

“SWAHILINISATION” OF THE EAST AFRICAN COURT OF JUSTICE: DECOLONISING THROUGH LANGUAGE

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Abstract

The importance of language as a means of communication in regional courts is something that does not require much debate. Of course, language is the “natural environment” of the law, in which all legal acts are fulfilled. The language in which we choose to teach, practice and engage actors on regional laws, such as in the East African Community, has political and operational implications; it is not a choice to be made lightly. In this regard, the dominance, if not monopoly, of the English language within the East African Court of Justice (“EACJ”), twenty-two years after its establishment, is something that citizens, lawyers, and scholars within the East African Community (“EAC”) should be concerned about.

Through this article, I will first argue why Swahili as a language should be used in the EACJ as the foremost official and working language. This view is not only to make Swahili the dominant language for access to justice, but also to liberate this court from the shackles of colonialism that continue to oppress the citizens of the EAC by making Swahili appear as an unsuitable language to be used in the Court or legal university education. I will then argue that if Swahili is to be introduced as an official working language in the EACJ, this will be an important step in the liberation of colonial court systems and the strengthening of access to justice in the East African region.

The arguments are based on five key pillars. The first pillar is that the EAC missed an opportunity at its inception to make Swahili a working language of the EACJ. Secondly, I argue that no prejudice would be suffered if Swahili is introduced as a working language of the court. Thirdly, I argue that Swahili has earned a globalized space, and therefore it no longer needs justification for being a small language that can't be an integral part of justice dispensation. The fourth pillar argues that culture and tradition form an integral part of the court, and thus, language must become an important tool of the court tradition and the actors at the court. I then conclude by offering a conclusion towards introducing Swahili as a working language of the EACJ.

INTRODUCTION

The members of the EAC are largely disintegrated with various colonially inherited languages amongst themselves. Only Swahili can be deemed to be a language with a fair amount of presence either in spoken or official use among all Member States, yet English remains the dominant working language despite the joining of new members who are more Francophone, such as the Democratic Republic of Congo and Burundi, or the new entrant Somalia, whose official languages are Arabic and Somali. For a court whose decisions have been far-reaching to the local communities such as the Serengeti matter on the protection of indigenous lands, it would only be fair if such proceedings and decisions are availed in a language that the local masses are more comfortable with. While I acknowledge that an argument of availability of resources could be raised regarding the high costs of translations, there are two examples noteworthy where the court has been willing to expend resources towards access to justice. The first instance is when the court created the divisions and appellate functions¹ as well as when the court established sub-registries in the member states.² Both moves which needed a fair number of resources including hiring very many new judges and senior staff which, for arguendo purposes, is much cheaper than what is needed towards the introduction of a language have been done before.

The conceptual framework of this paper builds on the writings of the renowned Kenyan writer Ngugi wa Thiong'o from almost four decades ago, in which he argues that imperialism continues to control the economy, politics, and cultures of Africa.³ The same holds true for the legal systems of all African countries and regional groupings. There is still a ceaseless struggle of African judicial system users to try and liberate themselves in all aspects from this capture, which, in my view, is the real "African state's capture" from the Anglo-Saxon traditions and to usher in a new era of truly indigenous African legal systems and jurisprudence. It has been an ever-continuing struggle to remodel our legal systems and history through real control of all the means of a people-centred judicial system. The choice of language and its use in African regional courts is central to this ongoing struggle and pursuit of a better judicial system.

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1 See East African Court of Justice ("EACJ") Sub-Registries, available at https://www.eacj.org/?page_id=5064.

2 Treaty for the Establishment of the East African Community, Art. 24 (Nov. 30, 1999), 2144 U.N.T.S. 255. The EAC Establishment Treaty provides that the Court, "shall consist of a First Instance Division and an Appellate Division." *Id.* at Art. 23(2). These amendments were made following a decision of the EACJ that was strongly objected to by the government of Kenya.

