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Regional Economic Community Courts and the Advancement of Environmental Protection and Socio-economic Justice in Africa: Three Case Studies

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Abstract

Focusing on three regional economic communities (REC) courts in Africa that nevertheless possess a human rights jurisdiction – i.e. the Court of Justice of the Economic Community of West African States (the ECOWAS Court), the East African Court of Justice (the EACJ), and the Southern African Development Community Tribunal (the SADC Tribunal) - this dissertation investigates the relationships among the RECs, states, activists and the courts themselves, as producing and framing the specific conditions under which environmental protection and socio-economic justice in the region in Africa are either advanced or stifled.

The dissertation discusses the ways in which the mandates and jurisdictions of these REC courts transitioned from their original mandates as regional integration courts to human rights or environmental protection courts, and conversely, how one of the three courts, the SADC Tribunal, regressed back to its original (non-human rights inclusive) mandate and jurisdiction. Arguing, and demonstrating, that jurisdiction and mandate are essential to the pursuit of of environmental protection and socio-economic justice before these REC courts, the dissertation illuminates the specific ways in which the mandates and jurisdiction that states, activists, RECs, and the courts themselves interact to manipulate, expand, or shrink the mandates and jurisdictions of the REC courts under study.

The chapter dissertation demonstrates using doctrinal and empirical analyses how the REC courts provide additional and alternative *forums* for activists and victims of environmental and socio-economic abuse to seek justice and hold their governments accountable. It argues that severe restriction or lack of access to these institutions is the most potent barrier to the goals of seeking some form of vindication/redress in such fora that that many populations who are affected by environmental and socio-economic justice issues have.

The dissertation demonstrates how these REC courts are very often engaged by activists and local populations as *tools* or *resources* for demanding and (in many cases) obtaining significant degrees of environmental protection and socio-economic justice from the more powerful state actors and so engages the question of the effectiveness of these institutions. Along these lines, the dissertation shows how activists and local populations utilize these courts to force *transparency* from otherwise reluctant and recalcitrant governments.

Dedication

To all the people who helped me create;

To all the people who kept me sustained;

For the times that I laughed,

and the times that I cried;

and for the times that I laughed until I cried.

You have my love

and my gratitude

I owe this to you…and so much more.

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CHAPTER ONE: Introduction

1.0. Background and Context

Over the last decade, academics and pundits alike have lamented and applauded the proliferation of international adjudication across the globe.[1] Since the establishment of the International Court of Justice in 1945 (following its predecessor, the Permanent Court of International Justice, which was established in the 1920s), international adjudication has taken off. There are currently twenty-four international courts in operation, with formal jurisdictions covering a wide range of subjects.[2]

International adjudication consists of permanent and ad hoc, judicial and quasi-judicial bodies, some with regional or bilateral jurisdiction.[3] They include the International Tribunal for the Law of the Sea (ITLOS), the World Trade Organization's Dispute Settlement Mechanism, the International Criminal Court, the International Criminal Tribunal for former Yugoslavia, the International Criminal Tribunal for Rwanda, the European Court of Justice, the European Court of Human Rights, the Inter-American Court, the African Court of Human and Peoples Rights, the African Commission, the Economic Community of West African States (ECOWAS) Court, the East African Court of Justice (EACJ), the Southern African Development Community Tribunal (SADCT) and the Common Market for Eastern and Southern Africa (COMESA) Court.[4] This proliferation has without a doubt extended to the African continent as there are currently eight (8)

[1] Karen J Alter, *The New Terrain of International Law: Courts, Politics, Rights* (Princeton University Press, 2014); Philippe Sands, "Turtles and Torturers: The Transformation of International Law Lecture" (2000) 33 NYU J Int'l L & Pol 527–560; Eric A Posner, *The Perils of Global Legalism* (University of Chicago Press, 2009).
[2] Karen Alter, Laurence Helfer, and Mikael Madsen eds. *International Court Authority*(Oxford, New York: Oxford University Press, 2018).
[3] Posner, *supra* note 1 at 150.
[4] Alter, *supra* note 1; Posner, *supra* note 1; Peter Brett, *Human Rights and the Judicialisation of African Politics* (Routledge, 2018).

international courts in Africa.[5] The African continent currently has more international courts than any other continent in the World.[6]

Understandably, their increasing numbers, expanding jurisdictions, geographical range, influence, and "swelling dockets" has spurred what Helfer and Alter refer to as a "cottage industry devoted to the study of international adjudication."[7] The existence of this industry is evidenced by Centers and research initiatives such as the Project on International Courts and Tribunals and the *Oxford Handbook on International Adjudication*, specialized journals on international adjudication, and centres within universities devoted to the study of International Courts (ICs).[8]

Despite the burgeoning scholarship on international courts, Kleis points out that "monographs and treatises on the topic [of African ICs] …are still rare".[9] Extensive scholarship on the African ICs is still sparse, with many of the recent monographs only tangentially implicating these ICs while discussing Human Rights[10] or Regionalism.[11] Klies further points out that legal scholarship on regional integration courts in Africa is quite sparse, identifying the works of Gathii[12] and Oppong[13]

[5] James Thuo Gathii, "Saving the Serengeti: Africa's New International Judicial Environmentalism" (2016) 16:2 Chicago Journal of International Law 386–438. Gathii lists them as: The African Court of Human and Peoples' Rights, the East African Court of Justice, the Economic Community of West African States Court of Justice, the Southern Africa Development Community Tribunal Court of Justice, The Common Market for Eastern and Southern Africa Court of Justice, the Common Market for Central Africa, the Court of Justice of the West African Economic and Monetary Union, and the Organization pour l'Harmonisation en Afrique du Droit des Affaires en Afrique.
[6] Brett, *supra* note 4.
[7] Laurence R Helfer & Karen Alter, "Legitimacy and Lawmaking: A Tale of Three International Courts" (2013) 14 Theoretical Inquiries in Law.
[8] *Ibid*.
[9] Jörg Kleis, *African Regional Community Courts and their Contribution to Continental Integration*, 1st ed, Recht und Verfassung in Afrika - Law and Constitution in Africa (Baden-Baden: Nomos Verlagsgesellschaft mbH & Co. KG, 2016). At 33
[10] Brett, *supra* note 4. Brett's treatise was more squarely focused on decisions of domestic courts in three Southern African countries
[11] Jonathan Bashi Rudahindwa, *Regional Developmentalism through Law : Establishing an African Economic Community* (Routledge, 2018).
[12] James Thuo Gathii, *African Regional Trade Agreements as Legal Regimes* (Cambridge: Cambridge University Press, 2013).
[13] Richard Frimpong Oppong, *Legal Aspects of Economic Integration in Africa* (Cambridge University Press, 2011).

as the most thorough and extended contributions on the subject of legal aspects of regional economic communities (RECs) in Africa (out of which the REC Courts under study emerge). While being concerned with the African RECs and their courts, Kleis's work focuses only on the courts' contributions to *regional integration*. Fortunately however, a recent edited collection, attempts to address this sparsity of literature on African REC Courts by engaging with the important aspects of litigation before African international courts.[14] The book and its authors pay specific attention to the multitude of ways that these courts have *effect* beyond just gaining compliance with their decisions.[15]

Despite these laudable and timely contributions to the scholarship on African ICs, scholarship that investigates how environmental protection and socio-economic justice is impacted by relationship(s) among regional courts in Africa, the states that created them, and the activists that use them, is still largely missing. This dissertation fills a part of this gap in the literature by being the first academic treatise to question the conditions and relationships that constitute (a sample of) Africa's regional economic communities and their courts and how these significantly implicate environmental protection and socio-economic justice in that region. In doing so, the dissertation examines the nature, orientation and complexities of the relationships among Africa's regional economic communities, its regional integration courts, states, and activists, as the factors that help produce increased or decreased environmental protection and socio-economic justice in the region. It anticipates that the character of the interactions among these actors creates the conditions that support or hinder the advancement of environmental protection and socio-economic justice in the region. To that end, it probes those interactions in order to demonstrate how those interactions

[14] James Thuo Gathii ed., *The Performance of Africa's International Courts: Using International Litigation for Political, Legal, and Social Change*, (Oxford University Press, 2020).
[15] *Ibid*.

implicate the advancement, or lack thereof, of environmental protection and socio-economic justice on the African continent.

A second motivation for the interest in African REC courts is that recent scholarship on international adjudication has highlighted the "gains" made by international adjudicatory mechanisms despite the absence of an international enforcement mechanism. Scholars like Alter cite instances where international courts, despite having no "central enforcer…led Latin American governments to secure indigenous peoples' land rights; the United States Congress to eliminate tax benefits for American Corporations; Germany to grant women a wider role in the military; [and] Niger to compensate a former slave."[16] Alter submits these instances as evidence of how international courts constrain powerful states.[17]

The potential of international courts to constrain state power is thus a significant line of inquiry particularly on the African continent, seen by some as "notorious for upholding state sovereignty and the principles of non-interference even in the face of grave human right violations".[18] Thus, there is significant scholarly interest in African states and their international adjudicatory institutions and the potential of these institutions to constrain African states.[19] This dissertation, however, moves beyond the question of the abilities of international courts to constrain powerful states. Instead, this dissertation is concerned with the conditions, actors, and interactions that

[16] Alter, *supra* note 1.
[17] *Ibid*.
[18] Tom Gerald Daly & Micha Wiebusch, "The African Court on Human and Peoples' Rights: mapping resistance against a young court" (2018) 14:2 International Journal of Law in Context 294–313. See also Rowland JV Cole, "The African Court on Human and Peoples' Rights: Will Political Stereotypes form an Obstacle to the Enforcement of its Decisions?" (2010) 43:1 The Comparative and International Law Journal of Southern Africa 23–45.
[19] Daniel Abebe, "Does International Human Rights Law in African Courts Make a Difference" (2016) 56 Va J Int'l L 527.

produce increased or decreased capacity within international courts to advance environmental protection and socio-economic justice on the African continent.

To this end, this dissertation analyzes the relationship between three sets of actors – the African states that created these courts; the Regional Economic Communities themselves; and activists that engage these courts. The work contemplates the relationship between these actors with a view to exposing and exploring the complex nature of the relationship between these actors, and how this four-part relationship enhances or impedes environmental protection, and social justice in regions of Africa.

Additionally, the dissertation engages with REC courts as the International Courts (ICs) that they are. I rely on the scholarship and definitions of ICs set out by scholars like Cesare Romano[20], who describe International Courts and Tribunals as having seven fundamental traits:

> have been established by an international legal instrument; (ii) rely on international law as applicable law; (iii) decide cases on the basis of pre-determined rules of procedure; (iv) are composed of independent members/judges; (v) only hear cases in which at least one party is a State or an international organization; (vi) issue legally binding judgments; and (vii) are permanent.

Other scholars like Christian Tomuschat[21] also describe International Courts as having five traits: permanency, establishment by an international legal instrument, international law as applicable law, predetermined procedures, and legally binding judgments. Given that the African REC courts

[20] Cesare Romano, "A Taxonomy of International Rule of Law Institutions" (2011) 2:1 Journal of International Dispute Settlement 241–277. See also, Cesare PR Romano, "The Proliferation of International Judicial Bodies: The Pieces of the Puzzle" (1999) 31 NYU J Intl L Pol 713–23.

[21] Christian Tomuschat, "International Courts and Tribunals with Regionally Restricted and/or Specialized Jurisdiction", in *Judicial Settlement Of International Disputes: International Court Of Justice, Other Courts And Tribunals, Arbitration And Conciliation: An International Symposium* (Berlin; Heidelberg; New York, Springer 1987) 285–416. See also Christian Tomuschat, "International Courts and Tribunals" Max Planck Encyclopedia of Public International Law [MPEPIL] (3rd edn).

have all the seven traits of an International Court or Tribunal, this dissertation refers to them and engages them as ICs.

1.2. Research Interests and Case Selection

1.2.1. Case Selection

As case studies for this research, I adopt the Court of Justice of the Economic Community of West African States (ECOWAS) –referred to as the ECOWAS Court, the East African Court of Justice (EACJ), and the Southern African Development (SADC) Tribunal. The focus on African international courts and these three specific ones has several justifications. Firstly, there is little academic literature that focuses on African international courts and environmental protection,[22] despite the significance of environmental protection and socio-economic justice to Africa. Secondly, Africa bears disproportionate impacts of environmental injustice (the effects of climate change included),[23] which have been exacerbated by underdevelopment and high levels of poverty that negatively impact its ability to mitigate climate-induced and other environmental problems. Thirdly, there is a growing amount of jurisprudence from African REC courts regarding environmental protection and socio-economic justice. Cases such as *ANAW v. Attorney General of Tanzania*[24] decided before the EACJ, and *SERAP v. Nigeria*[25] decided before ECOWAS Court demonstrate this jurisprudence. Fourthly, and perhaps most significantly, the three courts at a time, all had both private access jurisdiction *and* human rights jurisdictions. As such all three courts were at the time in a position to receive cases from and adjudicate matters involving private actors,

[22] See Gathii, "Saving the Serengeti", *supra* note 5.
[23] P Collier, G Conway & T Venables, "Climate Change and Africa" (2008) 24:2 Oxford Review of Economic Policy 337–353.
[24] ANAW v. The Attorney General of the United Republic of Tanzania (2010) REF NO. 9 of 2010, Online: http://eacj.org/?cases=anaw-v-the-attorney-general-of-the-united-republic-of-tanzania;
[25] The Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) v. President, Federal Republic of Nigeria ECW/CCJ/APP/08/09 Ruling of 10th December, 2010 [SERAP Niger Delta Judgment]

private citizens and NGOs, either for environmental protection, or the protection of socio-economic rights, or any other human rights claims. However, as of the time of writing this dissertation, one of these courts no longer has either private access or human rights jurisdiction. This essentially means that the court cannot adjudicate environmental protection or socio-economic justice cases that involve private actors or non-state actors (which are the actors that are most affected by environmental degradation and socio-economic deprivations). To this end, it will be interesting to question the conditions that lead to increased or decreased jurisdictional capacity for these REC courts, as international courts, to provide justice to victims of environmental protection and socio-economic justice in Africa, especially given that a) states are often complicit or responsible for the deprivation of environmental protection and socio-economic justice, and b) these issues are often regarded as non-justiciable before national courts. Fifth, this interest in the three REC courts advances scholarship by comparing three "like institutions" that operate in different contexts. As Karen Alter writes, "by comparing like institutions operating in different contexts, we can gain insight into **when and how ICs become politically effective**".[26] In this dissertation, I am interested in "when and how" these REC courts (as ICs) become "politically effective" for advancing environmental protection and socio-economic justice, given the reasons I outline above. Finally, while not fully representative of the continent, the locations of the three courts, geographically (and in terms of population), covers most of the continent, i.e. West, East, and Southern Africa.

1.2.2. Research Interests: Environmental Protection and Socio-economic Justice

[26] Alter, *supra* note 1 at 24.

My interest in these REC courts' contributions to environmental protection and socio-economic justice is served by an interrogation of the human rights jurisprudence of the courts, particularly relating to economic and social rights. However, I acknowledge that the human rights framework is not entirely sufficient for capturing the potentials of African ICs towards environmental protection and socio-economic justice. For example, while certain environmental issues can be litigated using the human rights framework, other environmental issues cannot. As such, different frames, including international environmental law, better capture those issues. Additionally, only one of the three courts under study has an express human rights protection mandate.

Ultimately, my interest in case law relating to economic and social rights derives from (but is not limited to) the challenges to the justiciability of economic, social, and environmental rights. Scholars note that the contemporary human rights framework includes a divide between socio-economic rights and civil and political rights,[27] and there are often questions regarding the justiciability, or lack thereof, of this category of rights.[28] Amartya Sen has argued that some critics propose "a discriminating rejection: they accept the general idea of human rights but exclude, from the acceptable list, specific classes of proposed rights, in particular, the so-called economic and social rights, or welfare."[29] The justiciability (or lack) of socio-economic rights is a substantial

[27] See Catarina de Albuquerque "Chronicle of an Announced Birth: The Coming into Life of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights – The Missing Piece of the International Bill of Human Rights" (2010) 32 Human Rights Quarterly 144 at 145. She argues that national and international levels of government have often viewed economic, social and cultural rights, "with caution, skepticism or triviality".
[28] *See generally*, Shivani Verma, "Justiciability of Economic Social and Cultural Rights Relevant Case Law", in *The International Council on Human Rights Policy Review Meeting: Rights and Responsibilities of Human Rights Organisations* (15 March 2005), arguing essentially, that economic, social and cultural rights are always justiciable.
[29] Amartya Sen, "Elements of a Theory of Human Rights" (2004) 32:4 Philosophy & Public Affairs 315–356.

barrier to accessing socio-economic rights, particularly in domestic jurisdictions.[30] There are thus significant jurisdictional challenges to pursuing socio-economic rights at domestic courts.

Fortunately, however, ICs have been quite receptive to adjudicating these rights. As such, activists have been innovative in the means and mediums through which they have pursued socio-economic justice within the existing human rights framework,[31] particularly before international courts.[32] International courts such as REC courts are thus quite sought after in pursuing socio-economic rights because these courts do not subscribe to the notion that socio-economic rights are not justiciable, an approach that has been common in domestic systems. For example, the African Commission in deciding an issue relating to environmental pollution against Nigeria, in the *SERAC Case*,[33] held that:

> Internationally accepted ideas of the various obligations engendered by human rights indicate *that all rights**, both civil and political rights and social and economic, generate at least four levels of duties for a State that undertakes to adhere to a rights regime, namely the duty to respect, protect, promote, and fulfil these rights***. These obligations universally apply to all rights and entail a combination of negative and positive duties. As a human rights instrument, the African Charter is not alien to these concepts and the order in which they are dealt with here [in deciding the case] is chosen as a matter of convenience

[30] Other criticisms of human rights relate to the suitability (or sufficiency) of human rights as a framework to protect human beings and reduce human suffering. See, Wendy Brown, "The Most We Can Hope For…': Human Rights and the Politics of Fatalism" South Atlantic Quarterly 103 (2004): 451–463; Gilbert Pablo, "Human Rights, Human Dignity, and Power", in Rowan Cruft, Matthew Liao & Massimo Renzo (eds.), *Philosophical Foundations of Human Rights*, (Oxford: Oxford University Press, 2015, 196-213); Tony Evans. "International Human Rights Law as Power/Knowledge." Human Rights Quarterly 27, no. 3 (2005): 1046-1068; Upendra Baxi, *The Future of Human Rights* (Oxford University Press, 2007).B S Chimni, "Marxism and International Law: A Contemporary Analysis" (1999) 34:6 Economic and Political Weekly 337–349.

[31] Catarina de Albuquerque, *supra* note 25 at 145.

[32] See Nihal Jayawickrama, *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence* (Cambridge: Cambridge University Press, 2002), Frans Viljoen, F. "The Realisation of Human Rights in Africa through Sub-Regional Institutions" (2001) *African Yearbook of International Law* 185, David Jacobson and Galya Benariah Ruffer, "Courts across Borders: The Implications of Judicial Agency for Human Rights and Democracy" (2003) 25 *Human Rights Quarterly* 74, Uche Ewelukwa, "Litigating the Rights of Street Children in Regional or International Fora: Trends, Options, Barriers and Breakthroughs" (2006) 9 *Yale Human Rights and Development Law Journal* 85.

[33] *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria* (Communication 155/96) African Commission on Human and Peoples Rights, 27 October 2001, online: ACHPR http://www.achpr.org/communication/decisions/155.96/ [SERAC Case]

> and in no way should it imply the priority accorded to them. Each layer of obligation is equally relevant to the rights in question.[34] (emphasis added)

To this end, I am interested in interrogating the case law of these courts as it relates to economic and social rights because of a) the receptiveness of economic and social rights claims before African ICs and b) the challenges of justiciability of these issues before domestic systems. The connection to the focus of this dissertation is that economic and social rights offer a frame for actors to pursue the advancement of environmental protection and socio-economic justice.

Secondly, environmental problems have also been litigated under the umbrella or economic and social rights. Scholars and activists acknowledge that salient links exist between environmental problems and socio-economic problems,[35] suggesting that environmental and socio-economic rights "work together"[36] given that environmental justice claims are often motivated or aggravated by socio-economic factors.[37] This interrogation of the human rights jurisprudence of Africa's REC courts is thus useful for investigating the advancement of environmental protection and socio-economic justice in these regions.

As discussed however, the utility of the human rights jurisprudence of the courts is quite limited. For example, two of the three Community courts did not in fact have formally conferred human rights jurisdiction. The judges of the courts had been innovative in assuming jurisdiction over

[34] *Ibid* at paragraph 44.
[35] David Schlosberg, *Defining Environmental Justice: Theories, Movements, and Nature* (Oxford: Oxford University Press, 2009).
[36] Jackie Dugard & Anna Alcaro, "Let's Work Together: Environmental and Socioeconomic Rights in the Courts" (2013) 29:1 South African Journal on Human Rights 14–31.
[37] L Amede Obiora, "Symbolic Episodes in the Quest for Environmental Justice" (1999) 21 Hum Rts Q 464–512; Schlosberg, *supra* note 34; Rhuks Ako, *Environmental Justice in Developing Countries: Perspectives from Africa and Asia-Pacific* (Abingdon, Oxon England: Routledge, 2013). Other scholarship has argued for the pursuit of the right to a healthy environment as tied to the right to life. See Alan E. Boyle and Michael Anderson*, Human Rights Based Approaches to Environmental Protection* (Oxford/Clarendon Press, 1996)

human rights violations through a broad interpretation of their founding treaties granting them jurisdiction to maintain the rule of law.[38] As such, human rights violations were litigated before these particular courts under the rule of law provisions.[39] Environmental protection cases have also been litigated both as human rights concerns as well as under treaty provisions relating to the preservation of the environment.[40] As such, reviewing the human rights jurisprudence of these courts is useful, I will also be engaging with jurisprudence relating to the rule of law, and environmental protection.

1.3. Literature Review and Theoretical Framework

This dissertation's concern with the relationships between three (3) different actors - REC courts, states, and activists, implicates a number of disparate (often related or intersecting) bodies of literature. In this section, I review the bodies of literature that my research is concerned with, engages with, or contributes to. This brief literature review helps frame and indicate this dissertation's contribution to the scholarship.

1.3.1. Court, Activists and States

1.3.1.1. Regional Economic Integration Communities (RECs) and REC Courts

There are a significant number of international courts today. Phillipe Sands traces the rise in popularity of international adjudication to 1945 when "the idea that international disputes could be settled by recourse to arbitration or judicial settlement truly took off".[41] Sands quotes the Chief Prosecutor at Nuremberg, Justice Robert Jackson, claiming "the judgment of the law" as "one of

[38] James Gathii, "Mission Creep or a Search for Relevance: The East African Court of Justice's Human Rights Strategy" (2013) 24 Duke J Comp & Int'l L 249.
[39] *Ibid*.
[40] Gathii, "Saving the Serengeti", *supra* note 5.
[41] Philippe Sands, "Climate Change and the Rule of Law: Adjudicating the Future of International Law" (2016) 28 J Environ Law 19 at 23.

the most significant tributes that power has ever paid to reason."[42] International courts as a dispute settlement mechanism, have thus become a settled phenomenon and have generated significant scholarly discourse.

The three courts under study in this dissertation are embedded within the regional integration communities (RECs) in Africa. There has been significant scholarship on these RECs in Africa, the regional courts within these Communities, and their function or frailty.[43] Regional integration communities such as the ECOWAS, the EAC, and SADC have particularly generated significant comment over the years, with some focusing on their potential for legal integration,[44] some interested in their status as flexible legal regimes,[45] and more recently, scholars have focused on their contributions to development.[46] REC courts have also drawn significant comments. Scholars have researched the potential of these courts to offer human rights protection[47] and their evolution from full-time economic integration institutions to part-time human rights protection institutions.[48]

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[42] *Ibid*.

[43] See Kofi Oteng Kufuor, *The Institutional Transformation of the Economic Community of West African States* (Ashgate Publishing, Ltd., 2006). James Thuo Gathii, "African regional trade agreements as flexible legal regimes" (2010) North Carolina Journal of International Law and Commercial Regulation 10–9. Jörg Kleis, *African Regional Community Courts and their Contribution to Continental Integration*, 1st ed, Recht und Verfassung in Afrika - Law and Constitution in Africa (Baden-Baden: Nomos Verlagsgesellschaft mbH & Co. KG, 2016); Oppong, *supra* note 13. Kehinde, Ibrahim, "The Puzzling Paradox Presented within the African Supranational Judicial Institutions: The ECOWAS Court of Justice" (2020) 28:Supplement African J Intl & Comparative Law 86–109.

[44] Oppong, *supra* note 13. Aniekan Iboro Ukpe, "Trade Integration in a Layered System of International Law" (2017) 25:4 African J Intl & Comparative Law 561–578.

[45] Gathii, *supra* note 12.

[46] Rudahindwa, *supra* note 11. See also Olabisi D. Akinkugbe, "Theorizing Developmental Regionalism in Narratives of African Regional Trade Agreements (RTAs)" (December 17, 2020). Volume 1, (2020) African Journal of International Economic Law, 297-320.

[47] Chidi Odinkalu, "Forging New Frontiers: ECOWAS Court of Justice in the Protection of Human Rights" in Chima Centus Nweze, ed, *Contemporary Issues on Public International and Comparative Law: Essays in Honor of Professor Dr. Christian Nwachukwu Okeke* (Lake Mary: Vandeplas Publishing, 2009). Solomon Ebobrah, "Human rights developments in African sub-regional economic communities during 2010" (2011) 11 *African Human Rights Law Journal* 216. Solomon T. Ebobrah, "Courts of Regional Economic Communities in Africa and Human Rights Law" in Stefan Kadelbach, Thilo Rensmann and Eva Rieter*, Jugding International Human Rights: Courts of General Jurisdiction as Human Rights Courts* (Springer, 2018).

[48] Nsonguna Udombana, "An African Human Rights Court and an African Union Court: A Needful Duality or a Needless Duplication?" (2003) 28 *Brooklyn Journal of International Law* 811. Gathii, *supra* note 12. Lucyline Nkatha

Gathii has described this transition from being mainly regional integration/trade courts to becoming largely human rights protection institutions as a "repurposing"[49] of the three courts. More recently, he has described their turn towards environmental protection as the "second repurposing" of the courts; I return to this subject of "repurposing" in the coming sections.

The broad academic research on RECs and their courts is quite significant. However, Kleis aptly points out that the scholarship on regional economic communities in sub-Saharan Africa:

> have attracted researchers' interest but mostly from a political, economic or sociological background. Most of the legal contributions concentrate on single judgements or on certain fields such as human rights, while none of them exclusively focus on an examination of the Courts' jurisprudence and their environment.[50]

There has thus been significant research on the ECOWAS Court,[51] the SADCT,[52] and the EACJ.[53] However, as Kleis points out, there is little scholarship on the jurisprudence of the courts in their

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Murungi & Jacqui Gallinetti, *The Role of Sub-regional Courts in the African Human Rights System, (2010)* 7 INT'L J. HUM. RTS. 119.

[49] *Ibid*. See also, James Gathii, "The Under-appreciated Jurisprudence of Africa's Regional Trade Judiciaries*",* (2010) 12 OR. Rev. Int't L. 245. In his more recent work, he describes the recent turn toward "environmentalism" in Africa's courts as their "second repurposing". See Gathii, "Saving the Serengeti", *supra* note 5.

[50] Jörg Kleis, *supra* note 9.

[51] Karen J Alter, Lawrence R Helfer & Jaqueline R McAllister, "A New International Human Rights Court for West Africa: The Ecowas Community Court of Justice" (2013) 107 Am J Int'l L 737–779. Nwogu, N., "Regional Integration as an Instrument of Human Rights: Reconceptualizing ECOWAS" (2007) 6 *Journal of Human Rights* 345.

[52] Gino J Naldi & Konstantinos D Magliveras, "The New SADC Tribunal: Or the Emasculation of an International Tribunal" (2016) 63:2 Netherlands International Law Review 133; Karen J Alter, James T Gathii & Laurence R Helfer, "Backlash against International Courts in West, East and Southern Africa: Causes and Consequences: Table 1": (2016) 27:2 European Journal of International Law 293; Laurie Nathan, "The Disbanding of the SADC Tribunal: A Cautionary Tale" (2013) 35 Hum Rts Q 870. Ebobrah, S., and Nkhata, M., "Is the SADC Tribunal under judicial siege in Zimbabwe? Reflections on *Etheredge v Minister of State for National Security Responsible for Lands, Land Reform and Resettlement and Another*" (2010) 43 *The Comparative and International Law Journal of Southern Africa* 81

[53] Gathii, "Mission Creep or a Search for Relevance", *supra* note 37; James Thuo Gathii, "Variation in the Use of Subregional Integration Courts between Business and Human Rights Actors: The Case of the East African Court of Justice" (2016) 79 Law & Contemp Probs 37–62. Lamin, A.R., "African Sub-regional Human Rights Courts: the ECOWAS Court of Justice, the SADC Tribunal and the EAC Court of Justice in Comparative Perspective", in Akokpari, J. & Zimbler, D.S., *Africa's Human Rights Architecture* (Fanele, 2008) 233. Ebobrah, S., "Human Rights Developments in Sub-Regional Courts in Africa during 2008" (2009) 9 *African Human Rights Law Journal* 312. Ebobrah, S., "Human Rights Developments in African Sub-Regional Economic Communities during 2009" (2010) 10 *African Human Rights Law Journal* 233. Ebobrah, S., "Human rights developments in African sub-regional economic communities during 2010" (2011) 11 *African Human Rights Law Journal* 216; Alter, Helfer & McAllister, "A New

"environments". By understanding "environment" as context, this dissertation extends Kleis' scholarship, interrogating the interactions, conditions, and actors that produce increased or decreased capacity for international courts to advance environmental protection and socio-economic justice in Africa. Thus, the dissertation is concerned with demonstrating the "environment" within which increased or decreased socio-economic justice and environmental protection are advocated for and produced.

My literature review reveals that there are essentially two main strands of scholarship on regional communities and REC courts in Africa. The first strand of scholarship focuses on the economic aspects of regional integration and demonstrates interest in the courts essentially as instruments of integration.[54] The second strand of scholarship focuses more squarely on the jurisprudence of the three courts, though mostly concerned with the human rights jurisprudence of the courts.[55] This dissertation sits at the intersection of both streams of scholarship, demonstrating the utility of the scholarship on regional integration to illuminating understandings of the contexts of REC courts and demonstrating how such contexts implicate not only the human rights jurisprudence of the REC courts but their potential to advance environmental protection and socio-economic justice.

1.3.1.2. Activists and the Creation of ICs

In addition to being concerned with REC courts, this research is also concerned with the relationship among activists, the REC courts, and the states. I am particularly interested in

International Human Rights Court for West Africa", *supra* note 50; Jörg Kleis, *supra* note 9; Brett, *supra* note 4. Oppong, *supra* note 13; Rudahindwa, *supra* note 11.

[54] Oppong, *supra* note 13; Gathii, *supra* note 12; Jörg Kleis, *supra* note 9; Rudahindwa, *supra* note 11.

[55] Alter, Helfer & McAllister, "A New International Human Rights Court for West Africa", *supra* note 50; A O Enabulele, "Reflections on the ECOWAS Community Court Protocol and the Constitutions of Member States" (2010) 12 Int'l Comm L Rev 111–138; Solomon T Ebobrah, "Human rights developments in African sub-regional economic communities during 2010" (2010) AFRICAN HUMAN RIGHTS LAW JOURNAL 35.

problematizing state-centric theories for understanding the creation and development of ICs, particularly African ICs. The literature on activism as it relates to international courts and states is well represented in international relations and political science scholarship. A bulk of the literature that studies the relationship between states, activists, and courts, accounts for the influence of activism to normative change in domestic and international planes[56] or studies the utility of international avenues (e.g. REC courts) to activists in domestic and international contexts.[57]

This research contributes to the existing scholarship on activism in international relations by mapping the under-analyzed aspects of the relationship of activism to international courts and states, specifically, the role of activism in the creation, sustenance and resurrection of REC courts.[58] It advances a role for activists as *co-creators*, *sustainers*, and *instruments of resurrection* for REC courts, by accounting for and demonstrating their roles in the development, maintenance and attempts at resurrecting the jurisdiction of African ICs.

The dissertation attempts to account for the relationship of activism to REC courts, demonstrating how understanding the creation and sustenance of REC courts through activism reveals more than realist or positivist[59] theoretical accounts which focus squarely on states as creators (or disposers) of REC courts and are thus insufficient to account for REC courts in Africa.[60] (These ideas are

[56] Martha Finnemore & Kathryn Sikkink, "International Norm Dynamics and Political Change" (1998) 52:4 International Organization 887–917.
[57] Kathryn Sikkink, "Patterns of Dynamic Multilevel Governance and the Insider-Outsider Coalition" in Transnational Protest and Global Activism, Donatella della Porta & Sidney Tarrow, eds. (Lanham, MD: Rowman & Littlefield Publishers, 2004).Obiora Chinedu Okafor, *The African Human Rights System, Activist Forces and International Institutions* (Cambridge University Press, 2007). Thomas Risse-Kappen et al, *The Power of Human Rights: International Norms and Domestic Change* (Cambridge University Press, 1999); Thomas Risse, Stephen C Ropp & Kathryn Sikkink, eds, *The Persistent Power of Human Rights: From Commitment to Compliance* (Cambridge: Cambridge University Press, 2013).
[58] This dissertation's engagement with the role activists is focused on their relationship to states and African ICs. It does not assume that activists are always progressive or well-intentioned.
[59] See Okafor, *supra* note 55 at 56 on realist and positivist accounts of the effectiveness of ICs.
[60] Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge University Press, 2003).

developed more fully in the third chapter of this work.) This scholarship on theoretical approaches to the study of international institutions is particularly significant to this dissertation as it theorizes different understandings of how and why international institutions exist. The dissertation relies on constructivist theoretical models that emphasize the significance of "ideas, values, knowledge, and norms, as well as the various roles that these factors play in the constitution of interests and identities of state actors".[61] It attempts to move away from overly state-centric models of understanding the creation of these REC courts by demonstrating the significance of context, and the interactions between states, activists, regional communities and the courts themselves which produces, sustains, or resurrects these institutions.

1.3.1.3. States and IC Creation

Additionally, the study is concerned with the more obvious relationship between states and REC courts, as creators of REC courts via international treaties. What is particularly interesting about the relationship of states to REC courts is the fact that since these REC courts have supranational jurisdiction, their decisions thus traverse state sovereignty and are formally binding on states. The creation and existence of supranational courts has generated significant debate, ranging from rationalist[62] to reflectivist[63] scholarship on the significance of international institutions (and

[61] Okafor, *supra* note 55 at 26.
[62] See A. Hasenclever, P. Mayer, and V. Rittberger, *Theories of International Regimes* (Cambridge University Press: Cambridge) 1997
[63] Robert Keohane, "International Institutions: Two Approaches" (1988) 32 International Studies Quarterly 379.

courts),[64] informing a whole spectrum of scholarship ranging from critics,[65] to skeptics,[66] to advocates,[67] of international courts.

Questions relating to the creation and existence of international courts have tended to include why states create these institutions,[68] whether they are effective or not,[69] the enforcement or lack of decisions of international courts,[70] backlash against international courts by states,[71] and influence

[64] See Okafor, *supra* note 55. Providing an extensive mapping of the various "schools of thought" on the conceptions of international institutions.
[65] See John Mearsheimer, "The False Promise of International Institutions", 19 INT'L Security 5 (1994). Earlier proponents of this scholarship include, Henry Morgenthau, "Positivism, Functionalism, and International Law" (1940) 34 American Journal of International law 260; George Kennan, *American Diplomacy* (University of Chicago Press: Chicago) 1984; and Henry Kissinger, *Diplomacy* (Simon and Shuster: New York) 1994.
[66] Posner, *supra* note 1; Eric A Posner & John C Yoo, "Judicial Independence in International Tribunals" (2005) 93 Cal L Rev 1–74.
[67] Alter, Helfer & McAllister, "A New International Human Rights Court for West Africa", *supra* note 50; Laurence R Helfer & Anne-Marie Slaughter, "Toward a Theory of Effective Supranational Adjudication" (1997) 107 Yale LJ 273–392; Laurence R Helfer & Anne-Marie Slaughter, "Why States Create International Tribunals: A Response to Professors Posner and Yoo Review Essay" (2005) 93 Cal L Rev 899–956; Cesare Romano, Karen J Alter & Yuval Shany, *The Oxford Handbook of International Adjudication*, wal har/ch edition ed (Oxford, United Kingdom ; New York, NY: Oxford University Press, 2014).
[68] Sands, *supra* note 40.
[69] *See* James Alexander, "The International Criminal Court and the Prevention of Atrocities: Predicting the Court's Impact", 54 VILL. L. REV. 1 (2009); Elena A. Baylis, "Reassessing the Role of International Criminal Law: Rebuilding National Courts Through Transnational Networks," 50 B.C. L. REV. 1 (2009); Juscelino F. Colares, "A Theory of WTO Adjudication: From Empirical Analysis to Biased Rule Development," 42 VAND. J. TRANSNAT'L L. 383 (2009); Laurence Helfer, Karen Alter & Florencia Guerzovich, "Islands of Effective International Adjudication Constructing an Intellectual Property Rule of Law in the Andean Community," 103 AJIL 1 (2009); Andrew T. Guzman, "International Tribunals: A Rational Choice Analysis," 157 U. PA. L. REV. 171 (2008); Donald McRae, "Measuring the Effectiveness of the WTO Dispute Settlement System" 3ASIAN J.WTO & INT'L HEALTH L. & POL'Y 1 (2008); Mike Burstein, "The Will to Enforce: An Examination of the Political Constraints upon a Regional Court of Human Rights," 24 BERKELEY J. INT'L L. 423 (2006); Leah Granger, "Explaining the Broad-Based Support for WTO Adjudication," 24 BERKELEYJ. INT'L L. 521 (2006); Julian Ku & Jide Nzelibe, "Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?" 8, 4 WASH. U. L. REV. 777 (2006); Helfer & Slaughter, *supra* note 66; Posner & Yoo, *supra* note 65; Yuval Shany, "Assessing the Effectiveness of International Courts: A Goal-Based Approach" (2012) 106 Am J Int'l L 225–270; Yuval Shany, *A Goal-Based Approach to Effectiveness Analysis* (Oxford University Press, 2014).
[70] William Burke-White, "A Community of Courts: Toward a System of International Criminal Law Enforcement", 24 MICH. J. INT'L L. 1 (2002); Abebe, *supra* note 18.
[71] Alter, Gathii & Helfer, "Backlash against International Courts in West, East and Southern Africa", *supra* note 51; Mikael Rask Madsen, Pola Cebulak & Micha Wiebusch, "Backlash against international courts: explaining the forms and patterns of resistance to international courts" (2018) 14:2 International Journal of Law in Context 197–220. Tom Daly and Micha Wiebusch , "The African Court on Human and Peoples' Rights: Mapping Resistance Against a Young Court" *International Journal for Law in Context* 14, 102–121 (2018).

of decisions on international courts on domestic policies (or politics) and state behaviour.[72] There is thus extensive scholarship studying the relationship of states to international courts.[73]

This dissertation thus builds on existing scholarship relating to state relationships to international courts. Quite significantly however, the dissertation is interested in challenging overly state-centric theories for explaining the development (or regression) of international courts. While acknowledging the role of states in the development of these institutions, this dissertation attempts to highlight and exemplify the significance of activism, norms and socio-political context in the development or otherwise of these institutions. The second and third chapters of this work interrogate the significance of regional integration bodies, local activism, and regional politics in influencing states' behaviour towards REC courts.

[72] See Kathryn Sikkink, and Carrie Booth Walling. "The impact of human rights trials in Latin America." *Journal of peace research* 44, no. 4 (2007): 427- 445. James D. Meernik, Angela Nichols, and Kimi L. King. "The impact of international tribunals and domestic trials on peace and human rights after civil war." *International Studies Perspectives* 11, no. 4 (2010): 309-334.

[73] There is a body of scholarship that pays particular attention the relationship between states and norm development, especially the development of human rights norms. International relations theorists such as Finnemore and Sikkink, have theorized the significance of activists to normative change within international politics. These scholars describe states are "norm leaders" and theorize the socialization of these states to new norms suggesting that states accept new norms for a number of reasons including: pressure for conformity, desire to enhance international legitimation, and perhaps a desire for states to enhance their self-esteem. See Martha Finnemore & Kathryn Sikkink, "International Norm Dynamics and Political Change" (1998) 52:4 Int Organ 887. Other scholars like Goodman and Jinks describe the process of state socialization to new norms, particularly human rights norms. They argue that there are three specific mechanisms for influencing state practice: material inducement, persuasion, and acculturation. See Ryan Goodman, & Derek Jinks, *Rethinking State Socialization and International Human Rights Law* (Oxford University Press 2013). While this body of literature is useful for understanding the relationship of states to norm development, these state-to-state relations/influence of other states on state practice of human right, are not central to this dissertation's research question. The dissertation is interested in clusters of states, specifically the states which form part of regional economic communities, and so create these international courts as parts of the regional economic communities to which they belong.

1.1. 2. International Judicial Environmental Protection and Environmentalism of the Postcolonial State

Finally, the dissertation engages a second more disparate body of literature relating to the significance of environmentalism to Africa and Africa's peoples, and the significance of international judicial environmental protection by African REC courts.

Firstly, the literature on judicial environmental protection has typically involved debates around the prudence of using international courts to resolve environmental disputes, particularly between states. These debates involve scholars arguing the need for "cooperation rather than confrontation"[74] with others arguing not only for the need to adjudicate international environmental disputes, but also for the need for the creation of a specific court to adjudicate environmental disputes.[75] Scholars such as Ellen Hey and Robert Jennings have argued that the creation of an international court for the environment would lead to a further proliferation of international courts and fragmentation of international law and that the existing international courts are fully capable of implementing international environmental law.[76]

In its review of the *Serengeti case*, this dissertation demonstrates that existing international courts are indeed capable of implementing international environmental law. It undertakes an empirical analysis of the significance of international adjudication of environmental protection using this case law and case study from African RECs. This view is supported by scholars like James Gathii, who in reviewing the decisions of African international courts on environmental protection, argues

[74] Tim Stephens, *International Courts and Environmental Protection* (Cambridge University Press, 2009).
[75] See Alfred Rest, "Enhanced Implementation of the Biological Diversity Convention by Judicial Control," 29 Environmental Policy and Law 1999, pp. 32-42; Alfred Rest, "The Indispensability of an International Environmental Court," 7 RECIEL 1998, pp. 63-67; Amedeo Postiglione, *The Global Environmental Crisis: The Need for an International Court of Environment* (1996)
[76] *Ibid*.

that African ICs, "have embraced the principle of systemic integration, promoting coherence within a fragmented system on international law rules."[77] He describes the judicial environmental protection of Africa's ICs as a "move to environmentalism" and a "second repurposing" of the courts who were first repurposed when they moved from a strictly regional integration mandate to a human rights mandate, and more recently, to an environmental protection mandate.

Secondly, the research engages scholarship that derides international environmental law as being "undemocratic"[78]. Scholars argue that the nature of international environmental law reflects concerns of the global North which are often quite different from those of the South.[79] Mickelson has argued that:

> a great deal of attention has been paid to the South. However, **there is a difference between paying attention and paying heed**. Much of the attention seems to have been focused on the question of how the South might be brought into environmental regimes, as opposed to how international environmental law and policy might be conceptualized in order to represent an inclusive framework that represents the interests and perspectives of the South and North alike.[80]

These scholars argue that this "undemocratic nature" of international environmental law results from a power imbalance in the negotiating powers between the countries in the North and those in the South, the power differentials resulting in a definition of environmentalism that reflects the views of the more powerful group – the North.[81] In the dissertation, I demonstrate that this dynamic, between more powerful groups and the less powerful groups, replicates itself within states in the global South, often resulting in differences in how the states conceive

[77] Gathii, "Saving the Serengeti", *supra* note 5.
[78] Obiora, *supra* note 36.
[79] See also, Ruchi Anand, "International Environmental Justice: A North-South Dimension" (2002) International Journal of Politics and Ethics
[80] Mickelson, *supra* note 29 at 60.
[81] *Ibid*.

environmentalism and the way local populations conceive environmentalism. I argue that these varying conceptions lend themselves to adjudication, and sometimes international adjudication. This is especially so because these variations in the conceptions of environmentalism often result in state-sanctioned rights violations, dispossession, and environmental pollution or degradation. The dissertation reviews instances of state-led or state-sanctioned environmental pollution, land dispossession, and environmental degradation, how these demonstrate the utility of ICs to environmental protection and socio-economic justice for local populations.

Ultimately, environmental protection and socio-economic justice are much needed on the African continent for a number of reasons, including the continent's significant disadvantage when it comes to climate change, climate change adaptation and resilience;[82] neoliberal development policies that often put development projects at odds with needs of local populations; and the deep interconnectedness of environmental protection issues to socio-economic issues especially in the global South. These issues are particularly pertinent to people on the African continent because a) environmental and socio-economic problems tend to affect the poor and people in the margins

[82] The immediacy of climate change also presents an urgent interest in environmental protection in Africa. Over the course of the last decade, scholars and experts have acknowledged the increasing relevance of climate change particularly for Africa. African countries have borne a disproportionate impact of the consequences of climate change, exacerbated by underdevelopment and high levels of poverty, citing the continent's "limited adaptability" and "changing, and mostly deteriorating, opportunities." In its most recent report, the United Nations Intergovernmental Panel on Climate Change (IPCC) reported evidence of increased warming over land regions in Africa, which is consistent with climate change. The report illustrated the significant climate change-induced risks to the African continent which include strain on water resources and availability, food security, a multiplication of already existing challenges on the continent including access to safe water, sanitation, healthcare and education, as well as human security. The report concludes "in a 2C world…even under high levels of adaptation, there could be very high levels of risk for Africa. At a global mean temperature increase of 4C, risks for Africa's security are assessed as very high with limited potential for risk reduction through adaptation." See Michael Boko etal, "Africa" in Susan Solomon eds., *Climate change 2007: The Physical Science Basis: Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge: New York: Cambridge University Press, 2007) 433-467. See also Intergovernmental Panel on Climate Change (IPCC), Third Assessment Report, Working Group 2, Impacts, Adaptations and Vulnerability, Executive Summary, online: IPCC https://www.ipcc.ch/ipccreports/tar/wg2/

more significantly and b) a vast majority of African people are poor and so vulnerable to environmental and socio-economic justice problems.

