies that limit the concept to off-bench relations (Squatrito 2021, 65). 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 to encompass the breadth of judicial decision-making practices.

Without reducing the role of these judges to political diplomacy only, these judges 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, and 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.

The EACJ also has articulated deference to political institutions and processes by refusing to adjudicate certain types of questions, especially those of political significance. While the bench has repeatedly rejected arguments where the parties explicitly argued that it should not hear a particular matter because the dispute raises questions that are political rather than legal in nature (Odermatt 2018, 230), it has applied subtler techniques to get rid of them. These more elusive avoidance techniques enable the court to retain its "image as a body committed to dispute settlement and the rule of law while still carefully navigating the issues that might provoke resistance or political recoil" (ibid, 231). Touching on judicial cautiousness in decision-making and the strict adherence to time limitations, the following section sheds light on how judges employ judicial diplomacy to deal with lingering threats to their existence in regard to decision-making. It also elucidates why the two divisions employed different approaches to judicial activism on the bench, especially regarding their take on furthering/hampering human rights adjudication.

6.3.2.1 Jurisdictional Limitations

Following the success of Kenyan opposition politicians in *Anyang' Nyong'o*, politically salient issues at the national level started to be litigated at the court. For example, the pivotal moment in Kenya's political life – the constitutional referendum – was disputed in the regional court. After the post-election violence of 2007/2008, the country pursued a long-lasting solution to the political turmoil through a new constitution that would address inequality and violence and forge a peaceful existence in the country. Consequently, a new constitution was promulgated on August 27, 2010, by then-president Mwai Kibaki. It was met with renewed hope amongst Kenyan citizens and the international community alike.[462] However, not all

462 Kabutu, Francis. 2020. "The Constitution of Kenya 2010: Panacea or nostrum." Strathmore Law School Blog, October 2. s://law.strathmore.edu/the-constitution-of-kenya-2010-panacea-or-nostrum/.

Kenyans were satisfied with the process, and this was witnessed in *Mary Ariviza and others*,[463] who challenged the promulgation and confronted whether due process was followed in presenting the draft constitution to the referendum and, if not, whether it was a breach of Kenyan national law and, by extension, the EAC Treaty. The court disagreed with the applicants, declaring that Kenya had followed due process.[464] The resulting appeal[465] was also dismissed, citing the fact that the appellants exceeded the jurisdiction of the appellate bench.[466] Even if the court disregarded the anxieties of Ariviza and others, the significance of the case lies in the fact that EAC citizens deemed the EACJ worthy of hearing "a historical event equated by many Kenyans to the rebirth of the nation."[467]

The other overtly political affair originated from Uganda, in *Democratic Party v. Secretary General of the East African Community and Others*.[468] An opposition party, the Democratic Party, brought an action against the EAC and its partner states, alleging failures to make individual country declarations in accepting the mandate of the African Court on Human and People's Rights. Predictably, the respondents argued that the issues raised were not justiciable as they were asking the EACJ to compel partner states to perform a purely executive function.[469] The court agreed with the respondents that the applicant had raised "purely political, rather than legal questions," which risked outplaying the executive and legislative organs of each entity (Odermatt 2018, 230). In essence, the EACJ avoided the question, avoiding direct confrontation with partner states. These developments are unsurprising. For a court that had just survived recent backlash and was still dealing with its repercussions, the second bench chose to exercise caution with political questions, employing legal diplomacy tendencies.

463 *Mary Ariviza & Other vs Att'y Gen. of Kenya & other,* Reference no 7 of 2010. November 30, 2011. https://africanlii.org/akn/aa-au/judgment/eacj/2011/11/eng@2011-11-30/source.pdf.

464 Ibid., 17–23.

465 *Mary Ariviza & Another vs Att'y Gen. of Kenya & other,* Appeal No 3 of 2012. November 8, 2013. https://africanlii.org/akn/aa-au/judgment/eacj/2013/142/eng@2013-11-08/source.pdf.

466 Ibid., 15.

467 Kabutu 2020.

468 *Democratic Party v. Secretary General of the East African Community and Others,* Reference No 2 of 2012. November 29, 2013. https://caselaw.ihrda.org/en/entity/be7kv0d4vdywtp7wmt9996bt9?file=1510827470855pcfb3t7wd9lnmmcpxs6jbrzfr.pdf&page=3.

469 Ibid., 20.

The bench dismissed half of the cases primarily on grounds of time and jurisdictional limitations.

The second bench ruled mainly in favour of applicants in cases that touched on issues challenging the functioning and institutionalisation of the EAC. As these were not controversial cases, the bench perceived them as a chance to clarify the role and position of the EACJ vis-à-vis national courts, pronounce itself on the process of attaining the EAC Political Federation, especially the participation of the citizens, clarify the role of other EAC organs and emphasise the centrality of the Secretariat as the pivot of integration.

Table 8: Second Bench (2008–2014) Judgements

Judgement type		**1st instance**		**Appellate**		**Total**	***Dismissed***
		Decisions	***Dismissed***	**Appellate**	***Dismissed***		
EAC institutional affairs	EAC Political affair	2	1	1		3	1
	EACJ Jurisdiction	4	1			4	1
	Employment Grievance	1				1	
Other Integration	Business and Commerce	3	3	1		4	3
	Electoral dispute	3	1	1	1	4	2
	Megapolitical disputes	2	2	1		3	3
	Environmental issue	2		1	1	3	1
	Human Rights	6	3	6	3	12	6
	Property Rights	1	1		1	1	1
Total		24	12	11	6	35	18

Source: compiled by the author from the EACJ Case Mapping dataset (with the author on file).

For the more politically salient cases, the court mostly avoided dealing with them through dismissal, except for the ground-breaking decision in the environmental protection case. For instance, in all three cases deal-

ing with national politics, the second bench avoided overtly politicised jurisprudence by dismissing them. For example, in the *Democratic Party case*, the court declared no Treaty violation as the delay in ratification was simply at the sole discretion of the respective partner states.[470]

6.3.2.2 Avoidance through the Statute of Limitations

Most prominently, politically salient cases were largely avoided by dismissal owing to strict interpretations of the two-month rule.[471] The two-month statute of limitations is widely acknowledged to be a result of the contentious *Anyang' Nyong'o ruling,* which saw the Treaty amended to reduce the time within which violations can be lodged heavily (Onoria 2010; Alter, Gathii, and Helfer 2016). Thus, this pace of avoidance – a stricter interpretation of the two-month time limitations – was set by the newly created Appellate Division (AD). The AD seemed to be taking a more careful stance, using the strict interpretation of the two-month rule and the non-declaration of the official human rights jurisdiction to avoid dealing with these issues. As legal scholars have noted, EACJ judges generally opt for legal diplomacy over direct challenges to partner states (Taye 2019), particularly in contentious cases with significant political implications.

Mostly dismissed over the two-month statute of limitations were the business and commerce-related cases and those dealing with overt national politically salient affairs (see *Table 8*). Interestingly, the court generally ruled in favour of applicants in human rights-oriented cases, except for the appellate bench. As stated earlier, issues of human rights still prevailed in the docket. Whereas the FID followed the *Katabazi* example, daring to rule against partner states for their human rights violations, the AD took a stricter interpretation of the two-month time limit and thus was less progressive in resolving these controversial cases.

In *Prof. Nyamoya Francois vs Attorney General of Burundi*, the EACJ bench emphasised the strict reading of time limitations and drew attention to the strict adherence to the rules of procedure of the court:

> "We think that it is high time that we reminded all persons (advocates in particular) who appear before this Court to comply with the said Court

470 Ibid., 27–28.

471 The strict adherence to time limitations as a means of avoidance has also been observed in national jurisdictions as well (Ellett 2013).

> Rules and to strictly adhere to them. Rules were made for a purpose, and that purpose was for orderly conduct of our business in this Court. We are alive to the fact that the Rules of Procedure are only handmaidens of justice and they should not be used to defeat substantive justice, but it is our pious hope and prayer that our remarks will bear fruit and that we shall see no more of what transpired in the instant Reference."[472]

Upon dealing with several cases that had been lodged out of time, the second bench felt compelled to remind litigants that strict adherence to the new Rules was non-negotiable. Complaints from court users about the strict application of time put the bench in a position where it could not remain silent, feeling constrained by the adherence to the newly created rules, but also aware that users perceived them as a means to defeat the acquisition of justice. Observers noted that the strict adherence to time limitations was a deterrent to future litigants who may not opt to use the EACJ for fear of failing to meet time limitations. In the East African context, with limited access to legal advice, literacy and economic hardships, this rule makes individual access to the EACJ grimmer. The small window within which one has to file the complaint does not provide adequate time for litigants to seek legal assistance, conduct the necessary legal research or even secure the required evidence. It is no wonder that, as mentioned earlier, litigants have been granted leniency in submitting their affidavits.

In 2015, concerned EAC members contested the strict time limitation in the *Steven Deniss case,*[473] claiming that it denies access to justice against individuals in favour of partner states.[474] They sought a declaration that it was illegal and needed to be rectified. Nevertheless, the court declined to grant the declaration that the time restriction was restrictive or hindering access to justice[475] and consequently ruled against the prayer to have it rectified. In their words, they "lack jurisdiction to make such orders"[476] that direct partner states and the EAC to amend the Treaty.

Unlike in the ECOWAS Court of Justice (ECCJ), where cases can be filed within three years of a claim arising (Ebobrah 2007), after exhausting local remedies, the EACJ has a stricter regulation on the lodging of cases.

472 *Nyamoya*, 25–26.
473 *Steven Deniss v. Attorney General of Burundi and 5 Others,* Reference No. 3 of 2015. March 31, 2017. https://www.eacj.org//wp-content/uploads/2017/04/Reference-No.3-of-2015.pdf.
474 Ibid., 8.
475 Ibid., 33.
476 Ibid., 34.

The EACJ's stricter stance has been described as "very restrictive, unjust and discriminatory" and "skewed towards the partner states and the EAC" (Taye 2019, 372), much to the detriment of the EAC citizens. Not only is the introduction of this rule illegal, but it also fails to meet the main objectives of a people-centred, market and rule-of-law-oriented regional integration to which the Community aspires (ibid., 372). Worse still, the rule cripples access to justice for ordinary East Africans because it is not equally applied to the partner states and the EAC (ibid., 372). Given that it is partner states, their institutions and the EAC that are frequently sued in the court, this rule serves their interests to the disadvantage of other court users.

6.3.2.3 Vague Explanations

In addition to the strict adherence to the two-month statute of limitations, the EACJ bench, since the creation of the appellate division, has started to see instances where judges resort to ambiguous elucidations in an effort to protect their autonomy. An example of this strategy was used in the *African Network for Animal Welfare (ANAW)* case[477] when the Appellate Division (AD) left a lot to the interpretation of concerned parties.

First, a brief background of the case at the trial level is provided. In a ground-breaking decision, the FID issued a permanent injunction barring Tanzania from constructing a highway across the Serengeti National Park in its first-ever environmental protection case.[478] Experts described the move as "audacious because, as a regional court, it was exercising authority to essentially reverse the decision of a sovereign government to build a road within its own borders" (Gathii 2016a, 397). Defying realist and rationalist assumptions, a court that had just survived backlash would not have dared to pronounce itself on such "extremely broad and significant remedies" (ibid, 389). Instead, we would expect it to exercise more caution to protect itself from the political ramifications of such expansive judicial

477 *Attorney General of the United Republic of Tanzania v. African Network for Animal Welfare (ANAW)*, Appeal No. 3 of 2014. July 29, 2015. http://eacj.org/?cases=the-attorney-general-of-the-united-republic-of-tanzania-vs-african-net work-for-animal-welfare.

478 *African Network for Animal Welfare (ANAW) v. The Attorney General of the United Republic of Tanzania,* Reference No. 9 of 2010. June 20, 2014. https://www.eacj.org//wp-content/uploads/2014/06/Judgement-Ref.-No.9-of-2010-Final.pdf. See (Gathii 2016a) for a discussion of the history and significance of this case.

intervention. The judges considered the local economic and social context within which the case arose, seeking to "stop future degradation without taking away the respondent's mandate towards economic development of its people."[479] This sensitivity to partner states' economic interventions was further underlined when the court said that "the role of the Court in balancing its interpretative jurisdiction against the needs of ensuring that partner states are not unduly hindered in their developmental programs has come to the fore."[480]

The Appellate Division largely upheld the trial court's decision without lifting the permanent injunction. However, as Gathii rightly finds, the appellate bench was murky in its judgement – without clarity on whether Tanzania should be stopped from constructing the road through the Serengeti:

> "This lack of clarity seems purposeful – the Appellate Division may well have realised that expanding the wings of the EACJ to cover environmental disputes would wither on the vine if the Court did not only affirmatively endorse its jurisdiction to entertain such suits, but at the same time realised that it had to make the government of Tanzania happy so that the Court suffered no backlash. [] Clearly, getting an order that could be served on the government of Tanzania pursuant to the judgment was out of the question because of this lack of clarity. Yet Tanzania, on its part, can see the writing on the wall. Should it decide to make concrete plans to build the road, ANAW can go back to the Court and get orders to permanently bar it from building the road" (Gathii 2016, 413).

Gathii links this type of decision-making to legal diplomacy, albeit without clearly stating it as such. The appellate bench was cautious enough not to seem like an environmental activist whilst taking a stand against environmental degradation. Likewise, they left room for the applicants to approach the court again should Tanzania proceed with the impugned project. International court's ability to push the boundaries of environmental conservation – amidst the African government's unrelenting pursuit of mega-development projects that ignore environmental concerns and the undesired impacts it could have on local populations – is only made possible by organised groups that seek to repurpose these courts from mere trade courts to avenues of environmental protection, social, economic and

479 Ibid., 31.
480 Ibid., 31.

political mobilisation (Gathii 2016a, 388). Even if the litigants do not win the cases, the symbolic gains of raising public awareness of these violations by autocratic governments are noteworthy (Gathii 2020b).

Courts could choose to adhere to the legality of texts and dismiss specific questions instead of interpreting them as a self-preservation mechanism. For various political reasons, the court may adhere to the spelt-out norms and evade deciding on highly contentious issues, especially if it has not built a support system. On the other end, they could adjust their stance to signal independence to the "global community of courts" (Slaughter 2003). REC courts are increasingly entertaining issues of high political relevance and are being used by litigants as an additional arena of political mobilisation. Judges recognise the new role they are expected to play and are not shirking it in an attempt at self-preservation. Despite limited jurisdiction and resources, they are fighting for their place as administrators of justice. Even if REC judges are appointed by these governments and, at times, even serve on national benches, they have devised clever ways of asserting their authority whilst minimising backlash.

This section has explored judicial on-bench strategies for expanding or restricting human rights jurisprudence. The chapter also highlights the impact of judicial off-bench activities on the evolution of human rights jurisprudence.

6.3.3 Off-bench Diplomacy

The second cadre of judges was from the then-five Member States of the EAC. Judges were appointed to the EACJ bench in October 2008 and served for a seven-year term (between October 2008 and June 2014). This was the first time the EACJ had judges from countries outside of the original three member states of the EAC. Rwanda and Burundi had joined the EAC and could appoint judges to the regional court.

While the bench changed in 2008, the pioneer Registrar served through the first two benches, and only the registry staff and Registrar were permanently residing in Arusha. The Registrar's calls for judicial permanence were partially answered when, in July 2012, President Harold Reginald Nsekela and Principal Judge Johnston Busingye finally assumed their full-time offices in Arusha, while the rest of the members were still serving on an ad hoc basis. This permanence granted the court leadership full-time service and enabled them to take part in off-bench activities, building

judicial constituencies, growing caseloads, and strengthening the court's legitimacy within the region.

Table 9: Second Bench Judges

Appellate Division		First Instance Division	
President	Harold Reginald Nsekela (Tanzania)	Principal Judge (PJ)	Johnston Busingye (Rwanda)
Vice-President	Dr Phillip Kiptoo Tunoi (Kenya)	Deputy PJ	Mary Stella Arach-Amoko (Uganda)
Members	James Ogoola (Uganda)	Members	John Mkwawa (Tanzania)
	Laurent Nzosaba (Burundi)		Jean Bosco Butasi (Burundi)
	Emily Kayitesi (Rwanda)		Benjamin Patrick Kubo (Kenya)
Registrar	Dr John Eudes Ruhangisa (Tanzania)		

Source: Author's compilation from publicly available data and judicial CVs.

Tanzanian judge Harold Nsekela was appointed to head the second bench of the EACJ as court president. Nsekela was a Justice of Appeal in Tanzania at the time of his appointment and had extensively served in public corporations and academia.[481] Rwandan representative Johnston Busingye served as the Principal Judge (PJ) of the First Instance Division of the second bench. Busingye had amassed leadership skills through his broad service in running the Ministry of Justice, prosecution, and as President of the High Court of Rwanda.[482] The two court leaders on the second bench worked with Registrar Ruhangisa, who had already witnessed the court's critical point during earlier backlash and understood the types of legitimacy-building initiatives that ought to have been implemented. As the first two leaders to work for the court permanently and reside in Arusha, Nsekela and Busingye were involved in a number of empowerment activities off-bench.

6.3.3.1 Opening of Sub-registries

Having only been around for seven years, the court lacked visibility in the region. Judge Nsekela and his team embarked on publicising the EACJ's developments through various engagements. Most notable was the opening

481 CV, Harold Reginald Nsekela.
482 CV, Busingye Johnston.

of EACJ sub-registries[483] in various partner states, thereby broadening the court's reach (Nsekela 2012). Hosted at national judiciaries of partner states, five sub-registries were established, staffed and supervised by the EACJ in 2012.

Sub-registries participate in various outreach programs to educate and sensitise their national public on the role of the court.[484] They participate in trade fair exhibitions and other law-related events[485] in the EAC partner states. One such event is the EAC Micro, Small and Medium Enterprises (MSME) Trade Fair Exhibition, an annual event held across the EAC partner states on a rotational basis, bringing together business actors to enhance and boost the socio-economic integration in the region. The court, through its sub-registries, participates in this event. The Bujumbura,[486] Kigali,[487] Kampala,[488] and Dar es Salaam[489] sub-registries have all participated and exhibited the EACJ booth containing informational leaflets, reports and court staff who engage visitors to the stand.

As the court reports, these exhibitions are meant to improve the attendees' "knowledge on the general mandate, jurisdiction and role of the court in the EAC integration agenda, its jurisdiction of the court in dispute settlement on cross border trade issues and private access to the EACJ."[490] Working together with national[491] and regional bar associations,[492] the sub-

483 The court intended to bring justice closer to the people by establishing Sub-Registries in the capital cities of each of the partner states where litigants can file cases that are then immediately transmitted to main registry via electronic case management system, thereby reducing travel costs to Arusha.

484 East African Court of Justice 2021, 38–43.

485 Such as the Law Society Law Week in Nairobi in which the court exhibited its material and the booth (East African Court of Justice 2021, 42).

486 Reported to have reached over 1500 exhibitors from the private sector, civil society, academia and others (East African Court of Justice 2021, 37).

487 Participated in five exhibitions, and reports reaching out and sensitizing a total of 1600 exhibitors (ibid., 40).

488 In 2013, 2014 and 2015, participated in 3 respective exhibitions in Kampala "to educate the public about the role and functions of the Court" (ibid., 42).

489 Attended 3 exhibitions between January 2020 and July 2021 and reported reaching over 900 residents within that time (ibid., 42).

490 East African Court of Justice 2021, 42.

491 The Nairobi sub-registry participated in the "Law Society of Kenya's legal awareness week held at Milimani law courts in Nairobi in September 2016, where over 100 people were sensitized" (ibid., 39).

492 The Kigali sub-registry participated in the Annual Conference of the East African Magistrates and Judges Association (EAMJA) in 2017 and the 24th EALS Annual Conference in 2019 (ibid., 41).

registries aim at enlightening the "public on the role played by the EACJ in the advancement of legal literacy and advocacy."[493] The court's 2021 Annual Report describes reaching over 20,000 people in the last nine years since it started engaging in these sensitisation activities.[494]The operation of the REC court through sub-registries is unique to the EACJ. The Courts of Justice of the Economic Community of West African States (ECOWAS) and the Common Market for Eastern and Southern Africa (COMESA) do not operate through a system of sub-registries. In both courts, filings are made through the centralised registry in Abuja, Nigeria and Lusaka, Zambia, respectively. Likewise, the Southern African Development Community (SADC) Tribunal operated centrally before its dissolution.

6.3.3.2 Engaging Academic Audiences

Like the pioneer bench, the second bench judges were also involved in academic writing to elucidate the role and functioning of the court. During Nsekela's leadership, he wrote extensively and presented at various venues on the position of the EACJ vis-à-vis national courts, emphasising that the EACJ works in collaboration with domestic courts to complement each other in the regional integration process. He spoke about the role of regional courts in protecting and developing human rights jurisprudence, and emphasised the delay in extending the EACJ's express human rights mandate (Nsekela 2010). The court president also addressed the ad hoc nature of judicial service at the EACJ (Nsekela 2012) and clarified the institutionalisation, functioning, challenges and future aspirations of the EACJ (Nsekela 2009; 2011). The court leader also noted in a paper presentation that the court's arbitration jurisdiction was "almost unknown" among its stakeholders (Nsekela 2009), and it, unfortunately, remains the case 15 years later, despite sensitisation campaigns to create essential awareness.

In addition to engaging in academic discourse, court judges and the Registrars have produced, published and shared their written or verbal statements – like those made during speeches and press conferences – to engage diverse audiences on issues affecting the court. Judicial speeches have been held across the region to emphasise the court's jurisprudence,[495]

493 Ibid., 39.
494 Ibid., 37.
495 Kiryabwire, Geoffrey. June 2018. Presentation: "Jurisprudence at the EACJ Appellate Division." Available with author.

its role in integration,[496] and its relationship with national courts. Likewise, they have criticised the ad-hoc nature of judicial service (East African Court of Justice 2018, 12). Judges have also emphasised threats to their financial and administrative autonomy, the statute of limitations, and the need for sensitisation about community law and practice at the EACJ to various members of the public, including targeted EAC institutions (ibid., 12). Though varied in their approach, these statements share a common discontent with the status quo and specify the judicial position on perceived threats to their independence and performance. Additionally, they clearly articulate the legal basis for these claims, citing the necessary Treaty rules and addressing the potential reproduction of such threats to their work. In this way, judges were afforded the agency to explain and frame their strategic interactions through carefully written dialogue.

As already alluded to in earlier chapters, 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 among its potential users, the second bench's judicial leaders were involved in a number of empowerment activities off-bench that contributed to its becoming a human rights bench. EACJ judges grew their human rights jurisdiction, established judicial constituencies, and sought inspiration from the global network of lawyers by purposefully and expansively interpreting the EAC Treaty. This joint effort has paid off in human rights jurisprudence, where the court heard and ruled mainly favouring applicants in human rights-oriented cases.

Despite the earlier-mentioned stringent measures, which seemed to be taking a more careful stance in issuing human rights decisions, repeatedly emphasising that it is not a human rights court, the EACJ still appeals to its litigants as such. Even if it remains cautious of pushback or potential backlash to interpreting human rights in a progressive manner, "the Court does not want to lose its legitimacy with litigants by being seen as abdicating its interpretive duties" (Possi 2015, 209). Therefore, through tactical balancing and employing legal diplomacy, the EACJ has craftily managed to adjudicate "cases with human rights allegations so as not to exercise its jurisdiction beyond the established boundaries" (ibid., 209).

496 Kiryabwire, Geoffrey. 2019. "The role of the East African Court of Justice in the East African integration process." Presentation at the 1st Annual East African Community Conference, March 15. Skyz Hotel, Naguru Kampala.

6.4 From Human Rights to Commercial Bench

The chapter highlights two outstanding factors that could serve as a starting point in making sense of the judicial restraint adopted by the second bench's appellate division in adjudicating human rights. Firstly, the backlash following the *Nyong'o* led to Treaty amendments that resulted in the imposition of stringent time restrictions, limiting case filing to two months from the occurrence or awareness of the matter, which sought to hamper access to the EACJ. As the chapter has shown, this rule was established to limit access to the EACJ, as litigants are often turned away due to time restrictions. The appellate judges were unwavering in exercising this rule, especially when confronted with cases that seemed like politically salient and involved human rights, to avoid confrontation with partner states.

Secondly, the second bench judges were appointed after the contentious *Anyang' Nyong'o* case, in which the court rendered an unfavourable decision that almost ended it. A watershed in the history of the EACJ, this case highlighted the potential political muscle of the new judicial organ and thus influenced appointees' stance on controversial human rights jurisdiction. The creation of an appellate chamber – as a result of this case – which would review unfavourable rulings from the trial bench created an opportunity for EAC governments to politicise appointments (Stroh and Kisakye 2024). As executives in the various member states started to grapple with the court's growing political intervention, they developed a closer interest in monitoring candidates for the bench. Instead of sending "activist" judges who would dare to turn the court into a human rights court or a "bold" bench (as the pioneer bench was usually fondly referred to in our research), member states exhibited caution in their appointments. For instance, Uganda's political will to signal a commitment to East African regional integration by judicial appointment had to give way to the court's desire for more commercial judges. Consequently, this concern was reflected in the succeeding politicisation of appointments.