3 Ngugi wa Thiong'o, *The Language of African Literature*, 1/150 NEW LEFT REV. (Mar.–Apr. 1985).

As Mazrui's have argued,⁴ Trans-ethnic languages in Africa will always be influenced by power dynamics. These power dynamics can be classified either as imperial, hegemonic, or preponderant.⁵ An imperial language is one which came with a dominant external power and has yet to develop a large enough number of native speakers from the indigenous population. English and French in many African countries would fall under this category. There is also a very big likelihood that Mandarin could also become a hegemonic language in the future for many African countries.⁶ A hegemonic language is a dominant indigenous language in which the speakers and the language itself are powerful forces in society. Amharic in Ethiopia is a good example.⁷ On the other hand, a preponderant language is very widespread as a second language but its native speakers are not numerous enough or otherwise powerful enough in society to be politically influential. Kiswahili in East Africa is a good example of this.⁸

Kiswahili, a Bantu language, represents the most widespread macro-continuum of mutually intelligible languages and varieties across East Africa, with a long tradition of documentation from the early 19th century.⁹ The language has a deep history of connection in the fight against colonialism across Africa and also as a tool of unity and solidarity across the continent.¹⁰ However, the history and traces of Kiswahili in the region show different variations from one country to another.¹¹ In Tanzania, upon taking colonial control in 1891, the German government proceeded to make Swahili the national language and great effort was made to disseminate the language

4 Alamin M. Mazrui & Ali A. Mazrui, *Dominant Languages in a Plural Society: English and Kiswahili in Post-Colonial East Africa*, 14(3) INT POL SCI REV. 276 (1993).

5 *Id.*

6 Ifeanyi Eke, *Globalisation will determine the growth of Mandarin in Africa*, LONDON SCHOOL OF ECONOMICS BLOGS (June 21, 2021), <https://blogs.lse.ac.uk/africaatlse/2021/06/21/globalisation-will-determine-the-growth-mandarin-chinese-language> ("A 2021 World Population Review record shows that four of the seven top countries with the largest Chinese communities and Mandarin speakers are African (South Africa, Nigeria, Mauritius and Madagascar), reinforcing demand for what is considered a growing and therefore lucrative skill.")

7 See Mazrui & Mazrui, *supra* note 4.

8 *Id.*

9 Nico Nassenstein, *On the Variability of Kiswahili in Bujumbura (Burundi)*, 26 SWAHILI FORUM 205 (2020).

10 Hellen Swingler, *KiSwahili as an agent of liberation, integration*, UNIV. OF CAPE TOWN NEWS (June 1, 2022), <https://www.news.uct.ac.za/article/-2022-06-01-swahili-as-an-agent-of-liberation-integration> (noting that Professor Aldin Mutembee of the Julius Nyerere Chair of Kiswahili at Dar es Salaam University points out that, "Kiswahili has evolved with a conscious mind for use in cultural liberation, political gain and educative purposes and to unify people and national consciousness. [KiSwahili] was used to solidify people's togetherness as a weapon against imperialism. It made people see their commonality rather than their differences.").

11 See Mazrui & Mazrui, *supra* note 4.

throughout the country.¹² The same seems to have been the case of the Swahili language in Congo where the Belgians influenced its growth, first to curtail the influence of the British from the south, and secondly, to grow a new class of civilisation like in Tanganyika.¹³ However, this phase of promotion of Swahili by colonial governments does not negate the phase where Swahili becomes an important tool for the struggle of new independent countries in Africa.¹⁴

HOW LANGUAGES EMBRACE COLONIAL CONTINUITIES IN COURTS

Sundya Pahuja in her work on decolonising states, argues that decolonial states were born into law.¹⁵ These foundations passed to the post-colonial state where a single world view and in this case the English or French language have a prejudicial preference, which is born out of a single worldview that these are the advanced languages in which law can be taught, practised or adjudicated thus continuing to hold hostage discourses of procedural law in African regional courts and tribunals. These postmodern colonial anxieties are deeply entrenched in our legal academia and practices sometimes even subconsciously. In essence the drafters of the treaties are subconsciously influenced by the epistemologies of colonisation to accept the continuity of dominance of colonially accepted languages as tools for their courts. By applying a decolonial critique, this paper unearths the perversions of colonially transposed languages that pervade the EACJ.