This dissertation is thus in line with scholars like Obiora Okafor and Okechukwu Effoduh who have sought to demonstrate the utility of African ICs to the poor and subalterns in Africa,[83] and also the scholarship of prominent Africanists such as Mahmood Mamdani, who urge scholars to understand the postcolonial state as more than just a vestige of colonialism, but as an instrument through which the violence of colonialism is "reproduced" in the postcolonial state.[84] In line with that scholarship, this dissertation attempts to demonstrate the ways in which, local populations and activists in Africa are often in pursuit of environmental protection and socio-economic justice, and how very often the states are who ought to be responsible for providing these protections are instead responsible for the deprivations.

1.4. The Dissertation's Contribution to the Literature

So far, the discussions in this introductory chapter have identified the dissertation's research interest while situating the dissertation within the existing conversations in the literature. As discussed while mapping the literature on RECs and their courts (Section 1. 3.1.1), much of the literature that currently exists on the three courts have tended to focus on the contributions of these courts to human rights protection or regional integration, with Gathii's more recent scholarship

[83] Obiora Okafor, and Okechukwu Effoduh, "The ECOWAS Court as a (Promising) Resource for Pro-Poor Activist Forces: Sovereign Hurdles, Brainy Relays and 'Flipped Strategic Social Constructivism'" in James Thuo Gathii ed., *The Performance of Africa's International Courts: Using International Litigation for Political, Legal, and Social Change*, (Oxford University Press, 2020).

[84] Mahmood Mamdani, *Making Sense of Political Violence in Post-colonial Africa* (2003). See also Mahmood Mamdani, "Beyond Settler and Native as Political Identities: Overcoming the Political Legacy of Colonialism" (2001) 43:4 Comparative Studies in Society and History 651–664.

turning attention to the contributions of (two of the three) courts under study here to environmental protection.

As seen in that section, earlier work on the three courts had captured and accounted at least in part for their contributions to human rights protection in the regions. Gathii had described the three ICs as having been "repurposed" from being regional integration courts to being human rights courts.[85] Subsequently, when the courts started deciding environmental protection cases, Gathii described this as the "second repurposing" of African ICs, demonstrating their "move towards environmentalism".[86] He argues that these decisions "signal the embryonic stages of using courts to enforce international environmental legal commitments in Africa. *This may have lessons for other parts of the world*."[87] (emphasis added)

However, as discussed in the earlier sections of this chapter, only two of the three courts originally described as repurposed have remained repurposed, specifically, the ECOWAS Court and the EACJ. The SADCT not only failed to achieve a "second repurposing", it in fact regressed to its original form and is now just a regional integration court. My dissertation is thus interested in interrogating the factors/conditions that facilitate the transition of African ICs from their original mandates as regional integration courts to human rights or environmental protection courts, and conversely, what factors facilitate a regression back to their original mandate. I proceed from the premise that REC courts are only useful to activists when they have private access jurisdiction, which allows activists and private actors to access them, and so can perform functions beyond their regional integration mandate. In this sense, my dissertation questions the conditions that allow for the expansion of REC court's mandates or produce the conditions for the regression of the said

[85] Gathii, "Mission Creep or a Search for Relevance", *supra* note 37.
[86] Gathii, "Saving the Serengeti", *supra* note 5.
[87] *Ibid*.

mandates. The dissertation anticipates that specific kinds of interactions between states, activists, and the ICs themselves provide the conditions that either support or hinder the development of the mandates and reach of African ICs and so interrogate these relationships towards illuminating the said conditions. If the contributions of African ICs to environmentalism are indeed going to have "lessons for other parts of the world", it is useful to understand the conditions that support (or hinder) their capacities of these courts to contribute to environmentalism, and how effective are these institutions in carrying out same.

1.5. Methodological Approach of Study

The dissertation adopts a law and politics, as well as, law and society methodological and theoretical frame that moves *beyond* an understanding of ICs as political institutions to include an understanding of ICs as social institutions as well.[88] This Weberian sociological approach contemplates the study of ICs by interrogating a "nexus consisting of law, politics, *and* society",[89] towards making ICs "intelligible as societal institutions".[90] The study is thus well-suited to socio-legal methodology. Leading scholars in socio-legal methods describe socio-legal methods as a study of legal systems that constructs "a theoretical understanding" of a "legal system in terms of the wider structure".[91] Scholars thus argue that socio-legal scholarship is not limited to just engagement with sociology or social sciences but represents "an interface with the context within which law exists".[92] Given its interest in international courts, their relationship with two other

[88] Mikael Rask Madsen, "Sociological Approaches to International Courts" (2013) The Oxford Handbook of International Adjudication, online: <https://www.oxfordhandbooks.com/view/10.1093/law/9780199660681.001.0001/law-9780199660681-e-18>.
[89] *Ibid*.
[90] *Ibid*.
[91] Collin M. Campbell and Paul Wiles, "The Study of Law in Society in Britain" 10 Law and Society Review 553 (1976)
[92] Sally Wheeler, and P. A. Thomas, "Socio-legal Studies" in David Hayton (eds), *Law's Future(s): British Legal Developments in the 21st Century* (Oxford: Hart Publishing) 2002

actors, and how that implicates environmental protection and socio-economic justice, this dissertation is well served by socio-legal methodology.[93]

In this sense, the methodology of the dissertation included a cross-disciplinary analysis, which drew on literature in international law, political science, sociology of law, international relations, and history. The doctrinal and empirical analysis is heavily informed by social science theories and discourses on international courts and other issues; supplemental primary data collected through semi-structured interviews; diary reflections; review of case law, treaties and other primary sources; and a review of secondary sources.

The underpinning social theory for the analysis in this dissertation is constructivism. The constructivist theoretical frame allows for the adoption of multiple theories toward illuminating the relationship(s) of the three actors and the outcomes of those relationships. Constructivists argue:

> understanding the constitution of things is essential in explaining how they behave and what causes political outcomes…*constitution in this sense is causal, since how things are put together makes possible, or even probable, certain kinds of political behavior and effects*.[94] (emphasis added).

As such, in understanding REC courts and their context, this dissertation attempts an understanding the constitution(s) of the legal regimes in REC courts, essentially between a) the actors that create these legal systems, b) the actors that engage these systems, and c) the conditions under which overlaps exist between both the actors in a) and b) and more significantly, how those conditions create opportunities for increased or decreased environmental protection and socio-economic

[93] Reza Banakar & Max Travers, *Theory and Method in Socio-Legal Research* (Oxford, UNITED KINGDOM: Bloomsbury Publishing, 2005).
[94] Martha Finnemore & Kathryn Sikkink, "Taking Stock: The Constructivist Research Program in International Relations and Comparative Politics" (2001) 4:1 Annual Review of Political Science 391–416.

justice. The dissertation also adopts the social logic theory[95] and the spiral model theory[96] as further analytical tools for analyzing the relationship of the actors. The analyses in the chapters reveal the insufficiency of one single theoretical approach to analyzing the interactions and outcomes of the actors in this research.

The dissertation primarily engages with scholarship that advances theories of international courts more broadly, and REC courts in Africa more specifically. A number of theories exist in relation to why states create ICs, and why litigants use these institutions, these theories include the principal-agent theory,[97] ICs as trustees,[98] Karen Alter's altered politics framework,[99] and Helfer and Slaughter's constrained independence theory.[100] These theories seek to explain why states create international courts (ICs), including seeking to understand why litigants use them.[101] The dissertation thus situates itself within the scholarship on theories on African ICs advanced by scholars like Gathii,[102] Ebobrah,[103] Okafor,[104] Alter[105] and others.

The doctrinal analysis in the dissertation is also supported by semi-structured interviews carried out with 18 participants, including judges and senior officials of the EACJ and the ECOWAS

[95] Martin Shapiro, *Courts: A Comparative and Political Analysis* (University of Chicago Press, 2013).
[96] Risse, Ropp, & Sikkink, *supra* note 56.
[97] See Gathii, "Mission Creep or a Search for Relevance", *supra* note 37. See also Alter, *supra* note 1.
[98] *Ibid* at 283.
[99] Alter, *supra* note 1.
[100] See Laurence R Helfer & Anne-Marie Slaughter, "Why States Create International Tribunals: A Response to Professors Posner and Yoo Review Essay" (2005) 93 Calif Law Rev 899.
[101] See generally Karen J. Alter, Cesare Romano & Yuval Shany eds. *Oxford Handbook of International Adjudication* (Oxford, New York: Oxford University Press 2014); Alter, Karen J. Laurence R. Helfer and Mikael Rask Madsen (eds) *International Court Authority*, International Courts and Tribunals Series (Oxford, New York: Oxford University Press, 2018).
[102] Gathii, "Saving the Serengeti", *supra* note 5; Gathii, "Mission Creep or a Search for Relevance", *supra* note 37.
[103] Solomon Ebobrah, "The ECOWAS Community Court of Justice: A Dual Mandate with Skewed Authority", in Alter, Karen J. Laurence R. Helfer and Mikael Rask Madsen (eds) *International Court Authority*, International Courts and Tribunals Series (Oxford, New York: Oxford University Press, 2018).
[104] See Okafor, *supra* note 55.
[105] Alter, *supra* note 1.

court, as well as a range of activists involved with the EACJ, the ECOWAS Court, and efforts to revive SADCT.[106] Activists interviewed for the research were selected *purposively* rather than randomly, identifying only activists who had engaged the courts or were involved with the courts' activism. Interviews were also carried out with judges and senior officials of the ECOWAS Court and the EACJ. These interviews took place in Arusha, Tanzania, the seat of the EACJ, and in Abuja, Nigeria, the seat of the ECOWAS Court. A limited number of phone interviews were carried out with activists that engaged the SADCT. This is because at the time this research commenced, the Tribunal no longer had supranational jurisdiction and thus had no engagement with activists. However, some phone interviews were carried out with some court staff and activists that had engaged the Tribunal before its jurisdiction was restricted. I acknowledge that purposive sampling, rather than random sampling and the use of snowball method of finding interview participants could produce similar or echoed findings, however, I attempted to mitigate this challenge by ensuring that I always triangulated the information provided by participants against the information provided by other participants who worked in different industries or organizations e.g. triangulating activist accounts against those of court staff. Secondly, the interview data was supplementary to the doctrinal analysis as this was mainly a desk study.

Finally, the research reviews case law from the REC courts, Treaties and Protocols of the Communities and other primary sources that illuminate the relationship between the actors and have implications on human rights, environmental protection, and socio-economic justice. The analysis of these materials offers insights into the means through which the mandates or

[106] Open-ended questions were used to carry out the interviews.

jurisdictions of these courts were developed or restricted, and the specific ways through which the decisions of the courts implicated environmental protection and socio-economic justice.

1.6. Conclusion and Outline of Dissertation

The dissertation is divided into 6 chapters, including the just-concluded introductory chapter. The second chapter reviews regional economic communities not only as the sites where REC courts are established and domiciled, but also as the *arenas* for the interactions between these courts, states, and activists. The chapter excavates historical and contemporary contexts in the three regional integration communities to demonstrate a link between regional integration and development or regression of the mandates of REC courts. It demonstrates how the institution of the REC provides the historical and physical context of the REC court, and how this affects the jurisdiction of the REC court.

The third chapter interrogates the relationship between states and activists in relation to these REC Courts, demonstrating in more granular form, the interactions that determine the jurisdictions of REC courts. The chapter investigates the specific ways in which states, activists, and regional communities play a constituent role in defining and shaping the socio-political contexts within which REC courts exist and how that context determines the capacity of the IC to influence environmental protection and socio-economic justice.

Although the fourth chapter is also concerned with the relationship of REC courts to states and activists, it focuses on the ICs *themselves* in demonstrating how ICs participate in the politics that determine their jurisdiction through concerns relating to gaining or maintaining legitimacy. A legitimacy that is derived from the actors that use the IC, specifically the states and activists. The chapter argues that in addition to the IC's jurisdiction being determined by context, as argued in

the preceding chapters, IC jurisdiction is *also* determined by politics that involves the ICs need to gain or maintain legitimacy. Thus, this chapter engages social theories supported by ethnographic evidence to challenge and demonstrate the complex interactions that underpin the relationship between REC courts and the actors that employ it.

Following the discussions in the previous chapters, the fifth chapter faces more squarely the question of judicial environmental protection and socio-economic justice. It illuminates that the significance of the discussions in the previous chapters, which have sought to demonstrate "how" African ICs have the mandate/jurisdictions that they have and the conditions that have created such. In this chapter, I analyze why that is important for the pursuit of environmental protection and socio-economic justice. It focuses specifically on uncovering *why* the nature of the IC's jurisdictions especially relating to access by private litigants is essential to these courts' abilities to exert influence in the area of environmental protection and socio-economic justice.

The sixth and final chapter concludes with a summary of the arguments made in the dissertation, essentially that understanding the significance of "context" and "logics" of international courts is useful to predicting and understanding the capacity of REC courts and that this capacity determines whether or not these ICs can advance environmental protection and socio-economic justice.

CHAPTER TWO

Regional Economic Integration Communities and their Role in Shaping Regional Courts in Africa

2.0. Introduction

Towards the dissertation's goal of interrogating the factors/conditions that support or hinder the ability of REC courts to advance environmental protection and socio-economic justice in Africa, three of that continent's regional economic courts (REC Courts) have been adopted as case studies. The dissertation as a whole anticipates that the relations and relationships among Regional economic communities (RECs), their member states, activists, and the REC courts themselves help produce the conditions that either support or hinder increased environmental protection and socio-economic justice, and attempts to probe those relationships.

In this chapter, I investigate regional RECs as both actors themselves and the "living" arenas/sites within which the interactions among states, activists, and REC courts occur and subsist. RECs are established by states via treaties; the same treaties often establish REC courts, entrusting these courts with the roles of interpreting the treaties and resolving disputes between the states. These RECs thus become the *site of engagement* for member states, the REC courts, and private actors, as well as the primary medium through which member-states either limit or expand the powers of the courts. These RECs also play a role as discrete actors in these interactions. Toward this end, the chapter analyzes the historical and contemporary relationships of the member states to these RECs in an attempt to demonstrate how these largely intra-REC relationships end up shaping the relevant REC Courts (e.g. by affecting their mandates, jurisdictions, independence, or

effectiveness). The chapter makes the argument that RECs provide the *context* within which REC courts are designed, re-designed, purposed, repurposed, reside and abide, and that this rich context shapes these REC courts in certain ways. Secondly, the chapter explores how these RECs also operationalize the physical structures of these REC courts, determining issues such as budgets, selections of judges, tenure and removal, and such. The chapter argues that these issues administered by the RECs also affect judicial independence and the effectiveness of these REC courts, arguing in this sense that RECs have the capacity to influence IC effectiveness and the independence or lack thereof of these REC courts.

The chapter is divided into three parts; the first part traces the history of these RECs, paying close attention to the relationships that member states have to regional integration in each of the three case studies. This historical analysis attempts to reveal the existence of links between these relationships and the character of the current mandates and jurisdictions of the REC courts. I argue that the historical and contemporary relationships among member states and RECs constitute the *context* and thus, the political community of each of these RECs, which tends to influence the mandate and jurisdiction of the REC courts. The arguments in this section seek to demonstrate a type of reflexive relationship between the capacity of the REC courts and the relationships of member states to the REC – in a sense that REC courts tend to reflect the *pulse* of the political community.

The second part of the chapter demonstrates how the design, framework and rules for the physical operations of the REC courts, which are determined and (more or less) administered within the broader bureaucracy of the RECs influence the independence and effectiveness of the courts. In this section, I discuss how the administration of certain aspects of the REC courts' operations by their RECs can frustrate or foster the operational effectiveness of the REC courts. The next section

engages the claims in the scholarship that direct, even causal links, exist between the political community of an IC (such as an REC) and that IC's effectiveness. It problematizes the links made between political community and IC effectiveness, and in doing so, explores and exposes some of the challenges to measuring, assessing, and defining the effectiveness of international institutions, especially as it relates to African REC courts.

Finally, in the concluding part of the chapter, Part C, the chapter concludes with a summary of the arguments made in the first two parts of the chapter. It concludes that "context," in this case provided by intra-REC conditions and politics, shapes these REC courts in tangible and intangible ways, affecting their independence and operational effectiveness as ICs. As such, the study of the RECs in this chapter lays a foundation for understanding the ways in which these RECs are used by states and activists and how this implicates environmental protection and socio-economic justice.

Part A

2.1. Introduction

A central claim being made by this dissertation is that historical and political contexts within which ICs, such as the REC Courts, were created and operate in, tend to influence the mandates and jurisdictions of these courts in very specific ways. For these REC courts, these historical and political contexts reveal themselves in the history of the broader political organizations (i.e. RECs) and in the nature of the commitments to its regional integration by the member states of such RECs. These histories I argue, manifest in the mandate and jurisdictions of the courts.

To illustrate this argument, the chapter provides an overview of regional integration in Africa and the historical development of the RECs that produced the three REC courts. It highlights previous attempts at integration made by the member states of these RECs, the varying levels of success (or failure) with regards to economic integration, and how those factors influence the formal mandates of the relevant REC courts. Ultimately, REC courts exist within the framework of their RECs, and as such the fate of the courts is closely tied to the fate of the RECs that produced them.

2.2. Background and History of Regional Integration in Africa

The concept of regionalism had enjoyed popularity in postcolonial Africa. Some scholars argue that these formerly colonized African states were keen on integration because they had been severely disadvantaged following colonization and thus sought integration as a means of banding together to lift themselves out of economic and political disadvantage.[1]

Other scholars argue that African states favoured regional integration for more historical and practical reasons. After achieving independence, African leaders had inherited the geo-political postcolonial state from their colonial masters. The postcolonial state had some inherent problems, one of which was that it failed to sufficiently capture the complexities of citizenship and national identity that had ordered pre-colonial life in Africa and had continued to persist even post-colonization.[2] For example, pre-colonial empires such as the Kanem-Borno, Nupe, Ife, Benin, Zimbabwe, Ghana, Mali, Congo, and others had exerted influence over their people linking

[1] Gathii, *supra* note 12.Piet Konings and Henk Meilink, "Regional Economic Integration in Sub-Saharan Africa" in Alex Fernández Jilberto & André Mommen, *Regionalization and globalization in the modern world economy: perspectives on the third world and transitional economies* (Routledge, 1998) at 128. These sentiments are also reflected in the Treaties for a number of regional integration communities, see for example the Preamble to the *Treaty establishing the African Economic Community*, Article 3(b) of the *Treaty establishing the Economic community of Central African States*, Article 4(b) of the *ECOWAS Treaty*.

[2] Munyaradzi F. Murobe. "Globalization and African Renaissance" in Pieter Hendrik Coetzee & A P J Roux, *The African Philosophy Reader* (Psychology Press, 1998),.

allegiances to ethnic districts as opposed to "territory"[3] of the state as defined by the postcolonial state. These circumstances thus created tensions within the citizenry given that their visions of identity and kinship lay within tribes and ethnic districts, which was not often confined within state lines or borders as created by the colonial state. Thus, it was argued that "the postcolonial state has no historical or cultural basis in Africa where the sociological nation is founded on shared traits and the will to live together."[4] Scholars thus argue that African leaders favoured regional integration to remedy the anxieties that arise between expressions of national identity in the pre and postcolonial state. They argue that regional integration was favoured among African leaders to soften borders and offer respite to citizens whose ethnic districts traversed these borders.[5]

A final explanation offered to explain Africa's disposition towards regional integration is "Pan-Africanism".[6] Agitations for independence from colonial rule in Africa had been championed by some of the greatest proponents of Pan-Africanism. Leaders such as Julius Nyerere, Kwame Nkurmah, Thomas Sankara, Haile Selassie, Nnamdi Azikiwe among others had fought for the independence of their countries (as well as other African countries), in part, using Pan-Africanist ideologies that sought the liberation and unification of all peoples of African descent.[7] Upon successfully achieving independence, these African leaders moved to actualize their goal of unifying people of African descent by pursuing regional integration projects. The first attempt at regional integration of the continent was establishing the Organization of African Unity (OAU)[8]

[3] Mwayila Tshiyembe, "Inventing the Multination: Would a United States of Africa work?" *Le Monde Diplomatique* (9) 2000, p. 14.
[4] *Ibid*.
[5] See Wale Are Olaitan, "Towards a Functional African State: Bridging the Gap Between the State and the People", African Journal of international Affairs (2006), p. 61 – 74 at 61.
[6] Gathii, *supra* note 12; Jörg Kleis, *supra* note 9.
[7] Toyin Falola & Kwame Essien, *Pan-Africanism, and the Politics of African Citizenship and Identity* (Routledge, 2013); Jörg Kleis, *supra* note 10.
[8] Now African Union (AU).

in 1963.[9] In creating the OAU, it was decided that "the ultimate objective of African nations is a commonwealth of Free African States, linguistic and other divisions should be subordinated to the overriding demands of African Unity".[10]

However, at least one "external" factor may also help explain the keenness of most African states towards regional integration. External forces such as the end of the cold war supported a rise in neoliberal capitalist ideas that encouraged a global move towards regional economic integration communities, trade liberalization, and economic interdependence.[11] Scholars like Thomas Risse argue that regional cooperation and integration enjoyed popularity following the end of the cold war because global geopolitics had ended, and countries were no longer required to maintain loyalties within ideological lines.[12] Western government and Liberal scholars supported arguments towards free-market economies, and trade liberalization included "the invisible hand", the argument that free markets would regulate themselves through competition, supply and demand, and self-interest.[13] They argued that increased economic relations between countries reduced the chances of war and supported economic growth, thus ensuring world peace. A famous French Liberal, Frederic Bastiat, is often quoted, echoing this sentiment "if goods don't cross borders, soldiers will".[14]

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[9] Rajen Harshe, "Reflections on Organisation of African Unity" (1988) 23:8 Economic and Political Weekly 373–376; Jörg Kleis, *supra* note 9; Falola & Essien, *supra* note 105.
[10] Timothy Murithi, *The African Union: Pan-Africanism, Peacebuilding and Development* (Ashgate Pub., 2005).at 24
[11] See Tanja Borsel, "Theorizing Regionalism: Cooperation, Integration, and Governance" in *The Oxford Handbook of Comparative Regionalism*, Oxford Handbooks (Oxford, New York: Oxford University Press, 2016).
[12] See Thomas Risse, "Explaining Regionalism: Diffusion, Translation, and Adaptation" in *Ibid*.
[13] Adam Smith, A Theory of Moral Sentiments (1776) available online at: https://www.adamsmith.org/the-theory-of-moral-sentiments
[14] Quoted in Johan Norberg, "In Defence of Global Capitalism" in J Timmons Roberts, Amy Bellone Hite & Nitsan Chorev, *The Globalization and Development Reader: Perspectives on Development and Global Change* (John Wiley & Sons, 2014).

Despite the roles played by all of these reasons, it is hard to say with any certainty what *specifically* accounted for Africa states turn to regionalism. However, it is evident that several factors, both internal to the continent and external to it, encouraged the pursuance of regional integration projects by African states – perhaps explaining the proliferation of economic integration communities on the continent. The next section reviews these RECs more closely.

2.3. African Regional Economic Communities (RECs)

There are currently eight (8) different regional economic integration communities (RECs) in Africa, with many African states belonging to more than one REC at a time.[15] These RECs include the Arab Magreb Union (AMU), the Community of Sahel-Saharan States (CEN-SAD), the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC), the Economic Community of Central African States (ECCAS), the Economic Community of West African States (ECOWAS), the Intergovernmental Authority for Development (IGAD), L'Organisation pour l'Harmonisation en Afrique du Droit des Affaires and the Southern African Development Community (SADC).[16] Only four of the eight RECs have established and operationalized judicial bodies, however. CEN-SAD and IGAD did not propose the creation of judicial bodies, while ECCAS and AMU proposed these institutions on paper but are yet to establish them.[17] COMESA, SADC, ECOWAS, and EAC are the only African RECs that have established functioning judicial bodies.[18]

[15] "Regional Economic Communities (RECs) | African Union", online: <https://au.int/en/organs/recs>; Jörg Kleis, *supra* note 9; Gathii, *supra* note 12.
[16] Jörg Kleis, *supra* note 9.at 32
[17] *Ibid*.
[18] *Ibid*.

It is interesting to note that although only four of the REC courts are established and (have at some point at least been) functional, Africa still has the highest number of "new style" international courts (not just REC Courts) than any other continent (at least on paper).[19] These courts are regarded as "new style" because they have compulsory jurisdiction and allow private actors to initiate litigation.[20] These courts are the COMESA Court, the ECOWAS Court, the EAC Court of Justice (EACJ), the Court of Justice of the West African Economic and Monetary Union, the Common Court of Justice and Arbitration of L'Organisation pour l'Harmonisation en Afrique du Droit des Affaires, the Court of Justice of the Common Market for the Eastern and Southern Africa, the Court of Justice of La Commonaute Economique et Monetaire de l'Afrique Central, and the African Court of Human and Peoples' Rights.

Even when the fact that the African Court of Human and Peoples' Rights is not an REC court is taken into account, Africa has almost as many RECs as it has REC courts. This reality has inspired a range of (admittedly still limited) scholarship on the utility, effectiveness, authority, and jurisprudence of these institutions. As discussed in the introductory chapter, this dissertation focuses on three REC courts - the ECOWAS Court, the EACJ, and the SADCT. The next few sections review the backgrounds and histories of these RECs and their relationship to the development of the REC courts.

2.3.1. SADC

The present-day SADC emerged in 1992 from the ashes of a now-defunct South African Development Coordination Conference (SADCC), which was established in 1980 by nine

[19] Brett, *supra* note 4; Alter, *supra* note 1.
[20] Alter, *supra* note 1. At the time of writing her book, The SADC Tribunal (SADCT) was aptly described as a new style court, however, in 2014, the Tribunal lost its jurisdiction to entertain private actors and so no longer fits the definition of "new style" as provided by Alter.

Southern African countries – Angola, Botswana, Swaziland, Tanzania, Zambia, and Zimbabwe.[21] SADCC was Southern Africa's first attempt at regionalism. This Community of Southern African States adopted a distinct approach to regional development; however, favouring economic cooperation rather than economic integration.[22] This "cooperation" strategy was designed to support state-led national development priorities, protect the markets of smaller countries from being flooded by goods from the larger countries, and overall, reduce the dependence of Southern African states on the then Apartheid South Africa.[23]

The economic cooperation strategy was thus articulated as "production coordination" through commissioning and managing projects in major industries and developing infrastructural support.[24] To that end, various projects were commissioned in member-states, and the states were responsible for managing the projects.[25]

The cooperation strategy, however, had a number of shortcomings. Firstly, there was still a high level of dependence on external sources in carrying out the projects due to a "lack of industrial development and export diversification in the region".[26] The heavy external reliance hindered any hope member-states had in developing a collective self-reliance and policy autonomy.[27] Secondly, the SADCC MOU, despite or perhaps because of, its focus on member states as central to its framework, not only failed to establish binding obligations on member states, it also failed to

[21] Rudahindwa, *supra* note 11; Francis A S T Matambalya, *The Impact of Regionalisation Schemes on the Export and Economic Performances of Developing Countries: A Case Study of the Southern African Development Community (SADC)* (Brandes & Apsel, 1995).
[22] Rudahindwa, *supra* note 11.
[23] *Ibid*.
[24] *Ibid*.
[25] *Ibid*.
[26] *Ibid*.
[27] *Ibid*.

establish appropriate coordinating mechanisms for the projects.[28] These challenges eventually led to the demise of the SADCC, and the SADC was established in 1992, abandoning cooperation and moving the region towards an economic *integration* model.

The SADC Treaty took effect on the 17th of August 1992, between Angola, Botswana, Democratic Republic of Congo, Madagascar, Malawi, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.[29] The Treaty formalized the abandonment of the state-led coordination-based regional scheme, favoring neo-liberal approach to regionalism, which centered on trade liberalisation and economic integration. The SADC thus adopted a new institutional framework for the Community that created binding obligations for member states through the Treaty and established organs such as the Organ on Politics, Defence and Security Cooperation, the SADC National Committees, and the SADC Tribunal.[30] These institutions were designed to improve the functioning of the Community and ensure effective implementation of regional policies.[31]

It is important to note that the SADC Tribunal did not exist in the pre-1992 version of this REC; a Tribunal was only established under the 1992 Treaty, with the move towards integration. The Tribunal was thus established, responsible for interpreting and ensuring the application of community law in support of the integration process.[32] Unfortunately, following the Tribunal's decision in *Mike Campbell v. Zimbabwe*,[33] the Tribunal suffered sustained attacks to its jurisdiction

[28] *Ibid*.
[29] Richard Frimpong Oppong, *Legal Aspects of Economic Integration in Africa* (Cambridge University Press, 2011); Jörg Kleis, *supra* note 10.
[30] Rudahindwa, *supra* note 11.
[31] *Ibid*.
[32] *Ibid*.
[33] Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe (2/2007) [2008] SADCT 2 (28 November 2008) online: http://www.saflii.org/sa/cases/SADCT/2008/2.html

by Zimbabwe.[34] Ultimately, Zimbabwe's campaign against the Tribunal enjoyed the support of member states. Consequently, the REC eventually adopted a Protocol that restricted the Tribunal's jurisdiction strictly to matters between states and barred private litigants from appearing before it. Scholars argue that the decision of SADC to limit the jurisdiction of the Tribunal negatively impacts the REC's capacity to effectively deliver on regional integration in the region. Rudahindwa writes:

> …to ensure the smooth evolution of a regional process, a sound regional regulatory framework should not be exclusive, and beyond state actors, it needs to include key stake holders who could either benefit from or be affected by the regional process. By preventing private parties from bringing cases to a regional judicial or quasi-judicial institution, therefore, runs the risk of seriously affecting the regional process, given the crucial role that they are expected to play in the promotion of regional trade.[35]

I argue that in addition to the incendiary nature of the *Campbell* decision (which I explore in greater detail in the coming chapters), the suspension of the Tribunal seems to be in consonance with a political community that historically favoured looser cooperation rather than deeper integration. A more contemporary example that demonstrates this leaning of the member-states of the SADC is the SADC Regional Indicative Strategic Development Plan (RISDP) of 2005, which sets out a five-stage strategy for the Community to achieve regional integration by the year 2020.[36] The Community is yet to complete the second stage of the five-year plan; it is still a free trade area (the first stage) and has not yet transitioned into a customs union (the second stage).[37] Another indicator of the region's inclinations of the Community regarding integration is the *SADC Protocol*

[34] See Alter, Gathii & Helfer, "Backlash against International Courts in West, East and Southern Africa", *supra* note 51; Nathan, "The Disbanding of the SADC Tribunal", *supra* note 51. This will be discussed in greater detail in the coming chapters.
[35] Rudahindwa, *supra* note 11.
[36] "Southern African Development Community :: Regional Indicative Strategic Development Plan (RISDP)", online: <https://www.sadc.int/about-sadc/overview/strategic-pl/regional-indicative-strategic-development-plan/>.
[37] *Ibid*; Jörg Kleis, *supra* note 9.

on Trade established in 1996 but did not come into force until the year 2000.[38] One scholar claims that the delay in the Trade Protocol's entry into force was perhaps the first sign of the region's "lack of preparedness to undertake trade liberalization".[39]

It is only fair to point out, however, that the failure of the SADC to achieve all of its trade liberalization targets is not peculiar to the SADC community; neither the ECOWAS nor the EAC has actually achieved trade liberalization.[40] However, what is peculiar to the SADC is the Community's opposition to a Protocol on the free movement of persons.[41] Out of the three regional communities under study, SADC is still the only Community that does not have and has resisted a Protocol on the free movement of persons.[42] In fact, a draft Protocol on the Free Movement of Persons within SADC was introduced in 1996 but it was replaced by the more restrictive Protocol on the Facilitation of Movement of Persons in 1997.[43] It was argued that "income disparities" among member states created "imbalances in migration flows".[44] In other words, the richer member states such as South Africa for example, were not keen on the idea that citizens from poorer member states could have "free" access to their countries.

Additionally, the SADC is also the only REC to suspend its Tribunal's jurisdiction to hear matters from private litigants and introduce a provision allowing states to withdraw from the jurisdiction of the Tribunal after giving it 12 months' notice.[45] In light of this, I argue that member states'

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[38] Jörg Kleis, *supra* note 9.
[39] John O. Oucho and Jonathan Crush, "Contra Free Trade Movement: South Africa and the SADC Migration Protocols", *Africa Today* 48(3) (2001) 139-158 at 140
[40] See Rudahindwa, *supra* note 11.
[41] Jörg Kleis, *supra* note 9.
[42] *Ibid*.
[43] "SADC - Free Movement of Persons | United Nations Economic Commission for Africa", online: <https://www.uneca.org/pages/sadc-free-movement-persons>.
[44] *Ibid*.
[45] Protocol on the Tribunal in the Southern African Development Community, online at: https://ijrcenter.org/wp-content/uploads/2016/11/New-SADC-Tribunal-Protocol-Signed.pdf, Art. 33, and Art. 50.

history with the REC and their current relatively weak commitments to the regional integration project while not entirely responsible for restricting the SADC Tribunal's jurisdiction *added* to member states' resolve to restrict the jurisdiction of the Tribunal.

In the coming chapters, I also argue that the suspension and eventual demise of the Tribunal's jurisdiction to hear matters from private litigants was even more likely because of the specific and delicate nature of the subject matter of the dispute between Zimbabwe and the Tribunal i.e. land in southern Africa. The issue of land reform is quite fraught throughout southern Africa,[46] and as such, the outrage that Zimbabwe felt following the *Campbell* case resonated with other SADC member states including South Africa, Swaziland, Namibia, and Malawi, as these countries were also navigating their own postcolonial land reform agendas.[47]

As I elaborate in the next chapter, the subject matter of the *Campbell case* did in fact hasten the Tribunal's demise. However, this chapter seeks to demonstrate that *in addition* to the subject matter of the dispute between Zimbabwe and SADC member states, the specific peculiarities of the SADC community i.e. its opposition to a protocol on the free movement of persons, suspension of the Tribunal, along with its history of favoring looser cooperation rather than deeper integration, provide insights into the disposition of SADC member-states towards the regional integration project and its institutions. As such, the analogy of "seed and fertile soil" resonates on two levels in the SADC; it resonates with regards to the subject matter of the *Campbell* case, making member states disposed to suspend the jurisdiction of the Tribunal. On a second level, it resonates with regards to the Community's already ambivalent disposition towards regional integration and

[46] Tendayi Achiume, "The SADC Tribunal: Socio-Political Dissonance and the Authority of International Courts" in *International Court Authority* (New York: Oxford University Press, 2018) at 133.
[47] *Ibid at 134*.

regional integration projects.[48] Ultimately, these antecedents of the SADC had implications for the mandate and jurisdiction of this specific REC court.

2.3.2 ECOWAS

The ECOWAS was established in 1975 with self-reliance, mutual cooperation, and regional integration as its major objectives.[49] The West African countries that came together to form the ECOWAS had in the not so distant past, gained their independence from colonial powers and, as such, were quite wary of any regional organization that could potentially limit or infringe upon their sovereignty. As a result, the ECOWAS member-states adopted an intergovernmental approach that centered national sovereignty and non-interference, rather than an interventionist approach towards trade liberalisation.[50]

As one might expect, the 1975 Treaty and the framework it established had a few shortfalls (culminating in a revised treaty in 1993). One of such shortfalls was an excessive pursuit of the intergovernmental approach.[51] This approach placed an overwhelming amount of control of the affairs of the Community in the hands of member states, and as a result, the Community institutions did not have enough authority or autonomy to carry out their functions effectively.[52] One expression of this problem was seen in the fact that Protocols and Regulations created by the Community lacked binding effect on member states because they required ratification by *all*

[48] See /Nathan, "The Disbanding of the SADC Tribunal", *supra* note 37 at 880-881. He offers compelling reasons why SADC countries resisted an regional entity whose existence would depend on a transfer of their sovereignty – including their long struggles to gain independence, and the absence of "common political values, systems and institutions" in southern Africa, which he argues accounts for the regions diverse political dispensations which vary from authoritarian to democratic.

[49]1975 Treaty of ECOWAS reprinted in XIV *International Legal Materials* (1975) pp. 1200-09 [The 1975 Treaty] Rudahindwa, *supra* note 11.

[50] See Kofi Oteng Kufour, "Law, Power, Politics and Economics: Critical Issues Arising out of the New ECOWAS Treaty" (1994) 6 Afr J Int'l & Comp L 429–448.. Rudahindwa, *supra* note 11.

[51] Rudahindwa, *supra* note 11.

[52] *Ibid*.

member states before they could come into force.[53] Although the 1975 Treaty provided a fairly sophisticated institutional framework for the REC on paper, the institution lacked the direction or impetus to give life to its many laudable projects.[54] This lack of authority eventually undermined the Community's institutions.

Another challenge of the 1975 Treaty was the frustration of the Trade Liberalization Scheme (TLS).[55] This frustration of the TLS resulted from a stalemate between francophone and anglophone countries in the ECOWAS. In order to adopt Free-Trade rules in the ECOWAS, anglophone countries, Nigeria in particular, had sought to impose Community rules of origin requirements goods moving through the ECOWAS region.[56] These rules were designed to prevent industrialized countries from preying on weaker economies by flooding their markets with finished goods thus stifling the industries of these weaker states.[57] However, Francophone countries were heavily dependent on France at the time and therefore voted as a bloc to defeat the Community rules of origin requirements. In response, Anglophone countries opposed the free-trade rules that would have given France access to their markets.[58] The result of this was a stalemate within the ECOWAS regarding regional trade, leaving member-states to focus on their individual industries and exports rather than regional trade.[59]

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[53] *Ibid*.
[54] *Ibid*; Kufour, "Law, Power, Politics and Economics", *supra* note 148.
[55] Kofi Oteng Kufuor, *The Institutional Transformation of the Economic Community of West African States* (Ashgate Publishing, Ltd., 2006) at 28.
[56] *Ibid*; Alter, Helfer & McAllister, "A New International Human Rights Court for West Africa", *supra* note 50.
[57] Kufuor, *supra* note 42; Alter, Helfer & McAllister, "A New International Human Rights Court for West Africa", *supra* note 50.
[58] Kufuor, *supra* note 42; Alter, Helfer & McAllister, "A New International Human Rights Court for West Africa", *supra* note 50.
[59] Kufuor, *supra* note 42; Alter, Helfer & McAllister, "A New International Human Rights Court for West Africa", *supra* note 50.

In July of 1993, a new treaty was adopted for the ECOWAS, seeking to remedy the challenges of the old treaty.[60] The new Treaty sought to move the organization from an intergovernmental organization into a supranational organization. It removed the requirement of ratification by member states for decisions of the Community to become binding and instead established that decisions of the Community would become binding on member-states sixty days after their publication in the Official Journal of the Community.[61] The treaty also established new organs within the Community. It established an ECOWAS Parliament, an Economic and Social Council (ECOSOC) and an ECOWAS Community Court.[62] The new Treaty thus strengthened the regulatory as well as the institutional framework of the ECOWAS.

In 2006, the ECOWAS carried out another significant reform of its regulatory and institutional framework. The Community revamped the ECOWAS Secretariat, converting it into a Commission which had a new organizational structure, and adopted a new legal regime.[63] The existence of the ECOWAS Secretariat was one of the vestiges of the 1975 ECOWAS Treaty. It had been established by the old Treaty to be responsible for servicing and assisting the institutions in the Community, keeping the Community under continuous examination, and submitting reports of the activities of the Community organs of the decision-making bodies of the ECOWAS.[64] The Secretariat thus lacked the requisite authority to implement the decisions of the Community because it was essentially designed as a monitoring and reporting mechanism. As such, in 2006, the Secretariat was restructured into a Commission, providing it with a president, vice-president

[60] Kufour, "Law, Power, Politics and Economics", *supra* note 148.
[61] *Ibid*.
[62] *Ibid*.
[63] ECOWAS New Regime for Community Acts Online: http://www.ecowas.int/ecowas-law/find-legislation/
[64] Kufuor, *supra* note 42. *Article 8 (1)-(2) of the 1975 Treaty*

and several commissioners in charge of different departments working on specific areas.[65] The conversion of the Secretariat to a Commission created an implementing organ for decisions of the highest decision-making body and created a monitoring framework of member-state compliance.[66] The restructuring in 2006 came with the adoption of a new legal regime for the ECOWAS, which translated all Protocols adopted by the decision-making body of the Community to Supplementary Acts, thus adhering such Acts to the ECOWAS treaty and making them immediately binding on member-states.[67]

These changes in the ECOWAS strengthened the institutional and regulatory framework of the Community, however, these impressive changes have not hastened the pace of economic integration in the region. Scholars like Kufuor criticize these changes, claiming that the new framework simply imposed a new legal framework on a non-existent economic base, given that intra-regional trade relations were "infinitesimal".[68] In partial agreement with Kufuor, Rudahindwa writes, "ECOWAS has allowed us to further emphasize the unsuitability of a model of regionalism based solely on market-led economic integration in the African context."[69]

[65] Rudahindwa, *supra* note 11.
[66] Kufuor, *supra* note 42.
[67] *Ibid*; Rudahindwa, *supra* note 11.
[68] Kufour, "Law, Power, Politics and Economics", *supra* note 148; Kufuor, *supra* note 42. Experts caution, however, that official trade statistics within the ECOWAS are "misleading…as they do not reflect the vast informal trade along the border(s)". They argue for example that the informal sector represents up to 50% of the Gross Domestic Product (GDP) of West Africa and up to 90% of employment. As such, while intra-regional trade in West Africa may be captured as "infinitesimal" in official trade statistics (for example Benin reported that trade with Nigeria accounted for only 6% of its exports and 2% of its imports in 2015-17), there is a vast amount of informal trade between the two countries that is not captured in the official statistics. See Stephen Golub Golubski Ahmadou Aly Mbaye, and Christina, "The effects of Nigeria's closed borders on informal trade with Benin", (29 October 2019), online: *Brookings* <https://www.brookings.edu/blog/africa-in-focus/2019/10/29/the-effects-of-nigerias-closed-borders-on-informal-trade-with-benin/>.
[69] Rudahindwa, *supra* note 11.

Ultimately, the ECOWAS has a fairly robust institutional and regulatory framework, modeled after the European Union.[70] However, despite this robust framework, the REC has had very slow progress in relation to regional economic integration. The region has been quite successful in adopting and implementing its Protocol Relating to Free Movement of Persons, Residence, and Establishment;[71] however, it has recorded lukewarm results regarding intra-regional trade and trade liberalisation.[72] The ECOWAS REC has also historically recorded modest success in adopting and implementing its Protocol on Conflict Prevention, Management, Resolution and Peace Keeping,[73] its Protocol on Democracy and Good Governance,[74] and its Protocols on Non-aggression[75] and Mutual Assistance on Defence.[76] These Protocols have been deployed by the Community to discourage military coups in member states, pressure errant African leaders to accept the results of elections, and deployed to seek the resolution of the civil wars in Liberia and Sierra Leone.[77]

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[70] Kufour, "Law, Power, Politics and Economics", *supra* note 148.

[71] *Protocol Relating to Free Movement of Persons, Residence, and Establishment*Protocol of Free Movement of Persons is reprinted in the Protocols annexed to the Treaty of the ECOWAS, *supra* note 45 at 87-95. The Protocol on free movement was an elaboration of *Article 27* of the 1975 Treaty entitling Visa and Residence of Member states as Community citizens.

[72] Article (3) of the Revised Treaty of the ECOWAS stipulates the removal of trade barriers and harmonizations of trade pollicies for the establishment of a free trade area, a Customs Union, a Common Market, and an eventual culmination into a Monetary and Economic Union in West Africa. The region has however been unable to achieve this goal, see Oppong, *supra* note 13; Kufour, "Law, Power, Politics and Economics", *supra* note 148; Rudahindwa, *supra* note 11.

[73] Protocol Relating to the Mechanism for Conflict Prevention, Management Resolution, Peacekeeping and Security

[74] Protocol on Democracy and Good Governance A/SP1/12/01 supplementary to the Protocol Relating to the Mechanism for Conflict Prevention, Management Resolution, Peacekeeping and Security

[75] Protocol on Non-Aggression reprinted in Protocols annexed to the Treaty of ECOWAS, supra note 28 at 81-86. The Protocol was designed to guarantee regional peace and obligated Member states to refrain from the threat or use of force or aggression in their relations with one another and to resolve conflicts in Sierra Leone and Liberia.