Uganda's picks for the second bench were both specialised commercial law experts, differing from its previous politically attuned or human rights judges. Mary Stella Arach-Amoko, the Ugandan judge on the trial bench, was a commercial judge whose bench did not shy away from exercising a human rights mandate.[497] In the case of Justice James Ogoola at the

497 Arach-Amoko was appointed Deputy PJ. She had been the deputy head of the Commercial Division of the High Court of Uganda.

appellate division, Uganda favoured a tried-and-tested judge at a former REC court. Appellate judge and legal powerhouse Ogoola was Head of the Commercial Court Division of the High Court of Uganda (2001) at the time of his appointment.[498] Ogoola had been a key figure in drafting the East African Treaty and played a vital role in establishing the EACJ as an organ of the EAC. Moreover, he had already served two terms on a REC bench at COMESA (CCJ) before being appointed to the EAC Court. A prominent judicial officer with evident experience in political processes, Justice Ogoola is hailed for speaking against the "Black Mamba's Urban Hit Squad" storming the High Court of Uganda in November 2005 under the sponsorship of the Ugandan government (Ellett 2013, 1). Being Principal Judge of the High Court at the time, Ogoola is reported to have referred to the attack as a "rape of the temple of justice" (ibid., 1), which was a direct message to President Museveni and his aides. Already a highly respected senior judicial officer at the time of their appointment, both at home and abroad, Justice Ogoola was more than just a specialised commercial law expert.

Tracing Ogoola's previous role at a typically commercial international court (COMESA court) and his own rich background as a celebrated judge (see above), as well as his Ugandan counterpart's background, shows a turn in the types of judges on the second bench. It could point toward the turn the appointers sought to achieve by shaking up the mostly human rights-oriented first batch. Ironically, despite actively trying to populate the bench with more 'commercial judges', the second bench still emerged as a human rights court, so much so that even Ogoola's own narrative above reinforces the notion that the second bench was indeed an activist human rights favouring cohort. Turning to the judicial biographies of the second bench reveals an evolution in the court's judicial structure and caseload. It explains the stance these judges adopted toward empowering themselves and the court and, by extension, provides a window into understanding why this bench is dubbed the "human rights bench."

Even though the EACJ was forging relevance as a human rights court, it was still struggling to assert itself as such. Scholarly work towards the end of the second bench suggests that the court found itself in a "difficult position" (Possi 2015, 213) as a human rights adjudicator. The EACJ First Instance Division judges had been accused of practising "judicial activism by interpreting the EAC Treaty in conjunction with various international

498 CV, James Munange Ogoola (available with the author).

human rights instruments" (Possi 2015, 213). Interviews with judges on the third bench showed they did not identify with the label "activist."[499] Recall that most of these judges are still employed in public office or on the bench in their national jurisdictions. Therefore, as younger judges still in active service start to perceive their reputation as stained by "judicial activism," they may seek to distance themselves from such a label and, instead, move the bench into a less politicised direction: economic intervention. Likewise, the change in judges, over time, has impacted the trajectory, firmness and audacity of the regional bench. This chapter finds that the trajectory of the EACJ's second bench as a human rights court is a product of appointments, the precedent set by the pioneer bench and the off-bench activities that garnered support for human rights jurisprudence. In the next chapter, the study advances the idea that the third bench was populated by specialised commercial law experts who were strategically selected to bring the court back from bold political ambitions and human rights jurisdiction to its core business of economic integration.

499 Justices Geoffrey Mupeere Kiryabwire (interviewed June 18, 2020) and Justice Monica Mugenyi (interviewed September 29, 2021) emphasised that the EACJ is not an activist court.

7. The "Commercial-Diplomatic" Third Bench

By 2015, the East African Court of Justice (EACJ) was most celebrated by scholars for its stand in protecting human rights in the region (Gathii 2010; 2013). As the previous chapter elucidated, the EACJ's second bench galvanised the court's intermediate authority[500] in human rights thanks to the pioneer bench's ground-breaking intervention in the *Katabazi* case. However, almost two decades later, the regional court remained largely underappreciated as a trade court, despite the East African Community's (EAC) three of four incremental significant stages of regional integration are overtly trade-based.[501]

The rest of the chapter explores why, despite the new bench's interest in painting itself with a new commercial brush, human rights breaches and the rule of law violations continued to populate the docket. It explores and explains the emergence of commercial litigation in the EACJ while centring the focal actors – judges and their allies. As the rest of the chapter explains, the judges were *intentional* and *purposeful* about shedding their image as a "human rights bench" in favour of a trade court. By illuminating why there is a dearth of trade cases 15 years into the court's existence, the chapter intends to explore why, despite the EAC's primary goal of trade and economic integration, it has not attracted significant trade-related disputes. Additionally, by underscoring the court's initial intervention in these cases and understanding the trend set from the commencement of commercial adjudication, the chapter sets the stage for appreciating the third bench's successful intervention in forging a commercial bench. It also broadly discusses other prominent cases, besides economic ones, that highlight the nature of judicial interventions in the third bench.

500 For a discussion on international court authority, see Alter, Helfer and Madsen (2016).

501 The EAC has established a Customs Union, a Common Market and is in the process of establishing a Monetary Union after which it will embark on establishing a political federation (see Chapter 4 for details on the EAC integration project).

7.1 Cooperative Solutions over Litigation

As James Gathii convincingly argues, business actors' aversion to antagonising governments through adversarial litigation, a post-colonial mistrust of the judicial system, and the lack of public awareness of legal norms continue to affect the court's role in promoting trade and economic links among the partner states (Gathii 2016b). As such, business actors have tended to resolve their business problems in other, less strenuous ways than litigation in the EACJ. The colonial origins of international law, their forceful imposition and their irrelevance to the previously colonised are well-documented (Gathii 2007; Caserta and Madsen 2016; Sanchez 2023). The fact that they are colonial remnants, disconnected from the everyday needs of local businesses, has affected their legitimacy and relevance, particularly for informal businesses. An overwhelming amount of EAC business happens in the informal sector – encompassing manufacturing, commerce, finance, and the mining sector – and most deals are orally sealed rather than contractually signed (Gathii 2016, 50). Thus, trade disputes among small and medium enterprises, especially in this sector, have not surfaced at the EACJ. The limited intervention is attributed to several factors, such as the lack of public awareness of the conceivable remedies for breaching regional economic obligations.

Most EAC citizens lack knowledge of the regional courts' underlying trade-integration mandates. Instead, they have relied upon customary modes of dispute settlement based on socially understood and accepted norms rather than formal legal business rules (Gathii 2016). In the same manner, even educated young lawyers across the EAC have favoured national laws over EAC law, which has had an opposing effect on the growth of EAC jurisprudence. Interviews with regional lawyers revealed that even those commercial lawyers who advise multinational corporations in the region tend to disregard regional trade rules as options for their clients.[502]

Additionally, business actors perceive the existence and persistence of non-tariff barriers (NTBs) as a "political challenge" which can best be solved through political engagements with the Council, whose decisions on integration processes are binding[503] on EAC actors (Gathii 2016b, 47). Therefore, it can make, propel, annul and push forward EAC agendas – even those that decide the future of economic integration, such as NTBs

502 Interview, Ugandan repeat Lawyer, October 20, 2021, Kampala, Uganda.

503 This applies to all EAC organs and institutions except the Summit, EALA and EACJ (Art. 16 EAC Treaty).

– because its decisions are binding on EAC states. Unlike the Council, whose authority is uncontested, the court has yet to establish its role as an equal stakeholder in the EAC integration agenda (East African Court of Justice 2018, 17). The apparent lack of appreciation, especially in economic integration, shadows the court.

Another layer is that large businesses in the EAC also refrain from dragging governments to the EACJ because governments are usually their clients, offering large procurement budgets and contracts, from which the businesses primarily benefit. Rather than create enmity through suing governments, business actors prefer to resolve the issues amicably through less formal channels. The aversion to antagonising governments could shed light on why there has been a dearth of cross-border trade cases over the court's lifespan.

7.2 Limited Jurisdiction

While the previous section explored possible reasons for a dearth of commercial litigation, this one turns to the deterrents that have steered litigants away from exploring the EACJ as a potential avenue of trade and commercial adjudication.

As of June 2023, only 16 trade-related cases had been filed compared to only four trade cases that had been filed at the EACJ ten years before.[504] Of the total number of trade-based cases that were litigated, 68.8 % were dismissed over limitations in the formal powers that the court possesses to entertain business cases. Table 10 provides a summary of all trade cases that were litigated in the EACJ over its lifespan. The first six cases (until 2014) were *all* dismissed due to a lack of jurisdiction or cause of action by the second bench, which could explain why business actors preferred national courts and continued to affect the number and success of trade-related cases in the EACJ.

504 By June 2013, only four trade cases out of sixty had been filed at the EACJ (Gathii 2016, 41).

Table 10: Commercial Cases (Third Bench)

Year filed	Case Name	Case content	Verdict in favour of	Reason for dismissal
2008	Modern Holdings (EA) Ltd v. Kenya Ports Authority and other	Loss of perishable goods	Dismissed	No jurisdiction
2010	Alcon International Limited v. Standard Chartered Bank of Uganda and other	Common Market dispute		No cause of action[505]
2011				
2013				
	Benoit Ndorimana v. The Attorney General (AG) of Burundi	Arbitrary arrest and business closure		
2014	Henry Kyarimpa v. AG of Uganda	Irregular procurement of construction project	Applicant (partially)	n/a
2016	Grands Lacs Supplier SARL & Others v. AG of Burundi	Unlawfully Seized goods (EAC Customs Union & Common Market)	Applicant	n/a
2017	Pontrilas Investments Ltd v. Central Bank of Kenya & Other	Monetary Union	Dismissed	No cause of action
2017	BAT Uganda v. AG of Uganda	EAC Customs Union Protocol (discriminatory excise duty)	Applicant	n/a
2018	Mironko Francois Xavier v. AG Of Rwanda	Refusal to pay debt of military equipment	Dismissed	No jurisdiction
	G & T Enterprise Trading Ltd v. AG of Burundi	Delays in the delivery of goods		Time barred

505 In Appeal No of 2011, the appeal was allowed, and the Ruling and Order of the First Instance Division (FID) were set aside. Furthermore, the FID was directed to specifically determine the merits of the Reference before the court. See https://www.eacj.org/wp-content/uploads/2019/03/Appeal-No.-2-of-2011-Alcon-International-Limited-Vs-The-Standard-Chartered-Bank-Ltd-Uganda-2-Others.pdf, 19.

2020	Chester House Ltd v. AG of Uganda	Flooding and resulting closure of business	Dismissed	Time barred
	Kioo Ltd v. AG of Kenya	EAC Customs Union Protocol (discriminatory excise duty)	Applicant	n/a
	Central Bank of Kenya & Other v. Pontrilas Investments Ltd	Monetary Union		
	Christopher Ayieko &Another v. AG of Kenya and another	Bilateral FTA with US		
2021	AG of Kenya v. Kioo Limited	Unlawfully Seized goods (EAC Customs Union & Common Market)	Dismissed	Overtaken by events

Source: compiled by the author from the EACJ Case Mapping dataset (with the author on file).

While the third bench only dismissed half of its trade-related caseload, owing to similar reasons, it also started like its predecessor, displaying limitations in the formal powers to grant orders requested by the business community. Most prominently, the third bench continued with a strict reading of time limitations set out by the second bench to dismiss these cases. However, with an increased caseload, the third bench dealt with even more commercial cases than ever before, starting on shaky ground but later finding its footing in business-oriented jurisprudence.

The EACJ has broad jurisdiction over the interpretation and application of the EAC Treaty[506] as well as arbitral jurisdiction in commercial contracts between private parties that come into agreement with EAC institutions and partner states.[507] Any EAC resident can initiate litigation, provided they file against a partner state or an institution of the EAC for breaching Treaty provisions.[508] Nonetheless, jurisdiction is deferred to an institution of a partner state if "a*n Act, regulation, directive, decision or action has been reserved*" under the Treaty to that institution.[509] Moreover, the EACJ was

506 Art. 27 (1) EAC Treaty.
507 Art. 32 (a) and (c) EAC Treaty. See the EACJ Rules of Arbitration 2012. Note that only partner states – not individuals – may refer disputes between themselves for arbitration by the EACJ (Art. 32 (b) EAC Treaty).
508 Art. 30 (1) EAC Treaty.
509 Art. 30 (3) EAC Treaty.

not given jurisdiction over the Customs Union[510] and Common Market[511] Protocols (Gathii 2013, 289) even though it was extended to include commercial, investment and trade matters arising under the EAC's Monetary Union treaty (Gathii 2016, 40).[512] EAC partner states intended for national courts to play an essential role in the Common Market and to reserve the enforcement of this Protocol at the national level, thereby limiting the EACJ's jurisdiction by giving original jurisdiction over the Common Market Protocol to national courts.[513] As a case before the court confirmed, the dispute settlement mechanisms provided for in both the Customs Union and Common Market Protocols indeed "*limit/deny the jurisdiction to the EACJ by transferring matters reserved for the EACJ under the Treaty to Partner State institutions and organs.*"[514] Judges agreed that the EACJ had broad jurisdiction before these amendments and that the amendments excluded the EACJ, where partner state organs take precedence on specific issues, albeit vaguely stating what those "organs" are.

Moreover, in *Eric Kabalisa Makala,*[515] the court clarified the three aspects in which a party can claim a lack of jurisdiction. Firstly, the party must demonstrate the absence of *ratione personae/locus standi,* which refers to jurisdiction on account of the person concerned.[516] In the EACJ, only the East African Community (and its organs), partner states and parastatals can be sued in court. Other entities will not be entertained and, as such, have been grounds for dismissal of commercial disputes. In the case of *Modern Holdings (EA) Ltd v Kenya Ports Authority*[517]*,* filed by a Tanzanian

510 Protocol on EAC Customs Union (2005).

511 The Common Market Protocol (2010) gave a quasi-administrative agency the power to determine any disputes under the Protocol. Original jurisdiction over the Common Market Protocol was given to national courts in Article 54 (2) EAC Common Market Protocol.

512 See Protocol on the Establishment of the East African Community Monetary Union 2013.

513 Art. 27 (1) EAC Treaty & Article 54 (2) EAC Common Market Protocol.

514 *The East African Center for Trade Policy and Law vs Secretary General of the EAC*, Reference Number 9 of 2012. Page 7. https://www.eacj.org//wp-content/uploads/2013/09/FI_EACommunity-EACTPL.pdf.

515 *Eric Kabalisa Makala vs. Attorney General of Rwanda.* Reference No, 1 of 2017. June 18, 2020. https://africanlii.org/akn/aa-au/judgment/eacj/2020/23/eng@2020-06-18. Hereafter *Makala*.

516 To be sued, an entity ought to be either a Partner State or an Institution of the EAC with legal persona before the court under Article 30 (1) of the Treaty (*Makala*, 7).

517 *Modern Holdings (EA) Ltd v Kenya Ports Authority,* Reference No. 1 of 2008. http://eacj.org/wp-content/uploads/ 2012/11/no-1-of-2008.pdf.

company, the company sought EACJ's intervention after it incurred losses in revenue following the Respondent's failure to clear its perishable goods from its warehouses promptly.[518] The EACJ dismissed the case for lack of jurisdiction as the Respondent was neither a partner state nor a Community organ.[519] In this case, the applicant did not have jurisdiction on account of the person concerned.

Similar reasoning was given in *Alcon International v Standard Chartered Bank & Others*.[520] In this case, a Kenyan company sued a Ugandan corporation (Standard Chartered Bank), the Ugandan government and the National Social Security Fund (NSSF), alleging contravention of the protections of cross-border investment under the EAC's Common Market Protocol.[521] Standard Chartered Bank was meant to award a guarantee, made on behalf of the NSSF, to Alcon International, which had not been paid. The trial court dismissed the case, citing a lack of jurisdiction, as the bank was not a member state of the EAC.In contrast, the case against Uganda was dismissed based on a lack of cause of action.[522]

The lack of cause of action falls in the second limb of a claim for lack of jurisdiction *ratione materiae*.[523] A party must illustrate jurisdiction on account of the matter involved. Precisely, the issue raised or the matter complained of must constitute an infringement of the EAC Treaty.[524] For instance, in *Benoit Ndorimana v. Attorney General of Burundi*,[525] the applicant contested his imprisonment, the closure of his business, and the

518 Ibid., 3.
519 Ibid., 11.
520 *Alcon International Ltd. vs. The Standard Chartered Bank of Uganda and others*, Reference No. 6 of 2010. August 23, 2011. http://eacj.org/wp-content/uploads/2012/11/Alcon-International-2010-6judgment-2011.pdf.
521 Under Art. 54 (2) of the EAC Common Market Protocol.
522 *Alcon International Ltd,* 13, 14. It was later appealed (in 2013) and dismissed again on the same grounds. The EACJ Appellate Division held, among other things, that commercial disputes brought by a commercial entity against a Partner State to enforce the EAC Common Market Protocol could only be heard by national courts under Art. 54 (2) EAC Common Market Protocol.
523 This second limb of "lack of jurisdiction" points towards the grounds on which a matter may be presented to the court for intervention (*Makala*, 8).
524 The duty of the EACJ is specified as ensuring "adherence to law in the interpretation and application of and compliance with" the EAC Treaty (Art. 27 (1) EAC Treaty).
525 *Benoit Ndorimana v. Attorney General of Burundi*, Reference No. 2 of 2013. November 28, 2014**.** https://www.eacj.org//wp-content/uploads/2014/11/REFERENCE-NO-2-OF-2013-BENOIT-NDORIMANA-28-NOVEMBER-2014.pdf.

resultant losses, seeking damages.[526] However, this case was dismissed due to a lack of cause of action as the court argued that "although the Applicant does have locus standi as he need not exhaust local remedies before coming to this court, his Reference did not disclose a cause of action."[527] The court defines cause of action as "a set of facts or circumstances that in law give rise to a right to sue or to take out an action in court for redress or remedy."[528] Thus, the applicant must have a legal basis to approach the bench.

This limitation led to the dismissal of *Henry Kyarimpa vs Attorney General of Uganda,*[529] in which the Ugandan government was sued over its irregular procurement of the construction of a hydroelectric power project. This case, too, was dismissed whilst upholding the sovereignty of the Ugandan state, saying, "*It is not the role of this Court to superintend the Republic of Uganda in its executive or other functions*."[530] This reasoning was carried forward in *Pontrilas Investments vs Central Bank of Kenya and other,*[531] as well as *Mironko Francois Xavier vs Attorney General of Rwanda* cases,[532] which were dismissed on the grounds of lack of jurisdiction.

Finally, the third limb for lack of jurisdiction is *ratione temporis* (the time element).[533] The strict time limitations were already enforced by the second bench and were carried on to the third bench. As already clarified, Treaty amendments following the *Nyong'o* backlash imposed time restrictions on litigants – cases ought to be filed within 60 days after the occurrence; otherwise, they are time-barred.[534] The bench's strict reading of time limitations

526 Ibid., 3.
527 Ibid., 12.
528 Ibid., 12.
529 *Henry Kyarimpa vs Attorney General of Uganda*, Reference No. 4 of 2013. November 28, 2014. https://www.eacj.org/wp-content/uploads/2016/03/Judgement-Ref.-No.4-of-2013.pdf/.
530 Ibid., 21. However, when the decision was appealed, the Applicant won the case. See *Henry Kyarimpa vs Attorney General of Uganda*, Appeal No. 6 of 2014. February 19, 2016. https://www.eacj.org/wp-content/uploads/2023/08/Appeal-No.-6-of-2014-Henry-Kyarimpa-vs-the-Attorney-General-of-the-Republic-of-Uganda-1.pdf.
531 *Pontrilas Investments vs Central Bank of Kenya and other,* Reference No. 8 of 2017. July 4, 2019. https://www.eacj.org/wp-content/uploads/2019/07/Ref.-No.8-of-2017.pdf.
532 *Mironko Francois Xavier vs Attorney General of Rwanda*, Reference No. 11 of 2018. April 6, 2022. https://media.africanlii.org/files/judgments/eacj/2022/1/2022-eacj-1.pdf.
533 *Makal*a, 6.
534 Art. 30 (2) EAC Treaty.

continued when the Rwandan company *G & T Enterprises*[535] dragged Burundi to the EACJ, aggrieved by losses due to the delays in the delivery of goods. While the court claimed its jurisdiction in the matter,[536] it resolved that the matter was time-barred, dismissing it entirely.[537] In another case, *Chester House Ltd vs Attorney General of Uganda and others,* a Kenyan Eco lodge sued Eskom Uganda Limited over flooding at the shores of Lake Victoria, which resulted in excessive damages and business closure.[538] The FID did not continue with the matter, citing time limitations. These two cases exemplify the hindrance that the two-month statute of limitations creates for litigation of commercial cases in the EACJ. In sum, the first set of commercial disputes was discouraging trade integration. Until 2016, the first cases had all been dismissed on procedural grounds -jurisdiction, cause of action and time limitations – which derailed business actors and had chilling effects on the court's role in the Community's economic transformation.

7.3 Finding its Voice in Economic Jurisprudence

While the previous cases painted a gloomy picture of the state of EACJ intervention in trade disputes, recent EACJ jurisprudence offers a more encouraging outlook on the court's role and potential in pushing forward economic integration. The third bench developed a more positive trend in handling business and trade-related matters.

Starting with the case of *Christopher Ayieko and Another vs Attorney General of Kenya and Another*,[539] two Kenyan advocates sued the government of Kenya over its alleged negotiations of a bilateral Free Trade Agreement (FTA) with the United States of America (USA). The applicants accused Kenya of jeopardising the EAC's common negotiation position

535 *G & T Enterprise Trading Ltd vs Attorney General of Burundi*, Reference No. 3 of 2018. October 8, 2021. https://africanlii.org/akn/aa-au/judgment/eacj/2021/9/eng@2021-10-08.

536 Ibid., 13.

537 Ibid., 24–25.

538 *Chester House Ltd vs Attorney General of Uganda and others*, Application N0. 18 of 2020. December 16, 2020. https://africanlii.org/akn/aa-au/judgment/eacj/2020/1/eng@2020-12-16.

539 *Christopher Ayieko and Another vs Attorney General of Kenya and another*, Reference No. 5 of 2020. December 2, 2022. https://africanlii.org/akn/aa-au/judgment/eacj/2022/35/eng@2022-12-02.

with the USA, failing to notify other EAC states of the pending deal, and requesting that the Council coordinate trade relations with the third parties.[540] The EACJ ruled that it had jurisdiction to entertain the case,[541] and that Kenya's intention to enter into an FTA without involving other EAC states violated the Customs Union Protocol.[542] In addition, it ruled that the EAC Secretary General ought to have raised the issue with the Council, alerting the Community to the intended violation of Treaty negotiations. The court was not sympathetic to the Secretary General's excuse of having written a letter to which there was no reply and pronounced that he had undeniably abdicated his obligations to uphold the EAC Customs Union and Common Market Protocols.[543] Not only did the court apprehend a partner state for disrupting the Community's shared vision of economic integration, but it also sent a message to the EAC executive heads to pay attention to similar violations and intervene accordingly.

7.3.1 Beyond Declaratory Orders

Another thorny aspect has been the court's hesitation in awarding monetary compensation, proving a deterrent for commercial litigators from approaching the EACJ (Ssemmanda 2018, 231–32). EACJ judges have delicately considered 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, taking into account 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. As the previous chapter highlighted, the Appellate Division has taken a more careful stance in adjudicating highly sensitive decisions, drawing on the strict interpretation of the two-month rule and

540 Ibid., 5.
541 Ibid., 15.
542 Ibid., 23.
543 Ibid., 32.

the non-declaration of the official human rights jurisdiction to engage in legal diplomacy.

Scholars have pointed to the EACJ's strategic issuance of declaratory rather than mandatory orders – usually at the litigants' request- leaving states with the option to ignore the orders instead of requiring compliance and implementation (Ebobrah and Lando 2020, 187). This approach has been lauded as a self-preservation strategy which restricts "direct confrontation" with partner states while rendering the necessary judgements and still maneuvering and challenging apparent obstacles to the rule of law (Ibid, 188). However, repeat players at the EACJ are challenging the court to move beyond issuing declaratory judgments to something *tangible* as a means of accountability towards partner states' violations of EAC commitments. A former CEO of the EALS and repeat litigant confirmed in an interview that judicial decisions in the EACJ must "have consequences" for partner states that fail to adhere to the rule of law, accountability and good governance, rather than issuing mere declarations:

> "Declarations must be followed by tangible consequences. That is what we are asking the court. A declaration is not enforcement. So, beyond declaring a violation, the court must exercise its second limb of jurisdiction, enforcement. Enforcement must be something real; it has to be something that can make the Partner States open their eyes and realise that it is not business as usual. If you declare a violation, stop there, or order meagre damages that do not act as deterrents against future violations, then you are underutilising the court. As to how many awards it can give, we, the practitioners, should shape the jurisprudence of the court in that area."[544]

This repeat player recognises the inescapable role that judicial allies ought to play – pushing the court to assert its authoritative position in regional integration processes. While they acknowledge the political realities that may hinder the judges from issuing mandatory orders in some instances, they see the potential in emboldening the court to exercise its mandate.