[76] Protocol Relating to Mutual Assistance on Defense, reprinted in 3 *Official Journal of the Economic Community of West African States*, (June 1981) at 9-13

[77] Niger, Cote d'Ivoire, and Guinea were suspended under Protocol on Democracy and Good Governance for engaging in military coups, See African Development Bank, Annual Report 2010 in African Development Bank/African Development Fund, "Regional Integration Strategy Paper for West Africa 2011 -2015" (2011) [AFDB RISP] at 3- 11 More recently, the ECOWAS imposed sanctions on Mali after a military coup unseated the President, see "ECOWAS to uphold Mali sanctions until civilian PM appointed", online: <https://www.aljazeera.com/news/2020/9/25/ecowas-to-uphold-mali-sanctions-until-civilian-appointed-

Evidently, the ECOWAS presents mixed results in relation to regional integration. Its robust institutional framework and history of success regarding certain protocols suggest a deep level of commitment to regional integration. However, its sub-optimal (though vastly increased) levels of intra-regional trade and economic integration suggest a lukewarm commitment to economic integration. I argue that the ECOWAS Court's mandate reflects this mixed history of the relationships of its member states with the ECOWAS REC of which it is an integral part. For one, the ECOWAS Court boasts of a strong human rights mandate (and jurisprudence as well), as well as being the only one of the three courts being examined, which has a Protocol[78] granting it jurisdiction to decide human rights cases brought before it by private litigants.[79] However, the ECOWAS court does not have the same mandate and jurisdiction over cases involving economic violations of the treaty, nor does it have a Protocol granting it jurisdiction to hear matters brought forth by private litigants involving economic violations of the ECOWAS Treaty.[80] A case involving the violation of ECOWAS trade rules can only be initiated before the ECOWAS court through a preliminary reference by a national court or by the ECOWAS Commission or a member state.[81] This is particularly curious, especially for a court created as an economic integration court. What then accounts for this unusual nature of the ECOWAS court? This chapter attempts to demonstrate how the jurisdiction of the court not only reflects the pulse of the REC of which it is a part but manifests the historical antecedents of that REC.

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premier>. There was also a similar intervention in The Gambia, following the former President's refusal to leave office after losing the election. The ECOWAS intervened in situation and saw to the inauguration of the Adama Barrow, the candidate who had been declared the winner. See [77] Paul D Williams, "A New African Model of Coercion? Assessing the ECOWAS Mission in The Gambia", online: *IPI Global Observatory* <https://theglobalobservatory.org/2017/03/ecowas-gambia-barrow-jammeh-african-union/>.

[78] Supplementary Protocol A/SP.1/01/05 Amending the Preamble and Articles 1, 2, 9 and 30 of Protocol A/P.1/7/91 Relating to the Community Court of Justice and Article 4 Paragraph 1 of the English Version of the Protocol.

[79] Alter, Helfer & McAllister, "A New International Human Rights Court for West Africa", *supra* note 50.

[80] *Ibid*.

[81] *Ibid* at 735 to 738.

For one, the court benefits from the ECOWAS' robust institutional framework and history of commitment to regional instruments on democracy, the rule of law, and non-aggression. The Protocol on Mutual Assistance on Defence[82] and Non-Aggression[83] had been foundational to the ECOWAS Peacekeeping missions in Liberia and Sierra Leone in the early 90s. The ECOWAS has also used its Protocols on conflict prevention, and democracy and good governance to suspend Guinea, Niger, and Cote d'Ivoire following coups and repression of dissent in the countries.[84]

Member states of the ECOWAS have a history of wielding existing regulatory frameworks in order to enforce governance standards and support democratic governments. One of such Protocols was the 2001 Protocol on Democracy and Good Governance; the Protocol had made several references to human rights and laid a foundation for the human rights mandate of the ECOWAS. The Protocol had included a clause stating the jurisdiction of the ECOWAS Court "shall be reviewed so as to give the Court the power to hear, inter-alia, cases relating to violations of human rights, after all attempts to resolve the matter at the national level have failed." These references, along with the history and experience of the ECOWAS with regional security, democracy, and humanitarian interventions across the region, reflected the sentiments and inclinations of the region and the REC, particularly towards human rights and the rule of law. Thus, it was unsurprising that it was around these sentiments that civil society organizations, officials of the ECOWAS Commission and the ECOWAS Court's staff mobilized to get the ECOWAS court a human right's jurisdiction.

The campaign to grant the ECOWAS Court jurisdiction to entertain cases brought by private litigants with regards to human rights violations was initiated by civil society organizations

[82] Protocol Relating to Mutual Assistance on Defense, reprinted in 3 *Official Journal of the Economic Community of West African States*, (June 1981) at 9-13
[83] Protocol on Non-Aggression reprinted in Protocols annexed to the Treaty of ECOWAS
[84] AFDB RISP, *supra* note 102 at 3.

following the 2004 decision of the court in the *Afolabi Case*.[85] In that case, a Nigerian national who had been trying to import goods from Benin claimed he suffered financial loss when Nigeria closed her borders with Benin. Thus, he argued that Nigeria violated the ECOWAS Protocol on the free movement of goods and persons.[86] The ECOWAS Court dismissed the case citing that under the then Protocol, the court could not entertain cases from private litigants and member states had to initiate proceeding on behalf of their nationals.[87]

The inherent contradictions of having a member state initiate proceedings on behalf of nationals, particularly nationals that were suing the member state, was immediately obvious to the Court, the ECOWAS Secretariat, and civil society actors.[88] The decision in the *Afolabi case* thus provided the impetus for a sustained and successful campaign to amend the Protocol of the court to allow private litigants and then grant the court a human rights jurisdiction.[89] It is thus interesting that the Supplementary Protocol that was birthed following the *Afolabi case* only granted access to private litigants in cases involving human rights violations and not economic violations, given that the *Afolabi case* was a case about an economic violation of the Treaty.[90] It is also interesting that since the adoption of the *Supplementary Protocol* in 2005, there has been significant comment about ECOWAS Court's lack of jurisdiction over economic cases.[91] Yet there is an absence of a similar campaign to expand the jurisdiction for the Court. CSOs, the Court, and the ECOWAS

[85]Afolabi v. Nigeria, Case No. ECW/CCJ/APP/01/03**,** Judgment (Apr. **27,** 2004), *reprinted in* 2004-2009 COMMUNITY COURT OF JUSTICE**,** ECOWAS LAW REPORT 1 (2011). See also Alter, Helfer & McAllister, "A New International Human Rights Court for West Africa", *supra* note 50.
[86] *Ibid*.
[87] *Ibid*.
[88] *Ibid*.
[89] *Ibid*.
[90] See Supplementary Protocol **A/SPI/01/05** Amending the Preamble and Articles **1,** 2, **9** and **30** of Protocol ***(A/P.1/7/91)*** Relating to the Community Court of Justice and Article 4 Paragraph **1** of the English Version of the said Protocol, Jan. **19, 2005**
[91] Alter, Helfer & McAllister, "A New International Human Rights Court for West Africa", *supra* note 50.

Commission seem unmotivated to launch a similar campaign for economic violations. I argue thus that to an extent, a Community court's mandate and jurisdiction regarding human rights and not economic violations reflect the pulse of the region, manifesting member-states' relationships to the political and non-economic aspects of the regional integration project. Thus, the mandate and jurisdiction of the ECOWAS Court reflect this pulse, revealing stronger inclinations towards human rights and democracy rather than economic issues.

Ultimately, the history and antecedents of the ECOWAS suggest a deeper level of convergence with regards to democracy, the rule of law and human rights, suggesting unsurprising support for the Court's influence in human rights. However, the lack of similar history with regards to economic integration contributes to an explanation of the court's incomparable influence in economic cases.

2.3.3. The EAC

The third and final REC we review in this section is the EAC. Much like the other two RECs, the EAC was preceded by a previous regional community that failed, leading to the birth of the existing EAC. The previous EAC was established between Kenya, Uganda, and Tanzania. It had pursued regional economic integration by pursuing trade liberalisation and the establishment of a Common Market. The then EAC treaty created institutions such as the East African Legislative Assembly (EALA), the EAC Authority, and a Secretariat.[92]

However, much like the ECOWAS Treaty of 1975, the EAC ran into problems with implementing its decisions as the decisions of the EAC were not binding, and the institutions within the Community lacked the authority to act independently.[93] Other problems relating to the equitable

[92] Rudahindwa, *supra* note 11; Oppong, *supra* note 13.
[93] Rudahindwa, *supra* note 11.

sharing of benefits of the Community, competition, and strong differences of opinion between the member-states led to the collapse of the community in 1977.[94]

Member states were however open to the possibility of recreating this REC in the future. As such, in 1993, a Permanent Commission for Cooperation was set up to coordinate economic, social, cultural security and political issues.[95] This saw the creation of a Secretariat of the Permanent Tripartite Commission three years later, and in 1997, the three-member states reviewed the progress that had been made by these institutions and approved a plan for the East African Cooperation Development Strategy 1997-2000.[96] This strategy was eventually modelled into a treaty establishing the EAC comprising Kenya, Uganda and Tanzania.[97] Burundi and Rwanda joined the Community in 2007,[98] and South Sudan joined in 2016.[99]

As was more or less the case in the ECOWAS, the EAC treaty was negotiated and signed following the adoption of a four-stage development strategy developed by its permanent commission. As such, the regionalism project of the EAC was driven by a specific strategy based on incremental progress and paired with a time frame for actualization.[100] This incremental process is anchored on two principles, "variable geometry" and "asymmetry". Variable geometry "allows for progression in cooperation - among groups within the Community for wider integration schemes in various fields and at different fields". [101] Asymmetry "addresses variances in the implementation of measures in an integration process for purposes of achieving a common objective." [102] These

[94] *Ibid*.
[95] Jörg Kleis, *supra* note 9.
[96] *Ibid*.
[97] *Ibid*.
[98] *Ibid*.
[99] "EAC Partner States - Republic of South Sudan", online: <https://www.eac.int/eac-partner-states/south-sudan>.
[100] Jörg Kleis, *supra* note 9.
[101] *Article 7(1) of the Treaty of the East African Community*.
[102] *Article 1(1) of the Treaty of the East African Community*.

principles were designed to account for and allay concerns of smaller countries within the Community who may not benefit from a market-driven trade liberalisation scheme.[103]

Scholars like Oppong argue that the EAC has enjoyed relative success with regards to regional integration because of its relatively small size and "the fact that founding members enjoy relatively stable and democratic political structures and the bond that existed between member-states from colonial times".[104] One scholar describes the EAC as having provided "a comprehensive approach to regionalism, which has managed to advance both economic integration and capacity building in Africa".[105] Scholars of RECs in Africa mostly agree that the EAC has had relative with regionalism.[106] Ultimately, this relative success is reflected in the mandate and jurisdiction of the EACJ; I discuss this further in the coming sections.

This relatively small size of EAC, i.e. 5 countries (compared to 15 in the ECOWAS and 16 in the SADC), similar political structures, shared pre-colonial history, and relative success in relation to regional integration, have influenced the character of the REC's court. For one, out of the three REC courts, the EACJ is the only court that adjudicates both economic (trade-related) [107] and human rights cases[108] brought before it by private litigants. Secondly, even in the face of a campaign to "kill the court", launched by Kenya following the Court's decision in the *Anyango case*,[109] the EACJ was still able to retain its jurisdiction to hear matters from private litigants

[103] Jörg Kleis, *supra* note 9.
[104] Oppong, *supra* note 13.
[105] Rudahindwa, *supra* note 11.
[106] *Ibid*; Jörg Kleis, *supra* note 9; Oppong, *supra* note 13; Gathii, *supra* note 12.
[107] See *British American Tobacco (BAT) Ltd Uganda v. Government of Uganda* where the EACJ decided that the government of Uganda violated the East African Community Treaty and the Customs Union and Common Market Protocols by imposing extra excise duty law over imported cigarettes within East Africa.
[108] Gathii, "Mission Creep or a Search for Relevance", *supra* note 37.
[109] *Anyang Nyong'o v. Attorney General of Kenya*, Reference No. 1 of 2006, 27 November 2006, available at http://eacj.huriweb.org/wp-content/uploads/2006/11/EACJ_rulling_on_injunction_ref_ No1_2006.pdf

(unlike the fate suffered by SADCT). The EACJ survived Kenya's campaign to "kill the court" with minor consequences. Member states of the EAC (Uganda and Tanzania at the time) were reluctant to strip the court of its jurisdiction because they "supported the East African integration project and resisted regionalizing Kenya's domestic political squabbles".[110] The result of the Kenya's campaign against the court was the creation of an appellate division for the court, which some authors argue was designed to be filled with conservative judges that would do the bidding of states.[111] My interviews with judges and staff of the court have challenged this claim, interviews reveal that the creation of an appellate division in the EACJ has proven to be advantageous to the court as it offers litigants the option of appeal. One of the judges interviewed during my fieldwork was of the opinion that by the time issues get to appeal "tempers have cooled."[112] I discuss this incident of backlash against the EACJ in greater detail in the third chapter of this work.

Ultimately, the specific nature of the jurisdiction of the EACJ is born out of this character of the EAC as a regional integration community. The EACJ's capacity to decide human rights as well as economic cases; and the court's ability to survive backlash reflect the pulse of the Community and the relationship of member states to the regional integration project in East Africa.

2.4. Historical and Political Relationship of Member states to RECs as Constituting the Context of REC courts

Ultimately, this section seeks to demonstrate how member states' histories with RECs a) constitute the *context*, i.e. the political community of the REC courts and most significantly, b) how that this context influences the mandate or jurisdiction of the REC court. I return to this point about context

[110] Alter, Gathii & Helfer, *supra* note 39 at 302.
[111] *Ibid*.
[112] Interview 2 with Judge of the EACJ, similar sentiments were also echoed in interviews 3, Arusha Tanzania, 4th May 2018.

as political community in Africa's RECs in the coming sections as I seek to demonstrate how this context particularly in the case of Africa has been unaccounted for in the literature, especially as it relates to the relationship between political community and IC effectiveness.

Part B

2.5. Regionalism and the three Courts: On the Question of their Strength and Effectiveness

As I had argued in the introductory part of this chapter, the chapter is interested in analyzing regional economic integration communities (REC) as the arenas within which REC courts are created and operationalized (to some extent). Having argued in the previous section that the RECs as the *context* within which REC courts reside and abide, influence the mandates and jurisdiction of the REC courts; this section seeks to elaborate on how these same RECs also influence the operational effectiveness or strength of these institutions. In this section, I demonstrate how RECs determine the structural designs and the independence, or lack thereof, of these REC courts and ultimately, how those issues influence the operational effectiveness of these courts. The salient point being made in this section is that RECs influence not only the mandate of the courts, as discussed previously, but also the physical design of the courts – which in turn has bearings on judicial independence and operational effectiveness of these institutions.

2.5.1. Structure and Form of REC courts

The three REC courts as regional integration courts have a number of similarities, as well as differences. For one, all three courts were all established by Treaty as principal institutions in their RECs, to ensure adherence to law in the interpretation and application of treaties.[113] The ECOWAS Court and the EACJ were both inaugurated in 2001 and are seated in Abuja, Nigeria and Arusha,

[113] ECOWAS Court Protocol, art. 9(1); EAC Treaty, art. 23; and SADC Treaty, art. 16(1)

Tanzania, respectively. The SADCT, however, was inaugurated a few years later, in 2005 and was seated in Windhoek, Namibia.

The benches of these courts vary in size and composition. The ECOWAS Court consisted of seven judges in the past but now consists of five,[114] the SADCT consists of ten, five of them not being regular members; and the EACJ has a maximum of fifteen members, not more than ten in the First Instance of the Court, and not more than five in the Appellate Division.[115] Judges serve a tenure of four years in the ECOWAS Court, five years at the SADCT, and a maximum of seven years at the EACJ.[116] These tenures are renewable for the SADCT judges; however, they are non-renewable in the case of the EACJ and ECOWAS Court judges.[117] In the ECOWAS Court and the Court of First Instance of the EACJ, a member state may appoint more than one judge, but not more than two.[118] However, in the SADCT and the Appellate Division of the EACJ, a member state may not appoint more than one judge.[119]

Qualifications for appointment to the courts are quite similar; all three courts require that judges possess qualifications for highest judicial offices in their respective home countries and be jurists of recognized competence.[120] The ECOWAS Court requires further that judges be "persons of high

[114] "CCJ Official Website | Membership of the Court", online: <http://prod.courtecowas.org/members-of-the-court/>.
[115] Article 3(2) of the ECOWAS Court Protocol
[116] Article 4(1) of the ECOWAS Court Protocol, Article 6(1) of the SADC Tribunal Protocol, and Article 25(1) of the EAC Treaty.
[117] *Ibid.* note 212.
[118] Although in practice, this has never happened.
[119] Article 3(4) of the ECOWAS Court Protocol, Article 4(1) of the SADC Tribunal Protocol, Article 24(1)(a) and (b) of the EAC Treaty.
[120] Article 3(1) ECOWAS Court Protocol; Article 24(1) EAC Treaty; and Article 3(1) of SADC Tribunal Protocol.

moral character"[121] and have at least twenty years of professional experience, and the EACJ requires "proven integrity, impartiality and independence".[122]

In the ECOWAS Court and the SADCT, judges are appointed via nomination by community institutions and appointment by the highest decision-making body in the Community.[123] In the case of ECOWAS, the Judicial Council of the Community is responsible for the recruitment and discipline of the judges of the court.[124] The Judicial Council shortlists and interviews candidates and recommends successful candidates to the Authority for appointment.[125] This preliminary process is skipped in the case of the EACJ, however, as the Summit (the EAC's highest decision-making body) directly appoints judges based on recommendations of member-states.[126] This process of appointment has sparked comments about the level of independence of judges.

The process of removal of judges of the courts also varies between the three courts. The EAC Treaty provides an extensive procedure for the removal of judges, requiring that upon the recommendation of the Court, the Summit must constitute an independent *ad hoc* tribunal to determine that a judge is guilty of misconduct or has failed to perform requested functions.[127] The EAC Treaty provides conditions under which the *ad hoc* tribunal may suspend a judge, including if the judge is bankrupt or charged with an offence. It also provides conditions under which the suspension can be lifted or revoked. This procedure varies from that of the ECOWAS Court, which provides that a judge may be removed by the Authority of the ECOWAS for misconduct or

[121] Article 3(1) ECOWAS Court Protocol
[122] ; Article 24(1) EAC Treaty
[123] Article 3(4) of the ECOWAS Court Protocol and Article 6(1) of the ECOWAS Court Rules of Procedure; Article 3(1) of the SADCT Protocol, and Articles 4(3) and 4(4) of the SADC Tribunal Protocol.
[124] note 212.
[125] *Ibid*.
[126] Article 24(1) of the EAC Treaty.
[127] Article 26(1)(a) of the EAC Treaty

inability to perform the functions of their office due to infirmity of mind or body.[128] It requires that the Court assess the fitness of the judge in question at a plenary session and make the recommendation of removal to the Authority. Surprisingly, however, the SADC Tribunal Protocol is almost silent on the procedure for removing judges. The Rules of Procedure provide insights for the removal of Registrars, but there is no express provision for judges' removal.[129]

A final issue relating to the structure of the courts is funding. Financial security, much like issues of appointment and removal, implicates the independence of the courts. Under the ECOWAS Court protocol, the remuneration and allowances of the court's judges are determined by the Authority. In the EAC, remuneration of the judges is determined by the Summit, upon the recommendation of the Council of Ministers. Under the SADC Tribunal Protocol, the terms and conditions and remuneration of the court is determined by the Council of Ministers.

Scholars like Oppong have critiqued the current funding system of REC courts.[130] He suggests that a lack of financial independence from the Community, could potentially jeopardize the exercise of judge's duties especially if their salaries are adversely varied by the Community.[131] He argues that in some African countries, judges are constitutionally protected from adverse variations to their conditions of service and REC courts judges should enjoy the same security.[132] He suggests that a separate fund, managed independently, be established to cater for the affairs of REC courts and their judges.[133]

[128] Article 4(7) of the ECOWAS Court Protocol
[129] Rule 19(1) of the SADC Rules of Procedure.
[130] Oppong, *supra* note 13.
[131] *Ibid*.
[132] *Ibid*.
[133] *Ibid*.

Ultimately, these issues of appointment of judges, tenure, removal, and financial independence implicate issues of judicial independence and operational effectiveness of REC courts. In the coming sections, I engage the literature relating to judicial independence and IC effectiveness more generally. I attempt to demonstrate how judicial independence as at least one indicator of an IC's operational effectiveness.

2.6. Independence and Effectiveness of REC courts as International Courts

Independence of REC courts is intricately linked to questions around the effectiveness, utility, and credibility of these institutions. Judicial independence has been cited as a means of assessing the credibility and legitimacy of judicial institutions. Mackenzie and Sands write, "judicial independence is recognized to be a significant factor in maintaining the credibility and legitimacy of international courts and tribunals,"[134] and as the reach of international courts expand, "efforts to evaluate their credibility, legitimacy, and efficacy will likely increase.".[135] The argument is that there is a strong link between judicial independence and the effectiveness of international courts – essentially that a court that establishes its credibility through an independent (or impartial) judiciary is likely to have its judgment's respected and thus be more effective. However, the definition of the term's "independence", and "effectiveness" have been debated significantly in relation to international adjudication. This section thus attempts to engage those debates, especially as they relate to African REC courts.

[134] Ruth Mackenzie and Phillipe Sands. "FOCUS: Emerging Fora for International Litigation (Part 2) - International Courts and Tribunals and the Independence of the International Judge." *Harvard International Law Journal* 44 (2003): 271-287 at 271.
[135] Ruth Mackenzie & Philippe Sands, "International Courts and Tribunals and the Independence of the International Judge Focus: Emerging Fora for International Litigation (Part 2)" (2003) 44 Harv Int'l LJ 271–286.

Judicial independence and impartiality for international courts vary somewhat from how the same concerns present themselves in domestic courts. While issues of impartiality and absence of bias are common traits to seek in judges, whether domestic or international, independence in the case of international judges tends to involve considerations around independence from state influence or nationalist ideals. This raises concerns regarding judicial independence and judicial impartiality.[136] It raises concerns about the independence of the judiciary from state power, a concern that is also found within domestic systems. However, it also presents a second concern that is peculiar to international courts, which is independence from the influence of nation states, and how the delivery of decisions that are contrary to state interests may affect the effectiveness of these institutions. This is particularly significant because parties to international adjudication are often sovereign states, and international adjudicative bodies derive their authority from the consent of parties.

Judicial independence is a significant concern in studying international courts because it a significant marker for assessing effectiveness. Different scholars define and assess independence differently; however, there is an agreement within the scholarship that independence is an indicator (whether positive or negative) of the effectiveness of judicial institutions, especially international judicial institutions. For example, Helfer and Slaughter identify independence as one of thirteen indicators for an effective international judicial institution.[137] In later work, Keohane, Moravcsik and Slaughter identify independence as one of three variables to measure the effectiveness of

[136] Judicial independence though closely linked to judicial impartiality is quite different. Judicial independence refers to rules, conditions and practices that shield the decision-making power of judges and other court officials from external control or interference. While judicial impartiality, refers to an unjustifiable preference or bias, affecting judicial decisions in a manner that is prejudicial to one of the parties to a litigation. In this work, judicial independence is used to refer to both concepts. See Yuval Shany, *A Goal-Based Approach to Effectiveness Analysis* (Oxford University Press, 2014) at 99.
[137] Helfer & Slaughter, *supra* note 66.

tribunals.[138] They define independence as "the extent to which formal legal arrangements ensure that adjudication can be rendered impartially with respect to concrete state interest."[139] Posner and Yoo however define independence differently; they argue that judicial independence relates to whether tribunals are "dependent" in the sense that they are set up by states to resolve a particular dispute, or "independent" in the sense that they are institutionally separate from states, have fixed terms, salary protection, and compulsory rather than consensual jurisdiction.[140] They argue however, that "independence prevents international tribunals from being effective,"[141] connoting a negative correlation between independence and effectiveness.

This view has been challenged by authors Helfer and Slaughter, who argue that independent tribunals are effective institutions, they argue:

> …if independent tribunals were ineffective in the ways that Posner and Yoo assert, we would expect to observe a decline in their number, in their caseloads, and in states' willingness to submit themselves to the tribunals' jurisdiction. Yet, as we demonstrate…the revealed preferences of states in all three areas is strikingly to the contrary.[142]

Mackenzie and Sands outline factors that affect judicial independence, including; procedures for the nomination, selection, and re-election of international judges; the relationship between the international judge and the parties; and the relationship between judicial and political organs.[143] This position is supported by Keohane et al. who argue that modes of selection and tenure are the most important determinants of judicial independence as it protects judges from retaliation from

[138] Robert O Keohane, Andrew Moravcsik & Anne-Marie Slaughter, "Legalized Dispute Resolution: Interstate and Transnational" 33 at 458.
[139] *Ibid at 458*.
[140] Posner & Yoo, *supra* note 65.
[141] *Ibid*.
[142] *Ibid at 910*.
[143] Mackenzie & Sands, *supra* note 88 at 276.

disgruntled governments.[144] However, they acknowledge that the degree of control states have over the material and human resources of the judicial institution can potentially influence judicial discretion.[145] Keohane et. al thus argue that judicial independence is on a continuum, ranging from "pure control by states" where disputes are resolved by "agents of the interested parties" to a continuum where judges are free from "at least 3 categories of institutional constraints: selection and tenure, legal discretion, and control over material and human resources."[146]

These measures raise interesting insights for understanding African REC courts. The three REC courts under study are "independent" because they have compulsory jurisdiction, selection and tenure, and a procedure for removingudges (except in the case of SADC judges). However, their material and human resources are derived from their RECs and, as such, could potentially influence judicial discretion at REC courts. Oppong's argument for establishing a separately managed fund to cater for the affairs of REC courts and their judges are thus quite persuasive. Secondly, it stands to reason that RECs affect or are indeed capable of affecting REC courts independence and effectiveness. For example, suppose the RECs are unable to (or refuse to) fund the courts (or release funding for the courts in a timely manner), the courts are not likely to be able to be effective (in this sense, I understand "effective" as operational, the courts are unable to operate effectively without funding). In a similar vein, if the RECs refuse to or are unable to select judges or replace judges in the event of judges tenures expiring, the courts will likely be unable to sit, thereby frustrating the effectiveness of the institution. In the next chapter, I discuss specific instances where states have attempted to frustrate the effectiveness of the courts by recalling judges and frustrating the procedure for replacing the recalled judge.

[144] Keohane, Moravcsik & Slaughter, *supra* note 92 at 460.
[145] *Ibid*.
[146] *Ibid*.

The argument here is that the structural designs of the REC courts (relating to tenure, selection e.t.c), which are largely created and administered within the RECs, influence the judicial independence of the REC courts which, as demonstrated by the scholarship, is at the very least one of the several factors that impact on IC effectiveness.

2.7. Political Community and IC (Including REC Court) Effectiveness

This section discusses the relationship between the political community and IC (including REC Court) effectiveness. There seems to be agreement within the scholarship that there is a causal, almost direct, link between the character of the political community within which an International Court (and REC Court) exists and the said court's effectiveness. This argument is made specifically in the case of Europe's regional courts and tribunals, which as we had seen earlier are quite similar in design to Africa's REC courts which this research is concerned with.

As the exception to their claim that independent courts cannot be effective, Posner and Yoo argue that, "independent courts can be effective if they exist within a *political community*. *Europe has such a community, the rest of the world does not*".[147] Helfer and Slaughter, although questioning how (or if at all) Posner and Yoo define political community[148], admit that "success" of European ICs is closely linked to specific characteristics of European countries.[149] They write:

> The central question …is whether the success of supranational adjudication in Europe can be translated or transplanted to other regions of the globe. Alleged obstacles are easy to find. *The nations that form the core of the European Union and the Council of Europe are established liberal democracies with strong domestic traditions or rule of law. They also share a common core of social, political, and legal values that European jurists themselves have linked to the effectiveness of the two tribunals. Their hopes for economic integration and their determination to safeguard basic human rights were rooted in the searing*

[147] Posner & Yoo, *supra* note 94 at 55 at 920.
[148] Helfer & Slaughter, "Why States Create International Tribunals", *supra* note 66.
[149] Helfer & Slaughter, *supra* note 66; Helfer & Slaughter, "Why States Create International Tribunals", *supra* note 66.

> *experience of two world wars. These conditions do not hold for the global community of nations; they may well be absent even for geographically linked nations in other regions.*[150] (emphasis added)

As Helfer and Slaughter point out, even though Posner and Yoo argue that the political community in Europe accounts for the effectiveness of the courts, they do not actually define what constitutes this political community. They also argue that it can be inferred that Posner and Yoo perhaps conceive the political community to mean the kind of community of *democratic* states that make up Europe. However, the authors demonstrate the flaws of such reasoning, suggesting that even though European states are democratic, their regime styles vary greatly. They argue that in fact, the Council Europe is:

> a treaty regime with forty-five member-states, including not only Western Europe but also countries such as Russia, Turkey, and Azerbajan, *with highly diverse legal, political and economic traditions and, in some cases, weak democratic traditions and still evolving commitments to the domestic rule of law*.[151] (emphasis added)

Posner and Yoo write further, "*in our view, the degree of political unity is a causal factor*. When states are not unified, only dependent adjudicators can be effective. As states become more unified, greater independence for adjudicators becomes possible". In a final attempt to describe what they mean by "political community", and "political unity", (which they argue is essential for IC effectiveness), they cite Andrew Moravcsik, speaking about enforcement of human rights, "the most effective institutions for international human rights enforcements *rely on prior sociological, ideological and institutional convergence towards common norms*".[152] (emphasis added)

[150] Helfer & Slaughter, *supra* note 91 at 276.
[151] Helfer & Slaughter, *supra* note 102 at 920.
[152] Andrew Moravcsik, "Explaining International Human Rights Regimes:: Liberal Theory and Western Europe" cited in Posner & Yoo, *supra* note 65.

Ultimately, both sets of authors - although they disagree fundamentally about what accounts for an effective IC - agree that the political community/unity/environment within which international courts, particularly regional (including REC) courts, exist, is essential to the effectiveness of the courts. Both sets of authors also agree that this political environment, particularly one with "shared histories", or "prior sociological, ideological and institutional convergence", "hopes for economic integration," either "does not exist outside Europe"[153] or is absent in the rest of the World.[154] As a consequence, both sets of authors insist that the consideration of political community or environment as a predictor of IC effectiveness is useful only when studying Europe or European Courts.

These conclusions are thus quite narrow, because political community or environment, especially as these authors describe it (to include shared histories; geographical location; prior sociological, ideological and institutional convergence; hopes for economic integration; and diversity of domestic regimes with "weak democratic traditions and still evolving commitments to the domestic rule of law"), can easily be found within the African RECs that this research is concerned with. As such, not only can "political community" be found outside of Europe, I argue that it is essential to understanding the capacity and influence of African REC courts. As the authors describe it, the seemingly nebulous idea termed "political community" refers to the historical and political contexts of regional economic communities discussed earlier in the chapter. An understanding of RECs, in their historical-political context, lends itself to predicting and understanding the capacity and mandates of these African REC courts.

[153] Helfer & Slaughter, *supra* note 66.
[154] Posner & Yoo, *supra* note 65.

Unlike Posner and Yoo, and Helfer and Slaughter, this scholarship is deliberate in not making a claim that "political community" is a predictor of IC effectiveness. Instead, the claim is that political community, understood as the *historical and political contexts* of regional integration communities, is a good indicator of the nature of the mandates and jurisdiction of REC courts. As we see in the next section, the question of "effectiveness" and the measures for assessing effectiveness of international courts is quite a complicated question, given that the question of effectiveness often needs to ask, "effective at what?"[155]

2.8. Defining and Assessing the Effectiveness of International Courts

The question of effectiveness, factors that influence effectiveness, and "metrics" for measuring the effectiveness of international courts, have generated significant comment within scholarly circles, inspiring the question: "*effective for what purpose?*".[156] Scholars acknowledge that international courts serve a number of functions, from dispute resolution, to "social control, lawmaking, articulating social and political ideals, protecting individual and minority rights, and securing social change."[157]

There are thus two prevailing streams of scholarship on the effectiveness of international judicial institutions. The first school stream is slightly more dated and tends to centre the compliance or usage rates of international judicial institutions when measuring their effectiveness.[158] Essentially this scholarship argues that higher usage rates of international courts and higher compliance rates with the court's decisions mean heightened effectiveness. This position has been criticized by more

[155] Kirsten Roberts Lyer, "Assessing the Effectiveness of International Courts. By Yuval Shany" (2016) 86:1 British Yearbook of International Law 217–221.
[156] Helfer & Slaughter, *supra* note 66.
[157] *Ibid*.
[158] *Ibid*; Posner & Yoo, *supra* note 65.

recent scholarship in the second stream of scholarship. The criticisms range from problematizing definitions of "compliance", to arguing that the means of assessing and measuring effectiveness must reach "*beyond*, without abandoning, the search for state compliance as the measure of utility".[159] Scholars deride measuring effectiveness merely in terms of "compliance and usage rates" as "crude and intuitive";[160] others argue that using compliance as the only metric to measure the effectiveness of ICs, "minimizes other goals served by litigation."[161]

2.8.1. The Effectiveness of African REC courts

The arguments made in this dissertation are more profoundly influenced by the second stream of scholarship. Evidently, focusing on compliance and usage rates of international courts misses more nuanced contributions of international courts, especially in Africa. Scholarship that advocates the expansion of both definitions and measurement of the effectiveness of international courts is more useful for capturing the contribution of international adjudication that is missed when focusing on compliance and usage rates. Shany articulates this concern quite aptly. In his view:

> …complicated links exist between the effectiveness of international courts, on the one hand and…judgment compliance, usage rates, and impact on state conduct. For instance, judgment-compliance rates may depend as much on the nature of the remedies issued by a court as on the actual or perceived quality of the court's structures or procedures. Thus, a low-aiming court, issuing minimalist remedies, may generate a high level of compliance but have little impact on the state of the world.[162]

These arguments are not only deeply persuasive; my field research also supports them. Interviews with judges and staff of the courts under study, revealed that the vision of these courts of their

[159] Obiora Chinedu Okafor, *The African Human Rights System, Activist Forces and International Institutions*, 1 edition ed (Cambridge: Cambridge University Press, 2007).
[160] Shany, *supra* note 68.
[161] Gathii, "Saving the Serengeti", *supra* note 5.
[162] Shany, *supra* note 90 at 227.

effectiveness or influence, extended beyond their ability to compel compliance.[163] Interviews revealed that the courts saw their roles more expansively, including dispute resolution, fostering diplomatic dispute resolutions between states, establishing rights etc.[164] Interviews with activists that use the courts supported the scholarship that litigants, particularly activists, approach the courts for reasons *beyond* merely establishing a right.[165] Interviews supported the scholarship that activists approach regional courts in Africa, both as an additional avenue to ventilate their claims and as a means of keeping the issue in the public eye.[166] Scholars argue that regional courts in Africa can through their judgments establish a "right" in favour of the activists, but far more importantly, provide impetus and ammunition for activists to promote their cause(s) in the court of public opinion, and as such drive policy, legal, or social change. Thus, the scholarly and empirical evidence suggest the varied ways in which international courts can be effective both in process and outcome, beyond compliance and usage rates.

These arguments illuminate new and compelling ways of understanding and conceiving the influence of international courts. This scholarship is also particularly useful as it responds to critics of regional courts in Africa, who argue that these courts are unable to influence any real change in Africa because they have low "compliance rates", and "institutional, procedural and operational challenges".[167]

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[163] Interviews 3 to 8.
[164] *Ibid*.
[165] Interviews 1, 2, and 9 to 15. See also Gathii, "Saving the Serengeti", *supra* note 5.
[166] *Ibid*. See William Forbath et al,, "Cultural Transformation, Deep Institutional Reform, and ESR Practice: South Africa's Treatment Action Campaign," in Jeremy Perelman and Lucie E. White, *Stones of Hope: How African Activists Reclaim Human Rights to Challenge Global Poverty*, (Stanford University Press: Stanford, 2010); and Douglas NeJaime, "Winning Through Losing,"(2011) 96 Iowa Law Review, 947
[167] Abebe, *supra* note 18.

That said, in studying the effectiveness of international courts, especially African REC courts, it is useful to interrogate the purpose for which the courts are being judged effective or ineffective. A broad-strokes dismissal of the courts as ineffective presumes that an international court can only be effective if its compliance and usage rates are high, which is not the case for African REC courts. Evidently, the ways in which an international court is or can be effective is a complicated question that depends as much on the issues for which it is being judged as effective, as on the end to which the interrogation is being made.

The need for nuance is (as we have seen) aptly captured by Yuval Shany's work, which offers compelling reasoning for adopting alternative measures to assessing IC effectiveness – alternatives to compliance rates, usage rates and influence on state behaviour. His work proposes a *goal-based approach* to understanding IC effectiveness and adopts the *rational system approach* to defining effectiveness as "an action is effective if it accomplishes its specific objective aim".[168] It thus focuses on measuring effectiveness against the "goals" of the institution as set out by the "mandate providers".[169] He admits however that the goal-based approach to assessing IC effectiveness has a narrow focus, which is the goal of the organization and particular constituency, i.e. the mandate providers. Shany's scholarship, however, acknowledges the challenges of adopting his approach, including identifying which goals, or set of goals, to be used as an evaluative standard,[170] issues with goal ambiguity, measuring aspirational goals, vague goals, and the time frame within which the measure the attainment.[171]

[168] Shany, "Assessing the Effectiveness of International Courts", *supra* note 260; Shany, *supra* note 68.
[169] Shany, "Assessing the Effectiveness of International Courts", *supra* note 260; Shany, *supra* note 68.
[170] Shany, *supra* note 109 at 233.
[171] *Ibid at 233 - 236*.

While Shany's approach offers new insights to assessing the effectiveness of international courts, its specific focus on goals as set out by the mandate providers obscures the other contributions of international courts. Beyond the other obscured contributions when adopting Shany's goal-based approach, a more practical challenge to adopting the approach to assessing REC courts is the concept of "runaway courts". The phenomenon of "runaway courts" refers to international courts that participate in judicial lawmaking that expands their jurisdiction often beyond the initial scope set out by the creators of the courts.[172] Shany's scholarship acknowledges that assessing the effectiveness of international courts using "goals" as provided by "mandate providers" runs into practical and conceptual problems in the case of "runaway courts". As a result, creators of the courts either "catch up", and amend the court's protocols at a later date or acquiesce to the court's new self-styled jurisdictions and goals created for themselves.[173] Shany thus acknowledges the challenge of using goals set out by mandate providers to assess effectiveness, conceding that the goals of the courts will be different before and after the mandate providers endorse the new goals as defined by the courts.

This concept of runaway courts is significant to this study because two of the three REC courts this research is concerned with fit the description of runaway courts. For one, the EACJ, despite not having a Protocol granting it jurisdiction over human rights cases, has successfully adjudicated human rights cases by liberally interpreting the provision in the founding Treaty mandating the court to maintain the rule of law in the region. The court has thus interpreted that provision to include jurisdiction over human rights, and the member-states of the EAC has acquiesced to this

[172] See Tom Ginsburg, "'International Judicial Lawmaking" in Stefan Voigt, Max Albert & Dieter Schmidtchen, *International Conflict Resolution* (Mohr Siebeck, 2006). Part of the reasoning around "runaway courts" is that the procedure for amending and expanding the scope of international courts is often so cumbersome and lengthy, that when courts are faced with opportunities to expand their reach through judicial lawmaking, the courts embrace it.
[173] *Ibid*; Shany, *supra* note 113 at 235.

interpretation.[174] In the case of the SADCT, a similar thing happened, albeit with different consequences. In the absence of a Protocol granting the court jurisdiction over human rights cases, the SADCT also liberally interpreted the rule of law provision in the Treaty and thus adjudicated human rights complaints.[175] This liberal interpretation proved fatal to the court as the creators of the court not only failed to endorse the court's jurisdiction; they stripped away the court's jurisdiction to hear matters from private litigants.

As we have seen, a court's self-styled goals can vary from the goals set out by its creators, and it is not always the case that the creators of the courts eventually formally endorse the court's self-styled goals. In such cases, assessing the goals of the court against those set out by the mandate providers offers even more limited utility as the courts may be adjudicating and influencing issues far beyond those set out by the mandate providers. In such instances, a study of the court against the goals set out by the mandate providers will be grossly inadequate to capture the influence of the court within its self-styled goals.

2.9. RECs as Determinants of IC (including REC Court) Structure and Predictors of IC Effectiveness

In this section, I briefly summarize the arguments made in this part of the chapter. RECs, as the institutions within which ICs are operationalized, determine the structural designs of these ICs. As a result, these designs determine the level of dependence or independence of the courts on the RECs (or member states), and this is important because judicial independence is adjudged to be at least one of the measures for assessing an operationally effective institution. Additionally, these RECs can also determine whether these ICs can be operational and so effective in that sense. The

[174] Gathii, "Mission Creep or a Search for Relevance", *supra* note 37.
[175] *Ibid*.

salient point being made in this section is that RECs influence not only the mandate of the courts, as discussed in Part A, but RECs also determine the physical design of the courts – which in turn has bearings on judicial independence and effectiveness of these institutions.

Part C

2.1.0. Conclusion

The discussions in the chapter have attempted to demonstrate how the historical and contemporary contexts of REC formation and development influence the mandate and influence of REC courts. The discussions have sought to demonstrate how the mandates and jurisdictions of these courts reflect, if necessarily in part, the history of member states relationships with, and approaches to, their RECs, and tend to reflect the pulse of the relevant regions. For example, we see how the ECOWAS court's express jurisdiction over human rights was produced in part because of the relevant REC's history and experience with commitment to democracy and regional security.

Having established that historical and contemporary contexts influence the character of these institutions, the second part of the chapter discusses how RECs also determine the structure of the REC courts. The section argues that these structural designs, in turn, influence the dependence or independence of these institutions. They have this effect in part because RECs can be used to foster or frustrate the effective running of their REC courts.

Next, the chapter discusses political community, as discussed in the literature. It argues that scholars have been quite dismissive of African RECs, suggesting that political communities capable of influencing effectiveness do not exist outside Europe. I argue that they do indeed exist outside Europe. However, my argument depends on a particular understanding of political

community and argues that this political community is a useful predictor or indicator of the nature of the mandates and jurisdiction of REC courts (as argued in the previous section). However, this argument is deliberate in not claiming that political community determines IC effectiveness.

Finally, the chapter takes on the scholarship on the measuring or assessing of "effectiveness," demonstrating that compelling arguments exist which illustrate the various shortcomings in the scholarship in relation to "measuring", "assessing", and defining effectiveness. Even the more expansive scholarship like Shany's, when applied to African REC courts focuses on goals of the mandate providers, and not on the varied ways in which these courts could have effect. Additionally, the fieldwork from this research confirms the existence of other ways in which African REC courts can and *do* exert influence beyond compliance rates and also beyond the goals set out by mandate providers. The chapter thus suggests that in the case of regional REC courts, such as the courts under study, the question of the *effectiveness* depends on what they are being adjudged effective for. In the fifth chapter of this dissertation, I return to this question of effectiveness when discussing the effectiveness of these institutions as resources in the hands of activists pursuing environmental protection and socio-economic justice goals.

Ultimately, the discussions in this chapter inform the dissertation's overall goal, which seeks to interrogate the conditions that support or hinder the ability of REC courts to advance environmental protection and socio-economic justice in Afric

CHAPTER THREE

The State-Activist-Judicial Interactions that Produce, Sustain, Deplete, or Resurrect the Mandates and Jurisdictions of Africa's REC Courts: Between Support and Backlash

3.1. Introduction

As discussed in the previous chapters, the goal of the dissertation is to investigate the conditions that support or hinder the ability of REC courts to advance environmental protection and socio-economic justice in Africa. The dissertation hypothesizes that it is the specific character and orientation of the relations and relationships among states, activists, and REC courts that themselves produce the conditions that either support or hinder the efforts of these courts to aid increased environmental protection and socio-economic justice. In this chapter, we review the specific ways in which those interactions produce these conditions.

The arguments in the chapter demonstrate how certain features of REC courts, specifically related to access and/or jurisdiction, are the instruments through which actors pursue environmental protection and socio-economic justice, *and* that these jurisdictional features of the courts are at the same time, the *sites of struggle* for states, activists and REC courts. The discussions in the chapter thus seek to demonstrate how these specific interactions among the actors serve to expand or limit the mandate and jurisdictions of the courts. Even more specifically, the focus is on the contributions of the interactions among states, activists and the REC Courts themselves to the creation, sustenance, depletion, or resurrection of these African ICs.

It is useful to note however, that the discussions in this chapter regarding the role of states in the development of the mandate and jurisdiction of REC courts, is distinct from the discussion had in

the previous chapter because the focus in this chapter relates specifically to how state-led backlash/resistance against REC court affects the development or regression of the mandate and jurisdiction of the courts. As such, while the previous chapter had discussed the role of member states' historical and contemporary relationships with the RECs and how that affects the mandate and jurisdiction of the REC courts, this chapter is more interested in member state resistance-led reforms that affect the mandate and jurisdiction.

Also, given the dissertation's interest in challenging state-centric theories for understanding the creation and development of ICs, the chapter emphasizes the contributions of activists and activism to the development of these African RECs. Although the works of Alter, et. al.,[1] have accounted for the contributions of activists to the development of ICs, one of the ways in which this dissertation contributes to the literature is by accounting for the contributions of activists to the *attempted revival or resurrection* of these regional judicial institutions. The related and also significant argument is also made that these attempts by activists at REC Court revival and resurrection speaks to the importance of: a) access to these ICs by private actors (including these activists); and b) the utility of such private actor access to ICs for environmental protection and socio-economic justice struggles.

To aid the systematic exploration of the questions raised in it, the chapter is divided into five main parts, including this introductory section. The next section of this chapter offers a background on the creation and utility of ICs (including the REC Courts that are under study here). The section that follows it probes the development of the jurisdiction of these REC courts and how the interactions of various actors influences the mandates and jurisdictions of REC courts in Africa. It

[1] Alter, Helfer & McAllister, "A New International Human Rights Court for West Africa", *supra* note 50; Alter, Gathii & Helfer, "Backlash against International Courts in West, East and Southern Africa", *supra* note 51; Alter, *supra* note 1.

is concerned with the contributions of the courts themselves, activists, and member states (via supplementary treaties, tacit approvals, or backlash) to the development of the mandates and jurisdictions of Africa's REC courts. Quite significantly, the discussions in this section highlight the significance of *access* as a significant jurisdictional feature of Africa's REC courts. The discussions demonstrate how access to REC courts is often the target of both backlash against these courts; and activist ambitions for expanding their jurisdiction.

The third section of the chapter discusses the incidences of states' opposition to these African ICs, and how such REC courts responded to or weathered this resistance/backlash. The discussion in this section attempts to highlight how state-led resistance/backlash can constrain or attempt to constrain the mandates and jurisdictions of REC courts and the significance of activist interventions (among other factors) in the success or failure of the said resistance/backlash against REC courts in Africa. It also analyzes the various factors that aggravate or mitigate such resistance to or backlash against these specific groups of ICs. The discussions in this section of the chapter do not attempt to suggest a causal relationship between activist interventions and the success or failure of backlash against these African RECs courts. However, it attempts to account for the contributions of activists to mitigating the effects of such backlash and attempts to revive or resurrect the REC court(s) that have been "killed off". Finally, the discussions also highlight the significance of access to these courts as a tool through which states attempt to constrain the influence of these regional courts.

Building on those discussions, the fourth section quizzes the significance of access to courts to both states and activists. In discussing the various attempts by activists to *revive* and *resurrect* the SADCT, the fourth section of the chapter engages theory in attempting to explain the motivations of activists in seeking to preserve or resurrect the Tribunal. The discussions in this section

demonstrate how access to REC court is the fundamental feature of the court's architecture that states and activists target for reform. Later chapters in the dissertation link the relationship of the nature of such access provisions to the struggles of many of the activists who utilize REC courts for environmental protection and socio-economic justice. However, the focus of this chapter is to demonstrate the specific ways in which state, activist, and judicial interactions account for the development or regression of the mandates and jurisdictions of the REC courts under study, which is the subject of this dissertation's inquiry.

3.1.1. Background on the Creation and Utility of International Courts and Tribunals (such as the REC Courts)

In setting the stage for understanding the relationship among states, activists and these RECs, it is useful to understand why states create these international judicial institutions in the first place, especially given that these ICs have supranational jurisdiction and can make binding decisions against the very same states who created and sustain them. An understanding of why states create these institutions is useful for understanding the role of states in the development of these institutions – developments that could either lead to human rights protection mandates, or environmental protection mandates, or neither.

Several schools have attempted to offer explanations for why states create international institutions or international judicial institutions. Realists for example, make the argument that international institutions are created to promote "the interests of powerful actors".[2] In this sense, ICs (according to Realists) are created to serve or promote the interests of hegemonic states. However, scholars have challenged this school of thought, arguing that the realist account insufficiently accounts for

[2] Stephen D. Krasner, "Sovereignty, Regimes, and Human rights" in Volker Rittberger eds. Regime Theory and International Relations (Oxfored, Clarendon PRESS, 1993), at 140 cited in Obiora Chinedu Okafor, *The African Human Rights System, Activist Forces and International Institutions* (Cambridge University Press, 2007) at 53.

effective international institutions such as the European human rights system which did not develop or acquire a sense of effectiveness because of a regional hegemon.[3] As such, although rational thought would suggest that ICs are built around or built to serve hegemonic states, evidence from the European system and the African REC courts we discuss in this dissertation would suggest otherwise.

Another school, the neoliberal school, argues that international institutions, such as international judicial institutions, are created to serve the "best interests" of states.[4] In this sense, the argument of the neoliberal school is that international institutions would only be created if "a critical mass of states" realize that the creation of that institution would serve their best interests.[5] Similar to the critiques against the realist school, scholars challenge the neoliberal school arguing that if indeed states only created institutions that served their best interests, then very few international institutions would exist today, particularly because, as Okafor puts it, the goals of these institutions "are usually to encourage states to adopt policies, norms, and ideas that state which act in neoliberal rational self-interested egotists will all-too-often perceive as against their national interest".[6] Other schools, such as constructivists, argue that international institutions are created and sustained because of their role in "shaping and reshaping" the self-understandings and conceptions of interests held by states. For constructivists, ideational, knowledge-based and normative transformations across states form the basis for creating and sustaining international institutions.[7] One of the criticisms ofthis school is their failure to account for exactly how ideational, knowledge-

[3] Okafor *Ibid*. See also Andrew Moravcsik, "Explaining International Human Rights Regimes: Liberal Theory and Western Europe" (1995) 1 European Journal of International Relations 157.
[4] Okafor, supra note 273 at 54.
[5] Ibid. See also Ann Marie Clark, "Non-Governmental Organizations and their Influence on International Society" (1995) 48 Journal of International Affairs 507.
[6] Okafor Ibid.
[7] Ibid at 57.

based and normative transformations occur and what the role of rationality was in that process.[8] Finally, the quasi-constructivists, being constructivists themselves, commence from a position that ideas, knowledge and norms are fundamental to the creation of international institutions.[9] However, they take these arguments further by providing specifics on how exactly norms and institutions shape international politics, including using rationalist approaches to help account for changes in state behaviour, including the developing international courts whose roles are often to hold states accountable.[10]

Posner and Yoo,[11] speaking more specifically about ICs, argue that states use international courts for three major reasons, "information disclosure in treaty disputes", "information disclosure in customary law disputes," and as a "dispute resolution mechanism".[12] Essentially, they argue that states benefit from cooperation with other states, and that the existence of international courts and tribunals fosters this cooperation as ICs provide "neutral information about the facts and the law relevant to a particular dispute."[13] As such, courts and tribunals provide information to states relating to treaty disputes in instances where treaties are unclear or do not anticipate a certain event.[14] Courts and tribunals are also useful in providing states with information relating to competing norms of customary international law in cases of dispute.[15] They argue that states avail

[8] Ibid.
[9] Ibid at 57 to 58.
[10] Ibid at 58 to 59. See also, Martha Finnemore & Kathryn Sikkink, "International Norm Dynamics and Political Change" (1998) 52:4 International Organization 887–917; Thomas Risse-Kappen, "Ideas do not Float Freely: Transnational Coalitions, Domestic Structures, and the End of the Cold War" (1994) 48:2 International Organization 185–214; Thomas Risse-Kappen, Stephen C. Rop, and Kathryn Sikkink eds. *The Power of Human Rights: International Norms and Domestic Change* (Cambridge University Press, 1999); and Thomas Risse, Stephen C Ropp & Kathryn Sikkink, eds, *The Persistent Power of Human Rights: From Commitment to Compliance* (Cambridge: Cambridge University Press, 2013).
[11] Posner & Yoo, *supra* note 65.
[12] *Ibid*.
[13] *Ibid* at 14.
[14] *Ibid.*
[15] *Ibid.*

themselves the use of international courts as dispute settlement mechanisms because they are a means of fostering international cooperation. Essentially, that states utilize ICs because:

> a state…retains the option to rely on tribunals in the future, for a state that routinely violated judgments would not credibly be able to propose international adjudication as a way of resolving a dispute with another state.[16]

In agreement with Posner and Yoo, Phillipe Sands extends the argument for the utility of international courts and argues that international courts are not only useful for dispute resolution and contributing to the development of rules of international law. In his view, they serve a "third function":[17]

> …by their existence and activity, to raise consciousness on a particular matter, to help us understand what needs to be done, or what is being done inadequately or not at all. International courts and tribunals may be purveyors of legitimacy.[18]

Undoubtedly, ICs are established by states, via treaty, to serve a number of functions. After being established on paper (by treaty), a concretization/development happens to ICs that allows ICs to develop both structurally and juridically. Structural developments of ICs include the establishment of a physical structure to house the court, recruitment of staff, and the establishment of procedure, tenures, etc. As discussed in the previous chapter, these structural issues are often administered by or within the RECs or their Secretariats. Judicial and jurisdictional developments are often shaped by forces that are more internal than external to the REC courts, with the courts deciding the limits or extents of their jurisdictions through judicial interpretations of their mandates and other legal instruments. As such, although the mandate of the IC is set out in the treaty establishing the court, the interpretation of that mandate and the definition of the boundaries of that mandate is often the

[16] *Ibid* at 20.
[17] Philippe Sands, "Climate Change and the Rule of Law: Adjudicating the Future of International Law" (2016) 28 J Environ Law 19 at 23.
[18] *Ibid.*

responsibility of the IC – some ICs interpret their mandates expansively, others interpret it conservatively.

The discussion about the specific ways that ICs, REC courts included, shape their mandates and jurisdictions (through either expansive or conservative interpretations of their legal instruments) is significant for two reasons. The first is that it offers an account of the specific means through which the EACJ and the pre-2012 SADCT developed their human rights mandates. Secondly, it demonstrates that this means of expanding a court's jurisdiction using jurisprudence is one of the more "traditional" or legal means through which ICs participate in the expansion or regression of their mandates. Thus, the discussions offer an account of the judicial means through which ICs affect the development or regression of their mandates and jurisdictions, which is the subject of this dissertation's inquiry.

3.2. The Development of the Mandates and Jurisdictions of the REC Courts

As discussed, all the African REC courts under study, were originally created as regional integration courts but either assumed or were granted, human rights jurisdictions; either through their liberal interpretation of the relevant treaties or through the adoption of supplementary treaties by the RECs of which they are a part.[19]

Essentially, the story of the development of international courts is often expressed in the jurisdiction and jurisprudence of the court. Two issues often constitute a court's jurisdiction– access, and subject matter. Access to ICs often refers to who; and under what circumstances parties

[19] Gathii, "Mission Creep or a Search for Relevance", *supra* note 37; Ebobrah, *supra* note 54. Solomon T. Ebobrah, "Courts of Regional Economic Communities in Africa and Human Rights Law" in Stefan Kadelbach, Thilo Rensmann and Eva Rieter*, Jugding International Human Rights: Courts of General Jurisdiction as Human Rights Courts* (Springer, 2018).

can approach the institution – specifically, whether access to the court is available only to state parties or whether the court can also entertain suits from non-state parties.[20] Subject matter jurisdiction refers to what issues the court can adjudicate, whether, for example, human rights violations or economic violations. It is worthy of note however that the question of access and subject matter are closely intertwined, especially in the context of international courts, however, as Enabulele points out:

> An international court cannot exercise jurisdiction over an entity that does not have a right of access. Where the court lacks jurisdiction *ratione personae*, it is immaterial that the claim the person or entity seeks to litigate ordinarily falls within its jurisdiction *ratione materiae*.[21]

As such, it is safe to say that the two concepts are intricately linked. In this section, I examine the development of these two separate but related constituents of the jurisdiction of REC courts while focusing on how the jurisprudence of the courts, activism and state conduct influence the jurisdiction of REC courts.

The section commences with a discussion of the development of the mandate and subject matter jurisdictions of these REC courts, highlighting the development of the jurisdiction of these courts from regional integration courts to more or less part-time human rights courts and the significance of state action, activism, and judicial action to this story of the development of REC court's jurisdictions.

[20] See Amos Enabulele, "The problems of jurisdiction by optional declaration: reflections on Articles 5(3) and 34(6) of the Protocol of the African Court on Human and Peoples' Rights" (2018) 24:2 Australian Journal of Human Rights 223–243.
[21] *Ibid at 225*.

As highlighted above, subject matter jurisdiction and access are intricately linked, as such, even though both concepts are discussed discretely in this chapter, the attempt at a discrete discussion is made to demonstrate the specific ways in which different actors – the states, activists, and the courts interact with specific aspects of IC jurisdiction. The goal is to demonstrate that a) access is a specific feature of IC jurisdiction and is often the site of struggle for states and activists and b) that this access is salient to activists in their pursuit of justice before these ICs, and is thus the subject of activists campaign to increase or revive access to the courts.

3.2.2. The Subject matter Jurisdiction of the three Courts

As discussed in the previous chapters, the three courts under study were initially created as regional integration courts, charged with interpreting treaties and resolving disputes between states. As with other regional integration communities, the prevailing notion among scholars and advocates is that regional courts or tribunals are integral to the economic integration project "since their jurisprudence has the capacity to provide legal environments that promote integration by affecting politics and concrete policies".[22] As such, in addition to interpreting treaties and resolving trade disputes, REC courts have been known to acquire additional mandates or jurisdiction to pursue the integration project.

The ECOWAS Court, for example has four mandates: it has a mandate as a REC court; an administrative tribunal for ECOWAS, a human rights court, a court of arbitration, and an Inter-

[22] Jörg Kleis, *African Regional Community Courts and their Contribution to Continental Integration*, 1st ed, Recht und Verfassung in Afrika - Law and Constitution in Africa (Baden-Baden: Nomos Verlagsgesellschaft mbH & Co. KG, 2016); Richard Frimpong Oppong, *Legal Aspects of Economic Integration in Africa* (Cambridge University Press, 2011). See also, Andrew Wilson Green, *Political Integration by Jurisprudence: The work of the Court of Justice of the European Communities in European Political Integration* (Leiden: A.W. Sitjthoff Publishing Company) 1969; Kurt Somerville, "Political Integration Through Jurisprudence: An Analysis of the European Court of Justice's Ruling on Freedom of Movement for Workers" (1983) 6:1 Boston College International and Comparative Law Review 273.

State dispute resolution tribunal.[23] The EACJ under Art. 27 (1) and (2) of the EAC Treaty,[24] has jurisdiction to hear and determine issues related to the interpretation and application of the Treaty, and shall have other original, appellate, human rights, and other jurisdictions "as will be determined by the Council at a subsequent date".[25]

The SADC Tribunal has a pre-2012 jurisdiction, and a post-2012 jurisdiction, and in the coming sections, we discuss the changes that occurred to the Tribunal's mandate. However, before 2012, the Tribunal had jurisdiction over the interpretation and application of the Treaty; the interpretation, application, or validity of the Protocols, all subsidiary instruments adopted within the framework of the Community, and acts of the institutions of the Community; and all matters specifically provided for in any other agreements that States may conclude among themselves or within the community and which confer jurisdiction on the Tribunal.[26]

As we see from the above, of the three REC courts under study, only the ECOWAS court has an explicitly conferred mandate over human rights violations, as is articulated in the relevant Protocol.[27] The EACJ protocol provides that the jurisdiction of the court "may" be extended to human rights violations at "a suitable date to be determined by Council".[28] No such formal extension to human rights violations has been made by the EAC's Council.[29] Despite this absence

[23] Protocol /P1/7/91 of 6 July 1991 on the ECOWAS Community Court of Justice adopted by ECOWAS member states in 1991; Supplementary Protocol A/SP.1/01/05 Amending Protocol A/P.1/7/91 relating to the Community Court of Justice adopted in 2005.
[24] Treaty for the Establishment of the East African Community (EAC Treaty) 1999, 2144 UNTS 255, Art. 27(1) and (2).
[25] Article 27(2) *Ibid*.
[26] Article 14, Protocol on Tribunal in the Southern African Development Community online: https://www.sadc.int/files/1413/5292/8369/Protocol_on_the_Tribunal_and_Rules_thereof2000.pdf
[27] Supplementary Protocol of the ECOWAS Court, *supra* note 12.
[28] EAC Treaty (revised), *supra* note 13, Art. 27(2).
[29] Gathii, "Mission Creep or a Search for Relevance", *supra* note 37.

of a protocol, the EACJ in the *Katabazi case*[30] decided 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 Art. 27(1) merely because the reference includes allegation[s] of human rights violation[s]."[31] As such, The Court has assumed jurisdiction over issues involving human rights violations carried out with the EAC.

Similarly, the SADCT, despite having no formal mandate to pursue human rights, decided in the *Campbell Case*[32]that Art. 21(b) of the Tribunal's protocol; and 4(c) of the founding treaty of the SADC when read together, enjoined "*the Tribunal to develop its own jurisprudence ... "having regard to applicable treaties, general principles and rules of public international law"*[33] and requires SADC member states to "*act in accordance with… human rights, democracy and the rule of law*."[34] As such, the Tribunal held "*it is clear to us that the Tribunal has jurisdiction in respect of any dispute concerning human rights, democracy and the rule of law, which are the very issues raised in the present application.*"[35] The human rights mandates of the EACJ and the SADCT were consequently derived from a broad interpretation of the treaties of the Communities.

As highlighted in the previous chapter, the *Afolabi case*[36] before the ECOWAS court was the first case decided by the court. The decision in that case ignited a campaign by the court's judges, the ECOWAS community officials, and civil society organizations (CSOs) to expand the jurisdiction of the Court.

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[30] See the decision in *Katabazi & Others v The Secretary-General of EAC & Others* Ref 1 of 2007 (unreported) http://www.saflii.org/ea/cases/EACJ/2007/3.html
[31] *Ibid* at 16.
[32] *Campbell and Others v. Zimbabwe (Merits)*, Case No. SADC (T) 2/2007, 28 November 2008.
[33] *Ibid* at 24.
[34] *Ibid*.
[35] *Ibid* at 25.
[36] Afolabi v. Nigeria, Case No. ECW/CCJ/APP/01/03**,** Judgment (Apr. 27, 2004), *reprinted in* 2004-2009 COMMUNITY COURT OF JUSTICE, ECOWAS LAW REPORT 1 (2011). (Afolabi judgement).

Briefly summarized, the *Afolabi* case involved a Nigerian Trader who was suing Nigeria for unilaterally closing her borders with Benin, resulting in a loss of his business[37] The plaintiff claimed that the closure of the border by Nigeria was a violation of ECOWAS treaty on free movement of persons and goods and demanded compensation.[38]

The challenge of the *Afolabi* case, however, was that the subsisting Protocol of the Court did not authorize private litigants to initiate proceedings before it.[39] Under the Protocol, member states of the ECOWAS were required to initiate proceedings on behalf of their nationals.[40] Afolabi argued the inherent contradiction of the requirement, particularly if a national was suing his own country, as was the case in his own suit.[41] In inviting the Court to expand its jurisdiction and adjudicate the case, Afolabi invoked the "principles of equity" as contained in the Court's protocol[42]and argued for the court to construe its powers broadly and adjudicate the case.[43]

The ECOWAS court, however, rejected his arguments.[44] It held that even though his case was a serious one, the Court simply did not have jurisdiction under its protocol to adjudicate matters involving private litigants.[45] It held that the wording of Art. 9 of the Protocol was "plain" and "unambiguous," and as such, only states could initiate proceedings on behalf of their nationals.[46]

[37] *Ibid*.
[38] *Ibid*.
[39] See 1991 Protocol of the ECOWAS Court, *supra* note 12.
[40] *Ibid,* Art. 9(3).
[41] Afolabi judgement, *supra* note 23.
[42] 1991 Protocol, *supra* note 12**,** Art. 9(1) which stated that "The Court shall ensure the observance of law and of the principles of equity in the interpretation and application of the provisions of the Treaty."
[43] Afolabi Judgment *supra* note 23.
[44] *Ibid*.
[45] *Ibid*.
[46] *Ibid* at paras 59 to 61.

The Court also rejected the plaintiff's interpretation of the principles of equity and compared it to a similar provision in the Treaty Establishing the European Community.[47] The Court held that "activist judges"[48] on the European Court of Justice had similarly construed that provision to "define the role of the [European] court very broadly,"[49] and "to extend its review on jurisdiction to cover bodies which were not listed in the Treaty,"[50] and "fill in gaps in treaties".[51] The ECOWAS Court, however, held that this practice of the European Court of Justice had drawn criticism, and so the ECOWAS court did not want to "tow the same line".[52]

3.2.2.1. The Campaign that Followed Afolabi Decision

The dismissal of the *Afolabi case* revealed a fundamental problem with the court's architecture.[53] Essentially, "governments had little incentive to challenge barriers to regional integration, and private traders had no judicial mechanism for doing so."[54] In response, the Court's judges, REC officials, and civil society organizations (CSOs) embarked on a coordinated campaign to expand the jurisdiction of the court.[55] Interestingly, as discussed in the previous chapter, the result of the campaign was not the expanded powers of the court to include access to the court by private individuals in cases involving economic violations (which had been the subject matter of *Afolabi*);

[47] See Treaty Establishing the European Economic Community, Art. 164, Mar. *25, 1957, 298 UNTS 3* which requires *the* European Court of Justice to "ensure observance of law and justice in the interpretation and application of this Treaty".
[48] Afolabi Judgment, *supra* note 23 at paras 56
[49] *Ibid*.
[50] *Ibid*.
[51] *Ibid*.
[52] *Ibid*.
[53] Alter, Helfer & McAllister, "A New International Human Rights Court for West Africa", *supra* note 50.
[54] Karen J Alter, Lawrence R Helfer & Jaqueline R McAllister, "A New International Human Rights Court for West Africa: The Ecowas Community Court of Justice" (2013) 107 Am J Int'l L 737 at 750.
[55] *Ibid*.

instead the result of the campaign it granted private actors access to the court to adjudicate human rights violations.[56]

To kickstart this campaign for the expansion of the court's jurisdiction, and on the same day they handed down the *Afolabi* decision, the judges of the ECOWAS court issued a press release urging governments to enable private individuals to bring actions before the court.[57] Additionally, the Court published and distributed a booklet, summarizing the issues, arguments and the holding in the Afolabi case in a bid to demonstrate the challenges of the existing 1991 Court Protocol.[58] The Court then reached out to media organizations, lawyers, civil society groups, and government officials in its campaign to see to the expansion of its jurisdiction.[59]

Before long, regional bar associations and human rights groups had joined the ECOWAS court's campaign.[60] As highlighted briefly in the previous chapter, the ECOWAS region's history of involvement in regional security had produced a history of engagement between human rights groups and state actors – particularly in the context of the human rights records of its armed forces (the ECOMOG) and ECOWAS institutions.[61] These human rights groups had thus been very keen on improving the human rights record of the region and so were quite keen to support the expansion of the powers of the court, particularly in relation to human rights violations – and not necessarily

[56] *Ibid*.
[57] See Lillian Okenwa, *ECOWAS Court Not Open to Individual Litigants,* THIS DAY (Nigeria) (Apr. 28,2004); *also ECOWAS Throws Out Suit Against Nigeria over Land Border Closure with Benin,* VANGUARD (Nigeria) (Apr. 28, 2004), 2004 WLNR 7109799 cited in *Ibid*.
[58] *Ibid at 750.*
[59] *Ibid*.
[60] *Ibid*.
[61] *Ibid*. See also discussion in the second chapter of this dissertation.

economic violations.[62] This coalition between the Court, the regional bar associations, and human rights groups vigorously pursued the agenda for reforming the ECOWAS court's mandate.[63]

This coalition's mobilization involved the ECOWAS Secretariat officials who participated in a stakeholder meeting in Dakar, Senegal.[64] This stakeholder meeting was aimed at proposing and drafting amendments to the Court's protocol to grant access to private individuals and confer a human rights mandate on the court.[65] This involvement and support of the ECOWAS Secretariat were highly significant to the success of the project, given that the REC institution was able to leverage its history and relationship with states, and garner member states support of the reforms to the ECOWAS court's system.[66] The REC Secretariat was also quite willing to support the reform agenda of the Court because the existing structure, with its permanent nature, physically structure, and no access to private individuals, resulted in a fiscally demanding institution that seemed to have empty dockets.[67] The existing structure of the Court imposed budgetary demands on the REC with very little justification.[68] The ECOWAS Secretariat was thus quite eager to support a bid to provide the Court with an opportunity to increase its dockets and justify its budgetary demands.[69]

In essence, this confluence of interests in expanding the court's jurisdiction between the judges of the court, civil society and human rights organizations, and the Secretariat of the ECOWAS, and states, resulted in the adoption of the *Supplementary Protocol of the ECOWAS Court*.[70] The

[62] *Ibid*.
[63] *Ibid*.
[64] *Ibid at 751 - 752*.
[65] *Ibid*.
[66] *Ibid*.
[67] *Ibid*.
[68] *Ibid*.
[69] *Ibid*.
[70] *Ibid*.

Protocol granted access to the Court to private individuals and granted the court a human rights mandate.[71]

3.2.2.2. Activists and the Development of Subject matter and Access Jurisdiction

As highlighted previously, however, the successful campaign to expand the powers of the ECOWAS court was ignited by the decision of the court in the *Afolabi* case. Although the *Afolabi* case implicated private access to the Court, its subject matter related to a violation of an economic right guaranteed by the ECOWAS Protocol on free movement of persons and goods. It is quite interesting then that the expansion of the Court's jurisdiction ended up granting the court an expansive human rights jurisdiction, but no jurisdiction over the violation of the economic rights of private litigants.

In line with previous work on this topic, I argue that a key factor in the development of a human rights mandate for the Court was the involvement of human rights CSOs (and the REC) in the campaign for the expanded jurisdiction.[72] The agenda of the Bar associations and the human rights groups involved mobilizing the reform of the Court's mandate in a way that centered human rights protection, democracy, and liberal ideals. In addition to the history of involvement of these activists with ECOMOG interventions and other ECOWAS work over the years, these activist groups had also either recently emerged from or were in the process of pursuing pro-democracy and human rights advocacy in the region.[73] The region's long and fraught history with military dictatorships had created and sustained an advocacy network, particularly attuned to human rights

[71] Supplementary Protocol of the ECOWAS Court, *supra* note 23.
[72] Alter, Helfer & McAllister, "A New International Human Rights Court for West Africa", *supra* note 40 at 744.
[73] Alter, Helfer & McAllister, "A New International Human Rights Court for West Africa", *supra* note 40 at 744.

concerns.[74] I argue that this network, which included human rights groups and bar associations, was thus quite willing to be mobilized to support a regional court, with supranational jurisdiction that could curb the excess of states, and also be available to private actors.

It stands to reason that the project of expanding the court's jurisdiction benefitted from the grounded and experienced nature of this human rights protection network. I argue that this kind of organized activist network, with previously existing ties to the ECOWAS and regional politics, is absent in relation to advocacy for a protocol for private access to the ECOWAS Court relating to economic violations of the Treaty. As such, while activists were able to rally and ensure the adoption of a human rights mandate, other economic related issues relating to the Court's mandate continue to lag.

The significance of my discussion of the absence of jurisdiction of the ECOWAS court over economic violations is not so much to lament this lack of jurisdiction (even though it is regrettable), instead I discuss it to demonstrate the potency and tenacity of activists campaigns for a human right mandate for the ECOWAS Court. I use the lack of activation of the ECOWAS Court's arbitration jurisdiction as another example of an aspect of the REC court's jurisdiction, which has not been activated because of the lack of a similar campaign, as that for human rights mandate, to activate it. Specifically, Art. 16 of the Revised ECOWAS Treaty established an Arbitration Tribunal for the Community[75] and art. 9(5) of the Revised ECOWAS Court Protocol provides that: 'Pending the establishment of the Arbitration Tribunal provided for under Article 16 of the Treaty,

[74] See the ECOWAS Protocol on Democracy and Good Governance that was adopted in 2001 to deter military coups and unconstitutional changes of government in the region. Protocol **A/SP1/12/01** on Democracy and Good Governance Supplementary to the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security, Dec. 21, 2001

[75] Art. 16, the Revised Treaty, *ECOWAS Doc. ECW/LEX/IV/2A/Rev.3*, Lagos, October 1992, signed at Cotonou, 24 July 1993. It is reprinted in International Legal Material No.14, 1975.

the Court [ECOWAS] shall have the power to act as arbitrator for the purpose of Article 16 of the Treaty.'[76] However, Art. 16(2) of the ECOWAS Treaty provides, "the status, composition, powers, procedure and other issues concerning the Arbitration Tribunal shall be as set out in a Protocol relating thereto".[77] The interpretation of that Article being that a subsequent protocol would be adopted relating to the arbitration jurisdiction of the ECOWAS Court, which would then allow the Court to exercise this jurisdiction. Unfortunately, as of the time of writing this dissertation, no such Protocol has been adopted, despite calls by the Chief Registrar of the Court for states to adopt this adopt the Protocol as set out in Article 16(2) and activate the said jurisdiction. In October 2017, the Court's Chief Registrar argued that activating the ECOWAS Court's jurisdiction over arbitration matters would attract foreign investment by assuring investors of the availability of an arbitration forum.[78] Despite these calls and the existence of an arbitration jurisdiction for the ECOWAS Court, the jurisdiction is still yet to be activated.

I argue that activists are comparatively more concerned about creating jurisdictional access ICs to pursue human rights violations than they are about pursuing economic violations or arbitration. This comparatively stronger interest in human rights *and private access* is significant because environmental protection and socio-economic justice are often pursued using human rights frames and/or as a consequence of the IC granting access to private actors. In this sense, activists are often inclined to pursue increased access to the ICs, however, states on the other hand tend to pursue decreased private access to ICs in instances where they are unhappy with the institution. I elaborate this argument in the coming sections.

[76] Art. 9(5) of the Revised ECOWAS Court protocol, *supra* note 22
[77] Art. 16(2)Revised ECOWAS Treaty, *supra* note 73.
[78] "ECOWAS calls for Regional Arbitration Forum for dispute resolution", online: <https://isds.bilaterals.org/?ecowas-calls-for-regional>.

3.3. Limiting Access as a Means of Constraining the Influence of REC Courts

The development of both the jurisdiction and the jurisprudence of REC courts has had certain consequences. As one might expect, decisions of REC courts elicit different reactions from different parties. While one party might applaud a decision, the other party (including a state) might resent the same decision, particularly if it is unfavourable to it. This kind of dynamic is typically produced in adjudicative systems. What is specific to REC courts, however, is that in instances where the disgruntled party is a member state of the relevant REC, this member state's reaction can sometimes have dire consequences for the REC court. This is especially the case when the relevant member state can rally other member states to change the constitution or jurisdiction of the REC court.

In the case of the 3 REC courts, this dissertation is concerned with states cannot also easily ignore the jurisdiction of the courts because the courts, by their design, have compulsory jurisdiction. Essentially, states cannot easily ignore the jurisdiction of the courts or reject it without rejecting their membership of the REC as a whole.[79] This compulsory jurisdiction of REC courts "traps" states within the IC's reach, and as one might expect, makes this same jurisdiction the target of state-led backlash against the court – particularly in the instance where the states are unhappy with decisions on the IC.

In this section, we discuss some of the backlash that REC courts have received from states following unfavourable decisions. Given that member states cannot simply "wish away" unfavourable decisions from the court, we discuss the reactions of member states to unfavourable

[79] Alter, Gathii & Helfer, "Backlash against International Courts in West, East and Southern Africa", *supra* note 51.

decisions of REC courts and attempt to demonstrate how member states attempt to limit the capacity of the court by manipulating access to the court.

3.3.1. Member states' Resistance of REC Courts

Following three separate decisions of the REC courts, one by each court, all three courts suffered resistance campaigns by disgruntled member states. Scholars have characterized these resistance campaigns against the courts as either "failed," "successful", or "intermediately successful," based on the degree to which they either succeeded or failed to alter the jurisdiction of the courts.[80] I review each of these incidences to demonstrate how jurisdictional access was at the centre of all three backlash attempts.

3.3.1.1. The ECOWAS Court

In the case of the ECOWAS, the resistance attempt against the court was adjudged failed because the proposal to limit the court's jurisdiction was not approved or adopted by the Community. The case(s) that ignited Gambia's resistance of the court involved the unlawful arrest and torture of journalists who had been critical of Gambia.[81] In the first case, *the Manneh case*,[82] the ECOWAS court found in favour of the plaintiffs, condemned the behavior of the Gambian officials and ordered Gambia to pay compensation to the aggrieved parties.[83] This decision embarrassed Gambia on the international scene as foreign governments and international NGOs demanded that Gambia comply with the decision.[84]

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[80] *Ibid*.
[81] ECOWAS Court, *Manneh v. The Gambia*, ECW/CCJ/JUD/03/08, 5 June 2008; ECOWAS Court, *Saidykhan v. The Gambia*, ECW/CCJ/RUL/05/09, 30 June 2009.
[82] Manneh case, *Ibid*.
[83] *Ibid*.
[84] Alter, Gathii & Helfer, *supra* note 63 at 297. See also Rhodes, 'Six Senators Call for Ebrima Manneh's Immediate Release', Committee to Protect Journalists (23 April 2009), online at https://cpj.org/blog/2009/04/six-senators-

Not long after this case was decided, a second case, *Saidykhan v. The Gambia*,[85] involving similar facts, was instituted before the ECOWAS court against Gambia.[86] Unlike the *Manneh case*, in this case, Gambia attempted to have this case dismissed summarily, alleging that it was an "affront to Gambia's sovereignty".[87] When the ECOWAS Court dismissed Gambia's objections, Gambia submitted a proposal to the ECOWAS Commission to have the Court's jurisdiction amended to the reflect following –

a) *that with respect to human rights cases, the Court should only have jurisdiction in cases arising from international instruments ratified by the respondent country;*

b) *also in human rights cases, the ECOWAS Court's jurisdiction should be made subject to the exhaustion of domestic remedies;*

c) *cases should only be admissible if instituted not later than 12 months after the exhaustion of local remedies;*

d) *cases should not be anonymous;*

e) *the Court should not hear cases that are before other international mechanisms of settlement; and;*

f) *to create an appeals procedure.*[88]

3.3.1.1.2. Activists and REC's Response to the Proposal

Scholars argue that although on its face, the proposed amendments seemed harmless, media organizations and non-governmental organizations (NGOs) in the region were immediately awake

call-for-ebrima-mannehsimmediate-rel.php. Linda Akrasi Kotey, 'Ghana: Akoto Ampaw, Two Others in Gambia', *Ghanaian Chronicle* (17 July 2009), online at http://allafrica.com/stories/200907171086.html

[85] Saidykhan, supra note 85

[86] Alter, Gathii & Helfer, "Backlash against International Courts in West, East and Southern Africa", *supra* note 51.

[87] Saidykhan, *supra* note 64 at paras 11.

[88] Alter, Gathii & Helfer, "Backlash against International Courts in West, East and Southern Africa", *supra* note 51. See also 'West Africa: Country Submits Proposals to Amend ECOWAS Protocol', *FOROYAA Newspaper* (Serrekunda, 25 September 2009), online at http://allafrica.com/stories/200909250810.html); see also N. Adu Ampofo, 'Gambian Authorities Seek to Limit Reach of Regional Human Rights Court', *Global Insight* (28 September 2009).

to its implications.[89] In a joint press statement issued by eleven NGOs in the region, they argued that the proposed amendment to the ECOWAS Protocol was a backhanded attempt to paralyze the court and ensure the court could not deliver any judgments against Gambia.[90] Given that Gambia was "one of the rare African countries which had not ratified the UN Convention Against Torture", and local judiciaries are often little more than an arm of the executive, they argued that the proposals would encourage impunity in Gambia and other West African countries and "deprive citizens of free access" to an "independent judicial instrument that is not usually available in many countries".[91]

This coalition of activists consequently requested the ECOWAS Commission invite it to the proposed experts' meeting that the Commission was convening to consider the proposed amendments.[92] The Legal Affairs Directorate of the ECOWAS Commission in fact, heeded this call and consulted rights group in preparing its response to Gambia's proposals.[93] In addition to the press release, rights groups also filed a widely publicized suit before the ECOWAS Court seeking an *ex parte* injunction "to stop the Government of Gambia and the ECOWAS Commission from amending the laws concerning the jurisdiction and access to the Court".[94]

In the wake of all these mobilization activities in the press, before the court, and within the ECOWAS Commission, the ECOWAS Committee of Legal Experts met in Abuja, Nigeria's

[89] *Ibid*.
[90] International Freedom of Expression Exchange, 'Four IFEX Members, Civil Society Groups Fear Gambia Proposal Will Prevent ECOWAS Court from Ruling in Saidykhan Case', 28 September 2009, available at www.ifex.org/west_africa/2009/09/28/ecowas_court_jurisdiction. *Ibid*.
[91] *Ibid*.
[92] *Ibid*.
[93] Alter, Gathii & Helfer, "Backlash against International Courts in West, East and Southern Africa", *supra* note 51.
[94] A. Jallow, 'Rights Groups Sue Gambia over Access to ECOWAS Court', 30 September 2009, online at http://listserv.icors.org/scripts/wa-ICORS.exe?A2=ind0909E&L=gambia-l&F=&S=&P=11181. The complaint was ultimately withdrawn after Gambia's proposals were defeated. See also *Ibid at 297*.

capital, and decided to recommend against adopting Gambia's proposals.[95] The ECOWAS Council of Ministers met the following week and adopted the recommendations of the Committee of Experts, ultimately defeating the proposed amendments.[96] Even though Gambia could have sought a review of the decision of the Council of Ministers, it elected not to pursue the matter any further.[97]

3.3.1.2. The EACJ

In the case of the EACJ, the court incurred Kenya's wrath when it issued an injunction barring Kenya's appointees to the East African Legislative Assembly (EALA) from being recognized by the EALA. [98] In that case, the *Nyong'o case*, opposition leaders in Kenya filed an action against the Kenyan government, alleging that it had violated the EAC Treaty by appointing the ruling party's members to the EALA, instead of holding elections for those seats as stipulated in the Treaty. [99] In a preliminary ruling, the EACJ issued an injunction stopping Kenya's appointees from being recognized and sworn into the EALA.[100] In its final judgement, the EACJ held that Kenya was in violation of the treaty and ordered Kenya to hold elections for those positions.[101]

The decision of the EACJ enraged Kenya, who alleged that the Court was not only interfering in its domestic affairs, it was also siding with the opposition.[102] As a result, Kenya launched a multi-pronged attack against the court. Following the issuance of the interim order, and in an attempt to stop the court from deciding against it in the final judgment, Alter et al. argue that Kenya

[95] *Ibid at 299*.
[96] *Ibid*.
[97] *Ibid*.
[98] *Anyang Nyong'o v. Attorney General of Kenya*, Reference No. 1 of 2006, 27 November 2006, online at http://eacj.huriweb.org/wp-content/uploads/2006/11/EACJ_rulling_on_injunction_ref_No1_2006.pdf
[99] *Ibid*.
[100] *Ibid*.
[101] Nyong'o v. Attorney Gen. of Kenya (*Nyong'o III*), Ref. No. 1 of 2006, at 2–5 (Mar. 30, 2007), *online at* http://eacj.huriweb.org/wp-content/uploads/2012/11/EACJ_Reference_No_1_2006. Pdf
[102] Alter, Gathii & Helfer, "Backlash against International Courts in West, East and Southern Africa", *supra* note 51.

commenced a "behind-the-scenes" plot to "kill the court".[103] This proposal was not met kindly by Uganda and Tanzania, who saw the proposal as "too extreme" and suspected that the proposal could lead to the collapse of the entire integration project.[104]

Facing opposition from the two other members states of the EAC, Kenya pursued its second course of action. It attempted to oust the two Kenyan judges on the court by demanding that the judges, including the President of the court, recuse themselves from the case, alleging that they were facing allegations of corruption at the national courts.[105] The government filed a motion for recusal; with the intent, the judges would be embarrassed and thus deter them from issuing a final judgment against Kenya.[106] The EACJ dismissed the application for recusal and held that the allegations were unfounded.[107]

Given the failure of the previous strategies, Kenya employed its third and final strategy to resist the court and punish it for its "interference." Kenya embarked on a hasty but successful project to amend the EAC's treaty; to curb the jurisdiction of the court; to limit access to the court by private individuals; and finally to create an appellate division for the court which, scholars argue, it hoped to staff with more conservative judges that would do its bidding.[108]

Kenya drafted and saw to the successful adoption of these amendments to the Treaty while avoiding any institutional processes that would have allowed civil society or opposition groups to

[103] *Ibid at 303*.
[104] *Ibid*.
[105] See *Attorney Gen. of Kenya v. Nyong'o*, Application No. 5 of 2007, 6 February 2007, also *Ibid*.
[106] *Ibid*; Gathii, "Mission Creep or a Search for Relevance", *supra* note 37.
[107] Alter, Gathii & Helfer, "Backlash against International Courts in West, East and Southern Africa", *supra* note 51; Gathii, "Mission Creep or a Search for Relevance", *supra* note 37.
[108] Alter, Gathii & Helfer, "Backlash against International Courts in West, East and Southern Africa", *supra* note 51; Gathii, "Mission Creep or a Search for Relevance", *supra* note 37.

oppose the proposed amendments.[109] The amendments altered the court's architecture – they created an appellate division for the court; added new grounds for removing a judge on allegations of misconduct by its home country; added that the court had no jurisdiction to review cases involving issues which the Treaty had vested in "organs of Partner states"; and finally, it added a two-month time limit for private individuals to approach the court to challenges national decisions or decisions arising from the Treaty.[110]

3.3.1.2.1. Activist Response to the Amendment

The hasty amendment of the EAC treaty was challenged by different groups.[111] Opposition parties in Kenya criticized the fact that the amendments were adopted by executive decree, which excluded them from being able to oppose it in the House.[112] The plaintiffs in the *Nyong'o* case attempted, unsuccessfully to challenge the amendment before a High Court in Kenya.[113] The East African Law Society (EALS) also challenged this amendment before the EACJ.[114] It argued that a lack of consultation with civil society violated the Treaty requirement for popular consultation, and as such, the amendment ought to be null and void.[115] In an interesting decision, the EACJ upheld the applicant's arguments and agreed that the failure to consult widely infringed on Art. 5(3)(g) and 7(1)(a) of the Treaty, relating to popular consultation and the goal of the EAC to

[109] Alter, Gathii & Helfer, "Backlash against International Courts in West, East and Southern Africa", *supra* note 51; Gathii, "Mission Creep or a Search for Relevance", *supra* note 37.
[110] EAC Treaty (revised), *supra* note 13, Arts. 26(1), 26(2), 27(1), 30(2). See also Alter, Gathii & Helfer, "Backlash against International Courts in West, East and Southern Africa", *supra* note 51; Gathii, "Mission Creep or a Search for Relevance", *supra* note 37.
[111] Alter, Gathii & Helfer, "Backlash against International Courts in West, East and Southern Africa", *supra* note 51.
[112] Kenya Parliamentary Debates, National Assembly (*Hansard)*, 16 May 2007, at 1339–1429, online at http://info.mzalendo.com/hansard/sitting/national_assembly/2007-05-16-09-00-00. See also *Ibid*.
[113] Nairobi High Court, *Anyang Nyong'o and 10 Others v. AG*, Civil Case No. 49, 2006, online at http://kenyalaw.org/caselaw/cases/view/37525. See also *Ibid*.
[114] *East African Law Society and 4 others v. Attorney General of Kenya and 3 others*, Reference No. 3 of 2007, 30 August 2008; See also *Ibid at 304*.
[115] *Ibid*.

establish a people-centred market-driven collaboration.[116] However, the Court declined to invalidate the amendments suggesting that in the future, those provisions would have to be adhered to.[117] It is interesting to note that even though the EACJ could have invalidated the amendments to the Treaty, it decided against doing so. In the end, the Kenya-led amendments to the Treaty remained, and Kenya was forced to comply with the judgement of the EACJ and conduct elections for its seats in the EALA.[118]

3.3.1.2. Access as Constraint in the Case of the EACJ and ECOWAS

Before discussing the resistance against the SADCT, it is important to note the similarities between Kenya's amendments to the Treaty and Gambia's proposed amendments to the ECOWAS Court Protocol. Even though both (proposed and actual) amendments reflected the specific grouse that the member states had with the courts, they ultimately sought to limit access to the court.

In Gambia's case, the state sought that the court only has "*jurisdiction in cases arising from international instruments ratified by the respondent country*"; and that the jurisdiction be "*subject to the exhaustion of domestic remedies*". The proposals were obviously responses to the torture cases against Gambia that were before the ECOWAS court, especially given that Gambia had not ratified the UN Convention Against Torture. However, they also required that private litigants first "exhaust local remedies", a requirement that would restrict private actors from being able to approach the court until they had exhausted all possible domestic courts.[119] Gambia's President at

[116] *Ibid*.
[117] Ibid at
[118] Alter, Gathii & Helfer, "Backlash against International Courts in West, East and Southern Africa", *supra* note 51.
[119] Although the requirement for the exhaustion of local remedies often serves as a hindrance to persons seeking redress at an international forum, the rule has not always been interpreted so rigidly as to serve as a bar to access. The *African Charter* for example, lists an exception to the rule for exhausting local remedies as "unless it is obvious that the [domestic] procedure is unduly long". SeeArticle 56(5) of the African Charter on Human and Peoples' Rights, *adopted*, 27 June 1981, art. 21, O.A.U. Doc. CAB/LEG/67/3 Rev. 5,1520 U.N.T.S. 217 (*entered into force* 21 Oct. 1986); Additional exceptions can be found in the jurisprudence of the African Court and the African

the time was referred to as having "conquered his own judiciary"[120] and so was very keen on having litigants approach the Gambian judiciary while preventing them from pursuing recourse elsewhere.

In Kenya's case, their proposals targeted the procedure for removing judges and the court's jurisdiction to review decisions taken by organs of partner states. However, the most significant move was the inclusion of a two-month time limit within which private individuals were to initiate suits before the court. The inclusion of this somewhat arbitrary, and obviously constraining and conservative time limit for instituting proceedings before the court was designed to restrict private access to the court.

Both Gambia's abandoned attempt at changing the structure of the ECOWAS Court, and Kenya's ferociously pursued ambition to resist the court and curb its jurisdiction, have in common the goal of *limiting* (not ending) access to the courts by private individuals. Gambia pursued this goal by requiring the exhaustion of local remedies, while Kenya introduced a two-month time limit for approaching the court. In the discussion regarding the SADCT, we see how what is described as a "successful"[121] campaign against the SADCT resulted in an absolute bar of private access to the Tribunal. This restriction of access to REC courts ultimately implicates whether the courts can exert influence over human rights violations or environmental violations, given that once private access to the court is restricted, private actors who have suffered rights violations cannot approach to address violations. This point is elaborated in greater detail in the fifth chapter of this dissertation.