This concern was put to rest in *Margaret Zziwa v Secretary General of the East African Community,*[545] where the court awarded the former EALA

544 Interview, Former CEO of EALS, March 29, 2022, Nairobi, Kenya.

545 *Hon. Dr. Margaret Zziwa v Secretary General of the East African Community,* Appeal No. 2 of 2017. May 25, 2018. https://www.eacj.org/wp-content/uploads/2019/03/Appeal-No.-2-of-2017-Hon.-Dr.-Margaret-Zziwa-vs-The-Secretary-General-of-the-East-African-Community.pdf.

Speaker monetary damages for unlawful impeachment. When Honourable Margaret Zziwa was removed as EALA Speaker, her lawyers asked the court to reinstate her and compensate her for the salary that she had lost, among other damages. The First Instance Division (FID) merely declared the actions of her removal to be unlawful but did not grant her request for reinstatement.[546] The Appellate Division (AD) reversed that decision and set the stage for the issuance of compensatory damages.[547] This case marked the start of the court's issuance of mandatory pecuniary orders. It was often cited in interviews as an indication of the lawyers' success in persuading the court to do away with mere declarations. An interview with the litigating lawyer on the *Zziwa case* illustrates their efforts to push the court beyond declaratory judgments, which made this shift happen.[548]

Likewise, as witnessed in the commercial dispute, *Grands Lacs Supplier SARL & Others vs Attorney General of Burundi*,[549] the EACJ third bench dared to award pecuniary damages rather than mere declarations. In this instance, a Ugandan company sought compensatory damages against the Burundian government for having illegally seized its goods and preventing the free movement of goods within the EAC. The applicants had sought USD 218,849 in compensation for losses incurred in truck hire, profits and investments, as well as earnings. They were awarded USD 20,000 as the court could not assess the said damages, but rather issued general damages as it saw fit.[550] The court not only declared that Burundi had contravened the East African Community Customs Management Act of 2004 and thereby breached Treaty regulations, but it also issued monetary rewards to the applicant.[551] This trend continued in another landmark ruling, *British*

546 *Hon. Dr. Margaret Zziwa v Secretary General of the East African Community,* Reference No. 17 of 2014. February 3, 2017. https://www.eacj.org/wp-content/uploads/2019/03/REFERENCE-NO.-17-OF-2014.pdf.

547 *Appeal No. 2 of 2017*, 51.

548 "So, when we went to the Appellate Division, we told them, "You see, you have the power to apply. How do you tell me that you have no power to tell somebody to do ABC?" And they picked it up. I think that started the era of the court to stop saying that we can only make declarations, and we stop there. Because now they can say, "go and be compensated this amount of money" (Interview, Lawyer03, October 11, 2021, Kampala).

549 *Grands Lacs Supplier SARL & Others vs Attorney General of Burundi*, Reference No. 6 of 2016. June 19, 2018. https://new.africanlii.org/na/judgment/east-african-court-justice/2018/129.

550 Ibid., 29–36.

551 Ibid., 35.

American Tobacco (BAT) Uganda Ltd v Attorney General of Uganda,[552] the implications of which will be briefly discussed in the following section.

7.3.2 The BAT case: Pushback against a Trendsetter

BAT Uganda Limited filed a case before the EACJ challenging the legality of the Excise Duty Amendment Act (No 11 of 2017), which introduced designated differential excise duty rates for locally (in Uganda) manufactured goods versus imported products (in this case, Kenyan cigarettes). A brief background to the case highlights that categorising Kenyan products as 'foreign' defeats the purpose of the EAC Treaty, the EAC Customs Union, and the Common Market Protocols.

BAT was incorporated in Uganda to manufacture and deal with tobacco and tobacco products that are domiciled in Uganda.[553] Years later, BAT restructured its business operations to have its sister company in neighbouring Kenya (British American Tobacco Kenya Limited) manufacture and supply it with cigarettes for sale on the Uganda market.[554] It is important to note that the company is located in two countries that are both members and signatories to the EAC Treaty, the EAC Customs Union Protocol, and the EAC Common Market Protocol.[555] Accordingly, Uganda's Excise Duty Act No. 11 of 2014 made provisions for an excise duty that uniformly applied to all goods originating from any of the EAC partner states, including the cigarettes in question. However, in 2017, the Act was amended, and Uganda introduced the Excise Duty (Amendment) Bill No. 6 of 2017, which created a distinction between locally manufactured goods in Uganda and imported goods.[556] Thus, a higher duty was imposed on imported goods; hence, all BAT tobacco products manufactured outside of Uganda were subsequently reclassified as goods from a foreign country, as they originated from Kenya, and were subject to the applicable excise duty.[557]

552 *British American Tobacco (U) Ltd v Attorney General of Uganda*, Reference No. 7 of 2017. March 26, 2019. https://www.eacj.org//wp-content/uploads/2019/03/Reference-No.-7-of-2017-British-American-Tobacco-U-Ltf-vs-the-Attroney-General-o-fthe-Republic-of-Uganda.pdf.
553 Ibid., 2.
554 Ibid., 2.
555 Ibid., 2.
556 Ibid., 3. The Excise Duty (Amendment) Act was enacted in July 2017.
557 Ibid., 3.

Consequently, BAT filed this case, claiming that the differential treatment of the excise duty applicable to goods originating from Uganda, as opposed to like goods from elsewhere in the region, was discriminatory and a violation of the EAC Customs Union and the Common Market Protocols for the establishment of the East African Community.[558] By imposing this discriminatory tax, Uganda was, in essence, going against its commitment to free movement and equal treatment of goods from all EAC partner states.[559] BAT further argued that the enactment of this Act posed a threat to its business operations and thus sought a declaration that the Act violated the EAC Customs Union and Common Market Protocols and an order directing the respondent state to take immediate action to prevent such violations.

Uganda, on the other hand, argued that rather than being discriminatory, it merely sought to "promote the growth of local industries, encourage more companies to invest in Uganda and promote the consumption of locally manufactured cigarettes."[560] Additionally, the respondent state contended that the impugned law was "passed in good faith" and was meant to benefit Uganda and the EAC as a whole, and accordingly sought to have the reference dismissed with costs.[561]

In its interim ruling, the First Instance Division granted an interim injunction to BAT, prohibiting the government of Uganda and the Uganda Revenue Authority (URA) from collecting excise duty due to discriminatory rates, pending the hearing and determination of the case. In a first-of-its-kind judgement, the EACJ, rather than issuing declaratory orders as it usually did, directly ordered a partner state to pay costs and abstain from interfering in free trade in the region. The court categorically declared a violation of the EAC Treaty and its objectives. It held that the URA misconstrued the term 'import' as Kenya, which is a partner state of the EAC, belongs to "a single economic area characterised by the free movement of goods" as per the Customs Union Protocol and thus goods produced in Kenya should not be treated as imports.[562] The court went ahead to

558 Ibid., 4. The Applicant contended that the Act infringes Art. 6 (d) and (e), 7(1) (c), 75 (1), (4) and (6) and 80 (1) (f) of the EAC Treaty; Art. 15 (1) and (2) of the EAC Customs Union Protocol, as well as Art. 4, 5, 6 and 32 of the EAC Common Market Protocol.

559 Art. 15 EAC Customs Union Protocol.

560 Ibid., 7.

561 Ibid., 7.

562 Ibid., 19.

emphasise that "it is manifestly clear that the intention of the framers of the EAC Treaty and Customs Union Protocol was to establish the Community as a single economic area characterised by the free movement of goods, and in which goods from any of the partner states were not treated as imports."[563]

The BAT case was the first case in the history of the EACJ to address an international economic trade dispute, especially one touching on internal taxation of goods under the Common Market and Customs Union Protocols. It has been dubbed "a significant milestone in the process of judicialisation of trade, business and commercial disputes" in the EAC as the case was filed by a "multinational company with great economic and political muscle internationally" (Mbori 2020, 344). Without going into the legal merits of the case, it suffices to note that by granting mandatory orders, as opposed to the usual declaratory orders, the court broadened its remedial powers. Upon issuing the ruling, it was mostly well-received by the legal complex and scholars alike (Mbori 2020). However, the Ugandan government was not pleased with the verdict, as the Registrar at the time recalls:

> "In the BAT case, the Ugandan Speaker indeed attacked them and said, 'This *ka* small court there. Why is it issuing such decisions? Are they trying to bite the hand that feeds them?' Interestingly, she (*Ugandan Speaker*) later then became the Minister for EAC affairs. So, the same person who criticised the court ended up becoming EAC Minister! The court has merely been at the periphery of the EAC institutions."[564]

Uganda did not instigate a backlash but chose a subtler pushback. The speaker of Parliament at the time, Rebecca Kadaga, is quoted as having questioned the legitimacy of the Arusha-based court. Her words were meant to have a chilling effect on the court's newly exercised economic jurisdiction and to undermine its impact on regional trade intervention. A presiding judge on the case noted that she was not personally attacked but was made aware of the Ugandan Speaker's discontent, which she believed was merely a case of *sour grapes.* Interestingly, when a similar case arose, when Kenya was allegedly blocking the importation of Uganda's dairy products, Kadaga "called on Ugandan citizens to sue the Kenyan

563 Ibid., 20.
564 Interview, EACJ Former Registrar, October 1, 2021, Kampala, Uganda.

government for unfair trade practices that infringe on the treaty of the East African cooperation."[565]

Despite the pushback from Uganda upon the issuance of the BAT case, litigants had already picked up on the potential of utilising the EACJ as an avenue for adjudicating cross-border disputes. As a former EACJ judge recalls:

> "My feeling is that the decision of the BAT case opened the door for direct trade disputes. By the time I left last year (*2020*), we had a case where Kenya was imposing differential taxes on Tanzanian goods. In BAT, it was Uganda doing that to Kenyan cigarettes. So, my sense was that BAT redirected the discussion in a certain direction. And I believe it's going to open up more trade-related issues. If there are projects in the works, it was informed by the BAT decision because it was very well received across the board. Everybody agreed that this was the core function of the court: to direct regional trade. I think going forward, arbitration should be encouraged because even in the BAT case – that's public international trade law – when it comes to the private rights of citizens, they might want to explore arbitration instead of litigation."[566]

The judge referred to *Kioo Limited (TZ) v Attorney General of Kenya*,[567] which closely resembles the BAT Case. In *Kioo*, a Tanzanian glass manufacturing company sought orders against Kenya, aggrieved by the latter's discriminatory excise duty levied on the former's imported glass bottles. The EACJ granted the interim orders pertaining to the Customs Union and Common Market Protocols in this case and took a firm stance in protecting the applicant's business operations. Unlike the usual cases where EAC residents and companies file against their partner states, this case was the first of its kind, where a resident of one EAC partner state (in this case, Tanzania) sought orders against another State (Kenya). Remarkably, the Kenyan government responded swiftly and affirmatively, amending the law in response to the impugned Act.[568]

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565 Kabimba. 2021. "Speaker Kadaga has called on Ugandan citizens to sue the Kenyan government." *Sanyu FM News,* February 11. https://sanyufm.com/speaker-kadaga-has-called-on-ugandan-citizens-to-sue-the-kenyan-government/.

566 Interview, Third bench judge, September 29, 2021, Kampala, Uganda.

567 *Kioo Limited (TZ) v Attorney General of Kenya*, Application 9 of 2020. November 27, 2020. https://www.eacj.org/wp-content/uploads/2020/11/RULING.pdf.

568 Following the ruling, the Kenyan National Assembly proposed the introduction of a proviso to the Excise Duty Act 2015 – to the effect that glass bottles imported from any of the countries within the EAC would not be subjected to the 25 % excise tax

A presentation from the litigating lawyer on the case confirmed the influence of the success of the BAT case as the inspiration for litigating in *Kioo* (Macharia-Okaalo 2021). It is, thus, an indication that other industries and business actors may acknowledge the regional court as an additional avenue for dealing with member state violations of the trade liberalisation obligations under the EAC Treaty.

7.3.3 The Emergence of Silent Compliance

A study conducted by the East Africa Law Society (EALS) on compliance with court decisions found that, as of June 2018, without considering the declaratory orders, 47% of the total number of cases that required implementation had been successfully enforced (Amol and Sigano 2019, 12). This study also confirmed that partner states mostly implemented orders of a pecuniary nature, favouring payments over "taking substantive steps to remedy situations for instances where there is a violation of human rights or the rule of law" (ibid., 13). This finding confirms what we already know, that non-compliant states go through various stages before they can achieve the desired behavioural change and compliance with international standards of human rights (Risse et al. 1999). Risse and colleagues presented five distinct phases – repression, denial, tactical concessions, prescriptive status and rule-consistent behaviour – which these states go through before any sustainable change can be observed (Ibid.). In the tactical concessions phase, "repressive states" use tactical concessions in order to get the international human rights community 'off their backs'" (Risse et al 2013, 6). Rather than commit fully to international norms, governments engage in "low-cost" concessions to save their image in the international sphere. Paying monetary compensation may be easier than changing repressive laws, for instance, and this is the type of tactical concession of which previous research speaks (Ibid).

My research adds to the debate by introducing the concept of silent compliance. In developing the concept of silent compliance, this study acknowledges that it remains difficult to empirically determine causal linkages between state behaviour and international court rulings (Hillebrecht 2009, 2014; Huneeus 2013; Abebe 2016). Moreover, compliance should be understood as an *outcome* of the implementation *process* (Biegon 2022,

– and the proposal was approved and introduced in the Finance Act 2021, which commenced on 1 July 2021 (Macharia-Okaalo 2021).

415). Implementation, therefore, may result in partial or full compliance with international rulings or compliance may even "be realised independently of implementation" (Ibid.). Biegon goes on to introduce the concept of situational or coincidental compliance, but limits it to a "result of sheer coincidence, change in circumstances or another neutral factor, and not the deliberate action of the concerned government" (Ibid.) In my understanding of silent compliance, governments *take deliberate action* and *move beyond the performative aspects of compliance* (which would also be classified as tactical concessions). Thus, silent compliance differs from tactical concessions and situational compliance in that it is not only performative, low cost or an extraversion tactic.

To illustrate what silent compliance is, I draw on the case of *Kioo Limited v Attorney General of Kenya*.[569] A Tanzanian glass bottle company, Kioo Limited, opposed the imposition of a 25% excise duty on its glass products that were entering Kenya. The court granted interim orders prohibiting the collection of excise duties on glass products from Tanzania pending the determination of the case. Subsequently, the matter of excise duty was debated in the Kenyan parliament, and provisions on excise duty were removed from the 2021 Finance Act before the law was enacted. In the Finance Act 2021, the importation of glass bottles was exempted from excise duty.[570] Thus, the Republic of Kenya complied with the court's ruling, engaging in a legislative review without much uproar and thereby contributing toward inter-state trade and harmonising taxation regimes.

In this case, the Republic of Kenya complied with the court's ruling, engaging in a legislative review and contributing toward inter-state trade and harmonising taxation regimes. Drawing on this incident, several interviewees (both judges and lawyers) highlighted that while it may appear that governments merely ignore the rulings of the court, they comply more than has been reported through what one judge implied as "silent compliance." According to this judge:

> "You know, the partner states, they comply but do not talk! So now Kenya has complied, but they comply silently. This is how governments operate. They comply but quietly" (Interview, EACJ Judge, November 9, 2021, Bujumbura, Burundi)

569 *Kioo Limited (TZ) v Attorney General of Kenya*, *supra* note 567.

570 The Kenyan Finance Act 2021 was gazetted on 30 June 2021. See "Exemption of glass bottles to excise duty." https://ronalds.co.ke/finance-act-2021/.

For this judge, governments tend to comply without being elaborate about it, opting for silent implementation rather than ignoring them completely. And yet, non-compliance has persisted in the literature despite silent compliance, which usually goes unnoticed in the media and scholarship.

A similar observation can be made in *Burundi Journalists Union v The Attorney General of the Republic of Burundi*,[571] where Civil Society Organisations challenged Burundi's 2013 Press Law, arguing that it restricts freedom of the press and violates the right to freedom of expression, which, in effect, violates EAC Principles.[572] The court found that Articles 19 (b) (g) (i) and (j) of Burundian Law No 1/11 of June 2013 violated the EAC Treaty.[573] Consequently, in March 2015, Burundi's national assembly approved a draft media law that would revise its restrictive Press law.[574] Likewise, in the case of *AG Tanzania v African Network for Animal Welfare,*[575] where the government of Tanzania complied with a permanent injunction that barred it from constructing a bitumen road in the Serengeti National Park. The EACJ argued that the construction of this road would have a negative impact on the environment and, therefore, infringe upon EAC Treaty provisions.[576] Experts described the move as "audacious because, as a regional court, it was exercising authority to essentially reverse the decision of a sovereign government to build a road within its own borders" (Gathii 2016a, 397). The fact that Tanzania complied and is only revisiting the idea upon seeking permission from UNESCO in 2024[577] is an indication that it heeded the court's ruling at the time.

From the two examples above, we see the member states silently complying. In Burundi, a draft media law that would revise its restrictive Press law

571 *Burundi Journalists Union v the Attorney General of Burundi and others.* Reference No 7 of 2013. May 15, 2015. https://ealaw.eastafricalaw.org/wp-content/uploads/2021/02/BURUNDI-JOURNALISTS-UNION-v.-THE-ATTORNEY-GENERAL-OF-THE-REPUBLIC-OF-BURUNDI.pdf.

572 Ibid., 3.

573 Ibid., 42.

574 Nduwimana Patrick. 2015. "Burundi lawmakers pass media bill to expand press freedoms." https://www.reuters.com/article/ozatp-uk-burundi-politics-press-idAFKBN0M11RA20150305/.

575 *African Network for Animal Welfare (ANAW) v. The Attorney General of the United Republic of Tanzania,* Reference No. 9 of 2010. June 20, 2014. https://www.eacj.org//wp-content/uploads/2014/06/Judgement-Ref.-No.9-of-2010-Final.pdf.

576 See Gathii 2016 for a brilliant discussion of the history and significance of this case.

577 "Tanzania seeks UNESCO permission to upgrade roads in Serengeti." *The Citizen*, March 11, 2024. https://www.thecitizen.co.tz/tanzania/news/national/tanzania-seeks-unesco-permission-to-upgrade-roads-in-serengeti-4551854.

was approved, whereas in Tanzania, the government seemed to respect the decision not to build a road across the Serengeti. Tanzania simply delayed action until further notice, but has gone ahead and displaced indigenous occupants of the same land, a case that was also brought before the EACJ. The government of Tanzania claimed that these communities occupied the Serengeti National Park and began violently evicting them from their homes.[578] This kind of compliance appears strategic and performative, aimed at maintaining international legitimacy for countries that intend to show their respect for international legal regimes, even if for a short time. Be that as it may, I hesitate to sweep the "small wins" of the court under the rug by simply calling it an extraversion tactic or a "tactical concession" (Risse et al. 2013, 6). Moreover, it differs in the sense that EAC governments have not only engaged in "low cost" concessions but have also responded by partaking in 'high cost' transactions, as in the case of Kioo discussed above.

Nevertheless, beyond the problems with compliance and the need for organised mobilisation to deepen the implementation of the court's rulings, the EACJ should be appreciated for its broader contribution to the regional integration agenda rather than its constraints in compliance. As one repeat litigant emphasised in an interview, it is the litigating lawyers' responsibility to follow up on the implementation of the case and to find a working solution to the implementation dilemma – including going the extra mile to suggest solutions to the partner states' representatives. Together with judicial allies, especially the East African Law Society (EALS) and the Pan African Lawyers' Union (PALU), court staff have embarked on mobilisation efforts to influence compliance with judicial rulings in the EAC.

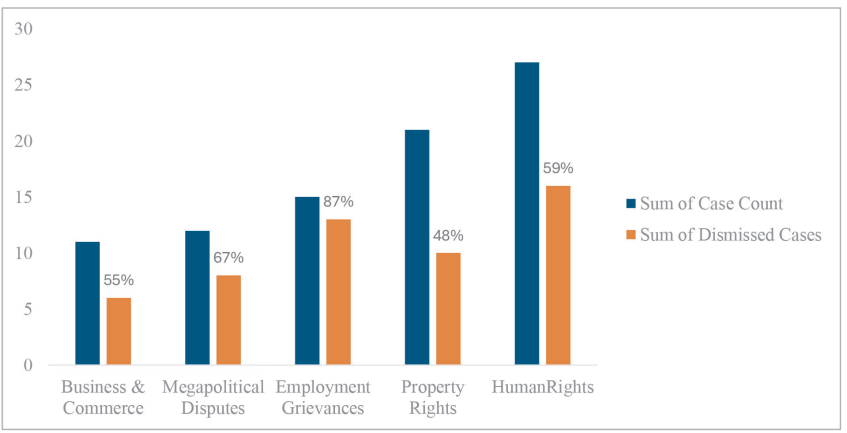
In conclusion, the EACJ has evolved in handling trade-related matters in the region. Recent EACJ jurisprudence offers a more encouraging outlook on the court's role and potential in advancing economic integration. The court has emerged from a very formalistic legal interpretation and from throwing cases out on technicalities to engaging with cases on their merits, daring to issue monetary damages, and issuing rulings that prompt changes in legislation. It has even highlighted its role in upholding the promises of the EAC Customs Union and Common Market Protocols. However, the infrequent assembly of judges, who continue to serve on an irregular basis, depending on funding availability, affects the duration of cases and delays

578 See https://www.lawyersofafrica.org/court-delivers-judgment-on-loliondo-case/.

their disposal. Even if cases are brought under a "certificate of urgency,"[579] they cannot be scheduled for hearing expeditiously, which impacts the urgent determination of matters and the efficiency of the court. Nevertheless, the urgent nature of cross-border trade issues does not favour business actors who are discouraged by lengthy and drawn-out court processes. As a result, this affects the types of cases brought to the court, as business actors may not opt for the slow process.

7.4 Shedding the Human Rights Image

A mapping of decisions dispensed between 2015 and July 2022[580] elucidates that the third bench had issued a total of 101 judgements across a diverse array of themes ranging from property rights to environmental rights. As shown in Figure 3 below, human rights violations still dominate the EACJ docket.



Making up almost a third of the cases (26.7%), human rights cases could not be ignored, even though they were not the priority of the third bench judges. A quick look at the top five categories of cases that dominated the docket reveals that property rights violations (20.8%), employment

579 Under EACJ Rules of Procedure, Rule 65 (2) (a), the court can take note of the urgency of matters and act accordingly.

580 July 2022 marks the end of the third bench, as defined by the study. See Chapter 3.

grievances (14.9%) and megapolitical affairs affecting the legislative and executive bodies in partner states (11.9%) were all more prevalent than commercial cases. Business-related cases were a mere 10.9% of the entire docket.[581] This finding resonates with what we already know about the EACJ's unforeseen role in becoming an avenue for political mobilisation (Gathii 2020).

Although the judges did not deviate from repurposing the court's mandates to include deciding human rights, they were keen to shed the image of the EACJ as a human rights bench.[582] Without elaborating on all the human rights violations tackled by the third bench, suffice to note that 27 judgements across the two divisions were decided, touching on various facets of human rights. For instance, civil society challenged the crackdown on civic space in Burundi[583] in the EACJ. Likewise, arbitrary arrests and detention of citizens in Uganda,[584] South Sudan[585] and Rwanda[586] have also been heard and decided by the third bench. Noteworthy is that slightly more than half (59.2 %) of these cases were dismissed with similar reasoning as in the previous bench. As the last chapter elucidated, the Appellate Division of the second bench set the stage for a strict interpretation of the two-month rule, using it as a means to deal with human rights-oriented cases and other politically salient matters. This approach trickled down to the First Instance Division in subsequent cases.

581 Table 11 provides a summary of all judgements – by type and across divisions – issued by the third bench. It also details the number of dismissals across categories and court divisions.

582 Interviews with four judges who served on both the second and third benches, September 2021 – June 2022.

583 *Forum Pour Le Reinforcement La Societe Civile & 4 Others vs Attorney General of Burundi*, Appeal No. 2 of 2020. November 19, 2021. https://x.com/EACJCourt/status/1461745309147713540.

584 *Izeere Jean Luc & 8 others vs Attorney General of Uganda,* Reference No. 18 of 2018. November 30, 2022. https://www.eacj.org/wp-content/uploads/2022/12/REFERNCE-NO.18-OF-2019.pdf.

585 *Garang Michael Mahok vs Attorney General of South Sudan*, Reference No. 19 of 2018. December 5, 2019. https://www.lawyersofafrica.org/eacj-ruled/.

586 *Dr Mpozayo Christophe vs Attorney General of Rwanda,* Appeal No. 1 of 2021. May 27, 2022. https://www.eacj.org/wp-content/uploads/2022/06/Appeal-No.-1-of-2021.pdf.