Commission where the further qualify that the that local remedies, which applicants must exhaust, should be available, effective, and sufficient. See discussions on the jurisprudence in Lilian, Chenwi. "Exhaustion of Local Remedies Rule in the Jurisprudence of the African Court on Human and Peoples' Rights." *Human Rights Quarterly*, vol. 41 no. 2, 2019, p. 374-398.

[120] *Ibid at 297*. See also Andrew Novak, "The Rule of Law, Constitutional Reform, and the Death Penalty in the Gambia", 12 Rich. J. Global L. & Bus. 217 (2013) on the rule of law under Jammeh's regime.

[121] *Ibid*.

3.3.1.3. The SADC Tribunal

The set of events that ignited the resistance against the SADCT are slightly different, and arguably more complex, than the cases in the other two REC courts. For the SADCT, the court adjudicated and delivered judgment in a case involving a white farmer in Zimbabwe who alleged that his land had been expropriated by the Zimbabwean government without compensation.[122] The plaintiff alleged discrimination on the basis of race, denial of access to justice and a lack of due process in depriving him of his property.[123]

After a long and contentious trial, during which the SADCT issued a number of bold interim orders (including an injunction barring Zimbabwe from evicting or interfering with Campbell on the farm pending the determination of the suit), the Tribunal decided the case in favour of the plaintiffs.[124]

The Tribunal held that Zimbabwe's land distribution practices were discriminatory on the basis of race and rejected the argument that the government's land reform practices were a legitimate claim towards land redistribution that only happened to influence whites because of Zimbabwe's colonial history.[125] The Tribunal rejected that argument stating that if the seized land was actually being redistributed to the "poor and landless",[126] the arguments would have held more sway, instead the Tribunal argued that the lands were being distributed to members of Zimbabwe's ruling party.[127]

The decision was derided by Mugabe, Zimbabwe's President at the time, who referred to it as "absolute nonsense," and commented, "*some farmers went to the SADC Tribunal in Namibia, but*

[122] *Campbell and Others v. Zimbabwe (Merits)*, Case No. SADC (T) 2/2007, 28 November 2008, at 4 (complaint filed 11 October 2007).
[123] *Ibid*.
[124] Alter, Gathii & Helfer, "Backlash against International Courts in West, East and Southern Africa", *supra* note 51.
[125] *Ibid* at 308.
[126] *Ibid* at 309.
[127] *Ibid*.

that's nonsense, absolute nonsense, no one will follow that …We have courts here in this country, that can determine the rights of people…our land issues are not subject to the SADC Tribunal".[128] The landowners then returned to the Tribunal and commenced contempt proceedings against Zimbabwe.[129] Although Zimbabwe did not participate in those proceedings, the Tribunal found the government to be in "breach and contempt" and submitted its findings to the Summit (the highest decision-making body of SADC) further action. It was this contempt ruling that "galvanized Mugabe [Zimbabwe's President] to action".[130]

Zimbabwe's reaction to this ruling on contempt was tenacious; it proceeded with a strategy to paralyze the court and ultimately "kill the court". The first play in this multi-pronged strategy to kill was the court, was a presentation of a 42-page memorandum to the Summit, challenging the validity of the Tribunal on the claim that two-thirds of the countries that adopted the Tribunal's enabling Protocol had not ratified it and so all decisions of the Tribunal were void.[131] This unsettling and deeply constitutional challenge to the validity of the Tribunal threw the Summit into disarray, as other states were unsure of the status or fate of the Tribunal, much less the consequence of Zimbabwe's failure to comply with the decisions of the Tribunal.[132]

The following month, the Summit held a second even more contentious meeting where it resolved to engage the services of an external consultant to review the "role, terms of reference and functions of the Tribunal", and report within 6 months.[133] While this seemed like a fair compromise, Alter et al. argue that the genius of Mugabe's plan lay in what the Summit had *failed*

[128] *Ibid at 309*.
[129] *Ibid*.
[130] *Ibid at 309*.
[131] *Ibid*.
[132] *Ibid*.
[133] *Ibid*.

to decide at that meeting, specifically, the renewal of the terms of the four judges of the Tribunal whose terms had expired; and the replacement of a fifth judge whom Mugabe had recalled.[134] Both issues required the consent of *all members* to execute.[135] By withholding his consent and ensuring that those issues were not decided at the meeting, Mugabe ensured that even if the Tribunal maintained its legal mandate, it could not function as it required 5 sitting judges to be properly constituted.[136]

Subsequently, several Summit meetings were held to review the recommendations of the independent consultant on the validity of the Tribunal, as well as adopt the revised version of the Protocol.[137] In an attempt to save the Tribunal, a coalition of activists submitted a new draft of the Protocol to the Summit.[138] The draft had proposed a compromise – the preservation of the right of private litigants to access the Tribunal, the creation of an appeals chamber, and the narrowing of the Tribunal's jurisdiction over human rights.[139] However, regarding the *Campbell* judgment, the civil society draft insisted that all decisions taken under the 2000 Protocol remained *valid and binding.*[140]

Even though the Ministers of Justice and Attorneys General approved a revised draft Protocol, Alter et al. argue that at the Summit meeting to adopt this new draft, Mugabe lambasted the proposals, reiterating his stance that Western powers were stage-managing the process.[141] They

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[134] *Ibid*.
[135] *Ibid*.
[136] *Ibid*. Interestingly, while Alter and her co-authors argue that the Tribunal was not in fact suspended by the Summit and that the Tribunal were merely frustrated into inaction, civil society groups argued that the Tribunal was in fact suspended. See TRALAC TRADE LAW CENTRE, "Top African court 'powerless' to reinstate SADC Tribunal", online: *tralac* <https://www.tralac.org/news/article/5511-top-african-court-powerless-to-reinstate-sadc-tribunal.html>.
[137] Alter, Gathii & Helfer, "Backlash against International Courts in West, East and Southern Africa", *supra* note 51.
[138] *Ibid at 313*.
[139] *Ibid*.
[140] *Ibid*.
[141] *Ibid*.

write that multiple sources alleged that Summit leaders had decided in the face of Zimbabwe's opposition to return the proposals to the Ministers of Justice and Attorney Generals for reconsideration. However, the Communique that emerged after the meeting reflected a resolution to call for the creation of a new protocol that confined the mandate of the Tribunal to the interpretation of SADC treaty documents and resolving disputes between states.[142]

Finally, in August 2014, the Summit adopted a new protocol that removed the right of private litigants to access the court and permitted states to withdraw from the jurisdiction of the Tribunal after giving it 12 months' notice.[143]

In the next section, I engage more pointedly with the arguments of Alter et al. and other scholars regarding the success, relative success, and failures of the backlash against the courts – specifically, the factors that aggravate or mitigate resistance attempts against the REC courts. In engaging their scholarship, this chapter attempts to reveal under-analyzed dynamics within the relationships between states and activists, REC courts, RECs, *and context*, and how those implicate the potentiality of the success or failure of resistance attempts against ICs. The arguments in the coming sections build on the arguments made in the previous chapter to demonstrate in more granular form how context, specifically socio-political context is useful for understanding the development or restriction of the jurisdictions of ICs, especially when these courts face resistance.

3.3.2. Aggravation and Mitigation of Resistance to REC courts: Analysing the Three Incidences of Resistance

[142] *Ibid*.
[143] Protocol on the Tribunal in the Southern African Development Community, online at: https://ijrcenter.org/wp-content/uploads/2016/11/New-SADC-Tribunal-Protocol-Signed.pdf, Art. 33, and Art. 50.

When Alter, et al. analysed the backlash against the three courts, they highlighted the significance of the following factors to the divergent outcomes of the backlash attempts. They identified the significance of the political clout of the member state leading the charge for the backlash.[144] They claim that in the case of Kenya and Zimbabwe, both countries had significant political clout in the region and could thus sway the other countries to support their ambitions.[145] I problematize this claim in the coming sections, especially the claim to Zimbabwe's political clout. Gambia, on the other hand, did not have as much political clout and was generally considered as a "bad actor" in the international scene and so his proposals did not carry similar weight.[146]

They also highlight the significance of the "subject matter of the dispute" between the courts and the states, highlighting that land issues in southern Africa (which was the subject of the SADCT dispute with Zimbabwe) are perhaps the "most incendiary" of the three.[147] I return to this point in the coming sections.

Quite significantly, Alter et al. discuss the role of REC Secretariats as "brokers" in managing backlash against REC courts. They suggest that strong alliances between REC Secretariats and CSO's increase the chances of an IC resisting backlash, as seen in the case of the ECOWAS court, whereas weak alliances with CSO's increase the chances of successful backlash, as seen in the case of the EAC and SADC.[148]

These arguments of Alter et al. regarding the factors that explain the divergent outcomes of the backlash against the courts are compelling. However, while their conclusions are convincing, I

[144] Alter, Gathii & Helfer, *supra* note 63 at 317.
[145] *Ibid*.
[146] *Ibid*.
[147] Alter, Gathii & Helfer, *supra* note 63 at 318.
[148] *Ibid at 319 to 321*.

add to that scholarship by exploring a few fundamental issues that are under-analyzed, particularly in relation to the divergent outcomes of the SADCT.

The specific focus on SADCT is important for two reasons: a) the significance of *access* is apparent in the case of the SADCT because the backlash against the court is only considered "successful" because it succeeded in removing access by private parties from the court's jurisdiction and b) as I had argued before, private access to ICs is essential to activists struggle for justice before these courts including to access environmental protection and socio-economic justice. In the next section, I elaborate further on the significance of access to states, activists and the courts themselves. However, in this section, we examine some of the under-analyzed factors that aggravated or mitigated the success or failure of the resistance against the three REC courts. They include –

a) formal jurisdiction (or lack thereof) over human rights;
b) The response of other member states to the dispute between the disgruntled state and the court (in the SADC case, this issue was tied to regional and historical nature of land in Southern Africa);
c) the conduct of the Tribunal, during and after the decision and;
d) The conduct/presence of activists.

In the case of the ECOWAS court and the EACJ, the issue that ignited their disagreement with member states arose from the formally conferred mandates of the courts. In the case of the ECOWAS court, the court indeed had a mandate to adjudicate human rights, and so was well within its rights to adjudicate the *Manneh* case.[149] While in the case of the EACJ, the *Nyong'o* case

[149] Manneh case, *supra* note 88

was also a case regarding the EAC treaty itself and so within the ordinary jurisdiction of the court. As such, while the member states felt offended by the courts' decisions in both instances, their challenge to the court's authority could not be legitimated in the way it was in the case of the SADCT.

In the case of the SADCT, a number of complex issues intersect in relation to its backlash. The first relates to the Tribunal's lack of a formally conferred human rights jurisdiction, under which it was adjudicating the *Campbell* case, and the second relates to the subject matter of what was being adjudicated, i.e. land. As Alter et al. argue, land in southern Africa was in fact, the most incendiary of the three issues, they argue:

> All postcolonial societies struggle with the fraught legacy of highly concentrated property ownership. Thus, there was much sympathy among regional leaders when Zimbabwe argued that 'if it happens to us, it happens to you next'.

This description of land issues in southern Africa, while accurate, does not sufficiently account for the cultural and physical significance of land issues in Southern Africa. It also does not sufficiently account for how or why states, *as well as* their populations, would be sympathetic to Zimbabwe's issue with the Tribunal. In a recent book chapter, Tendayi Achiume writes:

> Access to land is a pressing social, economic, and political issue across much of southern Africa, and the shared history of colonial dispossession continues to shape how many SADC member states and their populations perceive land issues. It is fair to say that 'throughout the southern African region, the land question is commonly viewed through the lens of historic injustice.' In a number of countries this injustice is understood in racial terms.[150]

[150] Tendayi Achiume, "The SADC Tribunal: Socio-Political Dissonance and the Authority of International Courts" in *International Court Authority* (New York: Oxford University Press, 2018) at 133.

In her scholarship, Achiume argues that the Tribunal's decision in *Campbell* (which declared that the expropriation of Campbell's land by Zimbabwe was unlawful) was "socio-politically dissonant" given that it "advanced a vision of racial equality and postcolonial land reform", "that was discordant with a fundamental ideal that is widely shared among members of a society [Southern Africa]".[151] As such, beyond simply being an argument of "if it happens to us, it will happen to you", Zimbabwe's grouse with the Tribunal resonated among southern African leaders and their populations because it spoke to widely felt tensions within the region regarding racial injustice and postcolonial land reforms. As such, beyond what Alter et al. argue was Zimbabwe's political clout which swayed the support of member states, I argue that far more likely it was the resonance of the implications of the dispute between Zimbabwe and SADCT that swayed their support – implications of racial inequality and land dispossession.

I argue that the discussions by Alter et al. on the involvement of activists, or its lack thereof, further illustrate this point. Alter et al. argue that civil society engagement with the Secretariats of the three RECs was a significant factor in the success or failure of the backlash attempt. In the case of SADC, they argued that the Secretariat had a "standoffish relationship" with the South African Lawyers Association even before the *Campbell* case and so the latter could not influence the Secretariat in resisting Zimbabwe's attack. They also argued that this lack of close relationship between the Secretariat and SALA created a vacuum for civil society engagement, which was occupied by foreign NGOs such as Open Society Initiative of Southern Africa (supported by the Soros Foundation) and the Southern Africa Litigation Centre (jointly funded by Soros and the International Bar Association) which were easy targets for political leaders on suspicion of being

[151] *Ibid at 125*.

pawns of Western powers.[152] They argued that "for all of these reasons, the SADC Secretariat mostly sidelined the civil society groups that rallied to save the Tribunal."[153]

Achiume, on the other hand, argues that the lack of a successful CSO and Secretariat mobilization was more likely a consequence of the delicate nature of the issue being disputed, i.e. land. She argues, "*the dissonance [of the Campbell decision] alienated SADC member states and limited the potential buffer civil society actors could offer the Tribunal in the face of Mugabe's backlash*".[154] She suggests that the mobilization to save the Tribunal came from "elite civil society actors"[155] rather than "popular civil society actors" such as "trade unions and religious community-based organizations".[156]

It would suggest that more than the Secretariat's suspicion of the almost entirely Western-sponsored NGOs that were lobbying to save the Tribunal, perhaps a more plausible explanation for the lack of civil society engagement by the SADC Secretariat was more closely related to the unpopularity of the Tribunal's decision within the Secretariat itself. This diminished chances of success for activists are theorized by Sikkink in her "insider/outsider coalition" theory.[157] The theory captures a situation where activists will suffer diminished chances of success both domestically and internationally because of the nature of the cause they are attempting to

[152] Alter, Gathii & Helfer, "Backlash against International Courts in West, East and Southern Africa", *supra* note 51.
[153] *Ibid*.
[154] Achiume, *supra* note 136 at 125. Emphasis supplied.
[155] *Ibid at 139*.
[156] *Ibid at 139 - 140*. Achiume acknowledges, in agreement with Alter, Gathii and Helfer, that civil society had indeed successfully lobbied the Justice Ministers to pass its "compromise" amended Protocol which was defeated by Mugabe once it got to Summit. However, she argues that such successful lobbying of the Justice Ministers demonstrates that the elite constituencies within which the Campbell judgment was likely to be viewed favorably. She argues that Justice Ministers were the most likely to be amenable to a "rule of law" argument.
[157] Kathryn Sikkink, "Patterns of Dynamic Multilevel Governance and the Insider-Outsider Coalition" in Transnational Protest and Global Activism, Donatella della Porta & Sidney Tarrow, eds. (Lanham, MD: Rowman & Littlefield Publishers, 2004).

advance.[158] In her work, she uses example such as abortion rights in Latin America; she argues that activists who advocate for such issues face diminished chances of success because those issues face a lot of opposition both domestically and internationally.[159] She argues that in these cases, "activism is not absent or impossible…it just faces a more serious set of obstacles."[160] I argue that this was perhaps the fate of the activists in southern Africa who were attempting to protect the Tribunal's jurisdiction. As such, while there were indeed activists fighting to "save" the Tribunal at the time, the dissonance of the Tribunal's decision and the lack of support for the decision from *within* the REC and its institutions frustrated the efforts of these activists. As I had argued in the previous chapter, *context* is useful for understanding the development of these ICs, but as we see here, it is useful for understanding their restrictions as well.

This dissertation also problematizes other scholarship on the demise of the Tribunal that suggests that the support of southern African states of Zimbabwe was a reflection of "SADC's hierarchy of values, in terms of which *sovereignty and regime solidarity take precedence over human rights and democracy.*"[161] I attempt to introduce more nuance into the discussions around the demise of the SADCT that reveal a complex nature of the subject matter of the dispute between the Tribunal and Zimbabwe and the conduct of the Tribunal. Although I discuss judicial behaviour in greater detail in the next chapter, it is significant to highlight the conduct of the SADCT as a significant factor in the success of the resistance against the Tribunal. Of the three courts, the SADCT was the most tenacious in issuing not only bold interim orders and the final judgment, but also in issuing a contempt order and submitting such to the Summit for action. This tenacity is remarkable,

[158] *Ibid* at 159 - 160.
[159] *Ibid*.
[160] *Ibid* at 160.
[161] Laurie Nathan, "The Disbanding of the SADC Tribunal: A Cautionary Tale" (2013) 35 Hum Rights Q 870 at 16.

especially when compared to the situation in the EACJ. For example, when the EACJ was presented with an opportunity to invalidate the Kenya-led reforms to its structure in the form of a suit by a CSO, the court even though holding that the executive ought to have consulted civil society, declined to invalidate the reforms. The contempt ruling issued by the Tribunal and the pursuance of the implementation of the judgment before the Summit introduced an additional element to the tensions between Zimbabwe and the Tribunal. I elaborate on this further in the next chapter when I discuss judicial conduct of ICs and how that also contributes to the development or regression of their jurisdiction (and very often their access), however for the point being made here, it is important to note that the tenacity of the Tribunal, compared to the other two ICs was also an aggravating factor.

Ultimately, a combination of all those factors, most significantly the subject matter of the dispute and its relationship (or dissonance) with the context of southern Africa, hastened the demise of the private access jurisdiction of the Tribunal. In the next section, I discuss the many attempts of activists to save, revive and, most recently, resurrect this private access jurisdiction of the SADCT. I argue that these attempts further prove the significance of private access to access to justice in international courts and thus significant to the pursuit of environmental protection and socio-economic justice.

3.4. Access to Courts as a Subject of Contention between States and Activists – The Case for Revival and Resurrection

The discussions so far have demonstrated how access to ICs is the subject of contention between states and activists. As discussed in previous sections, activists are often mobilizing to either access or extend their access to the courts, while states in expressing their displeasure with the courts will often attempt to remove private access to the courts. Access as a jurisdictional feature

of ICs then becomes a site of struggle for activists seeking access to justice and state seeking to limit the influence of the courts.

Sikkink's theory of insider-outsider coalition[162] is useful for understanding why activists pursue actions before international courts and why they may seek to expand jurisdictional access to the ICs. The theory outlines four approaches that NGOs adopt to pursue their agendas at national and/or international levels. One approach, which Sikkink describes as "Boomerangs" and "spirals", she argues is the most profitable for activists if they encounter resistance at a national level, but receptiveness and influential allies at the international level. In her view, the receptiveness of the issue by the international organization forces the domestic authorities to pay attention to the issue, thereby bringing about political or social change.[163]

This theory is useful for understanding why activists seek to develop or maintain access to these ICs. In the fifth chapter of this dissertation, I demonstrate the utility of African ICs, particularly for activists pursuing environmental protection and socio-economic justice in Africa especially given the fact that socio-economic issues are often considered non-justiciable and domestic courts are often unable to provide those rights. In this chapter, however, I argue more generally that obtaining and maintaining access to ICs is useful for activists as REC courts provide activists with an avenue to pursue their claims, obtain judgments and use those decisions to pursue policy change in domestic forums. In this sense, the restriction of access, or worse, the lack of access by activists to international courts provides challenges to activists especially if they encounter resistance to those issues at the national level.

[162] Kathryn Sikkink, "Patterns of Dynamic Multilevel Governance and the Insider-Outsider Coalition" in Transnational Protest and Global Activism, Donatella della Porta & Sidney Tarrow, eds. (Lanham, MD: Rowman & Littlefield Publishers, 2004).
[163] *Ibid.*

This frustration regarding lack of access is exemplified in the case of activists in southern Africa. Given the removal of private access to the SADC Tribunal and the restriction of the Tribunal's jurisdiction to only interpreting the constitutive treaty, it means that private actors in fourteen of the sixteen-member states in the SADC have no African international court which they could approach to pursue their claims. Of the sixteen member states of SADC, private actors in Tanzania and Malawi are the only ones with access to African international courts as private actors in Tanzania benefit from the country's membership of both SADC and the EAC,[164] and private actors in Malawi benefit from the country's access to African court.[165] However, private actors and activists in all other fourteen member states in the SADC have no such options of an IC to pursue their claims internationally.

3.4.1. Activist Influence: Revival or Resurrection

Essentially, victims of human rights or the rule of law violations in southern Africa and activists in Southern Africa who may wish to pursue their agendas in international judicial forums are currently without options given the lack of jurisdiction of the SADC Tribunal over such claims. It is no surprise then that activists are pursuing a plan towards resurrecting the private access jurisdiction of the Tribunal. Even before the adoption of the current SADCT Protocol, which restricted access to the jurisdiction of the court to states, and interpreting the treaty, civil society organizations had attempted to *revive* the Tribunal through international adjudication.

[164] Tanzania is also is a party to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, (the Protocol), and has made the declaration recognizing the competence of the African Court to receive cases from NGOs and individuals. See African Court of Human and Peoples' Rights, online: http://en.african-court.org/

[165] Malawi is the one exception because it is also a party to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, (the Protocol), and has made the declaration recognizing the competence of the African Court to receive cases from NGOs and individuals. See African Court of Human and Peoples' Rights, *Ibid*.

In the wake of the Tribunal's suspension, activists had attempted to challenge the decision of the Summit by submitting a complaint before the African Commission on Human and Peoples' Rights.[166] Activists argued before the African Commission that the suspension of the Tribunal was a violation of the *African Charter*[167] (a Treaty to which all member states of the SADC were signatory), as member states were effectively barring individuals within their countries from having access to courts within their territories.[168] Activists argued that the suspension of the SADCT was in violation of Articles 7 and 26 of the *African Charter*, and as such, the Commission, being the body that responsible for receiving complaints concerning the violation of the *African Charter*, ought to reprimand SADC member states.[169] The African Commission rejected the complaint, holding that the *African Charter* guaranteed the rights of individuals to access to courts within the domestic legal system of states.[170] They held that the African *Charter* did not guarantee access to international courts.[171]

In addition, activists also filed a request for an advisory opinion before the African Court of Human and Peoples Rights.[172] They sought the advice of the Court on whether the suspension of the SADC Tribunal and termination of office of its judges resulted in a violation of institutional independence of the SADC Tribunal and the personal judicial independence of its judges as guaranteed by Article

[166] Communication 409/12 – Luke Munyandu Tembani and Benjamin John Freeth (represented by Norman Tjombe) v Angola and Thirteen Others online at: https://africanlii.org/afu/judgment/african-commission-human-and-peoples-rights/2014/4 (Tembani case)
[167] Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982)
[168] See Tembani Case, *supra* note 131.
[169] *Ibid*.
[170] Ibid at paras 138.
[171] *Ibid* at paras 142 and 144.
[172] Pan African Lawyers Union and Southern African Litigation Center, Order No. 002/2012 online: http://en.african-court.org/images/Cases/Advisory%20Opinion/Orders/Order%20Adv.%20Opin.%20002-2012%20PALU%20&%20SALC%20Engl..pdf

26 of the *African Charter*.[173] This petition was also unsuccessful as the African Court held that according to its Protocol, it could not adjudicate any matter if the same matter was already before the African Commission.[174] In this case, the matter was indeed before the African Commission, and the Commission had not yet decided it.[175]

Needless to say, the attempts to catalyze the revival of the then suspended Tribunal using the African system were unsuccessful. Ultimately, in 2014, the new Protocol removing access to Tribunal was adopted, removing private access to the courts – what had previously been a redundant institution trying to be revived was effectively killed off. It is noteworthy that while attempting to revive the Tribunal, one of the first strategies adopted by the relevant activists, after encountering resistance (in the form of the suspension of the Tribunal) from SADC member states, was to appeal to both an international quasi-judicial body and an international court in Africa. The failure of that strategy, and the demise of the Tribunal, prompted activists to shift strategies from an attempt at revival to attempts at resurrection.

The strategy has involved mobilization by civil society through domestic litigation and public awareness campaigns to challenge the initial suspension of the Tribunal. Bar associations in Mozambique, South Africa, Tanzania have filed suits before their domestic courts challenging the decisions of their governments to support the suspension of the Tribunal under the previous SADCT Protocol.[176]

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[173] *Ibid*.
[174] *Ibid*.
[175] See also Erika de Wet, "Reactions to the Backlash: Trying to Revive the SADC Tribunal through Litigation" online at: https://www.ejiltalk.org/reactions-to-the-backlash-trying-to-revive-the-sadc-tribunal-through-litigation/
[176] Interview 7 with Member of Civil Society Coalition (22nd June 2018). See also Moses Phooko, "Has the SADC Tribunal been Salvaged by the South African Constitutional Court and the Tanzanian High Court?" 2020 (34) Spec Juris 174; Francesca Mussi, "From the Campbell Case to a Recent Ruling of the Constitutional Court of South Africa: Is There Any Hope to Revive the Tribunal of the Southern African Development Community?" (2020) 28:Supplement African J Intl & Comparative Law 110–137.

This strategy has recorded some success in South Africa in 2018, as a high court in South Africa declared the former President's support of the resolution to suspend the Tribunal unconstitutional.[177] The domestic court held that the President ought to have sought the consent of Parliament before supporting the suspension of the Tribunal.[178] Civil society groups applauded the decision suggesting that it could be used to mobilize other domestic courts in the region to hold their governments accountable in a similar way and ultimately mobilize towards resurrecting the jurisdiction of the Tribunal.[179]

This ambition has made some strides because the Bar association in Tanzania has also successfully filed a similar suit. The high court in Tanzania, while referring to the decision in South Africa, declared that the government of Tanzania acted unconstitutionally when it supported the resolution to suspend the SADCT and adopted a new protocol stripping the Tribunal of private individual access.[180]

These decisions have been "welcomed" by some civil society organizations and other interest groups.[181] Some human rights organizations in Zimbabwe, Mozambique, Botswana, and Namibia, have made similar calls for the revival of the Tribunal.[182] The ambition of these campaigns by civil

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[177] "Zuma's role in dismantling SADC Tribunal slammed by court | IOL News", online: <https://www.iol.co.za/news/south-africa/gauteng/zumas-role-in-dismantling-sadc-tribunal-slammed-by-court-13543070>.
[178] *Ibid*.
[179] Mia Swart, "A house of justice for Africa: Resurrecting the SADC Tribunal", (2 April 2018), online: *Brookings* <https://www.brookings.edu/blog/africa-in-focus/2018/04/02/a-house-of-justice-for-africa-resurrecting-the-sadc-tribunal/>.
[180] Tangayika Law Society v. Attorney General of Tanzania and Anor online: https://africanlii.org/sites/default/files/Judgment.%20TLS%20vs%20Ministry%20of%20Foreign%20Affairs%20and%20International%20Cooperation%20%26%20AG%2C%20Misc%20Civil%20Cause%20No.%2023%20of%202014._0.pdf
[181] "Tanzanian High Court condemns unlawful stripping of SADC Tribunal's powers rendering the rule of law a 'pipe dream'", (15 June 2019), online: *International Commission of Jurists* <https://www.icj.org/tanzanian-high-court-condemns-unlawful-stripping-of-sadc-tribunals-powers-rendering-the-rule-of-law-a-pipe-dream/>.
[182] Swart, *supra* note 452.

society is that armed with decisions of high courts in South Africa and now Tanzania, and the new governments in southern Africa, specifically South Africa and Zimbabwe, would be more accepting of a Tribunal with human rights jurisdiction and access to private individuals.[183]

It remains to be seen if this strategy will yield the desired result; however, it does seem to be recording some very modest gains.

3.6. Conclusion

The arguments so far in this dissertation have sought to demonstrate how the specificity of the interactions among states, activists, and the REC courts themselves, support or hinder a REC court's ability to advance environmental protection and socio-economic justice in Africa.

Towards that goal, this chapter has attempted to demonstrate 4 major arguments. The first is that the jurisdiction of the courts, both in relation to the subject matter and in relation to access, is formed as a consequence of the specific kinds of interactions among the relevant states, the activists, and the courts themselves. This jurisdiction determines whether courts can influence human rights or environmental claims (or over neither). Secondly, that access is a fundamental feature of an IC's architecture, such that access is often the target of expansionist or restrictive reforms of the courts by states and activists. Thirdly, the chapter seeks to demonstrate that in addition to the obvious role that states play in creating and developing ICs (including Africa's REC courts), activists play a role, not only in the development and sustenance of ICs but also in attempting to revive or resurrect them. Finally, the chapter seeks to demonstrate that while other member state's support and activist interventions play a significant role in the maintenance or restriction of private access to IC, the decision of the IC must reflect or at least resonate with the

[183] *Ibid*.

pulse of the region. As seen in the case of the SADCT, the *subject matter of the dispute* between a state and an IC was so dissonant that it was difficult for states, the RECs and the activists to defend the institution from losing its wider jurisdiction.

In this concluding section, I engage broader theoretical inquiries that account for the contribution of activism to the development of international courts. As briefly discussed in the introductory section of this chapter, dominant understandings regarding the creation of international courts tend to be overly state-centric, centering states as creators of international courts while interrogating the relationship of states to ICs.[184] While these accounts are not wrong, the overwhelming focus on the relationship of states to international courts tends to obscure the influence of activists in developing and maintaining these institutions. Okafor's work on the African Human Rights system provides a useful mapping of conventional approaches to the study of international institutions.[185] His review of realist,[186] neo-realist,[187] neo-liberal,[188] liberal,[189] constructivist,[190] and quasi-constructivist[191] approaches to the study of international institutions demonstrates how:

> these schools (save for the republican liberals and most constructivists) has tended to be quite (not totally), state-centric, overly focused on the international plane; and either too compliance-oriented, or too enforcement-centered. Many of the number have been quite positivistic, and few have been as holistic as they could be.[192]

[184] See also Principal-Agent Theory, International Courts as Trustees, and the Altered Politics Framework theories in Alter, *supra* note 1. See also Constrained Dependence Theory in Laurence R Helfer & Anne-Marie Slaughter, "Why States Create International Tribunals: A Response to Professors Posner and Yoo Review Essay" (2005) 93 Cal L Rev 899–956. See also Bounded Discretion theory in Tom Ginsburg, "Bounded Discretion in International Judicial Lawmaking" (2004) 45 Va J Int'l L 631–674.
[185] Okafor, *supra* note 257.
[186] *Ibid* at 16.
[187] *Ibid* at 17.
[188] *Ibid* at 19.
[189] *Ibid* at 22.
[190] *Ibid* at 23.
[191] *Ibid* at 28.
[192] Okafor, *supra* note 165 at 30.

In agreement with Okafor, this work attempts to deviate from the overly excessive positivist accounts of the development of international courts. This dissertation extends the scholarship by acknowledging the ways in which activists influence the development and sustenance of African REC courts while also demonstrating how their role goes beyond developing or sustaining these institutions. It demonstrates how the role of activist extends into attempting to revive or resurrect these institutions after they have been killed off. Their role is not only in creation or sustenance, as has been captured by the literature, it is also in revival or resurrection.

The chapter offers examples of the ways in which activists influence the development of international courts, including the campaign after which the ECOWAS adopted a human rights protocol, the mobilization by civil society to defeat the proposals by Gambia, and activists attempts to invalidate the amendments to the EAC Treaty that arguably weakened the EACJ.[193] We also see the role of activists attempting to revive or resurrect the SADCT, while arguing their need for the institution (needs that obviously differ from those of the creators of the institution). Although the activist arguments seeking the invalidation of the suspension of the Tribunal has only been successful before two domestic courts, it does inspire the interrogation of the role of activists in developing these institutions.

This mapping of activist interventions in the development of international institutions is aptly captured in Rajagopal's works. His scholarship accounts for the ways in which "grassroots groups, individuals, or social movements [are] agents of institutional transformation".[194] Although focused on the Bretton Woods Institutions – specifically the World Bank and the IMF, Rajagopal's work

[193] See EALS v. Kenya, supra note 96.
[194] Balakrishnan Rajagopal, "From Resistance to Renewal: The Third World, Social Movements, and the Expansion of International Institutions Symposium: International Law and the Developing World: A Millennial Analysis" (2000) 41:2 Harv Int'l L J 529 at 531.

demonstrates how social movements have been "agents of change"[195] for international institutions and critiques international law's failure to account for how these "Third World Masses" have influenced the "very architecture of international law".[196] His work accounts for the ways in which social movements have, through their resistance, forced international institutions to make changes to their architectural design, thus shaping these institutions. For example, he reviews how the World Bank's turn towards a poverty alleviation mandate was a response to external pressures mounted by social movements.[197] More broadly, his work critiques "traditional accounts of the birth of institutions that emphasize the role of leading individuals, or states, or simply functional needs that propelled institutional behaviour".[198]

Drawing insights from Rajagopal's work, this work attempts to account for the role of activism in the development and sustenance of these international courts. It attempts to draw attention to activism's role in the development of international courts without abandoning the understanding that these courts are in fact, creations of states. However, an overwhelming focus on states obscures the contributions of activists to the "very architecture" of international courts.

This significance of activism to the development of international institutions is accounted for, especially in political science literature and the works of constructivists who document the role of norms and norm entrepreneurs in the development of international institutions.[199] This work

[195] *Ibid at 530*.
[196] *Ibid at 532*.
[197] *Ibid at 578*.
[198] *Ibid at 534*.
[199] Finnemore & Sikkink, *supra* note 55. In their work, they characterise activists as "norm entrepreneurs" and credit them with generating consciousness about the existence of new norms within domestic and international discourses. Their theory of norm "life cycle," outlines three stages which a norm undergoes before it assumes universal acceptance within states. The first stage is norm emergence, where the *norm entrepreneur* creates a general consciousness about the norm and attempts to convince norm leaders (identified as a critical mass of states) to embrace this new norm. The second stage is the norm cascade where these norm leaders attempt to socialize other states to become followers of the norm. The authors of the theory suggest that states are convinced by norm leaders to accept new norms for a number of reasons including pressure for conformity, desire

however, draws from Rajagopal's in arguing that activism's role in contributing to the development of international institutions ought to be acknowledged in international law as well. The development and sustenance of the architecture of REC courts, especially in relation to access jurisdiction is and has been influenced by campaigns of activists. It is significant to acknowledge not only the role of states in the development of international courts, but also the role of activists.

to enhance international legitimation, and perhaps a desire for states to enhance their self-esteem. The final stage of the cycle is internalization. The authors posit that this is when the norm acquires a "taken-for-granted quality" and is no longer a matter for broad public debate. The campaign of civil society actors for the adoption of a human rights protocol in the ECOWAS, is one illustration of this theory.

CHAPTER FOUR

Understanding the Role of the REC Courts in Gaining, Maintaining or Losing their Legitimacy and its Relationship to the Expansion or Contraction of their Mandates and Jurisdictions

4.1. Introduction

So far, the discussions in the previous chapters of the dissertation have sought to highlight the significance of context, as including the interactions among states, the RECS (as ICs), and activists, and how that influences the development (or regression) of REC court's jurisdictions. The discussions so far have thus demonstrated how history, politics, political community, and the interactions of states influence the development or regression of the jurisdictions of the REC courts under study.

Unlike the previous chapters, which discuss and show how ICs such as the REC courts under study *participate* in the determination of their jurisdiction through jurisprudence that expands their jurisdiction (as we saw in the case of the EACJ and the SADCT), this chapter attempts to demonstrate how these REC Courts also accomplish the same participatory praxis by playing a significant role in the politics of their gaining or maintaining or losing of legitimacy.[1] This legitimacy that they participate in gaining or maintaining, or losing is particularly significant because it is often derived from the actors that use the IC – in this case: states and activists. This is a form of legitimacy can thus be lost if the parties that engage or could engage the ICs lose

[1] Legitimacy in this sense is understood as popular legitimacy, "as the perceived obligation to obey and trust and [have] confidence in the relevant institutions", see Tom R Tyler & Jonathan Jackson, "Popular legitimacy and the exercise of legal authority: Motivating compliance, cooperation, and engagement" (2014) 20:1 Psychology, Public Policy, and Law 78–95 at 78. See also, Tom R Tyler, *Why people obey the law* (Princeton, N.J: Princeton University Press, 2006). An extensive discussion of court legitimacy is undertaken in the coming sections of the chapter.

confidence in the institution. The chapter is thus interested in interrogating the specific ways in which the REC courts (as ICs) navigate the tensions that exist between their role as legal institutions and their (near-inevitable) participation in the politics of maintaining their own legitimacy.

A central focus of the discussions in this chapter relates to the ways in which ICs navigate the question of resistance against them by the actors that engage them. These discussions differ significantly from the discussions in the previous chapter because although this chapter is also concerned with resistance against courts, it focused on the resistance that challenges (or is likely to challenge) the legitimacy of the institution. In this sense, the chapter seeks to demonstrate how concerns around maintaining popular legitimacy (and authority) within the constituencies that engage the ICs affect the decision-making of the courts. In this sense, while the previous chapter was concerned with state-led resistance and how that shapes and reshapes the mandate and jurisdictions of the courts, this chapter focuses on judicial behaviour, specifically how courts anticipate or mitigate this state-led resistance while at the same time maintaining their legitimacy with the other actors that engage them. It seeks to illustrate how political considerations, outside or merely legal considerations, also play a role in how ICs adjudicate matters before them. Further, that that these considerations implicate whether or not the mandates/jurisdictions of these regional judicial bodies are expanded or restrained.

A central claim of this chapter is that understanding how ICs adjudicate political or politically sensitive matters before them is useful for understanding how some ICs maintain their mandates over time, and others do not. I argue that the specific nature of IC legitimacy demands that ICs contemplate political considerations in determining cases that may potentially ignite backlash.

Legitimacy, understood as popular legitimacy, provides a fitting frame for capturing the relationship of the ICs to states and activists – demonstrating how states and activists confer IC legitimacy and how these same actors also (in part) constitute IC authority. Although the main interest in this chapter is in "legitimacy," I am also interested in "authority" as a subset of legitimacy or as a factor in (de)legitimization. The scholarship of Alter et al., demonstrates that IC authority is derived not only from texts, as contained in their enabling instruments, it is also derived from the constituencies that engage the IC. They argue that IC authority is both "intersubjective and co-constitutive".[2] They write:

> although IC rulings nominally take the form of commands, IC authority is fundamentally **co- constitutive**. If all audiences that interact with an IC fail to seize the court when there are violations, fail to embrace its rulings as binding, or do not take meaningful actions in response to those rulings, the IC will have no authority in fact. In contrast, when different audiences— the parties to a case, similarly situated actors, and larger legal and political communities— respond in consequential ways to IC rulings, their actions help constitute IC authority. In this sense, IC authority is **both intersubjective and co-constitutive**: it must be both asserted by ICs and recognized by audiences who are independent of each other.[3] (emphasis added)

While IC authority relies *in part* on the constituencies that engage it, I argue that IC legitimacy relies entirely on the constituencies that engage the IC. As such, in attempting to maintain their legitimacy (and to a lesser extent authority), ICs must balance the interests of the actors that engage them, as well as their own interests relating to law, their role, and their preservation. The chapter attempts to produce an understanding of ICs as not only legal institutions but as also political institutions that exist within their specific contexts. In this sense, the chapter attempts to create an

[2] Karen J Alter, Laurence R Helfer & Mikael Rask Madsen, *International Court Authority in a Complex World* (Oxford University Press, 2018).
[3] *Ibid at 13*.

understanding of how these courts navigate their relationships and roles and how this ultimately influences their mandates and jurisdictions.

To aid the systematic discussion of the issues in the chapter, the chapter is divided into four main parts. The first part sets the stage for understanding the relationship between courts in general and the actors that engage it. It commences with a discussion of judicial legitimacy, seeking to highlight its significance in developing and sustaining relations among courts, litigants and other actors. This section offers a theoretical background for interrogating the roles of courts in society, engaging scholarship relating to whether courts *ought* to be *traditionalist* (and so almost entirely concerned with applying the rule of law); or whether they ought to be *adaptationist* (in which case their function should also be informed by what society needs from them). These discussions seek to provide a conceptual background for understanding the role of courts in society, how that relates to the legitimacy of the institutions, and how this legitimacy can be threatened if the court loses the confidence of the actors that engage it.

This second part of the chapter discusses, more generally, the ways in which ICs navigate the question of resistance against them by the actors that engage them. It is particularly interested in how courts adopt different techniques (resilience and avoidance techniques)[4] to avoid or mitigate resistance to their authority or challenges to their legitimacy.

The third part of the chapter underscores the utility of resilience and avoidance techniques to ICs in specific reference to the ICs under study. It reviews specific cases of the adoption (and lack) of those techniques in the context of the REC courts under study. Specifically, the discussions seek

[4] Madsen, Cebulak & Wiebusch, "Backlash against international courts", *supra* note 70; Jed Odermatt, "Patterns of avoidance: political questions before international courts" (2018) 14:2 International Journal of Law in Context 221–236.

to demonstrate the significance of resilience strategies to the maintenance of IC legitimacy but more significantly, it seeks to demonstrate how an IC's decision to use or not use resilience techniques can have a drastic effect on the ICs legitimacy – especially where the decision of the IC is unpopular or does not resonate with the with the concerned constituencies. Ultimately, it seeks to demonstrate that when this happens, and an IC loses its legitimacy, attacks to the institution's jurisdiction are far more likely to succeed. In this sense, the ICs adoption (or lack) of resilience techniques has bearings on whether the institution's jurisdiction is developed or restricted.

The fourth and final part of the chapter discusses the specific nature of IC legitimacy (and authority) that is derived through the interconnection of the ICs to the states and activists and also introduces the idea of a *pull relationship* among the actors which is tempered by considerations of the rule of law. The conclusion reiterates the argument that ICs are active participants in the legal and political contexts that produce or restrict their mandates and jurisdictions.

4.1.1. Background: On Judicial Legitimacy and the Role of Courts

Courts generally, whether international or domestic, have similar structural designs, and as such fit the mould of the "prototype of courts".[5] Martin Shapiro argues that the conventional understanding of courts (the prototype) involves "1) an independent judge applying 2) pre-existing legal norms after 3) adversary proceedings in order to achieve 4) a dichotomous decision in which one of the parties was assigned the legal right and the other found wrong."[6] This description of courts captures the most fundamental features of these institutions. Shapiro, however, theorizes

[5] Martin Shapiro, *Courts: A Comparative and Political Analysis* (University of Chicago Press, 2013) at 1.
[6] *Ibid*.

that courts have tended to "deviate" from this prototype, "showing how *uncourtlike* courts are or how much they are like other political actors" (emphasis added).[7]

The scholarship regarding the political or apolitical nature of courts has generated significant comment, especially within the literature that is interested in the role of courts in a democracy or focuses on judicial legitimacy. Many have argued that courts must maintain a sense of "*courtness*"[8] and avoid political considerations in order to maintain their legitimacy and uphold the rule of law.[9] Others, like Shapiro have argued that courts (in contemporary and historical societies) never actually fit the prototype of "*courtness*".[10] He argues that courts have never derived their legitimacy (solely) from their "courtness", but instead derive their legitimacy through other means such as the consent of parties and the reconciliatory elements of the court process.[11] Other scholars, however, argue the legitimacy of courts is *ensured* by political considerations, rather than threatened by it, and so courts o*ught* to engage (or avoid) certain political considerations as they are essential to maintain their legitimacy.[12]

This debate about judicial legitimacy has generated significant comment, particularly within domestic contexts. As a normative concept, it has been used to question the authority of courts to challenge the choices of elected officials, particularly in the context of judicial review.[13] In other forms, judicial legitimacy has been framed in the context of *capacity*, whether a court has the

[7] *Ibid*.
[8] Term borrowed from Martin Shapiro as he uses it to capture the 4 elements of a typical court. *Ibid*.
[9] Gerald Gunther, "The Subtle Vices of the "Passive Virtues" – A comment on the Principle and Expediency in Judicial Review" 64 COLUM. L. REV. 1, 22 (1964).
[10] Shapiro, *supra* note 93.
[11] *Ibid*.
[12] See Alexander M Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Yale University Press, 1986).
[13] Joel B Grossman, "Judicial Legitimacy and the Role of Courts: Shapiro's Courts" (1984) 9:1 American Bar Foundation Research Journal 214–222; Peter W Hogg & Allison A Bushell, "The Charter Dialogue between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing after All)" 52; Erin Delaney, "Judiciary Rising: Constitutional Change in the United Kingdom" (2015) 108:2 Northwestern University Law Review 543–606.

"internal ability to deal with a particular kind of question".[14] Other conversations relating to judicial legitimacy take the form of questions around the sources of judicial legitimacy. Grossman, for example, demonstrates that the legitimacy of courts depends on both internal and external factors expressed through "both process and results".[15] Grossman argues that courts derive their legitimacy from the internal process related to their sense of "courtness".[16] As such, courts are "intrinsically different from other political institutions; the differences are to be respected because they protect the independence courts must have to carry out their functions".[17] In this case, the legitimacy of courts is derived from their internal ability to present as, and remain, virtually apolitical. The second source of a court's legitimacy is derived from results.[18] As such:

> courts are to be judged by function and outcome, not by mere form. Democratic accountability rests on courts' ability to do justice and otherwise contribute to bettering the human condition; **what they contribute to attaining society's goal is more important than preserving a fictional – or at best theoretical – autonomy.**[19]

These opposing views illustrate two competing models on the proper roles of courts. The first is the *traditionalist* or *essentialist* models, which argue that courts are defined by their functions.[20] In this case, "what courts can do is determined by what courts are. Function follows form".[21] The second is the *adaptationist* or *nominalist* models, which assume that courts, "like other political

[14] Grossman, "Judicial Legitimacy and the Role of Courts", *supra* note 15; Philip L Dubois, *The analysis of judicial reform* (Lexington Books, 1982).
[15] Grossman, "Judicial Legitimacy and the Role of Courts", *supra* note 485.
[16] *Ibid*.
[17] Grossman, "Judicial Legitimacy and the Role of Courts", *supra* note 485.
[18] *Ibid*.
[19] *Ibid*.
[20] *Ibid.*
[21] *Ibid.*

institutions have a considerable adaptive capacity which they need to survive as meaningful political institutions."[22] Grossman writes:

> The traditionalists contend that courts *should not* transcend the limits of adjudicative structure and *must* remain within the protective limits of myth. The adaptationists counter that courts need not be and have not been so limited, that they are essentially hybrid institutions, and that within the limits of due process…courts should be receptive to what society needs: form should follow function.[23]

The question of what courts *are* and what they *ought to be*, while theoretical, is most vividly expressed in discussions around judicial review. Scholars and pundits vehemently question the rightness or wrongness of judges, who are not elected officials and thus not accountable for their actions, striking down legislation, or reversing actions carried out by duly elected representatives of people.[24] The argument in support of judicial review often reflects an appeal to constitutional principles and the rule of law. Essentially that all institutions in a democratic state must abide by the rule of law, and judicial review is merely an attempt to ensure such and uphold the rule of law.[25] Other scholars reject this rule of law argument in support of judicial review, arguing that for a judge to appeal to the rule of law as the basis for scrutiny of other organs of government is to misapply the rule of law.[26] John Finnis has argued that certain domains of democratic life are reserved by "*our law*" as solely the responsibility of the executive; as such, judicial review of these executive actions in the name of the rule of law is an "invasion"[27] of the responsibilities of the executive while entrenching responsibilities on judicial power which it is ill-suited to discharge.[28]

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[22] *Ibid.*
[23] *Ibid.*
[24] Hogg & Bushell, *supra* note 485.
[25] *Ibid*.
[26] John Finnis, "Judicial Power: Past, Present and Future" (2016) SSRN Electronic Journal, online: <http://www.ssrn.com/abstract=2710880>.
[27] *Ibid*.
[28] *Ibid*.

He maintains that "there are sufficient reasons of *institutional competence* to reinforce the already sufficient reasons of precedent and basic constitutionality that establish the rules recognising some judicially unreviewable executive discretionary power".[29]

The point of the discussions above is to demonstrate that theoretical debates about the roles, functions, capacities, and limits of courts color both academic and non-academic discussions about courts at domestic as well as international levels. While seemingly theoretical, these debates have material consequences, as unpopular decisions from courts generate criticism not only from the litigants but in some cases, from society, academic and non-academic alike.

The appeal to the rule of law as a defence of unpopular decisions by the courts often becomes insufficient as judges become targets of critique. As Peter Hogg notes, the famous American aphorism captures this sentiment, "We are under a Constitution, but the Constitution is what the judges say it is."[30] As such, while judges might defend anti-majoritarian decisions in the name of higher ideals, it is hard to ignore the unpopularity of such decisions.[31] Unpopular decisions could result in resistance against the courts, and as Erin Delaney points out, "courts have little recourse when powerful political interests align against them."[32] As such, reactions to unpopular judicial

[29] *Ibid*.
[30] Hogg & Bushell, *supra* note 485.
[31] Scholars and commentators of American jurisprudence even when they agreed with the decision of the American Supreme Court in *Brown v. Board of Education* 347 U.S. 483 (1954) and *Roe v. Wade* 410 U.S. 113 (1973), had been forced to acknowledge the unpopularity of those decisions within wider society. See *Ibid*. Recent scholarship from Adrienne Stone argues that "of course the point of constitutional principles is sometimes to frustrate the will of the people in the name of more fundamental ideals. But, for obvious reasons traced to our commitment to democracy, it is a weapon to be wielded carefully and rarely." Adrienne Stone, "A Comment on Professor Finnis's Praise of Australia's High Court | Opinions on High", online: <https://blogs.unimelb.edu.au/opinionsonhigh/2015/11/16/stone-finnis/>.
[32] Erin F Delaney, "Analyzing Avoidance: Judicial Strategy in Comparative Perspective" 66 DUKE LAW JOURNAL 67. In this paper, Delaney cites recent examples from Hungary and Poland, where the courts have come under attack by majority governments, seeking to limit the influence of the courts. See Joanna Berendt, "Polish Government Pushes Legislation to Tighten Control Over Judges", *The New York Times* (21 December 2019), online: <https://www.nytimes.com/2019/12/21/world/europe/poland-judges-independent.html>; "Rival orders deepen conflict over Polish judges", *BBC News* (23 January 2020), online: <https://www.bbc.com/news/world-europe-

decisions have ranged from politicians ensuring that either liberal or conservative judges are appointed to the bench[33] to legislative changes to constitutions designed and adopted to limit the capacity of courts to review executive decisions.[34]

Evidently, the discussions above attempt to demonstrate that courts, even domestic courts that are entrenched by national constitutions, can face backlash/resistance "when powerful political interests align against them."[35] As such, in theory and practice, courts can attract resistance,[36] and their legitimacy can be threatened by such resistance. Shapiro argues that in deciding in favour of one versus the other, courts immediately position themselves on the "side" of the successful party, which can easily be viewed as the triad (involving the courts and the two litigants), devolving into a "two against one".[37] He argues that as political actors, a "substantial behaviour of courts in all societies can be analyzed in terms of attempts to prevent the triad from breaking down into two against one".[38]

The significance of these discussions is to demonstrate that courts, even domestic courts, are subjects of critique and debate, both inherently (as to what they are capable of doing) and in

51226100>; Human Rights Watch | 350 Fifth Avenue, 34th Floor | New York & NY 10118-3299 USA | t 12122904700, "Wrong Direction on Rights | Assessing the Impact of Hungary's New Constitution and Laws", (16 May 2013), online: *Human Rights Watch* <https://www.hrw.org/report/2013/05/16/wrong-direction-rights/assessing-impact-hungarys-new-constitution-and-laws>.

[33] David Alistair Yalof, *Pursuit of Justices: Presidential Politics and the Selection of Supreme Court Nominees* (University of Chicago Press, 2001).

[34] See constitutional changes in Hungary, Deutsche Welle (wwwdwcom), "Hungarian parliament passes controversial constitutional changes | DW | 11.03.2013", online: *DWCOM* <https://www.dw.com/en/hungarian-parliament-passes-controversial-constitutional-changes/a-16664345>. One of the constitutional changes passed by the Hungarian parliament include the constitutional court no longer being able to void a constitutional law endorsed with a two-thirds parliamentary majority.

[35] Delaney, *supra* note 504.

[36] As Adrienne Stone writes that "the point of constitutional principles is sometimes to frustrate the will of the people in the name of more fundamental ideals." The unenviable role of role of "frustrating the will of the people" is often the responsibility of courts. Stone, *supra* note 503.

[37] Shapiro, *supra* note 93.

[38] *Ibid*.

relation to their capacity to review decisions of the executive branch of government. ICs are not removed from such issues.[39] In fact, these issues are arguably more potent in the context of ICs. Challenges to judicial legitimacy plague both domestic and international courts and all courts must often devise a means of navigating potential resistance.

The discussions in the later parts of the chapter attempt to demonstrate how this navigation is important, especially for ICs (the REC courts included), given that resistance against them not only threatens their legitimacy (and authority) but as we had seen in the previous chapter, it can also clip their jurisdiction or continued existence.

Part II

4.2. Resilience and Avoidance Strategies of International Courts[40]

Having discussed the complex nature of judicial legitimacy in the previous section, this section attempts two things. Firstly, it seeks to establish that courts are aware of the complicated nature of their role as adjudicators – specifically their ability to attract backlash and have devised strategies for either avoiding or mitigating resistance. Secondly, it discusses the specific instances of the adoption of such strategies by the REC courts under study, with a view to situating them in the literature, as well as demonstrating how the decision to adopt or not adopt these techniques reflects

[39] Daly & Wiebusch, "The African Court on Human and Peoples' Rights", *supra* note 17; Madsen, Cebulak & Wiebusch, "Backlash against international courts", *supra* note 70; Mikael Rask Madsen, Pola Cebulak & Micha Wiebusch, "Special Issue – Resistance to International Courts Introduction and Conclusion" (2018) 14:2 International Journal of Law in Context 193–196; Alter, Gathii & Helfer, "Backlash against International Courts in West, East and Southern Africa", *supra* note 51.

[40] I use the terms resilience and avoidance in this dissertation with an understanding that avoidance are always resilience techniques because they are designed to anticipate and thus avoid resistance. However, I argue that resilience techniques are not always avoidance techniques because while they are also concerned with anticipating or mitigating resistance, they can also be concerned with promoting compliance.

the complicated relationship of the courts, the states and activists and demonstrates – at the very least – the "small p" political nature of ICs.

Recent scholarship has turned attention to the ways in which domestic courts in various jurisdictions[41] and ICs[42] acknowledge, anticipate, and respond to resistance. In acknowledging the resistance to ICs, scholars have theorized the existence of avoidance and resilience strategies that ICs adopt to "avoid or mitigate the effects of resistance".[43] Madsen et al. argue that in pre-empting resistance, ICs will often do one of the following: adopt elaborate legal reasoning in their judgements by involving extensive comparisons with case-law from other jurisdictions or national contexts;[44] deploy deference and reliance on external expertise;[45] or lean towards "caution" in deciding cases, ensuring that the decisions had a minimal financial or political consequence,[46] or that the development of principles of law are politically sensitive towards member states.[47]

In some instances, ICs (such as the REC courts under study) will avoid the dispute altogether, adopting various techniques through which they avoid adjudicating disputes that could provoke resistance, including arguing that the dispute is a "political" dispute rather than a legal one.[48] Jed Odermatt writes:

> There are a number of reasons why an IC might avoid dealing with issues that are highly political in nature. An IC may employ such strategies **to enhance or preserve its legitimacy**. An IC may avoid ruling on a highly political issue in order to prevent a negative public perception, thereby **seeking to preserve its external legitimacy**. An IC may also

[41] Delaney, *supra* note 504.
[42] Odermatt, "Patterns of avoidance", *supra* note 476.
[43] *Ibid*; Madsen, Cebulak & Wiebusch, "Backlash against international courts", *supra* note 70.
[44] Madsen, Cebulak & Wiebusch, *supra* note 1 at 212 - 213.
[45] *Ibid*.
[46] Karen Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe*, Oxford Studies in European Law (Oxford, New York: Oxford University Press, 2003) at 115.
[47] See Mikael Rask Madsen, "Legal diplomacy – law, politics and the genesis of postwar European human rights" in Hoffmann SL (ed.), *Human Rights in the Twentieth Century: A Critical History* (Cambridge: Cambridge University Press 2011), pp. 62–81.
[48] Odermatt, "Patterns of avoidance", *supra* note 476.

> use such techniques to avoid going beyond the scope of authority delegated to them by states. Avoiding political disputes may also enhance the IC's effectiveness and compliance in the long term, by preventing the 'patterns of resistance'…Yet there are also clear downsides to adopting avoidance techniques. By avoiding politically sensitive disputes, an IC may also demonstrate that it is actually quite weak. Conversely, an IC may bolster its authority by taking up cases that are politically controversial.[49]

There are a number of reasons why ICs may, or may not, adopt such strategies. Significantly, much of the reasoning relates to legitimacy. It is also important to note that much of the scholarship on political constraints on ICs tend to be dominated by scholarship on the Court of Justice of the European Union (CJEU) or the International Court of Justice (ICJ) and has tended to focus on "judicial activism".[50] Similar attention has not been paid to how or why ICs (such as the REC courts this research is concerned with) either need to avoid or avoid political (or politically sensitive) questions. Jed Odermatt's work offers the most comprehensive scholarship on IC patterns of avoidance as a deliberate measure towards anticipating or mitigating resistance against the courts.[51] His work reviews instances of judicial avoidance in the case of the EACJ, the ICJ, and the CJEU, arguing the utility of a doctrine of international law, similar to the US political questions doctrine, that would allow ICs avoid making pronouncements on certain issues by holding that the dispute involves questions of politics and not law.[52]

In advocating for a similar doctrine under international law, Odermatt draws parallels to the political question doctrine under US constitutional law. He explains that the doctrine enjoins US courts to avoid making pronouncements on certain questions related to foreign affairs or

[49] *Ibid at 222*.
[50] Clifford J Carrubba, Matthew Gabel & Charles Hankla, "Judicial Behavior under Political Constraints: Evidence from the European Court of Justice" (2008) 102:4 The American Political Science Review 435–452; Bruno de Witte, Elise Muir & Mark Dawson, *Judicial Activism at the European Court of Justice: Causes, Responses and Solutions* (Cheltenham, Gloucestershire, UNITED KINGDOM: Edward Elgar Publishing Limited, 2013); Fuad Zarbiyev, "Judicial Activism in International Law—A Conceptual Framework for Analysis" (2012) 3:2 J Int Disp Settlement 247–278.
[51] Odermatt, "Patterns of avoidance", *supra* note 476.
[52] *Ibid*.

international law and instead defer those decisions to the executive.[53] The rationale behind the principle, as well as its application within US case law, had been somewhat inconsistent as Odermatt writes, "defining the circumstances where a decision is best left to the other branches of government has proven extremely difficult, and the 'precise contours of the doctrine are murky and unsettled' (*Tel-Oren v. Libyan Arab Republic*, 726 F.2d 803)."[54] The US Supreme Court in *Baker v. Carr* (1962),[55] sought to clarify some of this murkiness by setting out a list for when the doctrine would apply.[56] It held that the doctrine would apply when there were questions of appropriateness or otherwise of courts deciding certain issues when there was a lack of "judicially discoverable standards", and when there was a need to avoid "embarrassment" caused by various departments of government making pronouncements on the question.[57]

Despite the guiding list, however, the rationale behind the principle was not explicitly articulated by the Supreme Court.[58] As such, scholars and lawyers have speculated the rationale behind the doctrine, with such speculation being divided between "principled" and "pragmatic" arguments in support of it.[59] As such, while some argue that the doctrine is anchored in "principle" i.e. the Constitution itself, relating to a separation of powers and a need to "demarcate the political from the judicial domain",[60] others argue that it is based on more "prudential considerations",[61] which

[53] *Ibid at 224*.
[54] *Ibid at 225*.
[55] 369 U.S. 186 (1962)
[56] *Ibid* at 22-223.
[57] *Ibid*.
[58] Odermatt, "Patterns of avoidance", *supra* note 9 at 225.
[59] *Ibid*.
[60] *Ibid*.
[61] Louis Henkin, "Is There a Political Question Doctrine" (1975) 85:5 Yale LJ 597–625 at 598.

allows the court to avoid adjudicating certain questions in a bid to preserve its public image and not jeopardize its legitimacy given that it is not an elected branch of government.[62]

Odermatt's review of the political question doctrine under US constitutional law seeks to demonstrate not only that tensions relating to the roles and capacities of courts exist in domestic systems, but more importantly that avoidance techniques such as the political question doctrine also exist as legitimate options for domestic courts to avoid politically charged issues.[63] His work argues the utility of such a doctrine for ICs, arguing that avoidance techniques such as the political question doctrine offer ICs both principled and pragmatic rationales for avoiding resistance.[64] He argues further that ICs could benefit from such a doctrine because the determination of what a political question is can be quite complicated in practice.[65] Although he offers a distinction between a "political question" and a "politically sensitive" question.[66] A political question being one that involves a dispute of a "non-legal" nature, and so being one that cannot be resolved with the application of legal standards, and a politically sensitive question being one that may in fact involve a legal question, but due to its potential to invoke resistance from other actors is seen as controversial.[67] He acknowledges, however, that the distinction between a political question and a politically sensitive question is "blurred in practice"[68], since a matter can involve a legal question *and* be highly controversial at the same time.[69] A second reason why this distinction seems to be blurred in practice relates to the ambitions of the role of courts; Odermatt writes:

[62] Odermatt, "Patterns of avoidance", *supra* note 9at 225 - 226.
[63] *Ibid*.
[64] *Ibid at 227*.
[65] *Ibid*.
[66] *Ibid at 223*.
[67] *Ibid*.
[68] *Ibid*.
[69] *Ibid*.

> the idea that courts should avoid certain disputes due to their political character appears to run against the common assumption that an IC should, in principle, deal with any legal dispute before it, as long as it satisfies the criteria of admissibility and jurisdiction.[70]

This second reason Odermatt offers as to why the distinction is blurred in practice is particularly relevant to this chapter's discussion regarding the SADC Tribunal, and I return to it in the coming sections. Ultimately however, Odermatt's work discusses the utility of avoidance techniques to ICs by arguing that, much like the political question doctrine under US constitutional law, principled and prudential rationales exist within the international legal order to justify the development of a similar doctrine within international law, under which ICs could avoid adjudicating political questions.[71] Given the absence of a clear separation of powers under international law, Odermatt argues that the principled rationale for avoidance would take the form of ICs deferring the adjudication of certain issues to the authority of states.[72] Whereas, the prudential or pragmatic rationale for avoidance under international law would be supported by avoiding the "judicialization of politics", avoiding adjudication that could hurt their reputation, and "preventing instances of resistance by states and other actors, thereby bolstering the IC's external legitimacy and compliance in the longer term".[73]

Odermatt's work provides a significant contribution that links avoidance to judicial legitimacy. However, I argue that in the context of ICs, legitimacy is closely linked to the ICs authority. Intrinsically, resilience techniques address both legitimacy concerns and authority concerns. This work exemplifies Odermatt's scholarship, which links avoidance strategies to IC legitimacy by

[70] *Ibid at 223*.
[71] *Ibid at 226*.
[72] *Ibid*.
[73] *Ibid*.

contextualizing those arguments in the context of REC courts in Africa. It extends the scholarship; however, by demonstrating how resilience techniques are linked not only to the ICs need to maintain legitimacy but also the need for the ICs to avoid backlash, which could constrain its jurisdiction. I elaborate on this argument in the coming sections; I discuss specific cases of avoidance by the REC Courts under study and how this affected the jurisdictions of the ICs.

Part III

4.3. Resilience and Avoidance Strategies and the Three REC Courts

As discussed in the preceding section, resilience strategies are adopted by ICs to anticipate and mitigate resistance against the decisions of the court. These strategies often take the form of IC evading adjudicating the dispute entirely (by holding that the court lacks jurisdiction or locus standi); or the IC reaching a decision in a way that circumvents making a pronouncement on the more politically sensitive parts of the dispute – judicial minimalism.[74]

I argue, however, that resilience strategies are not entirely restricted to simply preventing resistance in the form of backlash, that they can take the form of framing the judgment in a way that promotes compliance. The scholarship of Madsen et al. offers significant insights into the different forms of resistance to ICs, ranging from "pushback to backlash" arguing that pushback is when "individual Member States or other actors seek to influence the future direction of an IC's case-law"[75] ." In contrast, backlash refers to "critique triggering significant institutional reform or even the dismantling of tribunals,". The acknowledge that backlash "typically involving the

[74] Odermatt, "Patterns of avoidance", *supra* note 9 at 227.
[75] Madsen, Cebulak & Wiebusch, "Backlash against international courts", *supra* note 70.

collective action of Member States."[76] Drawing insights from the scholarship on the existence of this range in the kinds of resistance ICs face, I argue that similar ranges exist in the types of resilience techniques they employ, specifically, that strategies will involve not only avoiding or mitigating resistance but also will also include promoting compliance with their decisions. I argue, and attempt to demonstrate with the cases discussed in the coming sections, that decisions of ICs can express a dual character – either avoiding or mitigating resistance or promoting the observance of their decisions. These decisions could also result in both types of actions occurring. I argue that this duality of purpose of resilience techniques is informed by concerns relating to the need for the IC to preserve its legitimacy.

In this section, I review the relevant decisions of the 3 REC courts under study. The discussion seeks to demonstrate the following: the existence of resilience techniques in these courts specifically, the utility of these techniques (and the consequences of the lack of utilization), and how these strategies exist consequent to the dependence of judicial legitimacy on the actors that engage the IC.

4.3.1. Resilience in the Context of the ECOWAS Court

The very first case decided by the ECOWAS Court, i.e. the *Afolabi* Case,[77] can be reviewed in the context of resilience. As seen in the previous chapter, the plaintiff, who was a private citizen, had sued Nigeria before the ECOWAS Court claiming a violation of his economic rights under the ECOWAS Treaty. Although the Court declined jurisdiction to entertain the matter citing a lack of

[76] *Ibid*.
[77] Afolabi v. Nigeria, Case no. Ecw/ccj/app/01/03, Judgment (apr. 27, 2004), *reprinted in* 2004-2009 Community Court of Justice, Ecowas Law Report 1 (2011).

jurisdiction, its subsequent (and successful) campaign around that decision suggests an attempt to bolster its authority by ensuring that in the future, it had express jurisdiction to adjudicate such matters.

The ECOWAS Court had declined the plaintiff's invitation to expand its jurisdiction via judicial lawmaking, and instead, it moved to solidify its authority by launching a campaign to expand its authority anchored on that decision.[78] In declining jurisdiction, the court had shown a deference to the authority of member states to expand its jurisdiction, a deference that was ultimately rewarded by (by all accounts) an unopposed adoption of a Supplementary Protocol for the court that expressly granted the court jurisdiction over private litigants and human rights matters.

It is interesting to note that the ECOWAS Court's reasoning for declining the plaintiff's invitation to interpret the principles of equity contained in the Treaty in the same the way the European Court of Justice (ECJ) had, was, as the Court held, "the ECJ had faced criticism" for such expansive interpretation.[79] The ECOWAS Court's strategy was to avoid such critiques or resistance against the institution and instead to pursue an expanded mandate via institutional means, rather than judicial means.

Ultimately, the result of this decision was a solidification of the ECOWAS court's authority regarding private access in the human rights sphere. This strategy adopted by the ECOWAS court is not always the means through which ICs make efforts to expand their authority, as seen in the ECJ's example that was cited by the court in this decision. Some ICs do in fact, interpret certain parts of their treaties expansively, thus expanding their jurisdictions through expansive readings of treaties. As discussed in the third chapter, this was the means through which the EACJ and the

[78] See discussion on the campaign that followed the *Afolabi* decision in Section 3.2.2.1 of Chapter 3.
[79] *Afolabi* case, *supra* note 79.

pre-2012 SADCT expanded their human rights jurisdictions. Evidently, the reasoning of the ECOWAS Court in *Afolabi* anticipated ECOWAS member-state resistance if it interpreted the principles of equity expansively to enable it to admit a suit that it had not been explicitly authorized to deal with, and so avoided that resistance by declining jurisdiction.[80]

However, resilience techniques relate not only to anticipating resistance but also to promoting compliance or other ways of implementing their decisions.[81] The works of Alter et al. refer to these as "strategies for promoting compliance", this work argues however that strategies for promoting compliance are fundamentally resilience strategies given that they aim to mitigate any potential resistance to the ICs authority. Reflecting these strategies, some decisions of the ECOWAS court have tended to be significantly circumspect with regards to awarding remedies. For example, in the much celebrated *Hadijatou Mani Koraou v. Niger* case,[82] a case in which the ECOWAS Court found the Niger Republic to be in violation of international law by failing to enforce its anti-slavery laws and as such condoning modern forms of slavery,[83] the court awarded $20,000 in damages to the plaintiff, a remedy which Niger promptly complied with. Niger even went a step further and prosecuted the slave master, even though the court had not required it. However, the ECOWAS Court, despite appeals by the plaintiff, refused to denounce the customs and practices that had given rise to these modern forms of slavery in the first place. This refusal by the Court allowed Niger to review its own customs and practices domestically. By refusing to denounce those

[80] A more recent decision of the Court displaying the use of avoidance can be seen in the decision of the Court in *Chude Mba v. Republic of Ghana & Ors* 16 ORS (ECW/CCJ/APP/22/16) ECW/CCJ/JUD/30/18. where the court declined the plaintiff's request to hold ECOWAS member-states accountable for failing to enforce sections of the treaty and instead held that the plaintiff had no standing because his human rights had not been infringed upon. See discussion in Chapter 3, Section 3.2.2.
[81] See Alter, Helfer & McAllister, "A New International Human Rights Court for West Africa", *supra* note 50.
[82] Hadijatou Mani Koraou v. Niger, Case No. ECW/CCJ/APP/08/07, Judgment, paras. 74-75, 77 (Oct. 27, 2008),
[83] *Ibid*.

practices, the court had avoided publicly reprimanding Niger in a way that could incur backlash from Niger.

Other decisions of the court that has displayed similar circumspection are the *Socio-Economic Rights and Accountability Project v. Nigeria*[84] and *the Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) v. President, Federal Republic of Nigeria,*[85] both cases involved a civil society organization suing Nigeria for failing to provide or protect rights relating to education and environmental protection. In the first case, relating to basic education, the court held Nigeria accountable for failing to provide free basic education to school-age children, holding "every Nigerian child is entitled to free and compulsory basic education".[86] However, the court did not order Nigeria to provide the funding required to provide this basic education.[87] Instead, after being presented with evidence of embezzlement of funds required to provide basic education, the court ordered Nigeria to "take the necessary steps to provide the money to cover the shortfall" as well as "recover the funds or prosecute the suspects".[88] In the second case, involving Nigeria's failure to protect the environment from oil pollution, the court similarly held Nigeria accountable for failing to effectively regulate oil companies Nigeria.[89] It then ordered Nigeria to "take all measures" to restore the environment, prevent future damage, and hold the perpetrators accountable.[90] The court did not, however, specify what measures Nigeria was supposed to adopt

[84] Socio-Economic Rights and Accountability Project v. Nigeria, Case No. **ECW/CCJ/APP/08/08,** Judgment (Nov. **30,** 2010) (UBE Case)
[85] The Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) v. President, Federal Republic of Nigeria ECW/CCJ/APP/08/09 Ruling of 10th December 2010 [SERAP Niger Delta Judgment]
[86] UBE Case, *supra* note 97.
[87] *Ibid*.
[88] *Ibid*.
[89] Serap Case, *supra* note 98.
[90] *Ibid*.

to implement the judgment. I argue that this kind of circumspection in deciding against states is not only designed to promote compliance but also to mitigate resistance.

As argued in the earlier parts of this chapter, this kind of circumspection in IC decisions is not peculiar to REC courts in Africa. Another example of it can be found in the decision of the European Court of Human Rights in *A, B and C v Ireland.*[91] In that decision, the court held that Ireland was in contravention of the *European Convention on Human Rights* (*the Convention*) by failing to provide an accessible and effective procedure by which a woman can establish whether she qualifies for a legal abortion under the Irish Constitution.[92] In reaching that decision, however, the European Court of Human Rights avoided the very politically sensitive question of abortion by refusing to interpret Article 8 of the *Convention* as conferring a right to an abortion.[93] Instead, the Court held that member states in the European Union had a broad margin to allow or prohibit abortion[94], which then allowed Ireland to ultimately make its own decisions about abortion. Following that decision, the Irish government convened an expert group to review the implications of the decision. Eventually, Ireland passed the *Protection of Life During Pregnancy Act*[95] , which defines circumstances and processes under which a woman could obtain a legal abortion in Ireland.

4.3.2. Resilience in the Context of the EACJ

Examples of resilience and avoidance can also be found in decisions of the EACJ. One example can be found in the decision of the court in *East African Law Society v. Attorney General of Kenya*[96]

[91] A, B AND C v. IRELAND - 25579/05 [2010] ECHR 2032 (16 December 2010)
[92] *Ibid*.
[93] *Ibid*.
[94] *Ibid*.
[95] Protection of Life During Pregnancy Act 2013 (Number 35 of 2013). Irish Statute Book. Attorney-General of Ireland. 30 July 2013
[96] *East African Law Society and 4 others v. Attorney General of Kenya and 3 others*, Reference No. 3 of 2007, 30 August 2008. (EALS Case)

, which was referenced in the previous chapter. In that case, the applicants had challenged the member states' amendments of the EAC treaty, which had restricted the jurisdiction of the EACJ and created an appellate chamber for it. They argued that the amendment was in violation of the treaty, given that the amendment was passed without consultation with civil society as required under Article 150 of the EAC Treaty. In response, the Attorney General of Tanzania and the Secretary-General of the EAC argued "that under international law, the applicants were not competent to challenge the sovereign right of the Partner States to amend"[97] the treaty, especially given that they were not parties to the Treaty.[98] The Attorney General of Uganda argued that the claim was "incompetent and misconceived because there was no dispute among the parties to the Treaty".[99] While the Attorney General of Kenya argued that the amendments were decisions of the Summit and thus not reviewable under Article 30,[100] the Article under which the claimants were basing their right to sue.

The EACJ rejected the objections of the member states, holding that the applicants were not challenging the member states' sovereign right to amend the Treaty but instead were challenging the non-compliance with the amendment procedures stipulated in Article 150.[101] The Court also held that Article 30 gives legal persons the right to petition the court when there is an infringement of the Treaty.[102] It further held that although Article 30 did not specifically mention that this right

[97] *Ibid* at 9.
[98] James Gathii, "Mission Creep or a Search for Relevance: The East African Court of Justice's Human Rights Strategy" (2013) 24 Duke J Comp & Int'l L 249 at 269.
[99] EALS Case, *supra* note 86 at 13.
[100] Gathii, "Mission Creep or a Search for Relevance", *supra* note 37.
[101] EALS Case, *supra* note 86. *Ibid*.
[102] *Ibid*.

could be claimed with respect to Treaty violations by an organ of the Community, that interpreting the article restrictively would defeat its purpose.[103]

Finally, the Court held that it had jurisdiction to hear and determine the application.[104] It also concluded that Article 150 of the Treaty had indeed been violated, given the failure of the EAC to consult civil society and the private sector.[105] However, the court decided *not* to invalidate the amendments, holding that "the infringement was not a conscious one,"[106] it was "not likely to recur" after the court's ruling.[107] It further held that "not all the resultant amendments are incompatible with Treaty objectives."[108]

It is significant to note that this decision of the EACJ had followed a long and tense battle between Kenya and the court, following the court's decision against Kenya in the *Nyong'o*[109] case. The *Nyong'o* case had been a particularly sensitive issue between Kenya and the EACJ because the decision, as well as the interim orders that the EACJ had issued against Kenya, had barred Kenya from appointing officials into the East African Legislative Assembly (EALA) and had instructed Kenya to hold elections for those seats. As discussed in the previous chapter, Kenya had been incensed by the decision of the EACJ in that case and had argued that the court was interfering in its domestic affairs. In retaliation, Kenya has sought to "kill the court", however, having failed to gain the support of member states, it resorted to amending the treaty to restrict access and create an appeals chamber for the EACJ. Specifically, the amendments slightly limited the jurisdiction of the court by adding a two-month time limit within which private litigants could approach the

[103] *Ibid*.
[104] *Ibid* at 30-31.
[105] *Ibid*.
[106] *Ibid* at 43 - 44.
[107] *Ibid*.
[108] *Ibid*.
[109] Anyang Nyong'o v. Attorney General of Kenya, Reference No. 1 of 2006, 27 November 2006

court; adding new grounds for suspending judges on allegations of "misconduct" (one of the means through which Kenya had attempted to oust the judges but was unsuccessful); creating an appellate division, and finally clarified that the court had no power to review cases for which "jurisdiction [is] conferred by the Treaty on organs of Partner States."[110] The last amendment being the main source of contention in the *Nyong'o* case.

These amendments seemed agreeable to the other two member states of the EAC, a compromise between "killing the court" (which was Kenya's original proposal) and pacifying Kenya. As such, it passed with the support of the other two member states, although evidently, without consultation with civil society.[111] In the *EALS* case, it was these amendments that were in issue. As such, the reasoning of the court in holding that it had jurisdiction; that a violation has occurred, but concluding that "the infringement was not a conscious one,"[112] and thus "not likely to recur" after the court's ruling,[113] can only be viewed as a deployment of a resilience or avoidance technique. The court's reasoning that "not all the resultant amendments are incompatible with Treaty objectives"[114] can be seen as a means to balance the spirit of the treaty while also avoiding further antagonizing Kenya.

This case further exemplifies how courts can avoid politically sensitive questions. I argue that in preserving its legitimacy, it was important for the court to avoid backlash not only from Kenya but the other two member states who had not only supported the amendments to the treaty but had also opposed the application before the EACJ. The Court consequently held that the amendments were

[110] EAC Treaty (revised), *supra* note 30, Arts. 26(1), 26(2), 27(1), 30(2).
[111] Alter, Gathii & Helfer, "Backlash against International Courts in West, East and Southern Africa", *supra* note 51.
[112] *Ibid* at 43 - 44.
[113] *Ibid*.
[114] *Ibid*.

"not incompatible with Treaty objectives", evidently attempting to maintain their legitimacy by anchoring the judgment in the spirit of the treaty.

A significant point to note with regards to the EACJ is that much like the other two REC courts, the court was primarily a regional integration court and was so originally designed to be concerned with regional integration and trade-related issues.[115] Its role in the protection and the promotion of the rule of law, and human rights was derived through judicial interpretation of the treaty establishing the Community.[116] As such, there is reasonable apprehension by the court officials and the activists that use the court[117] that backlash against the court could (as was the case of the SADCT) result in a restriction of the mandate of the EACJ. One of the interviewees for this research puts the concern quite aptly:

> We don't want the EACJ to be seen as fighting the government. If it is seen as fighting the governments then very soon, they could dissolve it. They could very well say, 'we want integration, but we don't need the courts' and we [activists] don't want to be in that situation. We also don't want to see that it is pro-government, it was not meant to be. It is supposed to stand in the middle. So, if anybody perceives it as not standing in the middle, then we see backlash coming from either end.[118]

The need for the court to remain in "the middle" while mediating between activists, states, and its own public image presents an interesting segue into the discussion regarding resilience (or its lack) in the case of the SADCT.

4.3.3. Resilience in the Context of the SADCT

[115] Gathii, "Mission Creep or a Search for Relevance", *supra* note 88 at 250.
[116] *Ibid*.
[117] This was revealed by the interviews I carried out in Arusha, 2018 during the fieldwork for this dissertation.
[118] Interview 5 with member of civil society working in East Africa (15 May 2018)

As discussed in the previous chapters, the SADCT currently exists in a much more subdued form than it did before 2012. Before the year 2012, the Tribunal had jurisdiction to hear and determine matters involving private litigants. Also, the Tribunal had, through its jurisprudence, construed its jurisdiction broadly, which allowed it to determine human rights and the rule of law cases, even though its constituting treaty did not specifically grant it jurisdiction over these issues. However, following a confrontation between the Tribunal and Zimbabwe over the decision of the Tribunal in the *Campbell* Case,[119] the Tribunal lost its jurisdiction to hear matters involving private litigants, and its new protocol restricted it to only determining cases involving states and arising from the treaty.

In this section, I conduct a different kind of review of the *Campbell* decision than was undertaken in the last chapter. Here the decision will be reviewed in the context of resilience and avoidance. I highlight how avoidance techniques were absent from the reasoning of the Tribunal in the *Campbell* and the potential utility resilience techniques might have served in the *Campbell* decision. Given that the previous chapter includes a detailed account of the successful campaign against the Tribunal, I will not reproduce those details in the section. Instead, this section will only highlight the sections of the decision that are significant to its discussion on resilience. It will thus focus on how the SADC Tribunal could have anticipated or mitigated resistance in *Campbell*.

A significant background to the *Campbell* case is that the facts which gave rise to the case arose from a constitutional amendment in Zimbabwe.[120] An amendment that was meant to (and gained popularity), as seeking to overcome the colonial legacy which has led to a concentration of arable

[119] Campbell and Others v. Zimbabwe (Merits), Case No. SADC (T) 2/2007, 28 November 2008,
[120] Tendayi Achiume, "The SADC Tribunal: Socio-Political Dissonance and the Authority of International Courts" in *International Court Authority* (New York: Oxford University Press, 2018) at 127.

land in a tiny white minority.[121] The constitutional amendment, Amendment 17, vested ownership of all land in the Zimbabwean government and stipulated the "uncompensated, compulsory acquisition of lands identified for resettlement purposes".[122]

It was this consequent to the land reform programme that caused the plaintiff in the *Campbell* case to institute proceedings against Zimbabwe before the SADCT.[123] He alleged discrimination on the basis of race, denial of access to justice, and a lack of due process in depriving him of his property.[124]

As discussed in the previous chapter, the case was decided in favor of the plaintiff. In its final judgement, the Tribunal held that Zimbabwe had violated the white landowners' rights by denying access to justice; discriminating on the basis of race; and failing to pay fair compensation for the expropriated land.[125] A decision that was considered to be highly controversial.

Alter et al. argue that if the decision had only found Zimbabwe guilty of a denial of access to justice, it would have been less controversial and offered a symbolic victory for the plaintiffs.[126] However, holding that the land reform was discriminatory on the basis of race, and Zimbabwe needed to pay compensation, the judgment "struck at the heart of Mugabe's land redistribution programme."[127]

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[121] *Ibid*.
[122] Constitution of Zimbabwe, Sept. 14, 2005, Amendment (n. 17), S 16B, cited in *Ibid*.
[123] *Campbell,* supra note 118
[124] Achiume, *supra* note 144; Alter, Gathii & Helfer, "Backlash against International Courts in West, East and Southern Africa", *supra* note 51.
[125] *Campbell*, supra note 118.
[126] Alter, Gathii & Helfer, "Backlash against International Courts in West, East and Southern Africa", *supra* note 100 at 308.
[127] *Ibid*.

In discussing the *Campbell* decision in the context of resilience techniques, I focus on three main decisions of the Tribunal and ultimately link them to discussions of the legitimacy of ICs. The first is the decision of the Tribunal regarding the Tribunal's jurisdiction to adjudicate human rights. The second relates to the finding of the Tribunal that Zimbabwe's land reform project was discriminatory on the basis of race and that the plaintiffs were entitled to fair compensation. The third was the contempt order of the Tribunal following Zimbabwe's non-compliance and the Tribunal's decision to refer the non-compliance to the Summit – the SADC Community's highest decision-making body, comprised of the heads of states of the SADC member states, for further action.

4.3.3.1. Jurisdiction

As discussed in the previous chapters, the SADCT did not have a formally conferred human rights jurisdiction. Against that backdrop, I discuss the Tribunal's decision to admit, adjuidicate and determine the *Campbell* case (a case involving a human rights claim). Zimbabwe had argued that in the absence of a protocol granting the Tribunal with powers to adjudicate human rights, the Tribunal had no such jurisdiction. It argued that references to "human rights, democracy and the rule of law" and non-discrimination in the SADC Treaty's Principles and General Undertakings clauses could not be adjudicated by the Tribunal until the adoption of a separate protocol.[128]

The Tribunal, however, dismissed this challenge to its jurisdiction, holding that Article 21 (b) of the Treaty enjoins the Tribunal to develop its own jurisprudence "having regard to applicable

[128] *Ibid*.

treaties, general principles and rules of public international law" which it held were the sources of law for the Tribunal.[129] The Tribunal held:

> In any event, we do not consider that there should first be a Protocol on human rights in order to give effect to the principles set out in the Treaty, in the light of the express provision of Article 4 (c) of the Treaty which states as follows: '*SADC and Member States are required to act in accordance with the following principles* –…3) *human rights, democracy and the rule of law'*[130]

Alter et al. in response to the decision of the Tribunal, have argued that "since the member states had adopted other protocols clarifying the issues to be referred to the Tribunal or handled in other ways, the judges could reasonably have declined jurisdiction".[131] Achiume, while discussing this same finding on jurisdiction, has argued that:

> analysis of SADC law shows firm ground for the Tribunal's ruling on jurisdiction, but this law could also have comfortably sustained a finding that the Tribunal had no jurisdiction over the Campbell dispute, or that the circumstances cautioned against an exercise in ostensible jurisdiction…avoiding the merits on these grounds would have been both legally viable and, from an authority perspective, judicially prudent.[132] (emphasis added).

Unlike, Achiume, this dissertation does not make a claim regarding what the Tribunal *ought* to have done. It does, however, seek to highlight that the arguments of Achiume and Alter et al. regarding how the Tribunal conducted the *Campbell* case, particularly focusing on the Tribunal's failure to adopt resilience or avoidance techniques proved fatal to jurisdiction of the IC. Ultimately, the scholarship demonstrates that if the Tribunal had declined jurisdiction over the matter, the holding would have been "reasonable", "legally viable", as well as been "judicially prudent".

[129] *Campbell* judgment, *supra* note 136.
[130] *Ibid*.
[131] Alter, Gathii & Helfer, "Backlash against International Courts in West, East and Southern Africa", *supra* note 123 at 308.
[132] Achiume, *supra* note 110 at 141.

Essentially, if it had declined jurisdiction, the Tribunal would also have anticipated the backlash that such a controversial matter would have (and did indeed provoke), while still maintaining its legitimacy as the decision would have been grounded in law. The presence of legal grounding to support a decline of jurisdiction would have also shored up the Tribunal's legitimacy.

However, perhaps the Tribunal was indeed convinced of its jurisdiction over human rights, or perhaps the reasoning of the Tribunal not to decline jurisdiction was informed by as Odermatt puts it "the common assumption that an IC should, in principle, deal with any legal dispute before it, as long as it satisfies the criteria of admissibility and jurisdiction,"[133] or perhaps the Tribunal was concerned that declining jurisdiction, in this case, would set a bad precedent for future human rights cases before it. Whatever the logic behind accepting jurisdiction was, an avenue was still open to it to apply certain resilience strategies in deciding the case.

4.3.3.2. The Finding Land Reform Project was Discriminatory on the Basis of Race, and the Plaintiffs were Entitled to Fair Compensation

I argue that there was still an opportunity for the Tribunal, even after holding that it had jurisdiction, to anticipate or mitigate the backlash against it. I argue that the Tribunal could have decided the case using avoidance strategies such as "judicial minimalism". Odermatt describes this approach as:

> Another form of avoidance is to find that an IC has jurisdiction to hear a case, but **to adjudicate in a way that side steps the most politically sensitive issues**. Such an approach allows the IC to maintain the appearance that it is not afraid to deal with any legal question, even the most controversial ones, while at the same time refraining from tackling the political question at the heart of the dispute. This is a form of judicial 'minimalism' – it recognises that the IC's role is to deal with the legal question before it, and not to resolve the underlying political dispute that led to it.[134] (emphasis added)

[133] Odermatt, "Patterns of avoidance", *supra* note 476.
[134] *Ibid at 233*.

In the *Campbell* case, the finding that the land reform programme of Zimbabwe was discriminatory on the basis of race and that the plaintiffs were entitled to compensation had multiple effects. The first was that it invalidated Zimbabwe's constitutional amendment – Amendment 17, by holding that it was inconsistent with international law. Secondly, and quite significantly, in holding that the land reform was discriminatory against whites, the Tribunal had inadvertently exalted the rights of the white farmers, whose titles to the land itself had come from deeply oppressive colonial regimes, above the rights of a legitimate (even though deeply fraught) need for postcolonial land reform.

As discussed in the previous chapter, Achiume argues that these findings made the decision "socio-politically dissonant."[135] She holds the view that if the decision had found Zimbabwe to be in breach of providing access to justice and ordered Zimbabwe to pay fair compensation "*without the unlawful racial discrimination finding,"* it would have made a positive difference, not only in how the decision was received by Zimbabwe, but also how it was received by other states in southern Africa who have had a similar history with colonialism, racism, and forcible dispossession of land from the indigenous black population.[136]

My argument is that in the context of southern Africa, it was reasonably foreseeable that race-related land reforms matters could reasonably trigger backlash, not only from the governments of the states involved but from the society. I argue then that even if the Tribunal had assumed

[135] Achiume defines sociopolitical dissonance as "a state that results when a legal decision contradicts or undermines deeply held norms (e.g. the meaning of racial equality) that a given society or community forms on the basis of its social, political and economic history. In other words, a socio-politically dissonant decision is one that is discordant with a fundamental ideal that is widely shared among members of a society, where the content of this shared ideal is rooted in a common sociopolitical history." *Ibid at 125*.
[136] *Ibid at 144*.

jurisdiction over the case, it could have decided the case in a manner that, as Odermatt puts it, "sidesteps the most politically sensitive issues."[137] The implications of such would be two-fold – not only would the Tribunal then be able to mitigate resistance, it would have also potentially shored up support for it from other quarters such as other member states and wider society.[138] While I explore this in greater detail in the next section, it is important to note that the support of other member states and activists, who are not directly involved in the dispute, is essential to an ICs maintaining its legitimacy. The Tribunal's failure in the *Campbell* case to garner the support of other member states threatened the legitimacy of the institution. This significance of this support is demonstrated in the discussions in the next section.

4.3.3.3. The Contempt Order

After the final decision of the Tribunal, the plaintiffs tried to enforce the decision in Zimbabwean courts without any success.[139] The plaintiffs then returned to the Tribunal and commenced contempt proceedings against Zimbabwe. Although Zimbabwe did not participate in those proceedings, the Tribunal found it to be in breach and contempt and reported its findings to the Summit "for further action".[140]

As discussed in the previous chapter, this decision incensed Mugabe. I have already discussed the actions Mugabe took to subdue the Tribunal in the previous chapter, so I will not reproduce it in this section.[141] The discussion here will instead highlight three issues: the reaction of SADC member states to Zimbabwe's grouse with the Tribunal; the limits of civil society's attempts to

[137] Odermatt, "Patterns of avoidance", *supra* note 476.
[138] Achiume, *supra* note 144.
[139] Nathan, "The Disbanding of the SADC Tribunal", *supra* note 51.
[140] Alter, Gathii & Helfer, "Backlash against International Courts in West, East and Southern Africa", *supra* note 51; Nathan, "The Disbanding of the SADC Tribunal", *supra* note 51; Achiume, *supra* note 144.
[141] See discussion in Section 3.3.1.3 of Chapter 3.

protect the Tribunal; the significance of these two actors – states and civil society to the maintenance of SADCT's jurisdiction.