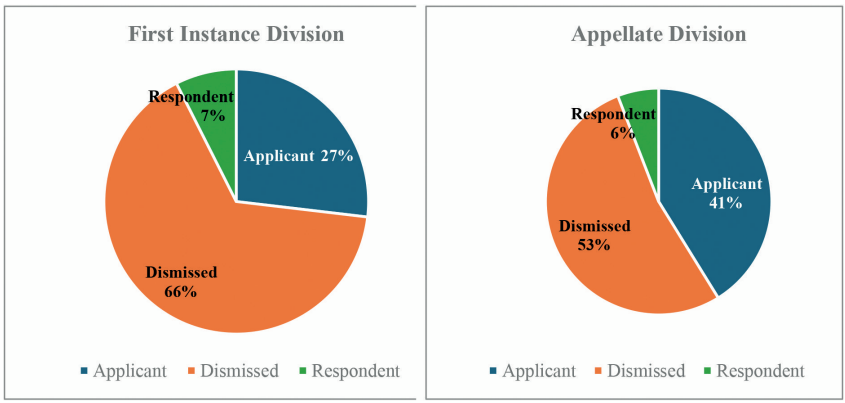
Table 11: Third Bench (2015–2022) Judgements

Judgement type	First Instance Division		Appellate Division		Decisions (total)	Dismissals (total)
	Decisions issued	Dismissals	Decisions issued	Dismissals		
Environmental issue			1		1	1
EAC Organs Performance	1	1			1	1
EAC Political affair	1		1	1	2	1
EACJ appointment	1	1	1	1	2	2
EACJ Jurisdiction	1	1			1	1
Electoral dispute	2	1	6	2	8	3
Business & Commerce	7	4	4	2	11	6
Mega-political disputes	8	6	4	2	12	8
Employment Grievance	10	8	5	5	15	13
Property Rights	15	8	6	2	21	10
Human Rights	21	13	6	3	27	16
Grand Total	67	43	34	18	101	62

Source: compiled by the author from the EACJ Case Mapping dataset (with the author on file).

Furthermore, the dismissal rate of human rights cases does not starkly differ from the average dismissal rate of 61%. Most strikingly, unlike in the second bench, where the appellate bench tended to be more stringent, the dismissal rate across the third bench divisions is not starkly different. If anything, it is tilted in favour of the trial court. While the appellate bench only had to dismiss half of its cases, the FID dismissed 12% more than that and ruled favourably in only 20% of the cases. Overall, of the 67 judgements issued by the FID, a 64% dismissal rate was observed. Likewise, there is a 53% dismissal rate at the Appellate Division (see *Table 11*). While examining the dismissal rate can reveal the intricacies of the politics of judging (Odermatt 2018; Squatrito 2022), it is illuminating to inquire into the cases where judges either explicitly defer to states in their rulings or when they expressly rule against states in favour of individuals.

Figure 4 summarises how judges of the third bench voted. The bench has mostly avoided confronting partner states through dismissals of cases and has only granted them a few overt wins.



At the trial court, applicants are typically private entities that sue member state governments and their affiliated institutions or the East African Community for breaches of the EAC Treaty. Of the decisions issued at First Instance, private applicants were only favoured in 26% of the cases. Rather than explicitly ruling in favour of member states – who are usually the respondents at the trial court – the bench dismissed the various complaints relying on the lack of jurisdiction on account of the person concerned or of the matter involved and the time element, as discussed above. Governments were accorded explicit wins in 5 cases. Moreover, 65% of the total cases were dismissed across the board. Likewise, at the appellate court, where partner states are usually the complainants owing to an unfavourable decision, the success rate was 41%. Still, the majority of the cases were dismissed due to similar reasoning to those in the first instance.

Avoidance through dismissal, as assumed by the third bench, can be interpreted as a form of deference to partner states that challenge Treaty violations by member countries. This is not to diminish the wins that are accorded applicants (who are usually private entities), even though they are negligible. So, while the EACJ demonstrates an apparent capacity and willingness to declare states in violation of the law, it has, since the creation of the appellate bench, tended towards more strict legal interpretation, moving away from the path set by the bold pioneers. Indeed, changes in the political climate and the several pressures that impact the various benches shape the trajectory of decision-making. Recall that by the end of the first bench, the new court was flexing its judicial muscle, trying to raise its profile within the Community by not only tackling cases that streamlined EAC institutions but also veering into uncharted territory with human rights

jurisprudence. However, the resulting backlash following *Anyang Nyong'o* – punishment for going against one Member State government's wishes – led to the creation of a more restrained appellate body on the second bench.

7.4.1 Intervention in Megapolitical Disputes

Ran Hirschl defines mega-political disputes as "core moral predicaments, public policy questions, and political controversies" that have the potential to divide countries or societies (Hirschl 2008, 94). Thus, the study examined national political affairs facing the legislative and executive bodies in the partner states, which have the potential to disrupt entire polities or create immense tension between EAC partner states, thereby risking the collapse of the EAC, and categorised them as "mega-political disputes".[587] For instance, in challenging the 2019 border closure between Uganda and Rwanda, Ugandan lawyer Steven Kalali sought out the EACJ.[588] Kalali alleged that Rwanda's closure of its border points with Uganda had restricted the flow of traders and their goods from travelling between the two countries, which he argued contravened the principles of good neighbourliness and the Common Market Protocol, among others.[589] He sought declarations on the unlawfulness of these acts and a permanent injunction restraining Rwanda from further action.[590] The FID ruled in favour of the applicant regarding the unlawfulness of the closure of border points,[591] the restriction of freedom of movement of Rwandan citizens to Uganda against their will,[592] and the denial of entry of Ugandan traders to Rwanda,[593] but did not grant costs to the applicant as the court believed it would "not serve the interest of justice."[594]

587 Except for electoral disputes as these were coded as such.
588 *Kalali Steven vs Attorney General of the Republic of Rwanda*, Reference No. 2 of 2019. June 23, 2022. https://africanlii.org/akn/aa-au/judgment/eacj/2022/12/eng@2022-06-23. Hereafter *Kalali.*
589 Ibid., 3.
590 Ibid., 3–5.
591 Ibid., 10.
592 Ibid., 11.
593 It contravenes Art. 7 (7) of the East African Common Market Protocol (ibid., 11).
594 *Kalali*, 12.

Equally, the Political Parties (Amendment) Act in Tanzania was challenged at the EACJ. In *Freeman Mbowe,*[595] five politicians from the Chama cha Demokrasia na Maendeleo, Alliance for Change and Transparency -Wazalendo and Chama cha Umma political parties in Tanzania, together with the NGO, Legal and Human Rights Centre, challenged the Political Parties (Amendment) Act No. 1 of 2019.[596] The applicants purported that the Act imposed restrictions on democracy, good governance and freedom of association, which are fundamental and operational principles of the Treaty.[597] The FID declared that the Act violated the said principles and directed Tanzania to bring the Act into conformity with the Treaty.[598] Tanzania appealed[599] this decision, but the Appellate Division upheld the trial court's ruling. While the *Kalali* and *Mbowe* decisions discussed here were decided in favour of the applicants, this is not representative of the stance taken by the third bench when it adjudicated overtly political cases.

Like the previous bench, the third bench dismissed 67 percent of the cases that involved megapolitical disputes across both divisions. Of the eight megapolitical disputes raised at the FID, six were dismissed. Likewise, half of the cases were also dismissed at appeal (see *Table 11*). These results echo what we already know regarding the sensitivity of specific politically charged questions at the international court (IC) level. ICs worldwide have avoided tackling controversial questions – especially those that intervene in overt political affairs of member states – through avoidance techniques such as deference to member states or deciding that a dispute is 'non-legal' in nature, denying standing to the party bringing the dispute (locus standi) or adjudicating in a way that sidesteps the most politically sensitive issues (Odermatt 2018). Over time, the EACJ has employed the same tactics, especially when confronted with megapolitical disputes. Judges have either relied on strict time limitations, declared lack of legal merits of the case, cited insufficient evidence, and (or) lack of jurisdiction to dismiss cases.

595 *Freeman Mbowe & Others vs Attorney General of Tanzania*, Consolidated References Nos. 3 & 4 of 2019. March 25, 2022. https://africanlii.org/akn/aa-au/judgment/eacj/2022/4/eng@2022-03-25. Hereafter *Mbowe*.

596 Enacted by the Parliament of the United Republic of Tanzania on 29th January 2019 and assented to by the President of the said United Republic of Tanzania on 13 February 2019. The Act was gazetted on 22 February 2019 (*Mbowe*, 4).

597 *Mbowe*, 4.

598 *Mbowe*, 52.

599 *Attorney General of Tanzania vs Freeman Mbowe & Others*, Appeal No. 5 of 2022. June 6, 2023. https://africanlii.org/akn/aa-au/judgment/eacj/2023/8/eng@2023-05-26.

The third bench assumed similar circumvention tactics to avoid confrontation with partner states in the eight electoral disputes that were raised. Decided mainly in favour of applicants against partner states, the third bench still dismissed 37.5 per cent (see *Table* 11). Recall that the first and most controversial case thus far, *Anyang Nyong'o,* paved the way for a successful intervention in the electoral procedure of representatives to the East African Legislative Assembly (EALA). Thus, when Burundi contested the speakership of EALA, alleging that the election of a Rwandan citizen as its speaker was unlawful, it was hoping for the judicial organ's favourable intervention. In *Attorney General of the Republic of Burundi v. The Secretary General of the East African Community*,[600] Burundi argued that the EAC parliament had failed to follow regulations on quorum that require half of the elected members of the assembly to be present during the poll. They claimed EALA Speaker Martin Ngoga was elected despite the absence of Burundi and Tanzania members of the assembly. Thus, Burundi wanted to have him barred from holding office and urged the court to order re-election, citing irregularities in the voting process. As the lead Counsel on the case clarified:

> "In the past, countries would discuss and agree. So, now, they could not agree because there was a political difficulty. The Burundian Minister of EAC was also a member of EALA. She had worked with Ngoga. So now, the personal went up to the court level. I didn't know. So, I told her we didn't have a case. The problem was that Burundi's candidate got three votes while Ngoga got 29 or 39. Then Burundi went out. They said there was no quorum. But I told them quorum was there because if you enter and then get out, quorum is there. Now, the affidavits. Normally, affidavits are sworn by the members there. I told them that if I swore the affidavits, it would be hearsay because I wasn't there. But Burundi insisted. You do what you are told! Now, the court said that Burundi failed to show that the members of EALA from Burundi were not there. So, my affidavits were defective."[601]

The EALA speakership occurs on a rotational basis in the EAC. In 2017, it was clear that either Rwanda or Burundi, the newer entrants into the

600 *Attorney General of the Republic of Burundi v. The Secretary General of the East African Community (Respondent) and Hon. Fred Mukasa Mbidde (Intervener)*, Reference No. 2 of 2018. July 2, 2019. https://www.eacj.org/wp-content/uploads/2019/07/Ref.-No.2-of-2018-1.pdf.

601 Interview, Nestor Kayobera, November 17, 2021, Bujumbura, Burundi.

regional bloc, would vie for the seat. Although it is an informal institutional arrangement amongst the partner states, there has been no disagreement about the EALA speakership thus far. This time, however, the Burundian Minister of East African Community Affairs,[602] who had fancied the speakership for herself, insisted on taking Rwanda to court over the post.

As we learned from this case, Burundi disputed the electoral process, leading to the announcement of Martin Ngoga as speaker, primarily due to politically motivated rather than legally sound reasons. Appreciating the political weight of the case and afraid of disrupting EALA on unreasonable grounds rooted in political conflicts between the two countries,[603] Hon. Fred Mukasa Mbidde, a Ugandan EALA member, assumed the role of the intervener and was represented by EACJ ally, Pan African Lawyers Union (PALU).

Predictably, the trial court struck down the affidavit evidence produced by Burundi as the State Counsel, Mr Nestor Kayobera, had sworn the affidavit claiming a lack of quorum despite not attending the event.[604] Consequently, the EACJ dismissed the case in the FID. Burundi sought an appeal, which was also dismissed.[605] The appellant was ordered to bear the costs of the Appeal and Cross-Appeal as a punishment for disrupting the EALA electoral process and thereby slowing down the integration process.[606]

Despite the lack of success in the Burundian electoral process case, PALU did not recoil in its intent to address the issue of electoral malpractice in the EAC.[607] In April 2021, PALU, with six citizens from Uganda, Kenya and Tanzania, lodged a petition at the EACJ challenging the conduct of the January 2021 presidential election in Uganda.[608] They asked the court to intervene in electoral violence and human rights abuses whilst shining

602 Nzeyimana Léontine, Minister of EAC Affairs, 3rd Assembly 2012 – 2017, Burundi.

603 Interview, EACJ judge, November 11, 2021, Bujumbura, Burundi.

604 Magubira Patty. 2019. "Burundi loses case challenging election of EALA speaker." *The East African,* July 3. https://www.theeastafrican.co.ke/tea/news/east-africa/burundi-loses-case-challenging-election-of-eala-speaker-1421632.

605 *The Attorney General of the Republic of Burundi v. The Secretary General of the East African Community (Respondent) & Hon. Mukasa Mbidde (Intervener)*. Appeal No. 2 of 2019. August 26, 2019. https://www.eacj.org//wp-content/uploads/2020/06/APPEAL-NO-.02-OF-2019.pdf.

606 Interview, Counsel to the Community, November 12, 2021, Bujumbura, Burundi.

607 Interview, PALU official, March 2, 2022, Arusha.

608 PALU News, April 21, 2021. "PALU and Partners file Uganda election petition filed at EACJ." https://www.lawyersofafrica.org/14684-2/ (last accessed September 21, 2024).

a light on the intimidation of citizens and opposition supporters by the Ugandan police, military and Special Forces Command. PALU and other human rights defenders filed this case to highlight the flawed, violent and corruptible nature of elections in the region and call for accountability, as they believed that the East African Community had not adequately intervened to ensure a free, fair and credible election in the country. As an interview confirms:

> "In late 2020 and early 2021, we filed cases that lifted Pandora's Box on the entire Tanzanian and Ugandan electoral processes. [] We are not in a hurry for the cases to get expedited. There was nothing we could do to stop the Ugandans from swearing in Museveni, and there was nothing we could do to stop the Tanzanians from swearing in Magufuli in 2020. But we said, 'Okay, you get sworn in. Let the dust settle. Let us drag the people of East Africa through the mud, blow by blow, to show how we got to the president. And let us not just say you rigged; let us call for moral accountability.'"[609]

While the case is still underway, it is vital to note the tone of megapolitical jurisprudence that is emerging in the EACJ. Judicial allies are pushing the court to uncharted territories – asking it to intervene in regional electoral malpractice and demand what has not been done before. These cases, as brought forth by allies, are vital in empowering the EACJ on various fronts. First, they raise violations of electoral conduct in an authoritarian regime. EASCOF used the court to "promote new norms and ideas about rights, but also to undermine justifications of authoritarian rule inconsistent with the observance and respect for rights" (Gathii 2020, 16–17). Secondly, the EASCOF case helped to continue the dialogue on the appellate role of the EACJ, putting earlier doubts to rest and affirming the place and hierarchy of the EACJ vis-à-vis municipal courts.

Thirdly, these cases also aim to streamline EAC institutions and consolidate informally institutionalised mechanisms such as the election of the EALA Speaker, which occurs on a rotational basis. Moreover, the case challenging the speakership of EALA also led to the first dissent in the history of the EACJ.

609 Interview, PALU official, March 2, 2022, Arusha.

7.4.2 Challenging Judicial Appointments

By 2015, cases challenging the institutional structures of the EAC remained relevant, accounting for 20 percent of the docket (see *Table 11*). Being a Regional Economic Community (REC) court, not least one in its formative stages, the prevalence of matters touching on the institutionalisation of the REC would be expected, even if they do not make up the majority of the docket. While this was the case in previous benches, most of the cases coming to the EACJ 15 years later were mainly concerned with consolidating the REC body organs through performance monitoring and seeking to streamline the decision-making of the various bodies. Likewise, employment disputes within the EAC were also raised.

Most notable amongst performance monitoring and seeking to streamline the functioning of the EAC bodies is the first-ever case that challenged judicial appointments at the EACJ. In *East African Law Society vs The Attorney General of the United Republic of Tanzania & Secretary General of the East African Community*,[610] the regional Bar dragged Tanzania to court, citing flaws in the appointment procedure as their nominee, Lady Justice Sauda Mjasiri, had already retired from the national judiciary and was thus unqualified for appointment at the REC court.[611] The Community watchdog expressed grievances over the lack of public participation and consultation with key stakeholders, which would have provided fairness and accountability.[612] Even though the First Instance dismissed the case, ruling that Mjasiri's appointment met the Treaty requirements, this case drew attention[613] to how the EAC Member States select judges for the regional bench. As expected, EALS appealed the decision, and predictably, the appellate chamber upheld the trial court's decision.[614]

610 *East African Law Society vs The Attorney General of the United Republic of Tanzania & Secretary General of the East African Community*, Reference No. 1 of 2019. November 25, 2020. https://www.eacj.org/wp-content/uploads/2020/11/Judgment2.pdf. Hereafter *Mjasiri*.

611 Ibid., 3.

612 Ibid., 4–5.

613 Kiyonga, Derrick. 2019. "Foreign job puts JSC, Judiciary on war path." *The Observer*, September 25. https://observer.ug/news/headlines/62090-foreign-job-puts-jsc-judiciary-on-war-path.

614 *East African Law Society vs Attorney General of the United Republic of Tanzania & Secretary General of the East African Community*, Appeal No. 2 of 2021. August 31, 2022. https://www.eacj.org/wp-content/uploads/2022/09/Appeal-no-2-of-2021.pdf.

This case highlighted that the opacity of the selection process in the EACJ is a result of a lack of participation and pressure from relevant interest groups and the public to interfere in the selection process. Instead, a few privileged insider gatekeepers – usually placed in the executive – manage the appointment process. These insiders select candidates who are either thoroughly connected within political and judicial circles, have direct links to the top executive offices or exhibit observable loyalties that tie them to the appointing authorities from their partner states. While this was not *necessarily*[615] the case with Mjasiri, the regional Bar intervened in judicial appointments to the EACJ to remedy the opaque and mysterious nature of these appointments, in a bid to bolster the institutionalisation of the EACJ. Before approaching the court, EALS had voiced its concerns in previous Summit meetings through its observer status function, but to no avail.[616] Litigation seemed like the most expeditious way to raise the issue while leaving it on record that judicial appointments had been conducted without public scrutiny or approval.

Following this case, Tanzania's next appointment was viewed favourably by the EALS, which believed that it had, in effect, won the case. Moreover, EALS has confidence that there has been a positive spillover effect in subsequent appointments from other EAC partner states, as one official reported:

> "And so, countries like Rwanda also became aware that these things are now under the spotlight. So even before a substantive determination by the Appellate Division, there was already a shift" (Interview, former CEO of EALS, Hannington Amol, March 29, 2022, Nairobi, Kenya).

The *Mjasiri Case* illustrates the concern for regulating judicial appointments to the EACJ. Even if the case was dismissed, it brought visibility to the irregularities in appointments and was symbolic in its attempt to check the nominating governments.

615 Interviewed lawyers on the case affirm that Mjasiri is a well-respected jurist of recognized competence within the national judiciary in Tanzania. However, it was the fact that she was already retired from judicial service in her home country that they took issue with and sought to use her appointment as a means to address the problem (Interviews, EALS officials, 19 February 2022, Arusha, Tanzania).

616 Interview, former CEO of EALS, Hannington Amol, March 29, 2022, Nairobi, Kenya.

7.5 Judicial-led Intervention

Even though judicial appointments to sub-regional benches in Africa are thinly regulated and often opaque, regional judicial appointers believe that *it matters who* sits on the bench for court performance (Stroh and Kisakye 2024). Our exploratory insights into two country cases suggest that national government interests depend on the historical relations that individual member states tie to the regional community. Thus, we can learn a great deal about the type of court and how it is perceived by the appointers by looking at the individuals on the bench. Likewise, the individuals on the bench contribute to the performance and trajectory of the court. Thus, this chapter attributes the shift in decision-making, from human rights to commercial bench, to the change in judicial biographies and competencies coupled with the growing political relevance of the court. The change in judges to those who are more commercially inclined (with some judges being experts in international trade law), coupled with the urge to steer clear of being labelled an activist bench, has shaped the bench's inclination towards less politicised cases like human rights to core issues of regional trade and commerce.

Table 12: Third Bench Judges (2015–2022)

Appellate Division		**First Instance Division**	
President	Dr Emmanuel Ugirashebuja (Rwanda)/ Nestor Kayobera (Burundi)	Principal Judge (PJ)	Monica Mugenyi (Uganda)/ Yohane Bokobora Masara (Tanzania)
Vice-President	Liboire Nkurunziza (Burundi)/ Geoffrey Kiryabwire (Uganda)	Deputy PJ	Isaac Lenaola (Kenya)/ Dr Faustin Ntezilyayo (Rwanda)
Members	Aaron Ringera (Kenya)	Members	Dr Charles Oyo Nyawello (South Sudan)
	Edward Rutakangwa (Tanzania)		Charles Nyachae (Kenya)
			Fakihi Abdalla Jundu (Tanzania)
	Sauda Mjasiri (Tanzania)		Audace Ngiye (Burundi)
	Kathurima M'Inoti (Kenya)		Richard Wejuli Wabwire (Uganda)
	Anita Mugeni (Rwanda)		Richard Muhumuza (Uganda)
Registrar	Yufnalis Okubo (Kenya)		

Source: Author's compilation from publicly available data and judicial CVs.

The third bench experienced a change in leadership across divisions as the terms of judicial leaders expired and new ones were appointed. Court

President Dr Emmanuel Ugirashebuja from Rwanda and Principal Judge Monica Kalyegira Mugenyi from Uganda both left the bench in November 2020 following the expiry of their non-renewable tenures. Observers feared that the functioning of the court would grind to a halt when these "two top judges" were leaving the bench, "with no replacements in sight."[617] As predicted, court activity came to a standstill for over five months following the departure of these two leaders in November 2020.[618] This was the longest time without judicial replacements at the court, even though appointments had usually been "drawn out" until the Summit eventually met to make the necessary appointments.[619]

In the past, staggered appointments had catered to the fact that even though appointments would not happen promptly, no more than two judges would exit the bench at the same time. However, the COVID-19 pandemic – coupled with already existing intra-EAC disputes -led to a two-year delay in the EAC Heads of State Summit meeting, during which time seven EACJ judges retired without being replaced.[620] It was only in February 2021 that six judges were appointed to fill the bench: Nestor Kayobera (Burundi), Yohane Bokobora Masara (Tanzania), Kathurima M'Inoti (Kenya), Anita Mugeni (Rwanda), Richard Muhumuza (Rwanda) and Richard Wejuli Wabwire (Uganda). As such, Nestor Kayobera replaced Emmanuel Ugirashebuja shortly after his appointment as President of the EACJ. Similarly, Yohane Bokobora Masara replaced Monica Mugenyi as Principal Judge.

Looking at the First Instance Division (FID) of the third bench, Ugandan Monica Kalyegira Mugenyi was the first female administrative head of the FID. At the time of her appointment, Mugenyi was a judge of the High Court of Uganda. She holds an LLM in international trade law from the University of Essex (UK). A member of several international women judges' associations, the Principal Judge had amassed leadership ex-

617 Anami, Luke. 2020. "Justice in the dock at Arusha-based EA court as Bench empties." *The East African*. October 12. https://www.theeastafrican.co.ke/tea/news/east-africa/justice-dock-arusha-based-ea-court-as-bench-empties-2463610.

618 Anami, Luke. 2021. "Long wait for justice draws to a close as Summit set to appoint judges." *The East African*. February 23. https://www.theeastafrican.co.ke/tea/news/east-africa/summit-set-to-appoint-judges-3300064.

619 Anami, Luke. 2022. "Okubo: EAC Court limping along under difficult conditions." *The East African*. May 17. https://www.theeastafrican.co.ke/tea/news/east-africa/eac-court-limping-along-under-difficult-conditions-3814736.

620 Anami 2020.

perience through her extensive service in municipal and regional courts.[621] Mugenyi's judicial journey has been remarkable. She joined the High Court of Uganda in 2010 and served as the youngest judge on the bench. Only three years later, she was appointed as the first woman head of the FID of the EACJ. While at the EACJ, in December 2019, Mugenyi was elevated to the position of Judge of the Court of Appeal. In January 2024, she rose to the highest post in the Ugandan judiciary, joining the Supreme Court bench.[622]

Unlike the previous cohort of judges whose experience was mainly in human rights instruments, Mugenyi's legal and judicial expertise is generally in the public sector, having spent 15 years as a senior transactional and courtroom lawyer dealing with the legal aspects of foreign direct investment, privatisation and private sector development.[623] With this experience, it would not be far-fetched to link the growing trend of commercialised jurisprudence of the third bench's trial court to Mugenyi's leadership. In an interview, she divulged:

> "I think the court is a lot more relevant today than it was when it adjudicated human rights matters only. Human rights tend to be individual, and maybe the security agencies that have violated these rights will be asked to tread with caution. The nature of matters coming now tends to be broader – if a person says, 'This court did not address access to justice issues in this way,' or 'You are taxing me irregularly as per the Protocol on Common Market and Customs Union, like what happened in BAT case.' We were sending a message to all traders that there must be uniformity in the taxation of goods (*in the BAT case*). So, those broad implications are being felt in the region – our president (*Museveni*) and the late Tanzanian president (*Magufuli*) addressed that issue. Today, it is cigarettes, and the next day, it will be sugar. I don't think the court is as irrelevant as it has been in the past."[624]

Indeed, under Mugenyi's leadership, the trial bench handled the bulk of the caseload during the court's existence, resulting in a total of 51 final

621 CV, Monica Kalyegira Mugenyi, https://africanarbitrationatlas.org/wp-content/uploads/2020/12/Monica-CV.pdf.

622 *The Daily Monitor*, January 17, 2024. "Justices Bamugemereire, Mugenyi appointed to Supreme Court." https://www.monitor.co.ug/uganda/news/national/justices-bamugemereire-mugenyi-appointed-to-supreme-court-4495358.

623 CV, Monica Kalyegira Mugenyi.

624 Interview, Monica Kalyegira Mugenyi, September 29, 2021, Kampala, Uganda.

judgements. It is common knowledge that Mugenyi wrote and delivered the first judgement of its kind in a commercial case, *British American Tobacco (BAT) Uganda Ltd v Attorney General of Uganda*[625], which opened the floodgates for future commercial disputes. The significance of this case has already been highlighted, and the resulting pushback is explained in the preceding section. Taking Mugenyi's arguments seriously reveals that her bench sought to actively steer the court away from individually focussed human rights jurisprudence to commercialised jurisprudence. In her explanation, we can infer that the bench found relevance and greater political weight in engaging in trade-related disputes over human rights. Moreover, some judges perceived the existence of the African Court on Human and Peoples' Rights in Arusha as a more suitable ground for litigating human rights cases.

Replacing Mugenyi as Principal Judge, Tanzanian Yohane Bokobora Masara was a High Court judge at the time of appointment.[626] Masara, whose background was in the Tanzania Revenue Authority and the Attorney General's office, had been exposed to regional integration initiatives in various capacities. As a Senior Technical Adviser to the Executive Secretary of SADC and representing the government of Tanzania at the EACJ, the SADC Tribunal, and the African Court on Human and Peoples' Rights. Masara was also involved in negotiating and drafting various EAC integration milestones, such as the Protocol for the Establishment of the EAC Common Market, the Monetary Union Protocol and the roadmap towards the EAC Political Federation. He was also a member of the expert team that negotiated South Sudan's admission to the EAC. Masara also has experience negotiating funds for REC initiatives and was Tanzania's senior legal officer at several EAC and SADC senior official meetings.[627] In sum, even though he was relatively new in the judiciary at the time of his appointment, Masara's vast expertise in regional integration affairs, political negotiations, administration and litigation was helpful in his new role as court leader.

Following Mugenyi's exit, the Masara bench had only dealt with 16 judgements by July 2022. Informal conversations with judges on the Masara bench and Masara himself also alluded to sentiments similar to those of their predecessor, Mugenyi. As opposed to the second bench, which dismissed three-quarters of its business and trade-related cases, citing limi-

625 *British American Tobacco (U) Ltd v Attorney General of Uganda*, *supra* note 554.
626 CV, Yohane Bokobora Masara (available with author).
627 Ibid., 3.

ted remedial powers, the third bench, mainly comprised of judges with a commercial law background, saw an increase in favourable commercial rulings. The fact that the judges were well-versed and partial to international economic law could explain why this bench passed the first landmark rulings in commercial law. In this case, the undertaking in economic cases is linked to the expertise of judges on the bench, which is comparable to the human rights interventions in previous benches.

Likewise, the third bench saw a change in leadership at the Registry. Noteworthy is that while judicial leadership has changed every six years since the court's establishment, the pioneer Registrar served for the first 15 years, whereas his counterpart, Yufnalis Okubo, only served half of this duration. Moreover, both Registrars served at different historical and political junctures. Amidst an unprecedented pandemic and changes in judicial leadership and the Registry, the third bench makes for an interesting comparison with the earlier two benches, as not only the judges' backgrounds starkly differed, but also the Registrar's. Dr John Eudes Ruhangisa's tenure expired, and Yufnalis Okubo replaced him in early 2016. While registrars are typically just administrators of the court, in the case of a REC court, they take on a broader role. Registrars in the EACJ have been responsible for influencing the trajectory of the caseload as they move around the partner states, doing most of the court's publicity work. In these sessions, they set the agenda for the types of questions that need to be addressed and guide the litigants in appropriate ways to approach the bench. Working together with the court presidents, registrars often serve as the voice of the judges in these instances, informing litigants about the types of cases the bench would like to receive and how they can directly influence the caseload of the EACJ.

For instance, Registrar Yufnalis Okubo has previous administrative and regional integration affairs experience through his service as the Legal Counsel and Head of Institutional Affairs at the Intergovernmental Authority for Development (IGAD).[628] While at IGAD, Okubo dealt with trade and commercial-related legal work, which also shaped his understanding of his role as an administrator of a trade court. In several discussions with him, it became clear that, unlike his predecessor, who was well-versed in human rights instruments and whose vision for the EACJ was for the bench to become an avenue for legal and political mobilisation, Okubo perceived the bench as primarily a regional trade court. In fact, he hailed

628 Staff, East African Court of Justice, *Yufnalis Okubo*. https://www.eacj.org/?page_id=1024 (last accessed September 21, 2024).

Judge Mugenyi's pioneering role in the BAT case and was hopeful for the emergence of a trade and commercial bench. I witnessed how he conducted legal training sessions across the region and noticed that he, like the court leaders, envisioned a court that was more authoritative in economic and trade affairs rather than being known for human rights alone, which is not its core responsibility.

Turning to the Appellate Division, its first head, Rwandan academic Dr Emmanuel Ugirashebuja, was appointed EACJ president shortly after his nomination to the EACJ in 2014.[629] Holding a doctorate in international law from the University of Edinburgh, Ugirashebuja was Dean of the Faculty of Law at the National University of Rwanda at the time of his posting to the regional bench. Not a stranger to regional integration initiatives, the academic had been a member of the team of experts that assessed and advised on the fears, challenges and concerns of EAC citizens regarding the attainment of the EAC Political Federation. Ugirashebuja was also a lecturer on the legal challenges to EAC integration and was well-versed in international human rights frameworks and international law.[630]

For his part, the succeeding court president, Burundian lawyer Nestor Kayobera, was a senior State Attorney in Burundi and the Director General of Judicial Organisation at the time of appointment in February 2021.[631] Kayobera had routinely appeared before the EACJ as the principal legal advisor and defender of the Burundian government and was familiar with the court's work. As Director General of Judicial Organisation, Kayobera had expertise in judicial administration, coordination, evaluation, budget preparation and outreach programs. A holder of a master's degree in public international law from Hope Africa University (Burundi), he also demonstrated experience in international legal regimes.

Even though Kayobera was appointed president without any prior experience as a judge on the regional bench, he worked alongside the long-serving Ugandan judge Geoffrey Wilfred Mupere Kiryabwire, who, by virtue of seniority on the bench, served as its Vice President. According to interviews and my observations,[632] Kiryabwire tended to take the lead in many pro-

629 CV, Emmanuel Ugirashebuja (available with author).
630 Interview, Former EACJ judge from Kenya (EA01) March 29, 2022, Nairobi, Kenya.
631 CV, Nestor Kayobera (available with author).
632 During fieldwork in Bujumbura, I observed how Vice President Kiryabwire usually led the questioning round when the appellate bench was in session. It was apparent that he was in charge, or at least respected by his colleagues, who were barely a few months old on the bench at the time.

ceedings at the appellate chamber, owing to his wealth of experience and longevity on the bench. Holding a Master's of Laws Degree in International Law (with a bias in International Economic Law) from the University of London, Kiryabwire was Head of the Commercial Court Division of the High Court at his appointment in 2015.[633] As head of the commercial court division, Kiryabwire amassed expertise in investment disputes, banking, insurance, capital markets, sale of goods and services and alternative dispute resolution (ADR) methods.[634] He is hailed as having led the Division to become a "model court for increased access to justice, judicial innovation and expeditious disposal of cases."[635] Before his appointment, he had attended judicial seminars on regional integration, investment and business legal frameworks, mediation and alternative dispute resolution mechanisms, judgement writing, and effective case management, amongst other trainings.

During his time on the bench, Kiryabwire took part in two study visits to the European Court of Human Rights in Strasbourg (March 2017) and to the European Court of Justice in Luxembourg (March 2018), from which he drew inspiration to move the EACJ beyond a human rights focus.[636] Moreover, the judge was already well-respected in the EAC owing to his social and political capital within the national, regional and international Bar and judges' associations. At the time of this writing, he was the longest-serving judge on the Appellate Division and clearly the most experienced in regional jurisprudence. Therefore, despite the delayed appointments and the simultaneous appointments of new judges, the fact that Kiryabwire was on the appellate bench for at least another year before his tenure expired provided the bench with a level of continuity, while allowing for a shift toward a more commercial bench.

In conclusion, it is safe to say that the leadership of the third bench *intentionally* steered the bench toward a commercial stance. An interview with one of the judges attributes the shift in direction to the third bench:

> "If you notice, most of the cases that come to us are regarding the violation of Articles 5, 6 and 7 (*of the EAC Treaty*). Now, we are moving further. We are now pushing the boundaries. I must say that it is during

633 CV, Geoffrey Wilfred Mupere Kiryabwire, https://icsid.worldbank.org/sites/default/files/arbitrators/2021-03/CV_Kiryabwire.pdf.
634 Ibid., 10.
635 Ibid., 10.
636 Online Interview, Third bench judge, Geoffrey Kiryabwire, June 18, 2020.

> my time at the court that you are really starting to see the court stretch itself into what it can or cannot do. If you look at our decisions, we have now given decisions that impact commerce. We are not just talking about the rule of law, good governance and human rights. Decisions have been rendered concerning the environment and infrastructure development. We have recently been involved in decisions relating to whether elections had been held properly in partner states. All these things are stretching the mandate. Some people have said, 'It's good.' Others have said, 'It's timid.' It depends on the strength of coffee you want to drink. It is really a matter of perception."[637]

The interviewee alludes to his bench as a trailblazer in trade and commercial jurisprudence at the EACJ. He also mentions that the bench faced both criticism and praise in equal measure over the direction they sought to steer their jurisprudence. According to him, his bench chose to push the boundaries beyond the rule of law, good governance and human rights, in order to pronounce itself on issues of commerce, the environment and infrastructure development. Moreover, they saw value in intervening in electoral procedures and other underexplored areas. The following sections will explore these avenues whilst paying attention to the role that judges and their allies played in shaping the future of the EACJ.

7.5.1 Between Avoidance and Activism

Another underexplored area that the third bench routinely handles is the growing number of property rights cases – involving seizure, destruction and wrongful eviction – by the Special Court on Lands and Other Assets (the Special Court) in Burundi. Violent conflicts and forced migration have exacerbated the ambiguity in regulating land dispute resolution and restitution processes in Burundi, which gives the state the upper hand to expand its control over customary land tenure (Tchatchoua-Djomo and Van Dijk 2022). Thus, land rights have become increasingly politicised in Burundi, with several cases being litigated in the supranational court after being dismissed by the top municipal courts.

637 Online Interview, Kiryabwire, June 18, 2020.

For instance, in the *Ngaruko*[638] case, the National Commission of Land and Other Property (the Land Commission) is alleged to have unlawfully declared the applicant's land state property. Ngaruko sought to regain his property through an appeal to the Special Court. However, the Special Court reaffirmed that it was state property, acquired by the state without due compensation. The applicant sought the EACJ's resolution of these issues and prayed for his land tob e restored and compensated in monetary terms.[639] The FID ruled in favour of Ngaruko, condemning the Burundian Courts for their involvement in land redistribution and unlawful repossession by the state:

> "It is not the duty of a Court of law to fetch pieces of land and give them to whomever they desire. Courts of law are established to determine matters brought to them by parties. This case presents a unique situation where Courts of the Respondent constituted themselves as parties to the dispute and not umpires of the matter brought to them by parties. That, on the records before us, constituted a breach of the laws of Burundi relating to right to property and consequently, an abrogation of the Treaty as submitted by the Applicant's Counsel" (Ngaruko, 19–20).

As already seen in the case of commercial disputes where the court issued compensatory pecuniary orders rather than mere declarations, the FID, in this case, did not shy away from issuing mandatory orders. The court directed the government of Burundi to either return Ngaruko's land or compensate him adequately for the property based on its current market value:

> "In our view, as the applicant has proved to the satisfaction of this Court that the property in question legally belonged to him, the prayer to restore the applicant's title is well founded. We, therefore, direct that the applicant be restored back to the property taken from him and given to the respondent or, in the alternative, be adequately compensated for the value of the property (Ngaruko, 21–22).

The fact that the EACJ has dared to intervene in land rights, which have resulted from the protracted conflict and authoritarian governance in Burundi since 2015, shows its willingness to become an avenue for galvanising

638 *Francis Ngaruko vs Attorney General of Burundi*, Reference No. 9 of 2019. September 30, 2022. https://africanlii.org/akn/aa-au/judgment/eacj/2022/24/eng@2022-09-30.

639 *Ngaruko*, pages 7–9.

resistance against continued authoritarian rule in this country (Heinrich 2020). Even if the Ngaruko case exhibits a positive trend, a closer examination of the growing property rights disputes reveals careful consideration of remedies by the third bench. Given the gravity of the cases and the nature of the land dispute in question, judges have chosen to order compensation rather than return the land, as they do not believe the latter is feasible in the Burundian context. Considering the fragile nature of cases at hand, judges would instead send signals to the partner states through their decision-making, such as issuing warnings, rather than touching upon issues that have proven divisive.[640] The display of caution and exercise of legal diplomacy by the bench can also be observed in the number of dismissals. The bench dismissed half of the cases over lack of jurisdiction or time restrictions, ruling in favour of the respondent states in only three of the 21 cases, and the applicants had favour with the court in only eight cases.[641]

Judges will carefully weigh their options concerning enforcement and compliance with decisions depending on the magnitude of the matters raised. They must be considerate of the nature of remedies they issue. Pecuniary redress may be preferable as a low-risk remedy instead of mandatory decisions that compel partner states to address highly politicised issues, such as land reform policies. For instance, asking governments for monetary compensation[642] or directing them to conduct an election rather than an appointment is more accessible than pursuing land restitution[643] or returning seized property[644] in post-conflict autocracies. Overall, making decisions that do not cater to their specific contexts could cause more turmoil in these countries, provoke a backlash and even risk decisions

640 As seen in issuing declaratory rulings over mandatory ones in human rights related cases.

641 The author's compilation from the EACJ Case Mapping Dataset.

642 The East African Court of Justice. 2018. "Appellate Court rules in favour of Hon Margaret Zziwa and awards her $114,000 as special damages and other costs." https://www.eac.int/press-releases/1107-appellate-court-rules-in-favour-of-hon-margaret-zzziwa-and-awards-her-$114,000-as-special-damages-and-other-costs (Accessed July 27, 2022).

643 *Venant Masenge vs Attorney General (AG) of Burundi*, Application No. 5 of 2013. June 18, 2014. https://www.eacj.org/wp-content/uploads/2014/06/APPLICATION-NO.-05-OF-2013-Venant-Masenge-18-June-2014-final.pdf and *Niyongabo Theodore and 2 others vs AG of Burundi*, Reference No. 4 of 2017. June 16, 2020. https://www.eacj.org/wp-content/uploads/2020/06/JUDGMENT-2.pdf.

644 Julius Barigaba. 2020. "Rwanda: Court Orders Kigali to Pay UTC U.S. $0.5 Million for Illegal Seizure and Sale of Mall." *The East African*. December 1. https://allafrica.com/stories/202012020056.html.

being seen as merely "academic"[645] if they are not easily enforceable. It is for this reason that judges tended to make decisions that avoided confrontation with the partner states and usually issued declarations over making mandatory judgements that might put partner states in a difficult position.

Equally, two decades later, the EACJ is still treading a tightrope between extending its authority to intervene in megapolitical jurisprudence and risking upheaval and threats to its existence or issuing a noncommittal declaratory order and saving itself from undue interference. Interventions in two of the electoral disputes handled by the third bench provide a perfect illustration: the contested 2015 presidential electoral process in Burundi and the 2017 General Election in Kenya, where a gubernatorial candidate, Martha Karua, lost the election. While the third bench refrained from reviewing Burundi's constitutional decision to hold elections in the former, it did not hesitate to "review"[646] the Kenyan Supreme Court's decision in the Martha Karua petition. A brief background to the cases elucidates the difference in tactics.

In July 2015, the East African Civil Society Organisations Forum (EASCOF), represented by Deya, intervened in the Burundi presidential election, in which Pierre Nkurunziza unlawfully participated and subsequently emerged victorious despite the parliament's rejection of a constitutional amendment that would have made him eligible to run for a third term.[647] Accordingly, the applicants sought an order directing Burundi to postpone the 2015 presidential and senatorial elections due to concerns about civic disorder and unrest.[648] The EACJ disallowed EASCOF's request, clarifying that while it is mandated to review provisions of a partner state's national law regarding its compliance with the Treaty, it would not interfere in

645 Interview, Ugandan Lawyer, October 5, 2021, Kampala, Uganda.

646 Kiplagat Sam. 2024. "Kenya Supreme Court rules that EACJ can't review its decisions." *The East African*, June 2. https://www.theeastafrican.co.ke/tea/news/east-africa/kenya-supreme-court-rules-that-eacj-can-t-review-its-decisions-4643464.

647 *The East African Civil Society Organisations Forum (EASCOF) v. the Att'y Gen. of Burundi, Commission Electorale Nationale Independent (CENI) & EAC Secretary General*, Reference No 2 of 2015. December 3, 2019. https://www.eacj.org//wp-content/uploads/2020/02/Reference-No.-2-of-2015.pdf.

648 *EASCOF v. the Att'y Gen. of Burundi, CENI & EAC Secretary General,* Application No. 5 of 2015. July 29, 2015. https://www.eacj.org//wp-content/uploads/2015/07/Appliation-No-5-of-2015.pdf.

national politics.[649] In the final judgement,[650] the matter was dismissed, reasoning that while FID had jurisdiction to determine whether any action taken amounted to an infringement of the Treaty, its mandate did not extend to the judicial review of decisions of other courts. The EACJ categorically stated that "manifestly insufficient governmental action" does not constitute a wrongful judicial act.[651] Moreover, the court pronounced itself on its position vis-à-vis national courts:

> "We [...] take due cognisance of the fundamental role of apex domestic courts in the development of municipal jurisprudence, which role cannot and should not be usurped by an international court or tribunal. […] we are hard-pressed to appreciate the circumstances under which an international court can 'put aside a national decision presented before it and (to) scrutinise its grounds of fact and law.' It seems to us that such an eventuality would run contrary to the counter-exigencies of the international review of domestic decisions viz the appellate function of domestic apex courts."[652]

The trial bench also reiterated that its role in reviewing the decisions of apex domestic courts is still limited to verifying the domestic court's compliance with the EAC Treaty.

In a subsequent appeal, *Appeal No. 4 of 2016*[653], EASCOF was pushing the EACJ to assert its supremacy in reviewing whether decisions of superior courts of partner states on the constitutionality of their domestic laws – which are not otherwise appealable – contravene the EAC Treaty and whether the EACJ can pronounce itself on such matters.[654] This wish

649 "This Court has no jurisdiction interpret the provisions of the Burundi Constitution or Arusha Peace Agreement for purposes of determining the correctness of the Burundi Constitutional Court's decision, as appears to be the thrust of the present application. That is entirely different from the Court reviewing the provisions of a Partner State's national law with a view to determining its compliance with the Treaty" (ibid, 10).

650 EASCOF v. the Att'y Gen. of Burundi, *supra* note 647.

651 Ibid., 24.

652 Ibid., 26.

653 *The East African Civil Society Organisations Forum (EASCOF) v. the Att'y Gen. of Burundi, Commission Electorale Nationale Independent (CENI) & EAC Secretary General*. Appeal No. 4 of 2016. May 24, 2018. https://www.eacj.org/wp-content/uploads/2020/07/Appeal-no-4-of-2016.pdf.

654 EASCOF succeeded, in part, and the case was reverted to the FID to be heard on its merits and to determine whether the Constitutional Court of Burundi had violated the EAC treaty (page 44).

was granted in the final judgement, *Appeal No.1 of 2020,*[655] where the appellate bench perceived the applicant's prayer as "not only challenging the impugned Supreme Court Judgement's inconsistency with the internal laws and the Constitution of Burundi *per se*," but rather, faulted Burundi for non-compliance with the EAC Treaty.[656] The appellate bench called for Burundi's international responsibility under international law and the EAC Treaty, and by extension, for the state to assume the wrongful acts of its judicial organ.[657] However, since the case had been overtaken by events, the applicant could only succeed partially.

The Burundian presidential case above is central as it set the pace for the court's activist stance in the Martha Karua case. While the trial court had exhibited restraint in dealing with the former, the appellate bench emphasised that such issues should not be viewed as the EACJ playing an appellate role over the highest courts in the partner states, but rather as applying "international responsibility under international law and the EAC Treaty."[658] Thus, it urged the trial court not to shy away from taking action against state irresponsibility. Subsequently, when Martha Karua contested the loss of the governor seat to Anne Waiguru in Kirinyaga County, the EACJ trial bench did not hesitate to go against the Supreme Court decision in the same matter.[659] The EACJ declared that Kenya had violated Martha Karua's right to access justice through its Supreme Court ruling, in effect, breaching the fundamental and operational principles of the EAC. The FID not only declared violations against the opposition politician's right to a fair hearing but also issued compensatory damages of up to U.S. Dollars 25,000 at an interest rate of 6% per annum.[660] By granting monetary damages, not just declaratory orders, the case is significant for testing the remedial power of the EACJ. While this ruling was heavily celebrated,[661] especially for painting the EACJ as an attractive avenue for more politically salient cases than human rights violations, Martha Karua was never compensated.

655 *The East African Civil Society Organisations Forum (EASCOF) v. the Att'y Gen. of Burundi, Commission Electorale Nationale Independent (CENI) & EAC Secretary General*, Appeal No. 1 of 2020. November 25, 2021. https://www.eacj.org/wp-content/uploads/2022/01/Appeal-No.-1-of-2020.pdf.

656 Ibid., 28.

657 Ibid., 31.

658 Ibid., 37.

659 *Martha Wangari Karua vs The Attorney General of the Republic of Kenya,* Reference No. 20 of 2019. November 30, 2020. https://www.eacj.org/wp-content/uploads/2020/12/JUDGMENT4.pdf.

660 Ibid., 27–28.

661 Kiplagat 2024, *supra* note 646.

Instead, the EACJ received a massive blow for ruling as it did. Kenya's Supreme Court ruled against the decisions of the EACJ, encroaching on the country's sovereignty by overturning the top court's opinion, thereby creating legally conflicting consequences and effects for its citizens. At the time of writing, this decision had only just been handed out within the week of writing. Therefore, its effects are yet to be seen. However, national apex courts in the region were finally attempting to establish the regional court in its rightful legal position. By daring to rule as it did, the EACJ had forsaken its initial restraint in reviewing the decisions of a sovereign state, which received pushback from the national courts.

7.5.2 Whither Consensual Decision-making?

The role of dissents in international courts is becoming ever more pertinent (Dunoff and Pollack 2022; Maučec and Dothan 2022). Because international tribunals "typically lack the democratic legitimation and enforcement capabilities associated with many of their domestic counterparts" (Dunoff and Pollack 2022, 342), dissenting judgements could either enhance or undermine the court's legitimacy. However, dissent, in and of itself, does not raise legitimacy concerns; rather, it is the patterns of dissent that do (Dunoff and Pollack 2022). Similarly, dissents do not undermine judicial independence, but a combination of dissents, independence and reappointment does (Ibid.).

In the case of the EACJ, scholars have referred to it as a "low-dissent court" (Dunoff and Pollack 2022, 394). Over time, EACJ judges across different benches have developed an informal agreement to present a united front, choosing to act collectively despite the possibility for individual dissents and the absence of any formal requirement for unanimous decisions. The Treaty provides that "the judgment of the Court (should be) reached in private by majority verdict, provided that a Judge may deliver a dissenting judgment."[662] Thus, judges would be at liberty to dissent, in deference to their appointing states, if they so wished. However, in all its 264 rulings (across divisions and benches), the EACJ has issued unanimous decisions in all but two judgments. The very first case of judicial dissent arose at

662 Art. 35 (2) EAC Treaty.

appeal[663] when Burundi challenged the election of the Rwandan EALA speaker, Martin Ngoga. Burundi challenged the elections to EALA, arguing that the assembly had failed to follow regulations on quorum, which required half of the elected members of the assembly to be present during the poll. In this case, Burundian judge Liboire Nkurunziza dissented from the majority opinion, which dismissed the appeal and issued costs to the Respondent Intervener.[664] In his opinion, Nkurunziza saw the trial court's ruling as imposing "undue technicalities", which defeated the purpose of administering justice.[665]

The other notable dissent arose in the *Manariyo case*,[666] where "the two dissenting judges questioned the trial court's position on circumstances when a decision of the domestic court may be impugned" (Njiru 2021, 510). For the dissenting judges, the concern was whether only a resident of the Community should initiate proceedings at the EACJ. An interview with one of the dissenting judges highlighted that the narrow reading of what constitutes a resident was detrimental to the purposes of enforcing principles of good governance and the rule of law before the EACJ. He saw it as discouraging for the diaspora, who may not be residents but seek to use the court.[667] In their final verdict, the two judges argued categorically that "the holding of the trial court is without support in international law as it stands today."[668]

Until 2019, the court had avoided dissenting voices in favour of unanimity, as judges sought to speak with one voice, especially in the court's early years, as a sign of unity and uniformity of jurisprudence within the new judicial organ. They were concerned that dissenting voices would cause confusion among the litigants, who were still trying to identify with the new court. Likewise, given that judges emerge from different partner states with varying levels of judicial independence and deference to the executive,

663 *Attorney General of the Republic of Burundi v. The Secretary General of the East African Community (Respondent) & Hon. Mukasa Mbidde (Intervener)*, Appeal No. 02 of 2019 (diss. op.,Nkurunziza, V.P), https://www.eacj.org/wp-content/uploads/2020/07/Dissenting-judgement.pdf.