4.3.3.3.1. The Relationship of the Summit and Civil Society to the *Campbell* Orders

One justification for the use of resilience and avoidance techniques is, as Delaney puts it, "courts have little recourse when powerful political interests align against them."[142] In the case of the Tribunal, its decision against Zimbabwe was evidently displeasing to Zimbabwe; however, if the decision had not been equally displeasing to other SADC member states, the Tribunal might have survived the backlash.

For example, when Kenya tried to "kill the court" following the decision of the EACJ against it, its proposal was met with resistance from the other two member states who felt the action "was too extreme".[143] Instead, the member states agreed to amend the EAC treaty to put in measures such as an appellate division and stricter rules around private litigants. Ultimately, the EACJ was able to maintain its jurisdiction because it had the support of other member states. I have argued in the earlier sections that it was perhaps a recognition of that support by member states that prompted the EACJ to decline the invitation to invalidate the amendments to the treaty in the *EALS* case—as such, acknowledging the need to maintain the support of other member states.

This type of circumspection was obviously absent from the decisions of the Tribunal in the *Campbell* case in two very separate but related aspects. The first being that the decision of the Tribunal was an invalidation of a constitutional amendment in a member state; and secondly, that the Tribunal issued a contempt order and referred it to the other member states to "take action" to

[142] Delaney, *supra* note 504.
[143] Alter, Gathii & Helfer, "Backlash against International Courts in West, East and Southern Africa", *supra* note 51.

pressure Zimbabwe to enforce this decision. In addition, the subject matter of the dispute was already a significantly politically sensitive matter – specifically, race-related access to land in southern Africa that was a product of colonial legacies.[144]

For one, in expecting the Summit to "take action" against Zimbabwe, the Tribunal was evidently overly optimistic. Laurie Nathan writes:

> In the Campbell case, *the refusal by the Summit and the Zimbabwean courts to insist on compliance with the Tribunal's ruling was influenced strongly by the drastic constitutional, political, and social implications of that ruling.* In 2010 the Zimbabwean High Court invoked these implications as the basis for dismissing Campbell's plea to register and enforce the ruling. The Court held that while the SADC states are unquestionably subject to the Tribunal's jurisdiction, this does not make the registration and enforcement of its decisions automatic or inevitable.[145]

It was perhaps this combination of "the drastic constitutional, political, and social implications of that ruling";[146] and the dissonant nature of the decisions that contributed to the inability of activists to help protect the Tribunal from the campaign against it.

In the previous chapter, I had discussed and underscored the significance of activists to the development and sustenance of the jurisdictions of REC courts and the additional challenges that activists in southern Africa faced in trying to protect the Tribunal from Zimbabwe's kill campaign; as such, I will not reproduce those discussions. However, it is important to note all the activists and some court officials I interviewed for this dissertation expressed scepticism and, in some cases, discomfort with using the SADCT to litigate land issues in southern Africa. One of the participants

[144] As Achiume argues, "access to land is a pressing social, economic, and political issue across much of southern Africa, and the shared history of colonial dispossession continues to shape how many SADC member states, and their populations perceive land issues". Achiume, *supra* note 110 at 133.
[145] Nathan, "The Disbanding of the SADC Tribunal", *supra* note 160 at 888.
[146] *Ibid*.

to this research said in relation to the fact that the *Campbell* case was initiated by private individuals, and the SADC Tribunal subsequently lost its jurisdiction:

> Because unfortunately, that's even my frustration of what happened to the SADC Tribunal. *If those litigants that approached that court, really cared about justice, and really cared about the long-term, they would not have used and abused the court the way they did, in such a way that the governments had no option but to shut it down.* I think it's really selfish, for a court that could have several hundred million people, a whole range of issues, for you to come like the Biblical Samson, and because you can't get what you want, you bring the pillars down for everybody.[147]

It is thus important to note that even activists were skeptical about the decision of the litigants in *Campbell* to take the case before the Tribunal. Gathii has argued that it was the "individual litigants, who did not consider the implications their politically explosive case would have on the continued availability the Tribunal"[148] that brought the case forward. As such, there is a sense that even activists were skeptical of: a) the decision to take the case to the Tribunal and b) the Tribunal's decision itself. To this end, I argue the Tribunal *itself* ought to have recognized the "explosive" nature of land politics in southern Africa and so applied discretion in deciding the case because not only did the decision lack support from the Summit, it was also seemed to lack the support of popular activists. Thus, I argue that it was this combination of the Summit's support of Zimbabwe and the frailty of activist support that proved fatal to the institution.

4.3.3.4. The significance of these two actors – states and civil society to the maintenance of SADCT's Legitimacy

A few things are apparent from the discussions on the Tribunal's decision in *Campbell*. The first is that in expecting the Summit's support, the Tribunal gravely miscalculated the extent of the

[147] Interviewee #1, Arusha, Tanzania (3rd May 2018).
[148] James Gathii, "Introduction" in James Thuo Gathii ed. *The Performance of Africa's International Courts: Using International Litigation for Political, Legal, and Social Change*, (Oxford University Press, 2020).

unpopularity of the *Campbell* decision, a decision that was so unpopular that member states were unable to sympathize with it, and activists were unable to effectively defend it. I argue that these two constituencies – states and activists, are essential to an IC gaining or maintaining its legitimacy. The adoption of legally viable avoidance strategies promotes an ICs ability to maintain the said legitimacy. The Tribunal's failure to gain the support of states and "popular" activists undermined its legitimacy in a way that made its subsequent loss of jurisdiction foreseeable. Further, the adoption of resilience or avoidance techniques by the Tribunal would have offered the Tribunal an opportunity for a decision that would have potentially conferred the institution with legitimacy.

Part IV

4.4. Legitimacy as a frame for understanding ICs, States, and Activists

One of the overarching arguments in this chapter is that IC legitimacy is derived from the actors that engage the IC – in this case, the states and activists that engage the REC courts. As such, it is the states and activists, perception of the legitimacy the institution that is the basis for offering the institution the recognition it requires to establish its authority. It is also this perception of legitimacy that encourages the actors to strive to protect or preserve the courts when the courts face resistance from one or more actors. REC courts have a role in maintaining their legitimacy by preserving or bolstering their legitimacy through how they decide the cases before them.

As one of my interview subjects, who is a member of civil society, puts it, there is an expectation that regional courts should be seen as neither "fighting the government" nor "pro-government".[149] He argues that the REC courts are "supposed to stand at the middle. So, if anybody *perceives* it as

[149] Interview 5, *supra* note 118.

not standing in the middle, then we see backlash."[150] This expectation of *perception* of "the middle" provides the basis for granting REC courts legitimacy from the states and the activists; and by extension preserves their authority.

Resilience and avoidance techniques offer courts an opportunity to advance the project of maintaining, gaining, augmenting IC legitimacy (including their authority). As Madsen writes, and Achiume agrees[151], "the success of an international court very often requires a dose of diplomacy".[152] I argue then that resilience and avoidance techniques offer ICs an opportunity to practice "legal diplomacy"[153] in order to mitigate or avoid backlash towards preserving their legitimacy. In this sense, avoidance techniques lend themselves to the preservation of IC legitimacy and, more significantly, the protection of IC's jurisdictions.

4.5. Understanding the Connection between Legitimacy and the REC Court's Relationships with States and Activists in Africa

The discussions so far in this chapter acknowledges and attempts to demonstrate the *politics at play* in international adjudication, specifically how ICs participate in the maintain (or loss) of their legitimacy and how that implicates the jurisdiction of the IC. The discussions in the chapter commence with Shapiro's social logic theory, which argues that the existence of a "social logic" to a court's process.[154] The social logic theory argues that courts have both a legal and political identity and must pay heed to both.[155]

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[150] *Ibid.*
[151] Achiume, *supra* note 110 at 145.
[152] *The Legitimization Strategies of International Judges: The Case of the European Court of Human Rights*, SSRN Scholarly Paper, by Mikael Madsen, papers.ssrn.com, SSRN Scholarly Paper ID 2536859 (Rochester, NY: Social Science Research Network, 2014).
[153] *Ibid*.
[154] Shapiro, *supra* note 93.
[155] *Ibid*.

This dissertation extends Shapiro's theory by contextualizing and exemplifying the theory in the context of the relationship between REC courts, states, and activists within the frame of judicial legitimacy. In this sense, I argue that ICs are not only concerned with balancing the interests of the litigants before them, they are concerned with maintaining their *own* legitimacy while carrying out their function. ICs are thus not apolitical dispensers of justice and so only concerned with the rule of law; as institutions whose legitimacy (and authority) is linked to the constituencies that engage them, they are differently involved, but involved no less, in litigation which comes before them. As such, less than being in the kind of relationship with the parties described in Figure 4.1., ICs exist more in the kind of relationship demonstrated in Figure 4.2.

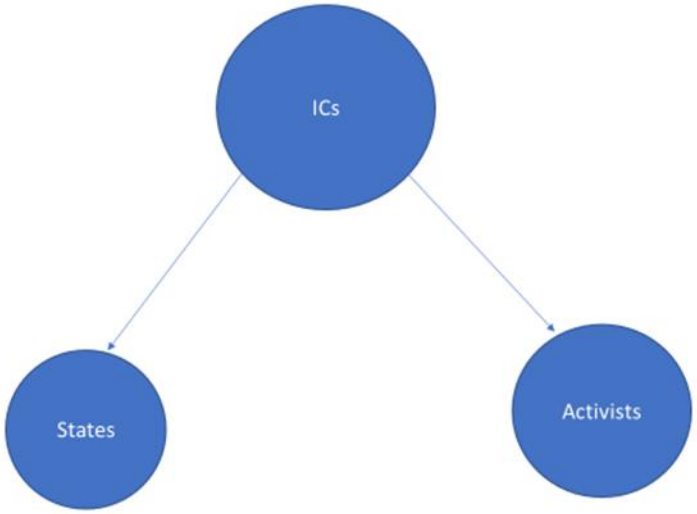

Figure: 4.1: Common conception of the relationship among the courts and the actors

The above figure suggests that the ICs exist in an uncomplicated relationship with the actors. In this model, the ICs simply dispense justice to the actors. However, as I've argued throughout this chapter, ICs exist in a far more complex relationship to the actors that engage them. I attempt to demonstrate the complexity of that relationship in the figure below.

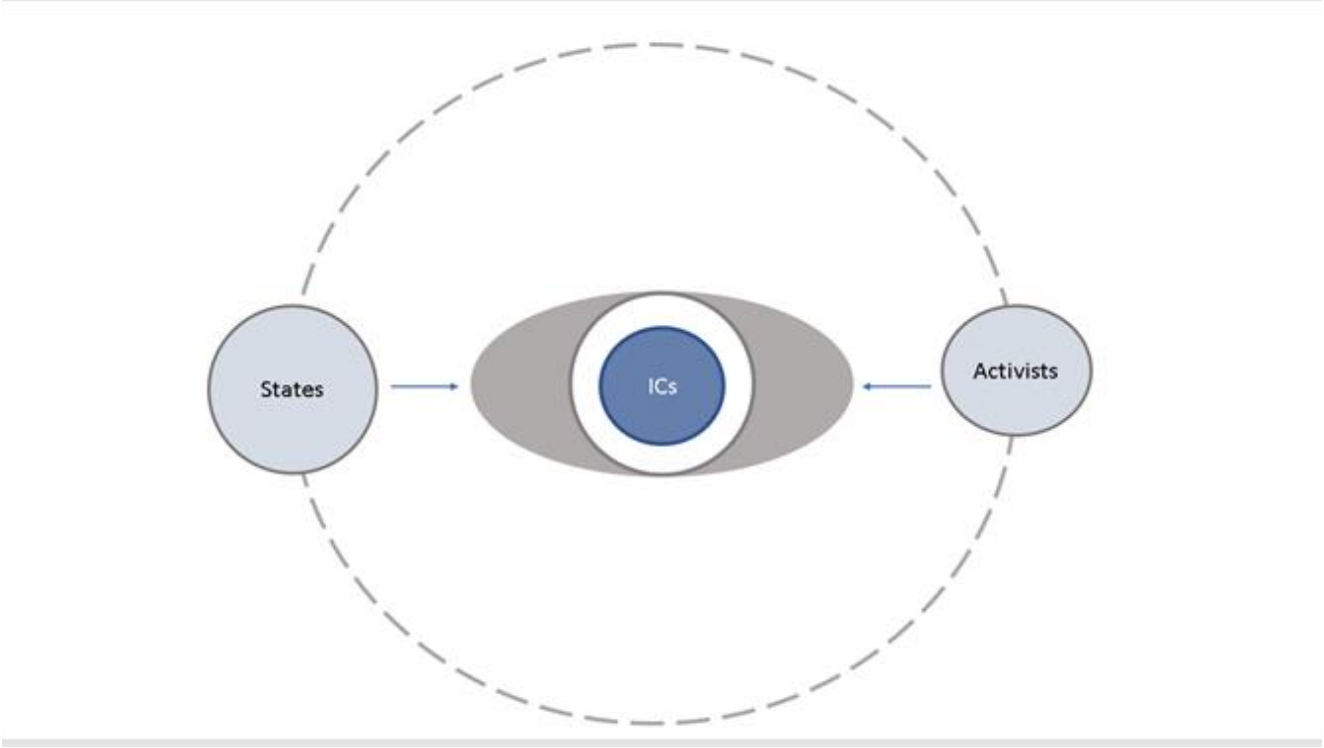

Figure 4.2: Demonstrating the *pull* relationship among the ICs; the states, and activists.

The image above seeks to demonstrate the relationship of the ICs to the other actors. Specifically, it argues that the ICs sit between the two actors while these actors constantly attempt to *pull* the ICs to their *side*.[156] The circle symbolizing the states is deliberately larger than the circle symbolizing the activists. The image seeks to acknowledge that while both states and activists exist in a *pull relationship* with the ICs, the capacity of states to subdue ICs through amending their treaties is reckoned with in this conception of the relationship among the actors. Also, while the IC is situated between the two actors, it is deliberately not represented as being at par with the two actors because its legitimacy is sourced from the two actors; as such, there is a *transference* of legitimacy (authority inclusive) from the actors to the courts within the *pull*.

[156] My understanding of the relationship among the actors is loosely inspired by understandings of gravitational pull between the earth, the moon, and the sun. However, I do not attempt to explain the relationship of the actors using that theory.

Despite the pull, and *within* the pull of the other actors, ICs are *centred* by their own concerns and conceptions of role, function, and law. These concepts offer the IC, the grounding (or the weight) to decide which direction to swing in at any given point. I argue that in its judgment, an IC has to manage two concerns – the micro and macro. The micro relates to the subject of the dispute and the law; and the macro relating to the court's role, function, and its co-constitutive legitimacy and authority. The image in Figure 4.3 attempts to display the different pulls which an IC contends with.

In order to maintain legitimacy, ICs must reckon their relationship with states, at the same time with their obligations to the activists *and* the rule of law. This kind of balancing requires a number of techniques, including the resilience techniques discussed in this chapter.

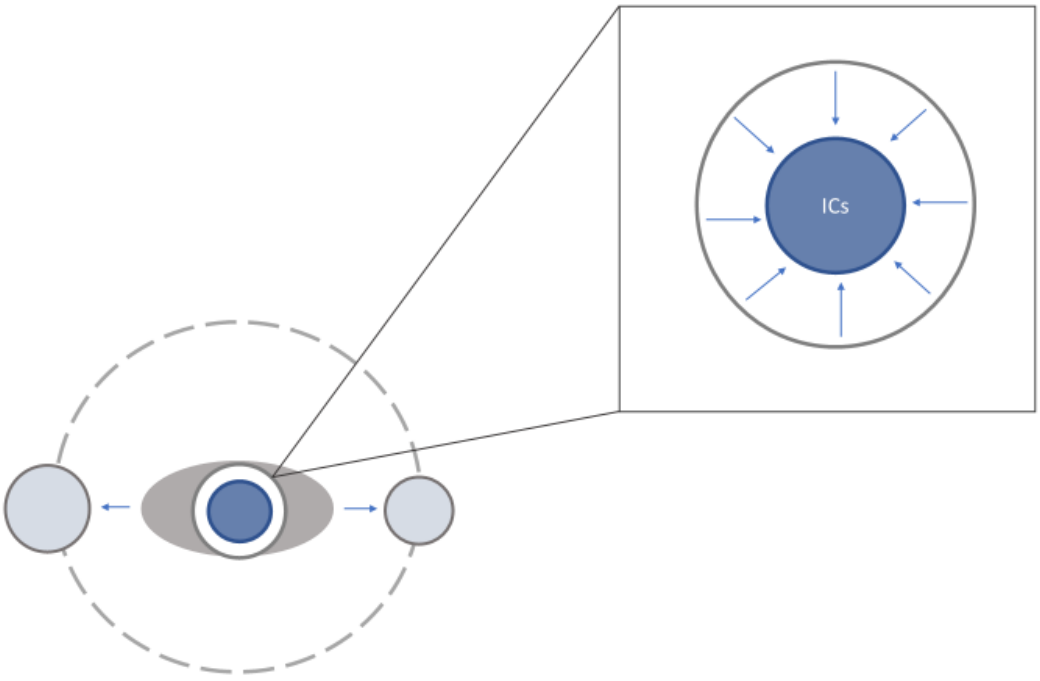

Figure 4.3. Demonstrating the centre of the IC, as it interacts with the pull(s) and transference of the other actors

4.6. Conclusion

The discussions in this chapter have sought to demonstrate ICs themselves through the adoption or lack of resilience strategies participate in the development of their own jurisdictions. As such, towards the dissertation's goal of interrogating the conditions that support or hinder an IC's ability to advance environmental protection and socio-economic justice, this chapter demonstrates how the conduct of the IC itself can lead to the maintenance or restriction of its jurisdiction – a jurisdiction which is essential to the pursuit of environmental protection and socio-economic justice before ICs.

The chapter seeks to demonstrate that judicial legitimacy is a complicated question, even in domestic contexts where judicial authority is entrenched by national systems. The answer to the question of "what *can* courts do" is often debated alongside "what *should* courts to do", and "*how* should they do it". These complex and often paradoxical questions complicate the nature of adjudication and particularly international adjudication. As such, the search for, and maintenance of judicial legitimacy, often requires innovation, prudence and sometimes circumspection from judges as judges must balance their role as adjudicators against the fact that their legitimacy is derived from the actors that engage them.

Secondly, the chapter concludes that because IC legitimacy is derived from the actors that engage the IC, ICs are often involved in the politics that maintains or preserves their relationships with the actors that engage them. One of the means through which these ICs participate in the politics is through the deployment of resilience strategies that, which, while grounded in law, are designed to shield the IC from resistance, either from the party the IC it has decided against, and/or gain support other states, and activists who also engage the court.

Although Shapiro's work had discussed the existence of political identity of courts, this dissertation extends and exemplifies his scholarship by contextualizing it within the context of REC courts in Africa and demonstrating how concerns about legitimacy as well as authority contribute to an ICs political nature. In demonstrating this argument, this work relies on the works of Odermatt and Alter et al. by demonstrating how IC legitimacy is tied to the use of resilience techniques and how the need to maintain legitimacy is tied to ICs roles in preserving their jurisdiction. The chapter extends the scholarship by offering an understanding of a *pull relationship* that exists between ICs and the two actors – the states and activists, which is tempered by the ICs internal concerns regarding the function of the court, the rule of law, and the role of courts, external concerns relating to the need to maintain legitimacy and authority.

As discussed in the introduction, one of the central aims of this chapter is to demonstrate that ICs participate in the politics that either preserves or diminishes their jurisdiction. While being concerned with the rule of law and their role as adjudicators, ICs are also concerned with preserving their mandate and so will contemplate political considerations (and perhaps sidestep politically charged subjects) in determining cases that tend to ignite backlash.

The discussions in the chapter reviewing some of the decisions of the ECOWAS Court and the EACJ have sought to demonstrate how REC court can and do avoid these politically charged questions in order to avoid or mitigate backlash; however, the review of the decision of the SADCT has sought to demonstrate the significance of the Tribunal's failure to successfully navigate the political relationship of the Tribunal to the other actors. I argue that the continued existence mandates of the ECOWAS court and the EACJ regarding private access, human rights and, more recently environmental protection, can be attributed to the REC court's successful navigation of the political spheres within which they exist. Whereas, the loss of the SADCT's mandate regarding

private access and its incapacity to now influence environmental protection or socio-economic justice can be attributed to its incapacity to successfully navigate the political space within which it existed. Essentially, the chapter seeks to demonstrate how ICs are political actors and so engage in the politics that determine their mandates.

Having discussed the relationship among states, activists and the REC courts themselves, which are the three principal actors that affect the mandates, jurisdictions, development, maintenance, and survival of ICs, including the African REC courts, the next chapter turns its attention to the implications of these complexities for the capacity and ability of Africa's REC courts to advance environmental protection and socio-economic justice in the region.

Chapter Five

The Promise and Limitations of the Deployment of African REC Courts in the Struggle for Environmental Protection and Socio-economic Justice in Africa

5.1. Introduction

One of the goals of this dissertation is to examine the conditions/factors, actors, and interactions that produce have increased or decreased, or that can advance or limit, the contributions of the African REC courts under study to the struggles environmental protection and socio-economic justice struggles that are being waged on the African continent. To this end, the discussions in the previous chapters have attempted to illuminate how the historical, socio-political, and internal politics *within* the ICs (implicating states, activists and the REC courts themselves) affects and can affect the development or restriction of scope and substance of the jurisdiction of the REC courts. Those discussions attempted, for the most part, to uncover one type of "how question;" specifically, how these REC courts are created, largely because of state, REC and activist decision-making and action; how the relationships of these courts with states and activists develop or impede different parts of their jurisdiction; and how these courts participate in the conceptual and actual dramas that lead or can lead, to the expansion or restriction of their mandates.

In this chapter, I further analyze another type of "how question", while also discussing some related "why" question(s). Specifically, I will analyze *how* exactly these ICs can (and do) contribute to the advancement of efforts to realize environmental protection and socio-economic justice on the African continent; and *why* the nature and scope of their personal jurisdictions

(relating to access by private litigants), is essential to these courts' abilities to exert influence in those specific areas.

I begin by analyzing relevant portions of the jurisprudence of African ICs (not just the REC courts) that have been mobilized to promote the advancement of environmental protection and socio-economic justice on the continent; that have served as normative resources for the activists who tend to lead those struggles. I then discuss the utility of using international judicial institutions in Africa for the advancement of environmental protection and socio-economic justice, particularly because the states (and the RECs they establish and run), which establish and set the functional parameters within which such courts must operate, are often the very perpetrators of the environmental rights violations and social injustices at issue, or are significantly complicit in these. This chapter adds to the discussions in the second chapter, relating to *how* these ICs provide an additional/alternative avenue for local populations and activists to pursue environmental protection and socio-economic justice. Specifically, it uses case analysis to demonstrate that when activists face resistance to environmental protection and socio-economic justice struggles at the domestic level, African ICs provide an alternative avenue for these activists to pursue their goals. The next section of the chapter then discusses the limitations of using ICs, such as the REC courts under study, to pursue environmental protection and socio-economic justice. I argue that a lack of access to these regional judicial institutions, particularly jurisdictional access, provides the most potent barrier to using these courts to pursue this environmental protection and socio-economic justice. Next, the chapter develops the point that (provided they have private access) these REC courts can be viewed as effective bodies for yet another reason. This is that the litigation before these REC courts is, and can be, beneficially used by environmental protection and social justice activists as a *strategy for forcing transparency* from recalcitrant or belligerent states/governments. Without

the availability of these courts to the relevant activists, this strategy would be ineffective. This discussion adds to the discussion in an earlier chapter on the need to view the effectiveness of these courts through a broader lens. It also contributes to the existing literature on this question, especially to works by Gathii and Okafor, and to the volume edited by Alter, Helfer, and Madsen.[1] Finally, the chapter concludes by restating the significance of the African REC courts under study for the struggles waged by activists to advance environmental protection and social justice on the continent, while reiterating how the lack of private access to these institutions greatly hinders their potential to exert influence in this area.

5.2. Jurisprudence of African ICs on Environmental Protection and Social Justice

Over the last two decades, the jurisprudence of African ICs on economic and social rights, and especially on environmental protection, has increased in quantum and quality. ICs in Africa have made a number of important decisions entrenching the significance of economic and social rights, as well as holding states accountable for their failure to protect these rights. Several decisions from African ICs such as the African Court of Human and Peoples Rights (The African Court), the ECOWAS Court, and the EACJ, have for example, affirmed the indivisibility of civil and political rights from economic and social rights, and have also recognized "new" rights such as collective rights and the right to development. It is quite safe to say that ICs in Africa offer significant

[1] James Thuo Gathii ed. *The Performance of Africa's International Courts: Using International Litigation for Political, Legal, and Social Change*, (Oxford University Press, 2020); Obiora Chinedu Okafor, 2007. *The African Human Rights System, Activist Forces and International Institutions* (Cambridge University Press), Karen Alter, Laurence Helfer, and Mikael Madsen (eds), *International Court Authority*, (Oxford, New York: Oxford University Press, 2018)

promise for the protection of economic and social rights (which includes environmental protection) – provided victims can access these institutions. I return to this point about access later.

5.2.1. The African Regional Human Rights Cases on Environmental Protection and Socio-economic Justice

In discussing the international judicial protection of the environment and the promotion of socio-economic justice, I separate the decisions emerging from the African System (specifically the African Court) from the decisions emerging from REC courts. This distinction is significant to this dissertation because it goes to the issue of access. Currently, 30 (of the 55) member states of the African Union have ratified the Protocol to the African Charter on Human and Peoples' Rights that establishes the African Court.[2] However, in order for citizens and activists of those 30 ratifying states to be able to access the court (and sue their governments), those states must make an additional declaration recognising the competence of the African Court to receive cases from NGOs and individuals.[3] At some point, 9 of the 30 state parties to the Protocol establishing the Court had made such a declaration.[4] However, as at the time of submitting this dissertation, 4 of those 9 states have withdrawn their declarations.[5]

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[2] The African Court of Human and Peoples Rights Website, online: www.african-court.org/en/

[3] Section 34(6) of the African Court Protocol. See also Adebayo Majekolagbe & Olabisi D Akinkugbe, "The African Court of Human and Peoples' Rights Decision in the Ogiek Case: An Appraisal" in Amissi Manirabona & Yenny Vega Cárdenas, eds, *Extractive Industries and Human Rights in an Era of Global Justice: New Ways of Resolving and Preventing Conflicts* (Toronto: LexisNexis, 2019) at 5.

[4] The African Court of Human and Peoples Rights Website, online: www.african-court.org/en/

[5] Sègnonna Horace Adjolohoun, "A crisis of design and judicial practice? Curbing state disengagement from the African Court on Human and Peoples' Rights" (2020) AFRICAN HUMAN RIGHTS LAW JOURNAL 40.
"A Court in Crisis: African States' Increasing Resistance to Africa's Human Rights Court", (19 May 2020), online: *Opinio Juris* <http://opiniojuris.org/2020/05/19/a-court-in-crisis-african-states-increasing-resistance-to-africas-human-rights-court/>; "Benin and Côte d'Ivoire to Withdraw Individual Access to African Court", (6 May 2020), online: *International Justice Resource Center* <https://ijrcenter.org/2020/05/06/benin-and-cote-divoire-to-withdraw-individual-access-to-african-court/>. See also, Sègnonna Horace Adjolohoun, "A crisis of design and judicial practice? Curbing state disengagement from the African Court on Human and Peoples' Rights" (2020) AFRICAN HUMAN RIGHTS LAW JOURNAL 40.

As such, at this point in time, the African Court can only accept suits from NGOs and individuals against only five States – Burkina Faso, The Gambia, Ghana, Mali, Malawi, and the Republic of Tunisia.[6] As we will see in the coming sections, in order for a country such as Kenya (one of the states that have not entered the relevant Declaration) to be sued by an NGO before the African Court in the Ogiek case, the African Commission had to refer the case to the African Court.[7] I discuss this in greater detail in the coming sections.

5.2.1.1. African Commission on Human and Peoples' Rights v. Republic of Kenya (The Ogiek Case)

In 2017, the African Court of Human and Peoples Rights (African Court) decided a case arising from the forced evictions of the Ogiek people by the Government of Kenya. The Kenyan government claimed that the decision to evict the Ogiek people arose from the need to conserve the forest and preserve the ecosystem, and that the continued dwelling of the Ogiek people on that land threatened the ecosystem.

After what the African Court held to be an "unduly prolonged" attempt to obtain justice from the Kenyan courts, the Ogiek people approached the African Commission in an attempt to seek protection from continuing forced evictions by Kenya. They sought the protection of their right to property (Article 14), freedom from discrimination (Article 2), right to life (Article 4), freedom of

[6] African Court Website, supra note 4.

[7] All 54 African states have ratified the *African Charter*, making their citizens able to access the African Commission. The African Commission is established under Art. 30 of the African Charter "to promote peoples' rights and ensure their protection in Africa," and while considered an international adjudicatory body in the African System, I have excluded decisions of the Commission from this dissertation because the Commission is not an IC within the definition of ICs that my dissertation has adopted. However, the Commission has issued significant recommendations in cases such as *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria* (Communication 155/96) African Commission on Human and Peoples Rights, 27 October 2001, online: ACHPR http://www.achpr.org/communication/decisions/155.96/ and **.** *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) / Kenya (the Endorois Case)* relating to the protection and promotion of environmental protection and socio-economic justice.

religion (Article 8), the right to culture (Article 17(2) and (3)), the right to freely dispose of wealth and natural resources (Article 21), the right to development (Article 22), and Article 1 (which obliges all member states of the Organization of African to uphold the rights guaranteed by the Charter).

Following Kenya's lack of cooperation with the African Commission, the Commission referred the case to the African Court, pursuant to Article 5(1)(a) of the Protocol establishing the African Court – which allows for the Commission to refer cases that had not been concluded before it to the African Court.[8] The referral was highly significant because it was the first time in the history of the two institutions where the African Commission had availed itself of that procedure. The Commission argued that there would far-reaching implications on the political, social and economic survival of the Ogiek people if the evictions were carried out.[9]

At the hearing, the government of Kenya argued that the Ogiek people of today were different from those of the 1930s and 1990s, given that they had transformed their lives to fit into the "modern" context and so could not argue that they were a distinct indigenous group, entitled to protection under indigenous rights.[10] Their argument was basically that the Ogieks were "like other Kenyans" and were thus not entitled to be treated differently from any other segment of the Kenyan population. Secondly, they argued that all the forests in Kenya belonged to the state and so the Ogiek could not lay claim to ownership of the Mau Forest, also that "that since the colonial administration it was communicated to the Ogieks that the Mau Forest was a protected

[8] *Ibid* at paras 5.
[9] *Ibid* at paras 4
[10] *Ibid* at paras 104.

conservation area on which they were encroaching upon and that they were required to move out of the forest."[11]

In its judgment, following an eight-year long process, the African Court upheld the land-related rights of the Ogiek people and found that Kenya had violated each of the rights claimed, except for their rights to life.[12] The African Court found that the Ogiek had indeed been subjected to discrimination given that other ethnic groups in Kenya, such as the Maasai, are recognized as such and so accorded certain rights, whereas this was not done for the Ogiek.[13] It further held that the need to preserve the environment could not justify the lack of recognition of the Ogieks or the continued denial of the title – particularly because the court had found that certain parts of the Mau forest had been allocated to other people "in a manner that could not be considered compatible with the preservation of the environment" and "and that the Respondent [Kenya] itself concedes that the depletion of the natural ecosystem cannot be entirely imputed to the Ogieks".[14]

The Court then ordered the government of Kenya to "take all appropriate measures within a reasonable time frame to remedy all the violations established and to inform the Court of the measures taken within six (6) months from the date of this Judgment"[15] and reserved its judgement on reparations for a separate judgment.[16]

5.3.1.2. On the Utility of African Court to Local Populations: Early Indications

[11] *Ibid* at paras 120.
[12] *Ibid* at paras 227, Merits (ii).
[13] *Ibid* at paras 141 to 142.
[14] *Ibid* at paras 145.
[15] *Ibid* at paras 227, Merits (iii).
[16] *Ibid* at (iv).

The decision of the African Court in the Ogiek case, indicates that ICs can be useful to such local populations given that states very often violate the collective, environmental, economic or social rights of such populations.

In the Ogiek case, the Kenyan postcolonial state argued that all forest land was vested in the state, but more importantly, that "colonial administrations" had designated the Mau Forest where the Ogiek were rural dwellers as "conservation areas", as such the Ogiek were "encroaching" on this land by continuing to dwell on it. In the Ogiek case, the state is not only the instrument of oppression; it seemed to be continuing the legacies of the British colonial empire in exploiting the resources of the Kenyan state at the expense of the local populations.

Ultimately, the avenues for recourse to the Ogiek within the state were extremely limited, and those that where available, were designed to protect the interests of the state at the expense of the marginalized community. In this instance, and others that will be discussed in the coming sections, international judicial institutions, including African ICs, provide an alternative/additional forum to marginalized people who were pursuing the protection of environmental, economic, and social rights.

5.2.2. Environmental Protection and Socio-Economic Justice Cases from REC Courts

5.2.2.1. The Two SERAP v. Nigeria Cases

Turning attention now to REC courts, I discuss the decisions of the ECOWAS court in two *SERAP v. Nigeria* cases. Both cases involved civil society actors demanding that the ECOWAS court hold Nigeria accountable for failing to protect economic and social rights relating to the provision of

basic education and a healthy environment. In the first case, *SERAP v. Nigeria and UBEC*,[17] the ECOWAS court made some laudable pronouncements and rulings in holding that the right to education was a justiciable right under the *African Charter* and is therefore justiciable in Nigeria.[18] Secondly, it held that in failing to curb corruption and allowing the embezzlement of funds earmarked for the provision of basic education, Nigeria had allowed for certain sections of society to be deprived of the right to education.[19] It held that Nigeria should take all the necessary steps to cover the shortfall resulting from the embezzled funds and provide access to basic education to its citizens.[20]

This decision of the ECOWAS court was significant both for establishing the justiciability of economic and social rights as a whole in Nigeria and showing that one kind of economic and social right – the right to education – was indeed justiciable in that country. The great significance of this decision is that under the Nigerian constitution, economic and social rights, this specific right included, are considered non-justiciable. Indeed, this argument was made by Nigeria in its preliminary objection to SERAP's suit, an objection that was dismissed by the ECOWAS court.[21] The Court held that while the right to education may be non-justiciable under the Nigerian constitution, it was justiciable under the *African Charter* which is both domesticated as a Nigerian statute, and one of the legal instruments the ECOWAS court is empowered to implement pursuant to the Revised Treaty of the ECOWAS.[22] This decision is also significant because it enjoined

[17] The Registered Trustees of Socio-Economic Rights and Accountability Project (SERAP) v. Federal Republic of Nigeria and Universal Basic Education Commission, No. ECW/CCJ/APP/12/70 & ECW/CCJ/JUD/10) (UBEC case)
[18] *Ibid*.
[19] *Ibid* at paras 28.
[20] *Ibid*.
[21] See ruling on preliminary objection, Socio-Economic Rights and Accountability Project (SERAP) v. Federal Republic of Nigeria and Universal Basic Education Commission, No. ECW/CCJ/APP/0808, Oct 27 2009, online: https://www.escr-net.org/sites/default/files/SERAP_v_Nigeria.pdf
[22] *Ibid*.

Nigeria to make resources available to provide basic education to its citizens. It is safe to assume that the biggest beneficiaries of free education in its society would be the poor and marginalized who cannot otherwise afford privately funded education.

The second decision of the ECOWAS court that is discussed here relates more directly to environmental protection. In that case, *SERAP v. Nigeria*, the plaintiffs, on behalf of the people of the Niger Delta region of Nigeria, sued the Nigerian government, the Nigerian state-owned oil company, and 6 transnational companies before the ECOWAS court. They alleged that the Nigerian government had violated the rights of the peoples of the Niger Delta region of the country to adequate standard of living, including the right to food, to work, to health, to water, to life and human dignity, to a clean and healthy environment; and to economic and social development - as a consequence of the impact of oil related pollution and environmental damage on agriculture and fisheries; oil spills and waste materials polluting used for drinking and other domestic purposes. They also argued that the government had failed to secure the underlying determinants of health, including a healthy environment and failed to enforce laws and regulations to protect the environment and prevent pollution.[23] Suing six transnational corporations operating in Nigeria alongside the Nigerian government, the plaintiffs alleged that the oil companies had also violated the rights of the people of the Niger Delta by polluting the environment and, in consequence, had violated these peoples' rights to a healthy environment under the *African Charter*.

In a ruling on the preliminary objection filed by the transnational corporations, the ECOWAS court struck out the case against the corporations, holding that it had no jurisdiction to entertain given that "the process of codification of international law has not yet arrived at a point that allows the

[23] *Ibid* at para 3.

claim against corporations to be brought before International Courts",[24] also, that "in the context and legal framework of ECOWAS…only member states and Community institutions can be sued before it for alleged violation of human rights."[25] I discuss this decision to strike out the case against the transnational corporations later in the chapter.

In deciding the case on merits, the court found Nigeria to be in violation of articles 1 and 24 of the *African Charter,* relating to member states requirement to recognize the rights enshrined in the Charter and adopt legislative or other measures to give effect to these rights. It held that the government had a duty to ensure that all peoples have the right to a general satisfactory environment favourable to their development. It further held that by failing to protect the Niger Delta area from environmental degradation, Nigeria was in violation of the Charter and ordered that the government take all measures to restore the environment, prevent the occurrence of further damage, and hold perpetrators of environmental damage accountable.[26]

It is significant to note that the ECOWAS Court in the two *SERAP v. Nigeria* cases, established the justiciability of economic and social rights, not only in Nigeria, also in the other fourteen ECOWAS member states. In both *SERAP v. Nigeria* cases, the government of Nigeria was either complicit in, or allowed for, the violation of the rights of its citizens to education and a healthy environment to be perpetrated. The court thus provided a significant supranational judicial avenue or pathway for victims to challenge their own governments who were at the same time responsible for the protection of their rights, as well as the instruments for the violation of the rights. It is important to note that while both cases could have been brought before the domestic courts in Nigeria, given that the *African Charter* is domesticated under Nigerian law, I argue that: a) the

[24] *Ibid* at paras 69.
[25] *Ibid* at paras 71.
[26] *Ibid* at paras 121.

ECOWAS Court provided an *additional and alternative forum* for the plaintiffs to pursue their claims; and b) the determination of the case by the ECOWAS Court lent these economic and social rights justiciability (at least before the ECOWAS Court) in other West African countries that might not have domesticated the *African Charter*.

5.2.2.2. ANAW V. Attorney General of Tanzania – Serengeti Case

Finally, in the last case I discuss in this section, I review the *Serengeti* case that was decided before the EACJ. In that case, an NGO operating out of Kenya (Animal Network for Animal Welfare (ANAW), brought a suit against the Tanzanian government, seeking a permanent injunction to stop the government from building a road across the Serengeti National Park, alleging that such a road would be detrimental to the environment, and would negatively impact the wildlife as the annual Wildebeest migration[27] which is regarded as quite remarkable given that (among other things), it "is the ever-moving circular migration of over a million animals across the Serengeti-Mara ecosystem".[28] As such, in the application, ANAW asked the EACJ for three remedies: a permanent injunction banning Tanzania from maintaining any road or highway across the Serengeti National Park; a declaration that the construction of the road would amount to a violation of the EAC (Establishment) Treaty; and, that the court find Tanzania accountable for violating its obligations under the Treaty.[29]

In response, the Tanzanian government filed an objection, challenging the jurisdiction of the court, alleging that the case was time-barred as it was filed more than 2-months after the Applicants

[27] Also regarded as the Great Migration, see "Everything You Need to Know About The Great Wildebeest Migration", online: *Asilia Africa* </blog/everything-you-need-to-know-about-the-great-wildebeest-migration/>.
[28] *Ibid*.
[29] ANAW v. The Attorney General of the United Republic of Tanzania (2010) REF NO. 9 of 2010, Online: http://eacj.org/?cases=anaw-v-the-attorney-general-of-the-united-republic-of-tanzania

became aware of the facts; and that the EACJ had no jurisdiction to bar a sovereign state from carrying out infrastructural developmental projects within its borders.[30]

In its ruling, dated the 29th of August 2011, the court overruled Tanzania's objection and held that it had jurisdiction to determine the case. It held that while it agreed with Tanzania's arguments that the state had the *right* to undertake development projects, it argued that "it is not the existence of that right which is the subject of the present reference but rather the legality of exercising that right by constructing or maintaining a highway across the Serengeti National Park".[31] Additionally, the court held that the action was not time-barred as the government's counsel had submitted insufficient evidence to prove that the Applicants knew about the case more than 2-months before filling it.[32] The government subsequently appealed this ruling before the Appellate Division of the Court, and the Appellate Division upheld the ruling and dismissed the appeal. The matter was then returned to the First Instance Division of the EACJ to be heard on the merits.[33] In subsequent sections of this chapter, I discuss this notion of *rights* of sovereign states to carry out developmental projects (or natural resource extraction) in their regions and how the exercise of these rights is often at the expense of local communities.

In deciding the Serengeti case on the merits, the First Instance Division of the EACJ decided the case in favour of ANAW.[34] It held that if the road project were implemented, it would have devastating effects for the park and neighbouring parks and so held that the road should not be built.[35] It further held, in response to Tanzania's arguments, that although a separate Protocol on

[30] *Ibid*.
[31] *Ibid* at paras 10.
[32] *Ibid*.
[33] *Ibid* at paras 6.
[34] *Ibid*.
[35] *Ibid* at paras 86.

environment was yet to come into force, that the provisions relating to protecting the environment contained in the EAC (Establishment) Treaty were in force, and so granted the court jurisdiction to hold Tanzania accountable.[36]

This decision was appealed before the Appellate Division of the Court, and the appeal was partially successful. The Appellate Division held that the First Instance Division of the court had ruled on what was a "mere proposal" to upgrade the road and that the First Instance Division had an obligation to confirm that there was a "real live dispute" and not entertain hypothetical cases.[37] Despite this finding by the Appellate Division, the court still did not (expressly) lift the permanent injunction issued by the First Instance Division, which had barred Tanzania from constructing the road; instead it held that the court had jurisdiction to actually permanently bar Tanzania from constructing the road.[38] Despite this potentially confusing decision of the Appellate Division, Tanzania complied with the decision of the EACJ and abandoned the plan to construct a road across the Serengeti National Park.

As such, much like the previously discussed decisions, in the *Serengeti* case, the aspirations of the state towards economic development was at odds with the need to protect the environment and the eco-system, and in pushing for the project to continue, the state attempted to put its need for economic advancement above that of local populations and the environment. The Appellate Division of the EACJ captured this situation perfectly when it held:

> At the heart of this Reference (the first of its kind in this Regional Court), was the delicate and precarious balance; pitting the aspirations of the State for accelerated socio-economic development of the Country, against the concerns of the Civil Society for the conservation,

[36] *Ibid* at paras 42 and 24.
[37] THE ATTORNEY GENERAL OF THE UNITED REPUBLIC OF TANZANIA v. AFRICAN NETWORK FOR ANIMAL WELFARE (ANAW), APPEAL NO.3 OF 2014 online: https://www.eacj.org//wp-content/uploads/2015/08/APPEAL-NO-3-OF-2014-FINAL-31ST-JULY-205-Anwaw.pdf at paras 67.
[38] *Ibid* at paras 50.

> preservation and protection of the Natural Environment. At the centre of this epic battle, was the fate of the iconic Serengeti Nature Reserve, straddling the International borders of Kenya and Tanzania.[39]

The utility of the EACJ to the plaintiffs in this case was especially significant because the Serengeti National Reserve at the heart of the dispute did indeed "straddle" the international borders of Kenya and Tanzania. As such, a regional court with supranational jurisdiction across the national border offered an additional utility as it is able to make a binding pronouncement on both and either states.

In summary, this section has attempted, through the discussions on cases emerging from ICs in Africa, to demonstrate the utility of this specific sub-group of ICs (i.e. African REC courts) as significant resources for the promotion and protection of economic and social rights, and as such also for environmental protection and socio-economic justice on the continent. These REC courts provide additional and alternative forums beyond the domestic judicial regimes of the relevant states at which local populations and civil society actors can, and do, hold states accountable for their failure to ensure environmental protection or socio-economic justice.

Additionally, and as I have argued throughout this dissertation, Kathryn Sikkink's theories of insider-outsider coalition,[40] offers additional insights into the significance of international courts to domestic struggles. Her theory of "Boomerangs" and "spirals" explains the utility of international forums to domestic actors, as it argues that international forums (and adjudicatory bodies) provide the most useful means for activists to pursue their goals, especially if they

[39] *Ibid* at paras 2.