664 PALU News, June 4, 2020. "EACJ dismisses the appeal by the Attorney General of Burundi." https://www.lawyersofafrica.org/east-african-court-of-justice-dismisses-the-appeal-by-the-attorney-general-of-burundi/ (Accessed July 27, 2022).

665 *Supra* note 666, 31.

666 *Manariyo Désiré vs The Attorney General of the Republic of Burundi*, Appeal No. 1 of 2017. Dissenting judgment. November 29, 2018. https://www.eacj.org/wp-content/uploads/2020/07/Appeal-no-1-of-2017Dissent.pdf.

667 Interview, EACJ judge, June 18, 2020, online.

668 *Manariyo supra* note 666, paragraph 79.

the EACJ sought to establish collective ownership of their decision-making rather than attribute it to individual judges. That way, they would seek to enhance the court's credibility, as clearly articulated in an interview:

> "The reason for decisions by consensus is that there is this feeling that if I am going to sit on a case from my country, then it will come out as a decision of the court, owned by all five judges. Even if my country were to perceive me as being anti-government, all five votes would not have been anti-government. So, this is a decision made by five judges, not just me. Five judges have sat and deliberated and agreed that this is the decision. In a sense, it is to protect the judges and to give a semblance of unity. The court should speak with one voice for unity and uniformity of jurisprudence, but also protect them."[669]

Moreover, unanimous decision-making acts as protective armour against pushback, especially to judges from more vulnerable states prone to personalised attacks. As one judge mentioned in an interview, the more vulnerable judges can "hide behind their colleagues"[670] and issue unanimous decisions without the fear that the particular decision will be attributed to them. Case in point, the dissenting opinion by Burundian Judge Nkurunziza was seen by some observers as a deference to the Burundian state.[671] An interview with the lead lawyer on the case, who had represented the Burundian government at the FID complaint, echoed similar sentiments when he reasoned that the case was politically motivated by Burundi to unseat Rwanda's nominee for EALA speakership. The government lawyer on the case reports that they have declined to take the case to appeal, believing that the FID ruling was the best-case scenario, given that the EALA speaker election was conducted lawfully.[672] However, the persistence of the Burundian Minister of East African Community Affairs, who had fancied the speakership for herself, led to the filing of the moot appeal.

Given the political enormity of this case and Burundi's stake in losing it (they had to pay costs following the loss at the appellate level), it does not seem far-fetched that Judge Nkurunziza saw no way out of dissent. While the only clear-cut evidence of judicial interference at the EACJ is in the *Anyang' Nyong'o* case, where Kenyan judges were not only harassed but suspended at the national level, Nkuruniziza's dissenting voice may

669 Interview, EACJ judge (EA07), September 29, 2021, Kampala, Uganda.
670 Interview, EACJ judge (EA01), March 29, 2022, Nairobi, Kenya.
671 Interview, Repeat Lawyer, March 29, 2022, Nairobi, Kenya.
672 Interview, Burundian government lawyer, November 17, 2021, Bujumbura, Burundi.

have roots in similar fears. An interview with a former Burundian judge at the EACJ alluded that Nkurunziza was rewarded for his loyalty with an appointment to the Burundian Constitutional Court a few months after his tenure at the EACJ expired.[673]

Without delving into the credibility of such allegations, it is sufficient to note that judicial interference in East African states is not a new phenomenon. Cases of judicial interference in Kenya (Mutua 2001), Burundi (Masengu 2017), and Uganda, where judges are clearly threatened and resort to judicial review only "so sparingly and with the greatest reluctance" (Oloka-Onyango 2017, 270). Cases of executive interference and the lengths to which the executive has gone to silence judges are documented elsewhere (VonDoepp and Ellett 2011; Ellett 2013). Thus, by unanimously deciding cases, the EACJ has supported the courts' work without fear of being singled out, as one judge noted in an interview:

> "In young regional and international courts, like ours, having one judgment is a good practice. It avoids speculations by people, including governments, saying that this was a judgment of one judge. It is easier for judgments to be accepted if they are court judgments. It is very easy to criticise judgments if they are identified with individual judges."[674]

EACJ judges have also adopted the practice of minimising dissent as they sought to build their fledgling legitimacy following initial backlash. Moreover, this strategy enables them to put on a brave front as a unified court. As witnessed in the Anyang Nyong'o case, after the government of Kenya lost the case, it justified its interference by accusing the Kenyan judges of perceived bias in the matter:

> "As a human being, the judge *[Justice Keiwua]* would harbour animosity against the Government that suspended him from his duty and subjected him to the resultant disadvantages and would seek to hit back by deciding the case against the Government of Kenya."[675]

Ultimately, this informal institutional tactic has prevented backlash and targeted attacks on particular judges, sheltered the judges from scrutiny and resulting pressures from the partner states, and, most importantly, given the

673 Government of Burundi. Office of the President. December 21, 2020. "The New members of the Constitutional Court take an oath." https://presidence.gov.bi/2020/12/21/the-new-members-of-the-constitutional-court-take-an-oath/.

674 Interview, EACJ judge (EA01), March 29, 2022, Nairobi, Kenya.

675 *AG Kenya vs Anyang' Nyong'o,* 24.

court ownership of decisions rather than single judges, which enhances the court's credibility.

7.6 Determined Off-bench Diplomacy

Recall that the EACJ is one of the organs of a regional intergovernmental body comprising seven partner states. As such, the court ought to engage not only with the various heads of EAC organs – the Summit, the Council of Ministers, the East African Legislative Assembly (EALA) and the Secretariat – but it must also earn the appreciation of various partner state institutions. While states may threaten ICs, they are also "always crucial to ICs' performance, as they are the actors that create ICs, accept their jurisdiction, and supply courts with their operational resources" (De Silva 2018b, 301). In this sense, IC judges, through their leadership, have devised astute ways to navigate their strategic space by engaging in *strategic dialogue* to pre-emptively circumvent conflicts with the relevant stakeholders in the EAC, thereby mitigating the looming threats to judicial independence.

EACJ judges seek support by forging regional and international support networks and drawing on their political ties and networks of EAC leadership. The court leadership, EACJ judges, and the Registrar regularly pay formal "courtesy calls" to potential judicial allies.[676] Courtesy calls, broadly perceived, are official visits by the court leadership and administration to politically influential figures at the EAC level, in the EAC partner states, to regional and national Law Societies, and other ICs, among others. The EACJ, in its courtesy calls, seeks out allies through the following avenues: 1) providing information to bolster their understanding of its mandate, progress and development; 2) maintaining and strengthening or even forging relationships; and 3) explicitly imploring them to support the court and its activities in specific ways.[677] At the partner states' level, EACJ judges reach out to senior government officials to build a bridge between the executives and the court. The court leadership and the Registrar, usually accompanied by EACJ judges from the respective partner states, pay regular courtesy calls to the regional Chief Justices, beseeching "support and cooperation"[678] with their national judiciaries.

676 East African Court of Justice 2021, 47.
677 Ibid., 47.
678 EACJ, Twitter post, September 17, 2021, 5:38 pm. https://twitter.com/EACJCourt/status/1438890074188492807.

We already know from previous scholarship that judicial leadership in African domestic courts plays a crucial role in building the rule of law. Widner's study on the life of Tanzanian former Chief Justice Francis Nyalali highlights the role of judicial actors in shaping political realities in periods of political and economic uncertainty in Africa (Widner 2001a). Likewise, in regional courts, the role of judicial leadership cannot be overlooked. While EACJ leadership in the past years was also actively mobilising alliances from EAC Heads of State, senior government officials in the partner states and other relevant politicians, it was not as clearly strategically motivated as it appears to be under the leadership of Justice Kayobera. Since his ascent to judicial leadership in February 2021, the Judge President (JP) has explicitly spelt out three principles – Teamwork, Good Faith and Judicial Diplomacy – as his guiding tools for a "better transparent, accountable, sustainable and prosperous court."[679] Under these principles, the JP has worked with other Heads of EAC Organs and Institutions, such as the Secretary General of the EAC and the Speaker of EALA,[680] with whom he arranged quarterly meetings to discuss issues affecting the court and the Community.[681]

7.6.1 Lobbying for Funding

As clarified in Chapter 4, the court is funded by resources that are planned and approved as part of the annual EAC budget. Thus, the leaders of EAC organs are vital players in the budgetary allocation of the court. Together with other leaders of EAC organs, the EACJ leadership has been involved in launching political appeals to Heads of State in the EAC – in Rwanda, Uganda, South Sudan, Burundi, Zanzibar and Tanzania – seeking their support for court funding and the court's activities.[682] They have also held strategic dialogue with other relevant EAC heads like the Chairperson of the Council of Ministers to "discuss key issues affecting the work of the Court."[683] As recounted on the court's official website, the judges use these

679 Speech by Hon. Justice Nestor Kayobera, *supra* note 133.
680 EACJ has also established relations with EALA to enable them to fight interference from the Partner States.
681 Interview, EACJ judge, November 9, 2021, Bujumbura.
682 Interview, EACJ judge, November 9, 2021, Bujumbura.
683 EACJ, Twitter post, July 20, 2021, 146 pm. https://twitter.com/EACJCourt/status/1417450775010287653.

encounters to lobby for financial independence, advocate for amendments in the court's jurisdiction, and solve the nagging issue of the ad-hoc nature of the bench.[684]

To mitigate its financial challenges, the court also seeks out alliances with various development partners – such as the United Nations Educational, Scientific and Cultural Organisation (UNESCO), International Development Law Organisation (IDLO), Konrad Adenauer-Stiftung (KAS),[685] the *Deutsche Gesellschaft für Internationale Zusammenarbeit GmbH* (GIZ), and The Raoul Wallenberg Institute of Human Rights and Humanitarian Law (RWI)[686] – to generate funding for its activities (East African Court of Justice 2023, 46-48). Likewise, ambassadors and representatives from the relevant Ministries of Economic Development in major donor countries to the EAC, such as the Ambassador of Norway to Tanzania,[687] the Ambassador of Belgium,[688] and the US Embassy in Dar es Salaam,[689] as well as Germany[690], among others, have also engaged the EACJ.

In their engagements, judges have also continually sought support for the pending *2016 EACJ Administration Justice Bill*.[691] As Principal Judge on the third bench, Justice Mugenyi led the institutionalisation of the Court Plenary in the 2017 Administration of the EACJ Act.[692] She successfully advocated for the adoption of this Act by the EACJ, following best practice models in other international courts. The Heads of State are yet to assent to the *2016 EACJ Administration of Justice Bill*, which was passed by the East African Legislative Assembly (EALA) six years ago. Consequently, the

684 EACJ. "EACJ President pays a courtesy call on the chairperson of EAC Council of Ministers." July 20, 2021. https://www.eacj.org/?news=eacj-president-pays-a-courtesy-call-on-the-chairperson-of-the-eac-council-of-ministers.

685 KAS was a key funder of the past two Annual EACJ Judicial Conferences.

686 RWI has been a long-standing partner of the EACJ, which has heavily steered the Court's intervention in human rights jurisprudence.

687 Her Excellency Elisabeth Jacobsen visited the court on May 25, 2022 (East African Court of Justice 2023, 49).

688 His Excellency Paul Cartier visited the EACJ on May 11, 2022 (East African Court of Justice 2023, 49).

689 Mr. Bion N. Bliss, the Deputy Political and Economic Chief of the U.S. Embassy in Dar es Salaam visited the court on August 26, 2022 (East African Court of Justice 2023, 49).

690 Ms Claudia Imwolde-Kraemer, Senior Policy Officer from the German Federal Ministry for Economic Cooperation and Development, July 5, 2022 (East African Court of Justice 2023, 49).

691 East African Community. "The administration of East African Court of Justice Bill, 2016." November 18, 2016. https://www.eala.org/uploads/EACJ_bill2.pdf.

692 CV, Monica Kalyegira Mugenyi (available with author).

EACJ is unable to engage directly in resource mobilization as prescribed by the Treaty, which stipulates that this is to be done through the EAC Secretariat (East African Court of Justice 2022, 32).

In the same vein, President Kayobera has, since the beginning of his tenure, visited the Chief Justices of Rwanda,[693] Kenya,[694] Uganda,[695] and Tanzania[696] as part of his three core principles. Likewise, he has also reached out to Attorneys General (AGs) of selected EAC states[697] – primarily when the said AGs serve as the rotational Chair of the EAC Sectoral Council on Legal and Judicial Affairs.[698] When Kenyan AG Justice Kihara Kariuki served in this position, the current Judge President sought his support in resolving the court's "outstanding issues,"[699] imploring him to secure the court's "support to strengthen and protect its independence."[700] The court leadership used this visit to plead its case and seek allyship with the AG, who "pledged to follow up on the status of the Protocol on extended jurisdiction of the court to enable it to promote the objectives of the Community."[701]

Under Kayobera's leadership, the court has prioritized judicial diplomacy activities to "strengthen the relationship" that the court has with its stakeholders as well as to mobilise support for "some of the issues that affect the operation of the Court (East African Court of Justice 2023, 43). While in Uganda in October 2021, the president and registrar of the court paid six courtesy calls to senior government officials, the national judiciary, the Chief Justice and Deputy Chief Justice of Uganda, the Attorney General, the Minister Responsible for EAC Affairs, Uganda, and the Chief Registrar

693 CV, Monica Kalyegira Mugenyi (available with author).
694 East African Court of Justice 2021, 47.
695 EACJ, Twitter post, October 2, 2021, 2:08 pm. https://twitter.com/EACJCourt/status/1444272954355879940.
696 East African Court of Justice 2023, 49.
697 For example, the current EACJ President, Vice President Justice Geoffrey Kiryabwire, and Registrar Yufnalis Okubo paid a courtesy call to the Attorney General of Uganda, Hon Kiryowa Kiwanuka. See East African Court of Justice, Twitter post, October 2, 2021, 2:10 pm. https://twitter.com/EACJCourt/status/1444273562056073217.
698 A rotational role which occurs when the Partner State also serves as the Chair of EAC. The Attorney General (AG) automatically serves as the Chair of the Sectoral Council on Legal and Judicial Affairs of the region. In that role, the AG becomes a member of the Council of Ministers.
699 EACJ, Twitter post, July 12, 2021, 9:20 pm. https://twitter.com/EACJCourt/status/1414666100504252423.
700 Ibid., 9:23 pm. https://twitter.com/EACJCourt/status/1414666634585858052.
701 Ibid., 6:14 pm. https://twitter.com/EACJCourt/status/1414619134646759425.

(East African Court of Justice 2021, 42–43). He also visited relevant national Ministries of justice to engage them in the work of the EACJ and the national courts (East African Court of Justice 2023, 49).

7.6.2 Localisation of Hearings

Since November 2021, when the court had its first annual *rotational court* sessions in Bujumbura, the Arusha-based court has been moving to a different EAC partner state to conduct its work there at the end of each year. As part of the rotational court, EACJ judges conduct hearings open to the public at the different national courts. With the localisation of hearings, EACJ "aims to increase its visibility and to take its services closer to the people."[702] The rotational court program is also tied to an *Annual Judicial Conference*, a ceremony bringing together all the relevant stakeholders[703] to "stimulate high-level conversations and discussion on current and emerging legal and judicial issues between judges, court users and academia in the EAC" (East African Court of Justice 2023, 57). There have been two such conferences, in Uganda,[704] and another in Burundi,[705] and the next one was hosted in Rwanda.[706]

Likewise, they invite EAC Heads of State to their Annual EACJ Judicial Conference so that they can witness the court's work and develop an appreciation for its mandate. For example, the President of Uganda, Yoweri Kaguta Museveni, attended the 2nd Annual EACJ Judicial Conference in Kampala, where he interacted with the judges, urging them to do more to support regional integration (East African Court of Justice 2022, 42). While his speech did not directly address the deficits in the court's independence and autonomy, his presence at the event presented an opportunity for the court leadership to address their concerns and seek his commitment to

702 Speech by Hon. Justice Nestor Kayobera, *supra* note 133.

703 Such as former EACJ judges, national chief justices, legal practitioners, Civil Society Organizations, Heads of EAC organs and institutions, Ministers of EAC Affairs, relevant national Ministers of Justice, Attorneys General, academia and the private sector.

704 The 2nd Annual EACJ Judicial Conference. "Transforming access to justice in the EAC." October 26 – 28, 2022, Kampala, Uganda.

705 EACJ Judicial Symposium, *supra* note 62.

706 The 3rd Annual EACJ Judicial Conference was held on October 30 – November 1, 2023, in Kigali, Rwanda. https://twitter.com/EACJCourt/status/1651595625044090880.

addressing the issues. This was underlined by the presence of Hon. Rebecca Kadaga, the first Deputy Prime Minister and Minister for EAC Affairs in Uganda, who assured the judges that she "took note of the challenges of the court" (ibid., 42). Kadaga was Uganda's Speaker of Parliament when the BAT case was handed out. Despite showing her discontentment with the regional court's intervention, she later implored Ugandans to use the court (see previous chapter). This example of the court engaging in diplomacy with leading political figures in the region – even those who were once opposed to its mandate – exemplifies the type of leadership the third bench set out to practice.

7.6.3 Forging Judicial Alliances

Another group of potential allies is similarly positioned ICs in the region and abroad. Internationally, the EACJ has sought the support of the United Nations International Residual Mechanism for Criminal Tribunal (UNICTR)[707] and undertaken several benchmarking activities with EU courts.[708] An avid international law expert, Justice Kiryabwire amassed expertise through his study visits to other international courts, including the European Court of Human Rights in Strasbourg (March 2018) and the European Court of Justice in Luxembourg (March 2017).[709]

Regionally, the EACJ organised the first tripartite forum with the African Court on Human and Peoples' Rights (African Court) and the ECOWAS Court of Justice (CCJ), bringing together judges and staff from the three courts, representatives of the partner institutions and members of the academy. Such arrangements indicate the awareness and willingness of Africa's regional courts to engage in transnational judicial dialogue and a timely exchange of ideas. In his speech, the EACJ President clearly articulated the importance of the meeting:

> "This is an important gathering which allows participants to share knowledge and experience, exchange judicial experiences, explore av-

707 EACJ Judges (Appellate Division) paid a courtesy call to the President of the United Nations-IRMCT, Justice Carmel Agius, to learn from the Mechanism and promote good working relations, sharing experiences on the progress made in digitising court processes and information resources (East African Court of Justice 2023, 46).

708 The EACJ President is seen appreciating the involvement of the CJEU in their work. See EACJ Twitter. https://twitter.com/EACJCourt/status/1638128714914430977.

709 CV, Geoffrey Wilfred Mupere Kiryabwire.

enues to strengthen existing cooperation and establish new relations, and discuss issues of common interest and challenges."[710]

In its own words, the court sought to "discuss issues of common interest, including the challenges faced by the courts and how to strengthen cooperation among them" (East African Court of Justice 2023, 50). One of the results of this exchange was an agreement by the three courts to "promote and strengthen the contextualisation of human rights standards and their implementation. The courts also recommended holding similar bi-annual dialogues and regular jurisprudential and procedural exchange between international, regional and sub-regional courts" (ibid., 50). EACJ judges perceive these off-bench engagements with other ICs as an avenue to elicit support against threats to their independence, foster knowledge exchange, and spark dialogue on common interest issue areas, such as judicial and staff capacity building and plans to share library resources.[711]

These engagements are sustained over time through the formal signing of a memorandum of understanding,[712] paying official visits[713] to each of their institutions, and regularly attending and contributing to each other's events[714] to share experiences and promote working relations. Correspondingly, the court reports exchanging with senior judicial officers from the Common Market for Eastern and Southern Africa (COMESA) Court of Justice (East African Court of Justice 2021, 48). Other important partners for the court are regional and international judicial organisations such as the East Africa Magistrates and Judges Association (EAMJA) and the Commonwealth Magistrates and Judges Association (CMJA). EACJ offered to house the EAMJA in its precincts in Arusha to deepen collaboration and working relations (ibid., 48). The court reports that this arrangement has

710 Speech by Hon. Justice Nestor Kayobera, *supra* note 133.

711 The Tripartite Forum was attended by the President of Zanzibar, representatives from the UN Human Rights Treaty, Raoul Wallenberg Institute of Human Rights, Konrad Adenauer Stiftung (KAS), and the media, among others. Held on June 7 – 29, 2022, at Hotel Verde, Zanzibar.

712 The EACJ and African Court signed one in 2019, pledging to "strengthen their relationship and explore better ways to enhance promotion and protection of human rights," among others (East African Court of Justice 2022, 6).

713 On April 12, 2022, the EACJ President paid a courtesy call to the African Court head, Hon. Lady Justice Imani Aboud, where it was agreed that the two courts would make efforts to undertake joint activities and programmes aimed at improving and strengthening their collaboration (East African Court of Justice 2023, 46).

714 Hon. Aboud also attended and actively participated in the EACJ 2nd Annual Judicial Symposium, where she reiterated the two courts' pledge to work together (ibid).

"contributed to strengthening collaboration, sharing of knowledge, skills and exchange of experiences in international legal procedures" (ibid., 48).

Mobilising allies may also be directed toward potential compliance constituencies such as national judges and leaders of national justice systems. EACJ leadership arranges meetings with national judges to construct, strengthen and advocate for a relationship between the EACJ and the national judiciaries, especially regarding the role of the EACJ, seek their cooperation in the preliminary reference procedure, and urge them to advocate for the enforcement of decisions under their respective mandates.[715] In these meetings with the national judiciary and others among legal elites, the court shares information materials and holds discussions on "the role, implementation of the court's decisions and its jurisprudence among others" (East African Court of Justice 2021, 40). It shows that these legitimation tactics (Squatrito 2021, 83) are crucial to the performance of the EACJ.

In short, through partnerships with other national, regional and international courts, organised judicial action can often be a compelling voice in advocating judicial independence against executive antagonism. This is because judicial associations create opportunities for networking as they typically have access to critical political networks while enjoying some official competencies, which allows them to intervene publicly through more accessible communication with the media and other important judicial allies. As already witnessed in the Hungarian and Polish contexts, judicial associations play a crucial role in mobilising judicial resistance (Gyöngyi 2024).

7.6.4 Allies in the Media and Academy

In addition to judicial, legal and political allies, the media can play an important role in judicial publicity and support. In the EACJ, judges go off-bench to mobilise the media in various forms: through television and radio broadcasting,[716] engaging in dialogue with regional media houses,[717] and

715 For example, President Kayobera met with 420 judges and magistrates from Bujumbura Municipality to advocate for these positions (East African Court of Justice 2021, 38–39).

716 For instance, the Sub-registry officials in Bujumbura report having conducted four televised and radio talk shows in one year (East African Court of Justice 2021, 38).

717 The Court hosted journalists from all Media Houses in Tanzania on June 17, 2022, as part of its mobilisation strategies (East African Court of Justice 2023, 49).

offering media training to regional journalists and editors on the court's mandate to enhance their reportage on judicial activities (East African Court of Justice 2023, 48). Through these activities, the court leverages the support of the media to sensitise diverse stakeholders on its legal regimes and attract potential litigants by publicizing its work. As former Judge President Nsekela[718] once aptly stated:

> "The Court may not have 'juicy' stuff within the media context in order to secure space within media circles, but the need to publicise it and its activities remains valid. The media, of course, in this context, faces the challenge of balancing its commercial interests by publishing juicy stuff to its readers and those interests of the EAC organs such as the Court, which may not be financially well to buy media space" (Nsekela 2009, 11).

Although the above statement was made 14 years ago, financing the court's media publicity remains challenging, even though its general reportage has grown exponentially. This is because the court has made provisions in its budget for purchasing space in various national newspapers to which it has remained committed (East African Court of Justice 2023, 48).

Similarly, essential alliances can be found in academia and Law Schools within the region, both as judicial allies and future constituents. Since 2021, the court judges and staff have made strategic visits to various law schools in Burundi[719] and Uganda,[720] where they have organized workshops to sensitise the students and lecturers, thereby boosting the awareness of the court within the universities. They also highlighted the court's rotational program across the region[721] and urged students to partake in the moot court competition.

The court also routinely cultivates relations with academics – through invitations to its Annual Judicial Conferences – to discuss its work, allowing for feedback, criticism, or reflection.[722] My experience researching the EACJ across space and time and receiving overwhelming support from the

718 He was the leader of the EACJ from October 2008 to June 2014.

719 EACJ, Twitter post, October 8, 2021, 3:59 pm. https://twitter.com/eacjcourt/status/1446475403154100229.

720 EACJ, Twitter post, November 30, 2022, 6:59 pm. https://twitter.com/EACJCourt/status/1598013926243196928.

721 EACJ, Facebook post, November 30, 2022, 5:17 pm.

722 A paper presented by Prof. Tomasz Milej at the 2nd Annual Symposium challenged judges to reflect on the thesis raised by Gathii (2020b) regarding sub-regional courts acting as agents of social and political change (East African Court of Justice 2022, 37).

court leadership, the Registrar, and the court staff is a testament to their openness to engaging in academic discourse.[723] The fact that the court opens up room for such dialogue and close partnership with all potential allies shows their willingness to appear transparent and people-centred.

7.6.5 Digital Socialisation

Another area in which the court has socialised its future constituents, litigants, judges, lawyers, and existing allies regarding its functioning and mandate is the successful pioneering of ICT infrastructure. Previous scholarship suggests that "public confidence in courts is conditioned by many cultural, political, and individual factors, including individual characteristics and experience of citizens (Lühiste 2006; Stoutenborough and Haider-Markel 2008; Salzman and Ramsey 2013). As such, public confidence in courts is typically very low in countries with muted electoral competition or no popular rights culture (Helmke and Rosenbluth 2009). Therefore, it is noteworthy that the EACJ has sought to socialise its users into its work by embracing digital tools while promoting its work to potential users.

Until 2016, the EACJ heavily relied on paper to conduct its work, with paper having to be filed, stored and physically moved from one place to another manually, which proved difficult and unsustainable for the court. EACJ now offers litigants and their advocates the flexibility to attend in person or virtually – saving litigants costs that were incurred when physical attendance was mandatory. The ability to hold court sessions virtually saves resources and time that would otherwise be needed to travel to Arusha. In the same light, filing cases online and processing digital cases reduces manual contact with and transmission of data, which is essential when dealing with vices like corruption, primarily due to excessive human interaction. This is not to say that computer programs cannot be tampered with and are immune to such malpractices. However, integrating ICT into the judicial processes has enabled the EACJ to socialise its users into its work more broadly through information sharing, allowing the users to access quicker and more efficient judicial processes, which enhances transparency, accountability and good governance. Repeat lawyers have confirmed in interviews that the ease of filing cases from the comfort of their home countries has eased their quest for justice. For instance, Ugandan lawyer

723 Refer to Chapter 3 on research methodology.

Male Mabirizi filed several cases during the pandemic alone – from opposing lockdown measures[724] to challenging presidential and parliamentary elections[725] and suing the government of Uganda over extrajudicial killings of terrorism suspects in the country.[726]

Furthermore, EACJ revamping its existing website into a web portal – where interested EAC citizens and other stakeholders can catch live proceedings – removes the mystery from courtroom proceedings and unveils the courtroom for what it is: an avenue to seek redress by aggrieved parties. An approachable space that is no longer shrouded in mystery and legal jargon- but a space that welcomes EAC residents and enables them to get closer to justice. Most significantly, it set up a video-conference system and started live-streaming hearings over the EACJ website so interested people outside the court could follow live proceedings – cementing its quest to bring justice closer to people. Given that EAC citizens can regularly follow the live streaming of selected cases of interest, they can participate in the current discourse and attend court sessions that affect their livelihood and social and economic stability as they occur. This fosters attentiveness to the court's work, exposes impunity by EAC governments and encourages citizens to seek justice. Most importantly, online court sessions coupled with live streaming, enhance judicial transparency and equalise access to justice for all EAC residents, regardless of their economic standing. Additionally, recordings of all sessions are available on demand, promoting transparency in judicial proceedings. The court hearings are video- and audio-recorded, with a digital transcript available almost instantly, which makes the courtroom experience more interactive and transparent.

A different, albeit helpful addition to the court's ICT infrastructure is its robust digital presence through its official website[727] and social media

724 Anami, Luke. "*Ugandan takes govt to EACJ, says lockdown against the law*." April 11, 2020. https://www.theeastafrican.co.ke/tea/news/east-africa/ugandan-takes-govt-to-eacj-says-lockdown-against-the-law-1439834.

725 *Male H. Mabirizi Kiwanuka vs Attorney General of Uganda*, Reference No. 6 of 2019. September 30, 2020. https://africanlii.org/akn/aa-au/judgment/eacj/2020/18/eng@2020-09-30/source.pdf.

726 Kukunda, Judith. 2021. "Mabirizi Sues Gov't Over Extra Judicial Killings of 'Terror' Suspects." November 22. https://ugandaradionetwork.net/story/mabirizi-sues-govt-over-extra-judicial-killings-of-terror-suspects.

727 EACJ. Website. https://www.eacj.org/.

platforms – Twitter[728], YouTube[729] and Facebook[730] – which it regularly uses to raise public awareness and educate the public about the court. The YouTube page is used to broadcast, sometimes live broadcasts, of EACJ activities, functions and other happenings relating to the court. Interested members of the public can access all videos of the two previous Annual Judicial Symposia and various informational broadcasts relating to the EACJ's mandate, functioning and performance. These platforms target the public and audiences where knowledge of the court may be deficient, hoping to communicate using easily understandable legal language that self-references. A quick check of the court's Twitter platform reveals norm-referential narratives around its role in advancing good governance, the rule of law, social justice, and accepted human rights standards.

The court utilises its social media platforms to promote capacity-building activities like upcoming seminars, conferences, trainings and other forms of information sharing. They also release timely press statements detailing updates on the role of the court and its several engagements, seeking to keep interested users and potential allies informed about its work. The court also socialises people into its work by bridging the gap between itself and its observers. Sharing daily updates on the social events that judges attend, especially the purely non-judicial activities, portrays judges as social actors who prioritise "the people" they serve. At the same time, the accompanying self-referencing language emphasises that it is people-centred, using phrases like "the Court belongs to the people."[731] Likewise, references to its contribution to the integration agenda underscore its commitment to the political purpose and mandate of the court in regional politics. This way, the judges socialise relevant actors to perceive their function as broader than adjudication, encompassing outreach to the community through non-judicial activity.

Consequently, ICT usage has facilitated easy access for all the court's stakeholders to the Court, ensuring that the EACJ does not become a court of the few privileged EAC citizens and residents. By following these events and through available information, citizens gaib a better understanding of how the court works and the legal instruments they need to recognise their rights, which increases beneficiaries' confidence and provides greater

728 EACJ. Twitter. https://twitter.com/EACJCourt.
729 EACJ. YouTube. https://www.youtube.com/@eacjcourttv.
730 EACJ. Facebook Page. https://www.facebook.com/eacjcourt/.
731 EACJ, Twitter post, May 17, 2022. https://twitter.com/EACJCourt/status/1526567465622331393.

legitimacy for the court and judicial power.[732] Scholars warn that increased court publicity and knowledge of its work does not translate into greater confidence in the court (Llanos and Weber 2021). 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 secluded in judicial chambers. It becomes an object of interest for all.

7.7 Towards a "Commercial" Bench

For third-bench judicial leaders, off-bench judicial diplomacy is just as important as the work they do on-bench. Although part of the official mandate of court leadership, these visits may pose a risk to the judicial reputation and independence, sparking questions about their impartiality (Squatrito 2021, 65). However, as we know, these visits are purposive, strategic, and vital in targeting potential compliance constituencies. They aim to cultivate legitimacy and build influential networks that, in turn, will protect the court against undue interference.

Drawing on a novel usage of the notion of *judicial diplomacy*, the chapter elucidated how African ICs respond to multiple audiences and decision-makers amidst the increased pressures of the job. *Off-bench*, the third bench has emerged very strategic in its untiring efforts to conduct strategic dialogue with the relevant national and regional politicians, lobbied for funds to support its work, and even conducted annual rotational court sessions to bring its services closer to citizens in the EAC countries. Compared to the previous benches, the third bench stands out as the most "diplomatic" bench due to its increased off-bench efforts, which have been vocal, unafraid and even use the term judicial diplomacy as the leader's governing motto. The Kayobera bench has openly spoken about employing judicial diplomacy as an essential guiding principle for international adjudication. As the chapter has shown, judges perceive their role *not* as neutral arbiters

732 For a detailed account of how ICT usage brings justice closer to the people, the author and a colleague have a working paper on embracing the administration of justice through ICT usage. See Kisakye Diana and Arnaud Gahimbare. 2021. "Of paperless hybrid Courts: Embracing the administration of justice through ICT in the East African Court of Justice." Presented at the VAD 2022 conference. "Africa-Europe: Reciprocal Perspectives," Thursday, June 9, 2021, Freiburg, Germany (available with author on file).

who merely stick to the confines of the law but as one that entails carefully balancing their judicial role with the existing realities of their political surroundings.

On the bench, even though the third bench was more progressive, ruling on controversial issues such as property rights in Burundi, the border closure between Rwanda and Uganda and the changes in legislation in Tanzania, the majority of its megapolitical affairs were dismissed. The judges seemed to shy away from overtly politicised regional jurisprudence. 61 % of all cases litigated within these seven years were dismissed as part of a tactical avoidance of adjudicating politically salient questions. As the property rights disputes illustrated, the bench exercised considerable caution and legal diplomacy to navigate threats to its existence.

Serving as an intermediary in the regional integration process presents an additional challenge to African REC courts. 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. Thus, the aforementioned tactics – issuing decisions by consensus and carefully considering the remedies issued, thereby ensuring compliance through careful decision-making – mirror arguments put forth by constrained independence theory. This theory suggests that these judges must tread carefully on very shaky political grounds whilst catering to the demands of their support networks and global networks of law. Taking the two dissenting judgements mentioned above reveals the intricacies of decision-making within a strategic space. While the *EALA Speaker case* from Burundi could be perceived as a case of acquiescence to the needs of a judge's appointers, the dissenting voices on the *Manariyo case* were expansively interpreting the Treaty in favour of advancing the regional integration agenda. One notable difference here is that the Burundian judge emerges from a judicial system within an autocratic government, where judicial independence is hardly a virtue. This case exemplifies that the strategies above, though applicable across the board, may not serve the same purpose for different judges. Those from overtly autocratic appointing member states may even employ similar tactics, but to their advantage and to the detriment of the REC body and the court itself.

Moreover, most of these judges are still employed in public office or on the bench in their national jurisdictions. This set-up complicates the issue even further, considering that REC courts are international institutions to which judges are sent as agents of their appointing member states. As such, the complex interplay between judges' roles as judicial diplomats of their

member state to the REC body and as employees of the REC body, whose interests should be in advancing the integration agenda, as well as their judicial expectation as "neutral" legal norm interpreters who demystify the REC Treaty poses a trilemma. Therefore, the strategies mentioned above should not be perceived as static, serving only one purpose, but rather as an attempt at resolving that trilemma, and how the various benches employ them is also open to interpretation.

Likewise, the change in judges over time has impacted the trajectory, firmness and audacity of the regional bench. This chapter finds that the professional backgrounds of the judges significantly influenced their desire to shift the bench toward a more commercial orientation. Unlike the previous bench, the third bench was populated by specialised commercial law experts who were strategically selected to bring the court back from bold political ambitions and human rights jurisdiction to its core business of economic integration. Recognising that the EACJ had primarily become known and appreciated for its human rights jurisprudence alone, the third bench judges set out to forge legitimacy as a trade and commercial court. This approach was a defensive tactic aimed at strengthening the institutionalisation of the court. Especially having witnessed what occurred in the Southern African Development Community (SADC) Tribunal, where adjudicating human rights led to the early demise of the sub-regional court, EAC judges sought to change the image of the court as one that primarily deals with human rights to one that caters to issues of economic integration.

Following the success of the *BAT case* and the increase in trade-related matters, the judges perceived their court as growing in political and economic relevance. However, they also noted that alternative dispute resolution, rather than litigation, may be the most suitable path for dealing with trade disputes in the region. This sentiment resonates with the reasons given above for business actors' distaste for resolving their commercial problems through litigation and instead opting for a more harmonious resolution. Such underlying issues have contributed to the scarcity of commercial cases and the development of a commercial trajectory. Worse still, at the time of writing, the EACJ had just received a massive blow from Kenya's Supreme Court ruling in the Martha Karua case. It had just ruled against the supremacy of EACJ decisions and warned the court against encroaching on the decisions of top domestic courts. By daring to rule as it did, the EACJ had forsaken its initial restraint in reviewing the decisions of a sovereign state, which received pushback from the national courts. While

the judges are keen on growing their influence in trade-related disputes and even issuing pecuniary damages, the future of the EACJ in this sphere remains to be seen.

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/.

9. Conclusions & Outlook

Set in the context of multiple, overlapping and sometimes competing African Regional Economic Communities (RECs), this study contributes to the dearth of political science literature on Africa's international courts (ICs) broadly perceived, and, specifically, its regional courts. Through a case study of the region's most vibrant judicial organ, the East African Court of Justice (EACJ), this investigation advanced our knowledge of ICs outside of the "usual suspects" of inquiry, going beyond the typical scholarly engagement with Europe and the Global North to centre courts in the Global South. The work builds upon previous scholarship on these courts, which has emerged in response to the backlash against international courts (ICs) due to the increasing judicialisation of politics and the emerging forms of resistance to political interference. It moves beyond institutional mimicry and foregrounds the actors behind these interventions.

The study also went beyond state-centric accounts of explaining international adjudication and, in its place, offered an analysis of the ever-evolving and dynamic pathways to judicial empowerment in Africa's transnational relations. As *Chapter Two* argued, dominant theorisations around African REC courts have tended to treat them as sites of legal norm imitation rather than innovators, resistors and, at times, disruptors of international legal regimes. This study views African REC courts as *innovators* who are active agents in creating a supranational judicial body, albeit operating within less than favourable political, economic and cultural conditions. *Culturally,* the tradition of strong executive branches, weak judiciaries, and citizens who share a deep post-colonial distrust of external interference poses a threat to judicial intervention. *Politically,* the study has highlighted that the court's role and place in the EAC institutional structure have not been fully appreciated. Strong executives pose the threat of sanctioning judges if they were to issue regime-defying judicial interventions, as seen in the court's pioneer controversial case. The threats to judicial autonomy, coupled with a lack of mechanisms to enforce the court's rulings, leave the EACJ vulnerable to executive interference. *Economically*, the East African Community is struggling to fund its organs owing to insufficient, delayed or even missed remittances from its constituent partner states. The Community's judicial arm has suffered a backlog and postponement of its already limited

sessions. At the time of writing, the EACJ was significantly affected by this funding limitation.[783]

Thus, the question of judicial resistance and dynamic empowerment in a REC setting remains ever more pertinent. Formally, the REC courts are the guardians of the regional integration agenda as stipulated in the REC Treaties. Therefore, they are *potential* drivers of regional integration. However, judges operate within the confines of the REC body and interact with multiple authoritative decision-makers and varied audiences throughout their work. Judges are citizens of their home countries – often still in service in a national function – who are proposed to the bench by their home governments. They become critical supranational decision-makers as part of the REC bench collective unit, working across intertwined levels of governance that link the member states and the regional governance level through both adjudicative and non-adjudicative processes.

Prevailing explanations of African ICs have been rooted in rational choice theorisations drawn from the experience of the Court of Justice of the European Union (CJEU). Such accounts are premised on rationalist state-centric narratives that emphasise state power and the utilitarian and regulatory function of ICs. Although these theories can explain the creation, proliferation and authority of ICs, they have usually favoured state-driven compliance processes as a measure of performance, understating the role of judicial actors in forging autonomy despite an apparent lack of authority. Rationalistic-leaning explanations of why ICs struggle with asserting their authority tend to perceive state-driven compliance processes as the core explanatory factor, even though questions linger about how freely IC judges can interpret the law and issue binding judgements without risking improper and unwarranted interference. This work highlights why, despite lacking a robust network of supporters, the East African Court of Justice (EACJ) has grown its jurisprudence, resisted backlash, and become an avenue for political mobilisation, defying rationalist expectations. Rather than emphasise compliance and effectiveness, which inevitably paints a singular, unflattering picture of IC power in Africa – that it is non-existent – this study sought alternative explanations for why African REC courts take on politically salient cases and check their appointing governments, despite all the foreseeable risks involved in upsetting the power holders. Likewise, it

783 Christine Mutimura. 2024. "Notice to the public regarding cancellation of June 2024 court sessions." May 27, Arusha, Tanzania. https://www.eacj.org/?news=notice-to-the-public-regarding-cancellation-of-june-2024-court-session (Accessed August 1, 2024).

explored when and why regional judges may choose to defer to appointing member states. Thus, it matters to know *who* these individuals are and *how* they conduct their work in such peculiar circumstances. As such, this study offers a unique window into the contemporary transformations of international relations and transnational practices through the lens of regional judges as savvy political actors.

My study contributes to the understanding of international courts by employing an interdisciplinary perspective to study regional integration courts in Africa. Going by the premise that Africa does not exist in an ideological, institutional, social, political and historical vacuum, the study drew on dominant theorisations from relevant disciplinary backgrounds to investigate the real additive value of RECs in Africa creating judicial institutions. Specifically, the work adopts a relational perspective in analysing ICs, which merges insights from critical socio-legal approaches drawn from international court scholarship with those on judicial empowerment in African judicial politics to provide much-needed explanations and empirical observations that can further refine theoretical arguments in judicial politics broadly. Bringing these debates into conversation highlights the context and long-term progress of court decisions, the court's relations with various stakeholders, and how courts may be used as sites of resistance to generate alternative ways of investigating African ICs (Gathii 2020b, 13–14). Building on these foundations, this study advances the idea that, despite eliciting an immense backlash, the EACJ was not only an agent of EAC partner states. The REC court has not become an extension of state coercive power, but it has dared to challenge authoritarian states, among other audacious and bold moves in its already extensive docket.

Moreover, in the context of African national courts, Ellett reminds us to shift our focus from " negative conceptualisations of independence towards a positive concept of judicial empowerment" (Ellett 2019, 150). Extending this conceptual shift to African REC courts, a positive judicial empowerment approach would entail shifting the focus away from the political and institutional conditions that encroach on their autonomy and hamper compliance towards a *positive* outlook on the actors' agency. It foregrounds the judges themselves and seeks to explain *how* and *when* they decide to rule against appointing governments and how they mobilise to resist interference. Therefore, in line with Piana (2020), to understand the power of African REC courts, this study not only tackles the structural-institutional challenges that impact judicial empowerment (*Chapter Four*) but also delves into, and centres, judicial agency. The agency dimension fore-

grounds that judges are proactive and creative proponents in constructing their power, highlighting the role of judicial support networks rather than the state's reactions to the rulings. Thus, the agency dimension comprises the bulk of the empirical sections (Chapters Five through Seven).

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. Methodologically, the study advances discussions on researching "up" by taking informal encounters and observations in the field seriously (Kisakye 2023; 2024). It illustrates the necessity of adapting the research process to context-specificity.

9.1 Main Findings

Unlike national courts, which enjoy legitimacy by virtue of their set-up within the national hierarchy, REC courts are relatively new structures positioned in the awkward position of being neither regional appellate courts nor appreciated as authoritative institutions of the REC body. Despite having the formal mandate to oversee REC Treaty agreements and the delegated authority to check Treaty violations by the partner states, REC courts' authority and power remain contested and are still being negotiated. Accordingly, REC judges are under much pressure to build their own constituency, grow their audiences, and socialise citizens into legal norms so that they can access the court regularly.

The study finds that the pioneer bench is hailed as being bold because it came closest to the idealised notion of judges as agents of regional integration. In their on-bench decision-making practices, pioneer judges demonstrated that REC judges can act as critical *players in integration politics* by deciding independently, purposefully and expansively on issues that will positively steer and influence the course of regional integration. Their earliest decisions advanced political integration through the stream-

lining of EAC institutions and organs, as exhibited in the electoral disputes governing the assent of regional politicians to the East African Legislative Assembly (EALA). The first cohort also successfully intervened in regional human rights violations to become an arbiter in good governance and rule of law issues in the region. Rather than adhering strictly to the letter of the law, the bench imposed checks on member state sovereignty through an expansive interpretation of the Treaty, while catering to the needs of the REC body.

At the time, the revamped EAC integration agenda was looked upon favourably and hopefully by regional community heads, national executives, civil society, donors and the international community. As the study explains, this regional integration optimism was reflected in the pioneer judicial appointments, where trusted members of the judiciary were selected primarily because of their reputation or professional norms as trusted representatives of their country. The first set of judges was lauded not only for being legally sound but also for being attuned to regional integration dynamics. The pioneer bench highlights that the REC court's intervention mirrors the *status*, *perception*, and *progress* of the region's integration process. While the court was perceived sympathetically in the first six years, the advent of controversial, regime-threatening jurisprudence set off alarm bells within the EAC Heads of State, who hastily amended the rules of judicial service, restricted access for private litigants, and even created an appellate division to curb judicial activism.

By the second bench, judicial boldness and activism were clouded by the strategic practice of *judicial diplomacy*. As litigants pushed the court to exercise its judicial muscle, and as pushback and backlash accrued, judges began to strike a balance between meeting the needs of the regional integration agenda and avoiding confrontation with executive sovereigns whilst protecting the bench's legitimacy. By expanding the concept of judicial diplomacy beyond international judges engaging in off-bench activities for legitimation purposes (Squatrito 2021), this study argued for a broader understanding of the term to encompass judicial decision-making practices. In this work, judges are perceived as politically savvy actors who employ different sets of resistance strategies – both on and off-bench – to avert, quash, or concede interference from political actors through pushback and backlash. Investigating how REC judges prevent pushback and backlash was raised in the first research question in the study.

The study argues that investigating the strategic space and judicial diplomacy in the EACJ broadens our understanding of the complex, multi-

faceted relational dynamics of the adjudication process in regional settings. *EACJ judges act as legal mediators* in the regional integration agenda, as exhibited by their exercise of caution in decision-making. Judges display a measured amount of legal and diplomatic skills with which they carefully balance legal principles with political sensitivity towards EAC partner states. Legal mediation entails heightened cautiousness and restraint in judicial decision-making as judges grapple with their legitimacy amidst looming threats to judicial independence.

Consequently, *EAC law serves as a negotiation tool* to uphold regional integration agreements and spur integration efforts. Judges exercise caution in their interpretation and application of regional law in relation to the realities of the EAC, rather than being strict legal norm interpreters, where they delicately weigh the magnitude of the social, economic and political repercussions of their decisions to the REC body and assess the likelihood and plausibility of enforceability. The study posits that judges generally take on the role of negotiator between aggrieved litigants and the partner states, wherein they perceive their role not only as adjudicative but as diplomatic representatives of the REC body. The dominant theme, as exhibited by the newly created appellate chamber, has been the exercise of *restrained activism,* both as an indicator of the desire to safeguard the REC institution and to forge its autonomy amidst deference to the appointing member state governments.

As stated earlier, judges only serve for a seven-year non-renewable period and on an ad-hoc basis. Furthermore, judges cannot enforce their decisions to expressively constrain governments from violating their supranational and national obligations. This complex dynamic presents a mixed bag of the effects of the construction of judicial power in the East African court. Judges may wish to safeguard the REC institution and, by extension, the REC body whilst advancing citizens' rights and daring to break new ground in an ever-changing regional integration landscape. However, the short judicial tenure, which does not relieve one of their domestic duties and allegiances, may create opportunistic strategic rationales. As such, successive benches have employed short-term opportunistic strategies to forge power amidst the numerous threats to their autonomy.

By the third bench, judicial leaders were outspokenly claiming the term "judicial diplomacy" as a guiding tool during their tenure. With those considerations, REC judges perceive their *role as relational* to their colleagues, partner states, court users and the international legal complex. Relationality with colleagues resulted from EAC judges' cognisance of the political limits

on their authority, which have tended to draw on each other (and the registrar) for strength in times of crisis, such as in the initial backlash debacle. As such, they have informally arranged to issue decisions by consensus and formally recorded politically induced intimidations and threats to their independence as a shield to 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 create a shared sense of belonging to the bench and to learn, strengthen and liaise against any outside pressures that may be directed at them.

Additionally, to minimise backlash, judges behave relationally to partner states when they employ tactics of avoidance when intervening in politically salient affairs. Through the strict application of the two-month statute of limitations, judges have been accused of crippling access to justice, weakening the legitimacy of the bench and playing to the advantage of partner state governments rather than checking them for breaches of Community law. Judges walk a tightrope between judicial deference to partner state executives – who still employ them at home – and judicial activism as set by predecessors in a bid to build legitimacy for the REC body. On the other hand, REC courts have the additional burden of establishing their legitimacy as newer institutions, even though they possess greater agency and autonomy by virtue of being removed from the everyday political realities and empowered by broader REC Treaty provisions. In that sense, this study raised new questions, built upon the literature on socialisation to international courts (De Silva 2018b; Squatrito 2021), by moving beyond legitimisation concerns to encompass the issue of forging judicial power through tactful resistance or avoidance. REC judges go off-bench and engage in judicial diplomacy – purposively and strategically – to create a safety net for the judicial organ and protect existing judicial autonomy. These off-bench activities with the various judicial allies (political, in the legal complex, national and regional judiciaries, the media, development partners and the academy) aim to cultivate legitimacy and build influential networks.

By engaging *off-bench activities as overt empowerment tools* rather than mere legitimation strategies, the study advances debates on judicial off-bench relations outside the courtroom, which inform, propel and, at times, undermine judicial independence. These non-judicial activities substantiate judicial resourcefulness and creativity, showing that judges are savvy political actors and judicial diplomats. Through off-bench activities, EACJ judges have,directly and indirectly, engaged with audiences to mitigate

political interference. They have engaged in strategic dialogue with EAC stakeholders to seek their support in strengthening the court. Through issuing written or verbal statements, engaging in critical academic writing and scholarly discussions, judges have highlighted areas of interference, formally recorded attacks and kept official records of these occurrences to prevent future backlash or resist it. Judges also mobilise support within the legal complex, the academy, the media, development partners and even political allegiances to resist interference. Research question two explored how these extra-judicial relations enable judges to navigate the strategic space.