[40] Kathryn Sikkink, "Patterns of Dynamic Multilevel Governance and the Insider-Outsider Coalition" in Transnational Protest and Global Activism, Donatella della Porta & Sidney Tarrow, eds. (Lanham, MD: Rowman & Littlefield Publishers, 2004).

encounter resistance at a national level, but encounter receptiveness from influential allies at the international level. In her view, the receptiveness of the issue by the international organization forces the domestic authorities to pay attention to the issue, thereby bringing about political or social change.[41]

In exemplifying Sikkink's theory, I argue that ICs in Africa, especially the REC courts under study, through their decisions and jurisprudence on environmental protection and socio-economic justice, do help to provide activists with the type of legitimacy from "influential allies" at the "international level" which Sikkink is referring to in her theory. As such, their receptiveness to the justiciability of these issues and towards adjudicating and advancing the underlying environmental rights and social justice claims advances the goals of activists who struggle for the realization of these values at domestic levels. This point dovetails and builds upon the work of scholars, such as Alter,[42] Gathii,[43] Okafor,[44] and Ebobrah,[45] who have long recognized the utility of ICs to local activists. I discuss the arguments of these scholars in greater detail in the coming sections.

Given this apparent utility of African REC courts for domestic environmental protection and social justice struggles, the next section seeks to discuss the challenges that are confronted by activists when using these such ICs in their efforts to these values. In the next section, I develop the argument that the lack of access for such groups at REC courts (and thus at other ICs) presents the most potent barrier to using these courts to achieve environmental protection and social justice.

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[41] *Ibid.*
[42] Alter, *supra* note 1.
[43] Gathii, "Saving the Serengeti", *supra* note 5; Gathii, "Mission Creep or a Search for Relevance", *supra* note 37.
[44] Okafor, *supra* note 257.
[45] Solomon Ebobrah, "The ECOWAS Community Court of Justice: A Dual Mandate with Skewed Authority", in Alter, Karen J. Laurence R. Helfer and Mikael Rask Madsen (eds) *International Court Authority*, International Courts and Tribunals Series (Oxford, New York: Oxford University Press, 2018).

5.3. Challenges faced by Activists in using the REC Courts to pursue Environmental Protection and Socio-economic Justice

There are two main challenges to activists using ICs in Africa to pursue environmental protection and socio-economic justice. Scholars like Gathii have argued that one of the major limitations to using African ICs to pursue environmentalism is ICs inability to hold corporations accountable for human rights violations or environmental degradation.[46] We see this argument demonstrated in the *SERAP v. Nigeria* case, where the ECOWAS Court was forced to dismiss the case against the transnational corporations (TNCs) because "the process of codification of international law has not yet arrived at a point that allows the claim against corporations to be brought before International Courts",[47] and that only member states and community institutions could be sued before the court.[48]

I argue that, while it raises a legitimate concern, this is not the most potent challenge to using African ICs to pursue environmental protection and socio-economic justice. As I demonstrate in the next sections, the lack of jurisdictional access that they too often experience is the most potent challenge to activists using ICs to pursue environmental protection and socio-economic justice. Also, the challenge of ICs being unable to hold TNCs accountable is not restricted to African ICs; it is a problem with wider international law. This challenge has birthed a whole field in international law relating to business and human rights.[49] It is obvious that international law must

[46] Gathii, "Saving the Serengeti", *supra* note 5.
[47] *Ibid* at paras 69.
[48] *Ibid* at paras 71.
[49] See scholarship on business and human rights, John Gerard Ruggie, "Business and Human Rights: The Evolving International Agenda"(2007) 101:4 AJIL / Am J Inti L 819.; John Ruggie, "Protect, Respect and Remedy: A Framework for Business and Human Rights" (2008) 3:2 Innovations: Technology, Governance, Globalization 189–212; John Gerard Ruggie, "Global Governance and 'New Governance Theory': Lessons from Business and Human Rights" (2014) 20:1 Global Governance: A Review of Multilateralism and International Organizations 5–17; Florian Wettstein, "CSR and the Debate on Business and Human Rights: Bridging the Great Divide" (2012) 22:4 Business

adjust itself to the calls for it to be able to address the challenge of TNCs committing human rights abuses and ICs not being able to hold them accountable.

I argue, however, that the more potent barrier to using African ICs to pursue environmental protection and socio-economic justice is jurisdictional access. I divide the discussion on access into two: proximate access and jurisdictional access.

5.3.1. Proximate Access

One of the ways in which access to ICs in Africa has provided a challenge to non-state actor (or private) litigants comes in the form of physical access to the institutions. As discussed in the second chapter, the physical location of the EACJ is in Arusha, Tanzania, while serving 7 other states; the ECOWAS Court is located in Abuja, Nigeria while serving 14 other member states; and the SADCT was located in Windhoek, Namibia while serving 14 other member states. The locations of these institutions make access a challenge for people who live outside these locations and especially difficult for litigants who live outside the states where these ICs are located.

The lack of physical proximity to these institutions hinders the capacity of most local populations, particularly in remote areas across these regions, to access the institutions in the pursuit of justice. However, this issue of limited proximity, I argue, is remediable. The ECOWAS Court for example, has in the past, reckoned with this physical accessibility challenge of the court and has devised means through which it sometimes sits at different locations, often closer to the victims in order to mitigate the challenge to access. As Okafor and Effoduh write, in the absence of circuits or branches, the ECOWAS Court has, at times, moved its seat to other locations in order to make

Ethics Quarterly 739–770; Anita Ramasastry, "Corporate Social Responsibility Versus Business and Human Rights: Bridging the Gap Between Responsibility and Accountability" (2015) 14:2 Journal of Human Rights 237–259.

itself more accessible to the victims.[50] For example, in the *Hadijatou Mani Korau*[51] case, the court sat in Niamey, Niger in order to be closer to the victims, the witnesses and the community.[52] In the *SERAP v. Nigeria* case, the court sat in Ibadan, which was much closer to Lagos, where the plaintiff's office was located.[53] In Madame *Ameganvi Manavi v. Togo*, the court sat in Porto Novo, Benin, and in *Mousa Leo Kaita v. Mali*,[54] the court sat in Bamako, Mali, in order to be closer to both the plaintiffs and the defendants.[55] Okafor and Effoduh argue that "in most of these cases, the move to sit in other cities or countries served the interests of the usually much more disadvantaged and vulnerable poor".[56] More recently, since the COVID-19 physical distancing measures came into force, the ECOWAS Court has commenced holding virtual sessions. The President of the court recently announced that even after the physical distancing rules are relaxed, the court will continue to hold virtual sessions as this innovation has been able to remedy challenges of proximate access.[57] During an interview with the News Agency of Nigeria, the President of the court said:

> "The ECOWAS Court is meant for indigent parties, it is not meant for the rich; therefore for parties to fly themselves and their lawyers to Abuja to have hearings was a problem for us and we sympathised with them. Now that this one has come, at the cost of $138,000 we purchased all the gadgets, processes, systems and software; that is a huge expenditure by the Court and, therefore, it has come to stay. **Whether there is COVID-19 or no COVID-19 we are going to do virtual hearings**."[58] (emphasis added)

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[50] Obiora Okafor, and Okechukwu Effoduh, "The ECOWAS Court as a (Promising) Resource for Pro-Poor Activist Forces: Sovereign Hurdles, Brainy relays and 'Flipped Strategic Social Constructivist'" in James Thuo Gathii ed. *The Performance of Africa's International Courts: Using International Litigation for Political, Legal, and Social Change*, (Oxford University Press, 2020) at 133.
[51] Hadijatou Mani Koraou v. Niger, Case No. **ECW/CCJ/APP/08/07**
[52] Okafor and Effoduh, supra note 51 at 133.
[53] *Ibid*.
[54] Keita v. Mali, Case No. ***ECWICCJIAPP/05/06,*** Judgment, para. 34 (Mar. 22, **2007).**
[55] Okafor and Effoduh, supra note 51 at 133.
[56] *Ibid*.
[57] "Virtual sessions stay after COVID-19 – ECOWAS Court", (25 October 2020), online: *The Guardian Nigeria News - Nigeria and World News* <https://editor.guardian.ng/news/virtual-sessions-stay-after-covid-19-ecowas-court/>.
[58] *Ibid*.

Ideally, in order to remedy their proximity challenges, REC courts ought to establish branches or circuit courts in all or most of the states where the ICs have jurisdiction. However, budgetary and funding challenges tend to frustrate the realization of this goal.[59] As such, moving the seat of the court, or conducting virtual proceedings in the ways in which the ECOWAS court has done, offers innovative ways through which that challenge can be mitigated.

While there is no evidence of the EACJ doing the same, i.e. moving the seat of the court closer to the affected populations, I argue that the ECOWAS Court models (both of moving the seat of the court and using virtual proceedings) offer a useful model for how the courts can become more accessible and also raise awareness about the institutions in other parts of the region. The issue of awareness is particularly pertinent in the case of the EACJ as my interviews with some of the staff of the EACJ had revealed that the staff were dissatisfied with the number of people, regionally, who knew of the existence of the court or knew of the remedies the court could offer. For example, one of the court staff said:

> There is another general problem to that, which is, you would find even lawyers don't know about the court. So, if a lawyer doesn't know about the existence of the court, or what can be canvassed in that court, then how does an ordinary citizen come to know that, if I have this problem, it can be better canvassed before the court? So, there's a lot of sensitization work, that needs to be done.[60]

I argue then that moving around the seating of the court, particularly where it can be closer to the victims and to poorer or more remote populations, not only mitigates the challenge of physical proximity, but also raises awareness about the existence and potential of the institution. Ultimately,

[59] See discussions on this in Okafor and Effoduh, supra note 51.
[60] Interview #3, Arusha, Tanzania (7th May 2018)

while proximate access is a hindrance to environmental protection and socio-economic justice, it is a hindrance that is capable of being mitigated. However, jurisdictional access, as I argue in the next section, is not as malleable.

5.3.2. Jurisdictional Access

As I had argued in the third chapter of this dissertation, jurisdictional access refers to whether a court can adjudicate a matter (subject matter), against whom a suit can be brought at a court (personal jurisdiction), and whether the certain parties have the standing to sue at the court (both personal jurisdiction and *locus standi*). Where parties have no form of standing to sue or be sued before the court, the court cannot recognize them as parties and so cannot adjudicate the matter they have brought before it or grant remedies to them. Very often, the victims of environmental degradation or socio-economic problems are local populations who have to fight the machinery of the state; as such, without standing or access to the ICs, these ICs cannot offer them any recognition or assistance.

It is quite laudable (and definitely advantageous to activists in pursuit of environmental protection and socio-economic justice) that the ECOWAS Court and the EACJ have, through their protocols and their jurisprudence, adopted a very liberal approach to providing private individuals access to the court. For example, Article 30 of the EAC (Establishment) treaty permits "*any person(s) resident* in East Africa, to challenge the legality of an Act, regulation, directive, decision or action of a Partner State or an institution of the Community on the grounds that it is unlawful or an infringement of the Treaty."[61] This use of the term "resident" under the Treaty has been interpreted liberally by the EACJ, and so has allowed private individuals and NGOs to bring actions before

[61] Article 30 of the EAC (Establishment) Treaty, online: https://www.eacj.org/?page_id=33

it.[62] In the *Serengeti case*, the plaintiff, ANAW, though an NGO operating in Kenya, was able to approach the EACJ to stop Tanzania from building a road across the Serengeti National Park.[63] ANAW was able to have standing before the court because of this liberal approach to providing access to the court.[64]

Similarly, Article 10 of the ECOWAS Court Protocol (as amended/modified by the Additional Protocol) allows for "individuals" to bring human rights cases before the court.[65] Additionally, through its jurisprudence in the *SERAP v. Nigeria* case, the court has allowed public interest NGOs to bring cases before it, even if the NGO was not the victim of the human rights abuse and did not obtain authorization from the direct victims of the human rights violation.[66] This liberal approach to its personal jurisdiction (jurisdictional rationes personae) has allowed for NGOs and private individuals to access the Court in pursuit of environmental protection and socio-economic justice.

Unfortunately, in the case of the SADCT, the adoption of the existing protocol, which removed the access of private individuals to the Tribunal,[67] provides a significant challenge to the pursuit of environmental protection and socio-economic justice in the region via regional courts. As I had argued in the previous chapters, out of the 16 member states of the SADC region, only private citizens and NGOs in Malawi and Tanzania have access to a regional court. This is only the case because Malawi has made the declaration recognizing the competence of the African Court, and Tanzania is a member of both the EAC and the SADC, and so its citizens are able to approach the

[62] See AG Tanzania v. ANAW, supra note 65 at paras 75.
[63] *Ibid*.
[64] *Ibid*.
[65] Article 10, Protocol /P1/7/91 of 6 July 1991 on the ECOWAS Community Court of Justice adopted by ECOWAS member states in 1991; Supplementary Protocol A/SP.1/01/05 Amending Protocol A/P.1/7/91 relating to the Community Court of Justice adopted in 2005.
[66] SERAP v. Nigeria case, supra note 49; See also Okafor and Effoduh, supra note 51 at 128.
[67] Protocol on the Tribunal in the Southern African Development Community, online at: https://ijrcenter.org/wp-content/uploads/2016/11/New-SADC-Tribunal-Protocol-Signed.pdf, Art. 33, and Art. 50.

EACJ. Essentially, private individuals and NGOs in the 12 other member states have no access to an international court in light of the SADCT's loss of private access.

Of course, the argument could be made that citizens in these southern African states, without access to SADCT, could approach the African Commission, which can then bring cases on their behalf to the African Court (as seen in the Ogiek case). Though this option can ameliorate the stated gap, it does not totally substitute for NGOs enjoying direct access to the court. Also, scholars like Majekolagbe and Akinkugbe have expressed concern about NGOs and the African Commission exercising this option, arguing that states may view this as an attempt to circumvent Article 34(6) of the Protocol (which requires states to make a declaration recognizing the competence of the Court in order for NGOs to be able to approach it).[68] They argue that it is important to maintain states' confidence in the African Commission and the African Court, and an increased exercising of this option may lead to states resisting the African system.[69] They signal Rwanda's withdrawal of its declaration under Article 34(6) as an early indication of how states can resist the jurisdiction of the court when they feel the court is overstepping its jurisdiction.[70] Evidently, the subsequent withdrawal of three other states from the jurisdiction of the court lends some legitimacy to this concern.[71] Ultimately, NGOs in the thirteen other southern African states (including Tanzania, because it has withdrawn its declaration)[72] do not enjoy direct access to the

[68] Majekolagbe & Akinkugbe, *supra* note 3.
[69] *Ibid* at 6.
[70] *Ibid*.
[71] See Nicole De Silva & Misha Plagis, "A Court in Crisis: African States' Increasing Resistance to Africa's Human Rights Court", (19 May 2020), online: *Opinio Juris* <http://opiniojuris.org/2020/05/19/a-court-in-crisis-african-states-increasing-resistance-to-africas-human-rights-court/>; Sègnonna Horace Adjolohoun, "A crisis of design and judicial practice? Curbing state disengagement from the African Court on Human and Peoples' Rights" (2020) AFRICAN HUMAN RIGHTS LAW JOURNAL 40.
[72] *Ibid*.

African Court, as the governments of the relevant states have not made the declaration recognizing the competence of the African Court to grant this kind of access to private litigants.

In the end, I argue that the REC Courts, when their enabling treaties allow them to provide jurisdictional access to private individuals, offer the best means for private actors to access African ICs because they (typically) have compulsory jurisdiction – meaning that states cannot in most cases withdraw from the jurisdiction of the court without withdrawing from the REC as a whole. This point is highly significant because as we had seen in the case of the African Court, even after making declarations recognizing the competence of the court which allows for NGOs and private individuals of the state to approach the Court, states could simply withdraw the declaration, once again leaving their citizens without recourse.

Secondly, decisions of these REC courts are legally binding; as such, where private citizens have access to these ICs, they offer a more accessible means for private individuals to pursue environmental protection and socio-economic justice. Finally, as we have seen, these ICs are able to apply not only general international law or international human rights law, but (as we had seen in the *Serengeti case*) international environmental law, as well. This means that the REC courts have even more range and potential for environmental protection and socio-economic justice.

The loss of private access to the SADCT is therefore a blow not only for the struggle to realize civil and political rights in that region but also for the environmental protection and socio-economic struggles there. This is so in part because these claims, being largely based on economic and social rights, tend to suffer from justiciability challenges before domestic courts (South Africa being the great exception).[73] Economic and social rights have been typically understood, especially

[73] According to the *Constitution of South Africa* and reaffirmed by the Constitutional Court of South Africa, economic and social rights are justiciable under the South African Constitution. See, Eric C. Christiansen,

in the West, to be less important than civil and political rights. Catarina de Albuquerque has described states' relationships with economic and social rights as generally viewed "with caution, skepticism or triviality."[74] In a similar vein, scholars like Gathii have suggested that domestic courts have a tendency to be overly positivist in determining environmental protection cases, and as such, African ICs offer a better alternative because these ICs can apply a broad range of international law, including international environmental law and so offer better options for litigants.[75]

Ultimately, as I have argued in the third chapter of this work, it is this recognition of the lack of an international court (especially a REC court) for private litigants in southern Africa that has sparked several campaigns and litigation aimed at "reviving" private access to the SADCT before its demise, and "resurrecting" it afterwards. Ultimately, while this point may not apply as much in South Africa, private litigants in almost all states seeking environmental protection and socio-economic justice are now left almost entirely at the mercy of domestic courts which may either deem their issues non-justiciable, or regard such issues as being less serious compared to the need for the economic advancement of the relevant states. The victims may also be left without much of a remedy because the language of the law in those states is too often designed to preserve the perceived interests of the state (read power elite). Private access to the REC courts (and other ICs)

"Adjudicating Non-Justiciable Rights: Socio-Economic Rights and the South African Constitutional Court" 38 Columbia Human Rights L. Rev. 321 (2007) 67.

[74] See Catarina de Albuquerque "Chronicle of an Announced Birth: The Coming into Life of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights – The Missing Piece of the International Bill of Human Rights" (2010) 32 Human Rights Quarterly 144 at 145. She argues that national and international levels of government have often viewed economic, social and cultural rights, "with caution, skepticism or triviality".
[75] James Thuo Gathii, "Saving the Serengeti: Africa's New International Judicial Environmentalism" (2016) 16:2 Chicago Journal of International Law 386–438 at 433.

is thus essential to litigants in this and other regions in their pursuit of environmental protection and socio-economic justice.

5.4. Enlarging the Conception of the Effectiveness of ICs for the Pursuit of Environmental Protection and Socio-Economic Justice – The REC Courts as *effective* tools for Forcing State Transparency

A likely question that will emerge from my claim that that the REC courts (and thus ICs) are useful for advancing environmental protection and socio-economic justice, aspects of which have already been addressed in a preceding chapter, is whether these courts are "effective" tools for such advancement. As I had argued in the second chapter of this dissertation, the answer to whether these ICs are *effective*, depends on what these ICs are being assessed effectivefor. Recent scholars have derided the conflation between "compliance" with IC decisions and the "effectiveness" of these ICs,[76] arguing (and I agree), that using compliance as the only metric to measure the effectiveness of ICs, "minimizes other goals served by litigation."[77] Okafor for example, urges the need to reach "*beyond*, without abandoning, the search for state compliance as the measure of utility of the African system and other such bodies."[78]

Recent scholarship has argued that these ICs are also effective, both as an additional avenue to ventilate litigants' claims *and* as a means of keeping the issue in the public eye.[79] In a recently

[76] Kirsten Roberts Lyer, "Assessing the Effectiveness of International Courts By Yuval Shany" (2016) 86:1 British Yearbook of International Law 217–221; Obiora Chinedu Okafor, *The African Human Rights System, Activist Forces and International Institutions*, 1 edition ed (Cambridge: Cambridge University Press, 2007); James Gathii, "Mission Creep or a Search for Relevance: The East African Court of Justice's Human Rights Strategy" (2013) 24 Duke J Comp & Int'l L 249.
[77] Gathii, *supra* note 10 at 38.
[78] Okafor, *supra* note 56.
[79] *Ibid*. See William Forbath et al,, "Cultural Transformation, Deep Institutional Reform, and ESR Practice: South Africa's Treatment Action Campaign," in Jeremy Perelman and Lucie E. White, *Stones of Hope: How African Activists Reclaim Human Rights to Challenge Global Poverty*, (Stanford University Press: Stanford, 2010); and Douglas NeJaime, "Winning Through Losing,"(2011) 96 Iowa Law Review, 947

published edited volume, Gathii and the book's contributors highlight eight different benefits (beyond compliance with IC decisions) for why activists engage states before international courts.[80] The authors argue that the benefits of international adjudication to activists include the fact that in compelling the states to appear to defend themselves, the process of international adjudication lends credibility to the cause of the activists.[81] It helps litigants organize and construct an organizational identity among like-minded actors who have similar interests.[82] It facilitates the mobilization of similarly outraged constituencies who then use the ICs as a disruptive strategy that operates outside the national level.[83] It lays the basis for appealing to other sympathetic actors, provides an avenue for naming and shaming, and provides impetus and ammunition for activists to promote their cause(s) in the court of public opinion, and as such drive policy, legal, or social change.[84]

5.4.1. ICs as Strategies for Forcing Transparency

In contributing to the growing scholarship on enlarging conceptions of REC court and IC effectiveness, my dissertation argues that REC courts in Africa are also effective in the sense of their effective utilization as strategies for *forcing transparency* from recalcitrant or belligerent states/governments. As such, even if the matter at issue is in fact resolved against the activists who have litigated the matter at hand, or even if the matter is resolved in favor of the activists, but the states refuse to comply, these activists are still able to use the pleadings and evidence that their governments have been forced to submit to the REC courts to continue to *advance* their contestation or compel governments to act, or explain their policies.

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[80] See James Thuo Gathii, "Introduction" in James Thuo Gathii ed. *The Performance of Africa's International Courts: Using International Litigation for Political, Legal, and Social Change*, (Oxford University Press, 2020),
[81] *Ibid*.
[82] *Ibid*.
[83] *Ibid*.
[84] *Ibid*.

The use of ICs in the above-discussed way as a means of forcing transparency from states is alluded to in Ebobrah and Lando's forthcoming chapter,[85] where the authors discuss the *Plaxeda-Rugumba v. Rwanda,* arguing that these ICs serve as a warning system that flag human rights violations in states that like Rwanda for example, where the government seems to have constructed a reputation for itself as "an African success story and a model of good governance in sub-Saharan Africa". However, this dissertation demonstrates, relying on empirical evidence and analysis, *how* ICs are used by activists to force transparency by governments.

An illustration of this strategy can be seen in the *Plaxeda-Rugumba v. Rwanda*[86] case decided by the EACJ. In that case, the applicant who claimed to be the elder sister of one Lieutenant Colonel Seveline Rugugana Ngabo of the Rwandan Defence Force complained that her brother (the subject) was arrested in August 2010 by Rwandan authorities and was being held in an unknown location without access to his family, his lawyer, doctor, or the Red Cross.[87] She claimed that the subject's family had been denied any information by the Rwandan Defence Force about whether the subject was dead or alive, why he had been detained, and also that the subject had not been formally charged or arraigned before any adjudicatory body since his detention.[88] She prayed the EACJ for a declaration that the unlawful detention of the subject was in contravention of Articles 6(d) and 7(2), which demand that partner states shall be bound to govern their populace on the principles of good governance and universally accepted standards of Human Rights.[89]

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[85] See Solomon Ebobrah and Victor Lando "African Sub-regional Courts as Back-up Custodians of Constitutional Justice: Beyond the Compliance Question" in James Thuo Gathii ed. *The Performance of Africa's International Courts: Using International Litigation for Political, Legal, and Social Change*, (Oxford University Press, 2020),
[86] *See* Rugumba v. Secretary General of the East African Community, Reference No. 8 of 2010, East African Court of Justice [E. Afr. Ct. Just.] (Dec. 1, 2011), https://eacj.org/wp-content/uploads/2012/11/Plaxeda-Rugumba-2010-8-judgment-2011.pdf.
[87] *Ibid* at paras 2.
[88] *Ibid*.
[89] *Ibid* at paras 3.

As a consequence of filing that case before the EACJ, and in order to be able to respond to the case before the court, the Rwandan military was forced to act. The Rwandan military then filed affidavits before the EACJ, confirming that they indeed still had the subject in custody; they then hurriedly arraigned him before a military court, and in that process, were forced to reveal the charges he was being held on.[90] Because of the litigation of this case before the EACJ, the government was forced to arraign the subject in order to be able to respond to the suits, and also, the subject's family was able to obtain information about the arrest of the subject from the Rwandan authorities, especially in light of the fact that their previous attempts to access that information from the national authorities were met with hostility.[91] This created value for the family's struggle for justice. The court's work was thus effective in this sense.

I therefore argue that forcing transparency from states is one of the ways in which activists use ICs to serve an additional effectiveness function. Further buttressing this point, the interviews carried out during the fieldwork for the dissertation strongly demonstrate this. The highly experienced and knowledgeable activists I interviewed repeatedly expressed the view that their use of REC courts and other regional ICs in Africa was part of a broader socio-political strategy. One participant described litigation before the courts as "only one of the tools in an activist's toolbox".[92] In developing this point further, the participant argued "states take this court [the EACJ] very seriously, you can tell by the quality of the pleadings; how detailed their responses are; who they bring as counsel, and how much attention it gets back home."[93] And so he articulated his reasons for using the court as:

[90] *Ibid*.
[91] *Ibid* at paras 2(h).
[92] Interviewee #6, Arusha, Tanzania (16th May 2018).
[93] *Ibid*.

> *What the greatest motivation of using the EACJ for me have been two things, one is getting the state to officially explain policy or position on certain issues. [this is] hugely useful because you then put the court on record in the context of a mechanism or an environment maybe there are no answers to certain questions. So, I give you an example, I represented a friend (NAME) who was a lawyer, representing people accused of terrorism, and he went to Uganda and he was deported. So, you ask the question, "Why was I deported? What have I done wrong?" You ask the government the question, they will never give you an answer. But in court, they are actually forced admit, "well we were afraid that maybe you were acting as a conduit for this aspect, right?" That's hugely powerful because even if you may or may not win the case, it gives your insight like for those of us who work in long term rule of law issues, it gives you insight to why states do what they do.*[94]

Another participant, speaking on the use of ICs as a strategy for forcing transparency, particularly when suing more than one state said:

> And I can tell you as somebody who litigates a lot in this area, many times when you sue two governments together, it's a field day for the litigants, because they end up cross-incriminating each other. And then the stuff that have gone on in close corridors of governments, that we now get to know through their own affidavits in this point. So many times, affidavits end up helping us rather than them.[95]

Admittedly, the cases I have used to illustrate these points in this section have been mostly related to the protection of civil and political rights; however, I argue that the point remains when we consider the protection of economic and social rights and the advancement of environmental protection and socio-economic justice on the African continent.

As we had seen in the previous section, REC courts in Africa have *effectively*, (however assessed), adjudicated environmental protection and socio-economic justice cases in the various regions in Africa. I argue that whether or not those decisions are "complied" with, the jurisprudence of these REC courts and other ICs in Africa has impacted either "directly" on the immediate cases that they

[94] *Ibid*.

[95] Interview #1, Arusha, Tanzania (3rd May 2018).

have adjudicated or "indirectly"[96] by affecting in a significant way the advancement of environmental protection and socio-economic justice incrementally over time.

As seen in the *Serengeti* case, for example, the government of Tanzania did in fact comply with the decision of the EACJ and so abandoned its plan to construct a road across the Serengeti National Park. However, the impacts of that decision reach beyond just compliance with the decision; the jurisprudence was impactful because the court made a pronouncement regarding the fact that "any resident" of the East African Community, including in this case an NGO operating in Kenya, could sue a partner state before the court. Also, that the REC court could in fact apply international environmental law, even in the absence of a specific EAC protocol on the environment.

Gathii has argued that this last point on ICs in Africa being able to implement international environmental law is highly significant because much of the literature on international environmental adjudication has been riddled with debate.[97] Some scholars have questioned whether international adjudication of environmental disputes provides the best route to international environmental protection, whether there is a need for the creation of a specific court to adjudicate environmental disputes; or whether the creation of an international court for the environment would lead to a further proliferation of international courts and fragmentation of international law.[98] Gathii argues that African ICs have evolved differently from the consensus in

[96] See Frans Viljoen & Lirette Louw, "State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights, 1994-2004" (2007) 101:1 The American Journal of International Law 1–34. on how to understand the "direct impact" and "indirect impact" of human rights treaties and law. The authors define "direct impact" as immediately demonstrable results expressed for instance by implementation of a finding of a treaty monitoring body, while "indirect impact" was seen as incremental and occurring over time.
[97] Gathii, "Saving the Serengeti", *supra* note 5.
[98] One school of thought makes a strong case for not only the need to adjudicate international environmental disputes, but also the need for the creation of a specific court to adjudicate environmental disputes. See See Amedeo Postiglione, *The Global Environmental Crisis: The Need for an International Court of Environment* (Giunti,

the literature, showing that even though these courts were established as regional integration courts, they have been able to deploy treaty provisions to protect not only human rights but also the environment, without having to rely entirely on human rights provisions.[99]

Ultimately, these ICs are effective not only when their decisions are complied with but also in other multiple ways. One of the participants interviewed for this research stated:

> Litigation is only one of the tools in an activists' toolbox. In fact, the best litigation is that, that triggers other conversations or *other discussions or other results apart from the case itself. Those are often the cases for me that would have the most lasting impact*. And so, we should always resist this singular focus on litigation as a solution.[100]

5.5. Conclusion

Three main points can be drawn from the discussions in this chapter. The first is that ICs provide additional and alternative forums for activists and victims of environmental and socio-economic abuse to seek justice and hold their governments accountable. The cases analyzed in this chapter have shown how African ICs have been instrumental in the establishment and promotion of

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Gruppo Editoriale | Firenze, Italy) 1996; Alfred Rest, "The Indispensability of an International Environmental Court," 7 RECIEL, pp. 63-67. 1998; Thirlway H. 2010. "The Law and Procedure of the International Court of Justice". Oxf J Br Yearb Int Law 81(1):13–15. A second school of thought claims that international adjudication is confrontational by character and unnecessary and, instead, proposes "cooperation rather than confrontation". See Abram Chayes, Antonia Handler Chayes, Ronald Mitchell. 1998. "Managing Compliance: A Comparative Perspective" in Edith Brown Weiss and Harold K. Jacobson (eds) *Engaging Countries: Strengthening Compliance with International Environmental Accords* (The MIT Press: Cambridge Massachusetts). A third school of thought, while supporting international adjudication of environmental disputes, argues against the creation of a specific court to adjudicate international environmental disputes and suggests the use of existing international courts. See Patricia W Birnie, Alan Boyle and Catherine Redgwell. 2009. *International Law and the Environment* (Oxford University Press); Daniel Bodansky, Jutta Brunée, and Ellen Hey. 2007. "International Environmental Law: Mapping the Field" in Daniel Bodansky, Jutta Brunée, and Ellen Hey (eds) *The Oxford Handbook of International Environmental Law* (Oxford University Press); Duncan French. 2006. "Environmental Dispute Settlement: The First (Hesitant) Signs of Spring?" Hague Yearbook of International Law / Annuaire de La Haye de Droit International, Vol. 19. Hey, for example, has argued that the creation of an international court for the environment would lead to a further proliferation of international courts and fragmentation of international law. This view advocates that existing international courts are fully capable of implementing international environmental law See Ellen Hey, *Reflections on an International Environmental Court* (Martinus Nijhoff Publishers) 2000.

[99] Gathii, "Saving the Serengeti", *supra* note 57 at 432.

[100] Interview #6, supra note 75.

collective rights, environmental rights, and economic and social rights – rights which tend to be difficult to enforce at the domestic courts. More so, the chapter demonstrates the innovations of these ICs, showing how ICs have been able to reach beyond just international human rights law in the protection of the environment, and as seen in the Serengeti case, have been able to advance international environmental law by adapting treaty language to protect the environment.

The second major conclusion from the discussions in this chapter is that while these ICs are useful for environmental protection and socio-economic justice, access to the courts is an essential element for their ability to provide such function. A lack of access to the ICs by local communities and activists, specifically jurisdictional access, provides the most potent barrier to IC's abilities to advance environmental protection and socio-economic justice. It argues that ICs are unable to exert any influence over these issues if the non-state parties lack jurisdiction to appear before them or if they lack jurisdiction to hold states accountable.

The third and final point relates to how and whether ICs are "effective" tools for advancing environmental protection and socio-economic justice. On this point, the chapter returns to the question of the effectiveness of these institutions, adding that in enlarging conceptions of the effectiveness of ICs, ICs are effective tools for environmental protection and socio-economic justice. It argues that even when/if the decisions of these courts are complied with, they are effective for use as strategies for forcing state transparency. In demonstrating this point, the chapter analyzes case law from the EACJ and buttresses the point with empirical data derived from interviews carried out during my fieldwork.

Ultimately, the goal of the broader dissertation has sought to interrogate and demonstrate how the specific character of the relationship(s) among states, REC courts, and activists significantly implicates environmental protection and socio-economic justice struggles in the region. The

preceding chapters have examined the relationship between the actors (states, activists, and REC courts) in order to demonstrate *how* the interactions between the actors create the conditions for increased or decreased environmental protection and socio-economic justice. One of the major findings of those chapters has been to demonstrate that *access* to the ICs, specifically jurisdictional access, is a fundamental feature of the ICs and as such, a site of contestation between states, activists and the ICs themselves. The discussions demonstrate how in cases of backlash against ICs by states, states will often attempt to constrain the influence of the ICs by limiting access to these institutions. Conversely, and in their attempts at activism, activists will often launch campaigns aimed at expanding jurisdictional access to the ICs, in order to be able to access them. In this chapter, I have attempted to demonstrate *why* this access is important, particularly to environmental protection and socio-economic justice in the region. Essentially, this chapter argues that ICs are very often engaged by activists and local populations as *tools* for demanding environmental protection and socio-economic justice from the more powerful state and as such, without jurisdictional access, ICs are unable to provide this utility to activists and local populations.

Chapter Six: Conclusion

6.1 Summary of Findings

The dissertation aimed to show and did show, that the specific character and orientations of the relationships among regional economic communities (RECs); courts established by such communities (REC courts); states; and activists, on the African continent constitutes and frames the conditions that produce the extent of the contributions (or lack thereof) of these courts to the struggles of activists for environmental protection and socio-economic justice in the region.

It adopted three of the REC courts that exist in Africa as its case studies – one each from three of Africa's main sub-regions. The detailed reasons for adoption are discussed in chapter one. It should be noted as well that these case studies were also particularly fitting for interrogating the dissertation's overarching research question, which is: how do we understand the relationships among states, activists and REC courts as the conditions or factors that facilitate or frustrate the transition of African ICs from their original mandates as regional integration courts to human rights or environmental protection courts? And what are the implications of these relationships for environmental protection and social justice in the region?

The arguments in the foregoing chapters of the dissertation have sought to demonstrate the ways in which the specific nature and orientation of the interactions among RECs, their member-states, activists, and the REC courts themselves determine the content and scope of the mandates of these REC courts. It demonstrates how the historical and political contexts in which these REC courts have operated and must operate (where that "context" is read in the above-mentioned way) significantly helps to shape the mandates of these REC courts. However, in a more granular form,

the dissertation demonstrates the specific ways that these actors interact to manipulate *access*, as a specific jurisdictional feature of the mandates of REC courts. The dissertation argues that this jurisdictional access is essential to the abilities of affected populations on the continent to more successfully pursue environmental protection and socio-economic justice before these REC courts.

One of the things that the dissertation accomplishes in the course of developing these overarching points is that it probes the conditions that facilitated the transition of the African REC courts under study from their original "states of being" as courts with mainly regional integration mandates to courts with significantly or largely human rights and environmental protection remits. All of these REC courts had, at some point, had their mandates expanded to include human right protection, a mandate that could be used, and has often been used, to advance environmental protection and socio-economic justice. However, as discussed throughout the dissertation, the mandate and jurisdiction of one of the three courts, the SADC Tribunal, was subsequently restricted in a way that precludes the court from being able to adjudicate environmental protection and socio-economic justice claims. Of necessity, therefore, the dissertation had to consider the factors that facilitated the "regression" of the SADC Tribunal, from a court with a significant (if self-acquired) human rights mandate back to its original "state of being" as a court with a mainly or even exclusively regional integration mandate.

The sequence in which these overarching points were made are summarized briefly in the coming paragraphs. Following the introductory first chapter, the discussions in the second chapter investigated the relationship of these REC courts with the overarching regional political institutions that created them – i.e. the relevant RECs. This chapter demonstrates in sufficient detail how the historical and contemporary relationships of these RECs as discrete institutions (as opposed to their member states) with the REC courts under study influence the development and

subsistence of the mandates and jurisdictions of the courts (the extent to which these get enlarged, retained, or restricted). Additionally, the chapter reviews the specifics of the relationship of decision-making and actions of these RECs to the administration of the relevant REC courts - in terms of the latter's budgets, selection of judges, tenure and such. The argument here is that REC Secretariats could, and have at times been, used to foster or frustrate the "effective" or pro-environmental protection and social justice administration of these courts.

The third chapter turns attention to demonstrating the specific ways in which the specific kinds of interactions among states (as opposed to the RECs themselves as overarching political institutions), activists, and the REC courts themselves, produce the specific types of conditions that support or hinder the court's abilities to advance environmental protection and socio-economic justice. The chapter demonstrates how the jurisdiction of the courts, both in relation to subject matter and to access, is formed consequent to the specific nature and orientations of the interactions between the states, the activists, and the courts themselves. Further, the chapter shows that mandate and jurisdiction, especially as they relate to private access, are fundamental features of an IC's architecture and "being", such that it is – for ill or for good – often the target of expansionist or restrictive campaigns by the courts, states, and activists. Finally, the chapter illuminates the significant role that activists play (in addition to states), not only in the development and sustenance of ICs but also in attempting to revive or resurrect these courts. The chapter emphasizes, however, that access to the courts is the crux of the activist campaigns for expansion, revival or resurrection of the courts. All of these kinds of activist praxis in relation to the REC courts are ultimately directed at making the court better serve their goals of advancing environmental protection and social justice on the African continent.

Further to the goal of a more granular interrogation of the specific conditions (in this sense, the REC, state, activist, and REC court interactions) that facilitate the development or regression of the mandates and jurisdictions of the African REC courts under study, the fourth chapter examines the roles of these REC courts themselves in the enlargement or restriction of their mandates and jurisdictions. The chapter shows that beyond simply engaging in legal or formal judicial interactions and contestations, these REC courts also participate to a significant degree, if not very actively, in the "small p" politics that determine their jurisdictions. In this sense, they are active participants in the politics of the development or regression of their mandates and jurisdictions (read in these cases as mostly the enlargement or restriction of these mandates and jurisdictions). Drawing from an analysis of case law and social theories, the chapter illustrates how political considerations, relating to the need to maintain legitimacy, plays a role in how these REC courts, as ICs, adjudicate matters before them, and argues that this has implications for whether or not the mandate of the institution is developed or restrained.

The fifth and penultimate chapter demonstrates more precisely *how* and *why* the jurisdiction of the specific African REC courts under study is significant for the many struggles waged by activists on the continent for the advancement of environmental protection and socio-economic justice. Using case law from both the REC courts under study and other African ICs, this chapter discusses the utility of the REC courts in the pursuit of environmental protection and socio-economic justice by activists. The chapter argues that, among other things, these REC courts provide additional and alternative forums for activists and victims of environmental and socio-economic abuse to seek justice and hold their governments accountable. Further, the chapter demonstrates how the severe restriction or lack of access to these institutions, particularly the tight constriction or lack of jurisdictional access, provides the most potent barrier to the goal that many populations who are

affected by environmental and socio-economic justice issues have of beneficially using these courts to advance their pursuit of these important goals. The chapter concludes by arguing that the REC courts (which it must be emphasized are a type of ICs) are very often engaged by activists and local populations as *tools* or *resources* for demanding and (in many cases) obtaining significant degrees of environmental protection and socio-economic justice from the more powerful state actors with whom they have to deal; and that without jurisdictional access being provided to private litigants at the REC courts, these regional judicial bodies are, and will most likely remain, unable to provide this utility to activists and local populations.

6.2. A Major Finding of the Research: On IC Effectiveness

A major finding of my research into the capacity and ability of the three REC courts under study to contribute significantly to the advancement of the struggles waged by activists for environmental protection and social justice on the African continent relates to the issue of the "effectiveness" or otherwise of these institutions, and how to understand their effectiveness in the first place. In the second and fifth chapters of the dissertation, I engage the literature on the assessment of the effectiveness of international institutions and ICs, arguing that the conclusion whether ICs such as the REC courts under study are *effective* or not depends to a large extent on what these ICs are being assessed as *effective* for. By arguing and showing that the REC courts, as ICs, are and can be effective, not only when their decisions are complied with, but also when they contribute significantly to activist *strategies for forcing transparency* from recalcitrant or belligerent states/governments. Using data gathered from my fieldwork and analysis of the relevant case law, I argue that the REC courts under study are often approached and deployed by activists in an attempt to *assist in forcing governments to explain their policies or the rationale(s) behind their policies*. This value-added is especially potent, where previous attempts at gaining the

relevant information had proved futile. As such, even if the main issue being litigated is eventually resolved against the litigants; or even if they are resolved in favor of the activists, but the states still refuse to comply with the REC court's ruling, activists are still able to use the pleadings or information (documents, oral testimonies, e.t.c.) submitted by or on behalf of the relevant governments to continue their broader political contestations or struggles, or to assist in their efforts to compel governments to act in particular ways. It is in this sense that this dissertation contributes to the growing scholarship on the imperative necessity of enlarging our conceptions of the "effectiveness" or otherwise of ICs such as the courts under study in this dissertation.[1]

Further to the dissertation's contributions to the debates over, and case for, enlarging the measure for assessing IC effectiveness, it argues that African RECs have indeed been significantly effective, at least at times, in adjudicating environmental protection and socio-economic justice claims/cases in some of the various sub-regions on the African continent. In that vein, it bears repetition that whether those decisions are "complied" with or not, the jurisprudence of the REC courts or other ICs can have a significant impact, either "directly" on the immediate case that is being adjudicated or "indirectly", thereby affecting the advancement of environmental protection and socio-economic justice, incrementally, over time.

[1] Solomon Ebobrah, "The ECOWAS Community Court of Justice: A Dual Mandate with Skewed Authority", in Alter, Karen J. Laurence R. Helfer and Mikael Rask Madsen (eds) *International Court Authority*, International Courts and Tribunals Series (Oxford, New York: Oxford University Press, 2018). James Thuo Gathii (ed.) *The Performance of Africa's International Courts: Using International Litigation for Political, Legal, and Social Change*, (Oxford University Press, 2020); Obiora Chinedu Okafor, *The African Human Rights System, Activist Forces and International Institutions* (Cambridge University Press 2007); Karen J. Alter, *The New Terrain of International Law: Courts, Politics and Rights* (Princeton University Press 2014); and Karen Alter, Laurence Helfer, and Mikael Madsen (eds), *International Court Authority*, (Oxford, New York: Oxford University Press, 2018)

6.3. Key Points of Originality

In addition, there are four main ways this dissertation adds significantly to the various literature sets it engages with:

- In the second chapter, it challenges existing literature by identifying the existence of "political community" outside of Europe by demonstrating how the three RECs under study constitute this political community.
- In the third chapter, the dissertation introduces nuance to the conversation around the restriction of SADCT's jurisdiction, particularly troubling the claims of certain scholars that a hierarchy of values exists in southern Africa, which puts regime solidarity above human rights. The chapter highlights the significance of race-related land reforms matters and its resonance with not only other southern African states but also activists and the REC Secretariat.
- In the fourth chapter, the dissertation adds to the literature by demonstrating the ways in which concerns relating to popular legitimacy account for the participation of ICs, and REC courts, in small "p" politics. Specifically, how the failure to effectively navigate these politics can have detrimental effects on their mandates.

6.4. Concluding Remarks

The dissertation's arguments are thus useful, in my view, for international lawyers and scholars who are interested in the mechanics and the machinations of REC court and other international adjudication in Africa (and even beyond). Aside from other uses to them, more specifically, these actors are likely to be interested in the dissertation's claims regarding how the contexts produced, shaped and framed by their interactions with each other in turn shape the mandates/jurisdictions and potential "effectiveness" of these REC courts (and other ICs).

The research will likely be useful as well to activists and private individuals who either already engage these ICs or might engage them in the future. It is useful for activists and private actors interested in engaging the court to reckon with the understanding of the dynamics of international adjudication before these courts. Particularly, an understanding that as creations of states, and in carrying out their legal function, ICs themselves can attract backlash, a backlash that could be fatal to the private access jurisdiction of the court. As such, understanding that certain factors such as the legitimacy of the decision, the support of popular activists, and the sympathy of other member states could serve litigants designing their strategies for litigating before these courts.

Secondly, these understandings are useful for preserving the access that these activists and private actors already enjoy in relation to the REC courts under study (and other ICs); especially given that, as we have seen from the discussions in the various chapters of this dissertation, the backlash against these courts often comes in the form of attempts to restrict private access to these REC courts. As one of the participants in my research notes, "it is not just about that specific situation, today we need the EACJ for Burundi, but tomorrow we're going to need it for Kenya. There is no point in killing the court because of that particular issue, and then tomorrow you are left with nothing."[2] This reasoning can provide rich guidance.

Additionally, judges of African REC courts might find this dissertation's claims useful, as mapping of backlash campaigns across regional courts in Africa and the specific factors that aggravate or mitigate backlash. I argue that REC courts and other regional courts in Africa (as well as other similarly situated ICs) must be awake to the need to hold states accountable for their misdeeds while reckoning with the need to maintain, to a reasonable extent, their legitimacy among states,

[2] Interviewee #1, Arusha, Tanzania (3rd May 2018).

activists and the relevant general populations, as well as the confidence that these actual or potential actors have in them. In this sense, international judges at the REC courts under study in this dissertation (as well as at other ICs) are served by an understanding of how the context and the interactions of different actors with their decisions can lead to the limitation or expansion of their jurisdictions; with highly significant consequences for the capacity and ability of these ICs to contribute to the advancement of environmental protection and socio-economic justice.

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