In turn, judicial allies have helped raise awareness of the court's mandate amongst its potential users, engaged in court publicity, and socialised potential users in the court's mandate. They have also enriched jurisprudence through litigation, fact-finding and evidence assistance by appearing as amici. To protect the court against undue interference and seek transparency in judicial appointments to secure the institutionalisation of the court. They also interceded in jurisdictional limitations and are assisting it in cultivating compliance with its rulings, amidst negotiating and lobbying for political and financial support with relevant politicians and officials, both nationally and regionally.

Perceiving judges as *regional diplomats* whose assignments at the REC body *ought to* go beyond and above their nationalities, judges become creative proponents of their autonomy, strategising to build the profile and legitimacy of the court while issuing authoritative decisions. The study concedes that judges have personal motivations for straying from this ideal and that their double agency – which emanates from serving on an ad hoc basis whilst in active public or judicial service in their member states – creates tension between the idealised notion of judges as agents of regional integration and the lived reality of judging across borders. In sum, it highlights *how* judges operating outside the expectations of popular IR theory build support networks in a hostile political climate and, consequently, shines a light on *how* those alliances become useful in constructing judicial empowerment.

9.2 Lessons and Implications for Research and Policy

Drawing lessons from the findings in this study, we can extrapolate and infer whether similarly positioned REC courts could engender comparable

results. As argued in the case of the EACJ, the resilience and political relevance of REC courts mirror the individual judicial motivations, ambitions and aspirations coupled with the status, perception, and progress of the REC bloc. Moreover, the discrepancies in the court's interventions are also rooted in inconsistencies in regional integration. This finding explains why the COMESA Court of Justice has remained operational, albeit politically restrained. From this study, we can deduce that this is a reflection of the character of engagement of the member states and their preferences towards the REC court. Because the COMESA bloc does not have politically high stakes in its regional integration agenda, such as a political federation, but is predominantly an economically oriented body, this attitude has permeated its organs. Moreover, COMESA judges also perceive their role as simply economically oriented and, thus, have avoided any politically charged jurisprudence. Unlike the EACJ, which has claimed human rights authority by repurposing existing legal tools and is now issuing landmark rulings in regional trade, the COMESA court has remained reserved and politically restrained. It has not dared to exceed its jurisdictional limitations or engage in overt off-bench diplomacy to grow its constituencies. Likewise, individual judges have not been as daring or concerned with growing a politically relevant court.

In the same manner, the absence of such explicit judicial tactics of avoidance sheds light on why the SADC Tribunal succumbed to the interests of a powerful state and could not be saved. While the SADC Tribunal judges were expansive in their interpretation of human rights, they lacked the fortune of learning effects, given that the court was dissolved shortly after its first contentious case. The EACJ has thrived despite initial backlash because it has achieved maturity and evolution through various benches, which have learned to devise specific means of fending off interference, including avoidance tactics where politically contentious issues are raised. The ECOWAS court, on the other hand, 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. The court, therefore, has not had to fight to assert itself in this area; instead, it has gone on to adjudicate issues of high political salience, many of which are closely tied to the status, perception, and progress of the REC bloc. At the time, the ECOWAS community was stronger as a bloc. This occured before the exit of three member states in early 2024 due to political tensions and a lack of solidarity in the REC bloc. As the regional bloc starts to weaken, so does the REC court. Amidst strained resources, the ECOWAS court is already

facing difficulties with judicial appointments and forging legitimacy within a fragmented political environment. Thus, the study recommends assessing the judicial organs of RECs within the context, perception and progress of the REC bloc.

Future work interested in judical agency and the empowerment of African sub-regional and regional courts could build on this study's approach in several ways. Firstly, this study focused on judges and their key allies (mostly other elites) and left aside questions about how EAC citizens interact with and relate to the court, especially concerning how they perceive the court's decision-making and its place in regional integration politics. Although this was outside the scope of this study, it appears to be a worthwhile area for future research to explore.

Likewise, the study analysed the entire universe of cases the EACJ has handled and linked it to judicial empowerment and broader issues in regional integration politics. Similar considerations could be made in other sub-regional courts on the continent to expand the literature on these courts in nuanced ways. Equally, I laid the foundation to further develop emerging concepts, which I could not delve deeper into, as they were beyond the scope of the study. These could be explored and broadened. The study was not preoccupied with compliance but proposed the concept of "silent compliance" by partner states. Its implications for assessing court legitimacy and authority, as well as how relevant actors go about achieving compliance in practice, are promising. Additionally, while it was outside of the scope of this study, the impact that donors and other development actors have on swaying the court's agenda and developments warrants closer qualitative research. Broader and lingering issues, such as mistrust of judicial structures and perhaps a decolonial approach to African REC courts, which could engage with issues of citizen alienation by international legal norms, seem to be fruitful areas for further comparative empirical research on African judicial institutions. Future researchers from various disciplinary perspectives, including political science, law, sociology, and anthropology, could further investigate these aspects.

Lastly, what does it mean for an economically constrained EAC bloc and the future trajectory of the regional court that the region continues to grow geographically? The EACJ would need to appoint more judges in the new member countries, establish sub-registries, and navigate hurdles similar to those already encountered in the original member states. I am, however, guarded about making hopeful predictions for the court's future. The study highlighted limitations in funding to the REC judicial organ and examined

the opaque practices in judicial appointment procedures for the EACJ. Perhaps framing formal rules to govern the selection practices of regional judges would be a significant first step in ensuring transparency, citizen participation and judicial ownership of the REC court. Likewise, the practice of appointing sitting judges – who suffer from the earlier-mentioned double agency – ought to be reconsidered by the national selectors and appointers. The regional bloc does not have a shortage of well-versed lawyers who may be less attached to their governments, possess more time and have the drive to spur the regional integration agenda forward. Moreover, knowledge of EAC law could be enhanced in the region. The study finds that training on regional integration law and integration processes remains minimal, with only a few specialised training institutes catering to it, which affects lawyers' participation, as only a few specialised lawyers engage with the court.

In the bargain, the REC court lacks the support of national courts. Unlike its European counterpart, the CJEU, which was built on preliminary reference procedures emerging from member states (Cuyvers 2017), the EAC has not had the same luck as national courts, which have hardly sought its counsel. Moreover, the Kenyan Supreme Court's recent advisory opinion – in which it challenged the authority of the EACJ – has set a dangerous precedent for the regional court.[784] During fieldwork for this project, throughout the analysis and write-up of this study, I was charged with optimism about the trajectory and future of the East African Court of Justice (EACJ). It is rather disheartening to see the "supremacy battle"[785] between national apex courts and the EACJ play out in the courtroom instead of the two working together to advance the regional rule of law.

Nevertheless, despite the unfavourable structural and institutional realities, the EACJ has mobilised, as shown in previous chapters. As one judge reckons, "*the court has been the most functional part of the EAC*."[786] This proclamation carries some weight, given the resilience of the EAC judicial arm. It survived the initial backlash that threatened to instigate its untimely demise. The EACJ embraced megapolitical cases that were too politically

784 *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/.

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

786 Online Interview, Third bench judge, Geoffrey Kiryabwire, June 18, 2020.

volatile at the national level, assumed a role as a human rights adjudicator despite the lack of express mandate and is even veering into environmental and economic-related jurisprudence – with some success – amidst constant pushback, financial constraints and opaque judicial appointments. However, as previous chapters have asserted, the court can only act as far as its constituencies support it – its broader intervention requires robust engagement by citizens, politicians and civil society. It has relied on civil society actors and private litigants to grow its jurisprudence and assert itself in regional integration processes. The imminent issue is that civil society remains primarily externally donor-funded, which poses the risk that their interventions are dictated and steered by shifts in donor policies and the availability of funds, potentially slowing down the rising momentum in some of these interventions. On the other hand, in most EAC states, leaders deliberately try to shrink civic space and use subtle signals to caution judges from overstepping their mandate.

Moreover, the understated role of the judiciary in governance, democratic building and the rule of law is not unique to Africa. We are seeing an intense wave of resistance to the authority of supranational judicial institutions sweeping across the globe. In the past two decades, states worldwide have gone to extreme lengths to constrain international courts (IC) as realised in the Court of Justice of the European Union (Alter 2000; Dyevre 2016), the European Court of Human Rights (Madsen 2016; 2020), the Inter-American Court of Human Rights (Helfer 2002); and the Central American Court of Justice (Caserta 2017a), to name a few. Some have even rescinded their jurisdiction – such as Britain's withdrawal from the jurisdiction of the CJEU (Simoncini and Martinico 2021) – or politicised appointments to quash independence (Shaffer, Elsig, and Puig 2016). In the African context, scholars have noted that the relatively small size of RECs, coupled with the tradition of strong executive branches and weak judiciaries (Alter, Gathii, and Helfer 2016), places REC courts in a predicament.

Consequently, we must engage Africa's REC courts to shed light on international systems of governance, especially in newer and less democratic settings. African REC courts are vulnerable to political pressures, like their national counterparts. However, without enjoying the legitimacy and institutional cushions of the latter, and as such, they deserve to be analysed in their own right and not just as regional replicas of domestic courts. Rather than see their job as strict interpretation and application of regional legal norms, judges on these courts perceive themselves – and behave – as

agents of regional integration rather than as mere implementers of regional law.

Relatedly, REC judges employ regional law as a negotiation tool to resolve regional integration conflicts through judicial legal mediation, thereby upholding REC agreements and promoting integration efforts. In this sense, REC judges perceive their role as relational – to their colleagues, appointing states and the international legal complex – making them *regional legal mediators* and *judicial diplomats*, whose immediate concern is furthering the regional integration agenda. This is not to minimise the impact of regional law *per se,* but to highlight the extra-judicial role of judges in the articulation and support of regional integration initiatives. Overall, this study argues that we cannot fully understand the processes of African integration unless we account for the judicial organs, whose vital role is usually glossed over in scholarly engagements.

Judicial empowerment at the EACJ reflects the individual judicial motivations, ambitions, and aspirations, as well as the status, perception, and progress of the REC bloc. Moreover, the discrepancies in the court's interventions are also rooted in inconsistencies in regional integration. The EAC promises a people-centred integration but remains a leadership-driven project. The region prides itself on shared histories, peoples, and shared visions of *East-Africanness*. Amidst the ever-expanding EAC territories, what regional similarities or collective destiny does the region *still share* that could spur on the regional economic and political project? If the integration project remains top-down, led by Heads of State whose commitments shift with the urgency of national political agendas (for instance, upholding national borders in a time of shared crisis), it is not only the EACJ that remains in limbo, but the entire integration project, especially the ambitious political federation scheme.

APPENDIX

Chapter 3

This section comprises supplementary research material and is inspired by (Kapiszewski and Karcher 2021, 287), who advocate for a methodological appendix that provides more transparency in research.

Case Mapping: Summary of Cases

The dataset contains 264 decisions across divisions and benches. The study prioritised judicial rulings on contested issues, focusing on the discernment and analysis of judges' decisions as opposed to the administrative or procedural aspects associated with tax rulings. Thus, all references, applications, appeals, case-stated and advisory opinions were considered, but taxation claims and arbitration clauses were deliberately left out. This explains the discrepancy between the total case count by the EACJ. As of June 2022, the court is estimated to have received 639 cases – broadly perceived as all references, applications, appeals, arbitration clauses, and taxation claims, with half of them determined and the rest awaiting determination.[787]

Table 13: Entire Universe of Cases per Bench (July 2022)

Bench	Case Type	Count
Pioneer bench (10)	Interim Ruling	5
	Judgement	5
Second bench (62)	Advisory Opinion	1
	Interim Ruling	26
	Judgement	35
Third bench (192)	Advisory Opinion	1
	Interim Ruling	89
	Judgement	101
	Preliminary reference procedure	1
Grand Total		264

Source: Author's compilation from the EACJ Case Mapping dataset (with the author on file).

787 Speech by Hon. Justice Nestor Kayobera, *supra* note 135.

Interview Guidelines: Selected Questions

EACJ Judges

The first questions broadly explore personal experience on the EACJ bench and seek to understand appointment processes.[788]

1. Literature on the European Court of Justice (ECJ) has shown that REC courts have the power to influence and shape regional integration processes. Could you please share your take on regional integration efforts through your work at the EACJ?
2. During your time on the bench, how would you describe the relationship between the Regional Court and:
   a) the regional administration at the headquarters in [Arusha]
   b) home governments, REC ministry
   c) major legal associations
   d) foreign and international actors, in particular those significantly sponsoring integration processes
3. Following the SADCT's rulings against Zimbabwe, in a series of sensitive land-tenure cases, former President of Tanzania, Jakaya Kikwete, said: "*We have created a monster that will devour us all.*" Subsequently, the Tribunal faced an early demise. REC judges in the region remain vulnerable to executive interference. As such, politics *shapes* and *influences* the court's functioning, practice and performance.
   a) Would you say you faced some undesirable pressures at the EACJ? If yes, from whom mostly? And how did you react?
   b) In your view, what are the main challenges of the regional courts in advancing regional integration and the rule of law in EAC?
   c) What considerations do you make when faced with a politically contentious question?
4. Parts of the literature about regional courts in Africa and elsewhere claim that stakeholders and potential users of the courts do not sufficiently know the jurisdiction and procedures of the court. Were you involved in any activities intended to increase awareness and the active participation of various stakeholders in the court? With whom did you work, and who was your target audience?

788 Part of the larger project work in which I am involved is a comparative study of appointments to the COMESA Court of Justice, the East African Court of Justice and the suspended SADC Tribunal. As such, interviews always asked specific questions on judicial appointments to actors across the board.

5. Some interviewees have told me that the court remains an "academic court" lacking an enforcement mechanism and that decisions remain ignored by member states. What is your take on that statement?

National Judges

1. How have you interfaced with the EACJ during your time on the national bench? For example, have you participated in any training that orients judges towards serving on the EAC court? Or simply training on EAC law and the role of preliminary reference procedures? Any personal interest in dialogue with the EACJ or its activities?
2. How would you broadly describe the relationship between the national judiciary and the EACJ?

Lawyers

1. You have litigated a wide range of issues, from X to Y, to mention a few. What would you say was the drive to litigate in the EACJ?
   a) What are some considerations you have in mind for taking the types of matters you take and why?
   b) What explains the scarcity of economic-related cases?
2. As a repeat litigant at the EACJ, what strategies do you employ to circumvent the statute of limitations and narrow jurisdiction?
3. Please identify three cases you deem fundamental in substantiating the court's role as a powerful instrument in regional integration efforts. Why do you consider these decisions this important?
4. Aside from such training by EALS lawyers on how to litigate in the EAC, what else has the legal fraternity done to support the court?

REC & Government Officials

As a ministry (responsible government entity), your mission is to "promote country X's interest in the pursuit of regional integration."

1. To what extent does that pursuit involve the EACJ?
2. Additionally, you ensure timely, effective implementation of EAC decisions, policies, and programmes- do you help the EACJ enforce and comply with its rulings?
3. How do you, as a ministry, increase awareness and active participation of various stakeholders with the court?
4. Is the MEACA/ministry involved in selecting judicial officers from country X?

Journalists

1. As a reporter on the judiciary in country X, have you covered the EACJ, and what areas have you covered?
2. Would you know about the appointments of judges to Regional Court X?

Interview Transcript: Excerpt

Interviewee: EA07 [hereafter R]

Interviewer: Diana Kisakye [hereafter I].

Date: 29.09.2021. Audio Recorded (Stored as EA07_29.09.2021). Conducted in person in Kampala, Uganda.

Duration: 1hr 30 mins

I [29:00]: **I have been told by some interviewees that the court remains an "academic court" lacking an enforcement mechanism and that decisions remain ignored by member states. What is your take on that statement?**

R [29:59]: unfortunately, most of our decisions were declarations. The reason is partly that it is a young court, and we don't want to discourage people from coming so early in the day. Second, we did not want to be seen as an elitist court–a court of the rich. So, a poor person cannot access the court. So, that's why we avoided financial issues. However, it is in terms of enforcement, given that there are declarations. Interestingly, we did see the partner states responding. A decision we have taken against a country, and next, we hear of an amendment. I think, in a way, the court, as you say, it is goodwill. But the goodwill has worked. There's no formal enforcement process, but we have seen decisions being enforced.

I [31:01]: D**o you feel you're speaking and being heard? Do you think you are growing in political relevance over time?**

R: The Court is getting to a stage where it can't be ignored. This is the child who is quiet but simply will not be ignored because when he opens his mouth to say something, it's extremely relevant. The nature of cases that are coming to the court now, for instance, the case from Kenya that arose from an election – parliamentary elections. And what happened was, in that case, I think a party that was aggrieved challenged this election up to the highest court and then went to the Supreme Court. […] That's a clear indicator to politicians back home. Some of these national courts might not be doing

as well as we think they are. The courts themselves can pull up their socks because they suddenly realise there is another watchdog somewhere. So, I think the court is a lot more relevant today than it was always, adjudicating human rights matters only. Human rights tend to be individual, and maybe the security agencies that have violated these rights will be asked to tread cautiously. But the nature of matters coming now tend to be broader- if a person says, this court did not address access to justice issues in this way, that's a broad thing because anybody who has a similar complaint, and someone comes and says "You are taxing me irregularly because the protocol on Common market and customs union like what happened in BAT case. Clearly, you're sending a message to all traders that there has to be uniformity in the taxation of goods. So, those broad implications are actually being felt in the region. Our President and the late Tanzanian President addressed that issue because today, it was cigarettes, and the next day, it would be sugar. I don't think the court is as irrelevant as it has been in the past. Depending on how it continues to do, this could be a very useful court, and in fact, a discussion has begun to make it a final appellate court. This discussion, I think, has been mooted [...]

I [44:43]: Were there any apparent attacks on you for decisions you passed or dismissed?

R: Interestingly, I have not. But I hear judges saying they receive calls from people trying to influence them. I think I am the kind of person -my background is in the Attorney General's chambers – I have always been known for being fearless. So, they just do not bother. I have never received a call. Because of that, when I get onto a case, people tend to think, "She is objective." So far in the EACJ, my biggest nightmare was Rwanda […]

I: Did you feel shaken after what happened to the SADC Tribunal? Were you a bit on edge?

R [52:28]: The interesting thing about this region is that we don't have similar issues. You know, here, the president will tell you off thoroughly and keep quiet. And then he will call up these people and tell them whatever judge but did nothing to them. At some point, in one of the cases I handled here *(in Uganda*), I sentenced someone to life imprisonment, and the president disagreed with me. He said, "Can you imagine they sent this murderer to go and eat my food for the rest of his life? Why can't they sentence them to death? I told myself, okay, "This is a rant." It actually gets amusing. So, with us here, of course, they will be unhappy. But they respect

the courts. At least a little bit. So that didn't shake the court. So, the only thing that shook the court was a decision they passed on elections in Kenya. The *Anyang' Nyong'o* case. That case made them divide the court, where they said, "This Court is stupid; we need to have an appellate division." You know, politicians are very interesting. So, they decided to create the appellate division. [...]

Chapter 4

Table 14: EACJ Judicial Leadership

Duration		EACJ Leadership				Registrar
Pioneer bench (2001–2007)	Nov. 2001 – June 2008	President: Moijo Ole Keiuwa (Nov. 2001 – Nov. 2007) Vice President: Joseph Nyamihana Mulenga (Nov. 2001 – June 2008)				Dr John Eudes Ruhangisa (Apr. 2001 – Apr. 2016)
		Appellate Division		**First Instance Division**		
		President	***Vice President***	***Principal Judge (PJ)***	***Deputy PJ***	
	June – Nov 2008	Joseph Nyamihana Mulenga		Kasanga Mulwa		Yufnalis Okubo (Apr.2016 – Jan. 2023)
Second bench (2008–2014)	Oct 2008 – June 2014	Harold Reginald Nsekela (Oct. 2008 – June 2014)	Dr Phillip Kiptoo Tunoi (Oct. 2008 – Aug. 2014)	Johnston Busingye (October 2008 – June 2013)	Mary Stella Arach-Amoko (Oct. 2008 – June 2014)	
				Jean Bosco Butasi (June 2013 – June 2015)		
Third bench (2015–2022)	June 2014 -July 2022	Dr Emmanuel Ugirashebuja (June 2014 – Nov. 2020)	Liboire Nkurunziza (June 2014 – June 2020)	Monica Mugenyi (July 2015 – Nov. 2020)	Isaac Lenaola (Dec. 2013 – June 2018)	
					Dr Faustin Ntezilyayo (July 2019 – March 2020)	
		Nestor Kayobera (Feb. 2021 – X)	Geoffrey Kiryabwire (Feb. 2021 – July 2022)	Yohane Bokobora Masara (Feb. 2021 – X)	Audace Ngiye (Feb. 2021 – July 2022)	

Source: Compiled by the author according to the East African Court of Justice 20th anniversary Report (East African Court of Justice 2021). X implies still serving in this position by the time of writing (August 2025).

Chapter 5

Table 15: List of EALS Leadership

Duration	EALS President	Country of origin	EALS CEO
2002 – 2004	Prof. Frederick E Ssempebwa	Uganda	Donald Omondi Deya 2002 – 2010
2004 – 2006	Commissioner Bahame Tom Nyanduga	Tanzania	
2006 – 2008	Prof. Tom Ojiende	Kenya	
2008 – 2010	Dr. Alan M. Shonubi	Uganda	
2010 – 2012	Dr. Wilbert B. Kapinga	Tanzania	
2012 – 2014	James Aggrey Mwamu	Kenya	Tito Byenkya (2011 – 2016)
2014 – 2016	Nassor Khamis Mohammed	Zanzibar (Tanzania)	
2016 – 2018	Richard Mugisha	Rwanda	Patrick O Okoth (2016 – 2017)
2018 – 2020	Willy Rubeya	Burundi	Hannington Amol (2017 – Mar 2021)
2020 – 2022	Bernard Malingu Oundo	Uganda	David Sigano (2021 – Date)
2022 – Date	Dr. Fauz Twaib	Tanzania	

Source: The list was compiled by the author from information provided by the EALS Secretariat on March 28, 2023. The regional Law Society's first President, Solomy Bossa, is not included in the table because she served before the EACJ existed.

Chapter 6

EALS Strategic Litigation

Table 16: EALS as an Applicant

CEO EALS	President EALS	Case Number	Respondent	Classification
Donald Omondi Deya (2002 – 2010)	Prof. Tom Ojiende (2006 – 2008)	Reference No. 3 of 2007	Attorney General of Kenya & others	Jurisdiction: Treaty Amendments
		Application No. 9 of 2007		
	Dr. Wilbert B. Kapinga (2010 – 2012)	Reference No. 1 of 2011	EAC Secretary-General	Jurisdiction: Customs Union and Common Market Dispute
		Reference No. 3 of 2011	Attorney General of Rwanda & Uganda	Human Rights Violation
		Reference No. 2 of 2011	Attorney General of Uganda & other	Human Rights Violation (walk-to-work protests)
Tito Byenkya (2011 – 2016)	James Aggrey Mwamu (2012 – 2014)	Application No. 12 of 2012		Process
		Application No. 3 of 2014	Attorney General of Burundi & other	Violation of Free Movement
		Reference No. 1 of 2014		
		Reference No. 7 of 2014	EAC Secretary-General	Implementation of Council Decision
Hannington Amol[789] (Aug 2017 – Mar 2021)	Bernard Malingu Oundo (2020 – 2022)	Reference No. 1 of 2020		Council Quorum & Ad Hoc Service Commission
		Reference No. 12 of 2021	Attorney General of Uganda & EAC Secretary-General	Internet Blockage during Elections
		Reference No. 1 of 2019	Attorney General of Tanzania & EAC Secretary-General	Judicial Appointment
		Appeal No. 2 of 2021		

Source: Author's compilation from the EACJ Case Mapping dataset (with the author on file).

789 Appeared in all four cases during his tenure.

PALU as Litigant

Table 17: Cases involving PALU

Case Type	Case Number	Applicant	Respondent	Representation
Elections Dispute (Burundi 2015)	Application No. 5 of 2015	EACSOF	Attorney General of Burundi, *Commission Electorale Nationale Independent* (CENI) & EAC Secretary General	PALU
	Reference No. 2 of 2015			
	Appeal No. 4 of 2016			
	Appeal No. 1 of 2020			
Elections Dispute (Uganda 2021, Tanzania 2020)	2021	PALU & Six others	Attorney General of Uganda & Tanzania	
Treaty Amendments and other Dispute Settlement Mechanisms	Reference No. 9 of 2012	The East African Center for Trade Policy and Law	EAC Secretary General	Francis Gimara (former ULS president)
Restrictions on Freedom of the Press	Application No. 2 of 2014 (arising from Reference No. 7 of 2013)	Burundi Journalists Union	Attorney General of Burundi & several amici curiae	PALU (As amicus)
Unlawful evictions & Arrests (Maasai Communities)	Reference No. 10 of 2017	Ololosokwan Village Council and 3 others	Attorney General of Tanzania	PALU
	Appeal No. 13 of 2022			
Arbitrary Arrest and Detention of EAC Citizens	Reference No. 19 of 2018	Garang Michael Mahok	Attorney General of South Sudan	
	Application No. 20 of 2018	Morris Mabior Awikjok Bak	Attorney General of South Sudan & Kenya	
Elections of EALA Speaker	Reference No. 2 of 2018	Attorney General of Burundi	EAC Secretary General (Respondent) & Hon. Fred Mukasa Mbidde (Intervener)	

Source: Author's compilation from the EACJ Case Mapping dataset (with the author on file).

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