Ngũgũ wa Thiong'o asks a pertinent question on decolonization: from which knowledge system should a postcolonial system - or people for that matter - draw? He argues that if local systems were to thrive, postcolonial societies must look beyond European epistemology.¹⁶ He states that "The choice of language and the use to which language is put is central to a people's definition of themselves in relation to their natural and social environment, indeed in relation to the entire universe." To Ngugi, postcolonial societies struggling to recover from the trauma of Eurocentrism should begin by developing the capacity to self-define "time and space."¹⁷ To him, as a conveyor and incubator of culture and cognition, language is primordial in this struggle.¹⁸

12 Beverly E. Coleman, *A History of Swahili*, 2(6) BLACK SCHOLAR 13, 22 (1971).

13 JOHANNES FABIAN, *LANGUAGE AND COLONIAL POWER: THE APPROPRIATION OF SWAHILI IN THE FORMER BELGIAN CONGO 1880-1938* (University of California Press, 1991).

14 See Coleman, *supra* note 12, at 23.

15 SUNDHYA PAHUJA, *DECOLONISING INTERNATIONAL LAW: DEVELOPMENT, ECONOMIC GROWTH AND THE POLITICS OF UNIVERSALITY* (Cambridge University Press, 2011).

16 NGŪGŪ WA THIONG'O, *DECOLONIZING THE MIND: THE POLITICS OF LANGUAGE IN AFRICAN LITERATURE* (James Currey Ltd. / Heinemann, 1986).

17 *Id.*

18 Mohsen al Attar & Shaimaa Abdelkarim, *Decolonising the Curriculum in International Law: Entrapments in Praxis and Critical Thought*, LAW & CRITIQUE, FORTHCOMING (2021), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3923429.

Ngugi's epistemological position captures the essence of the decolonising African regional courts from the epistemic violence upon which African regional courts are founded. Colonial languages were on many instances imposed in many African countries through brutality. Yet, irrespective of that colonial history, Africans must accept those languages in their pursuit of justice in independent regional courts. How ironic? Why are African regional courts so comfortable disregarding the nefarious origins of the English and French languages? What the EACJ is doing is just allowing the continuity of colonial epistemologies by only having colonially imposed languages as the languages of use before these courts while disregarding indigenous languages like Swahili. Just like Ngugi I prefer the restructure of access to justice and to value local epistemological systems.

As al Attar and Shaimaa¹⁹ have argued, the process of decolonisation is contingent. Decolonisation is mixed up with histories of invasion and settler-colonialism, exclusion and assimilation, and independence and identity. Most of all, the history of decolonisation is the history of resistance and of counter-revolution: colonised peoples sought to shake off the shackles of oppression while colonisers, both internal and external, sought to concretise them. Taking cue from al Attar and Shaimaa, there is no doubt that English is concretised in many African courts to the point where the introduction of indigenous languages is met with disdain. English has been assimilated to this court to a point of wiping out the independence and identity of African languages such as Swahili.

At times it may appear so obvious that law is determined by language.²⁰ It is true, however, that in whatever way law is perceived, it is primarily a linguistic phenomenon. Wiśniewski elaborates that language can be said to be both a medium for the existence of the law and the form in which it is communicated.²¹ Given the primary significance of language for the existence and operation of law, it is no wonder that the relations between language and the law are often the subject of scholarly analysis.

19 *Id.* at 12.

20 Adam Wiśniewski, *Remarks on Language and International Law*, 14 PRZEGLĄD PRAWNICZY UNIwersytetu im. Adama Mickiewicza 57 (2022), available at http://ppuam.amu.edu.pl/uploads/PPUAM%20vol.%2014/03_Wiśniewski.pdf.

21 *Id.*

In a more thought-provoking manner, Justina Uriburu begins her blogpost²² on how we should address English centrism in international law by reviewing the works of Benedict Anderson²³ in his many years of working in international law, “more and more scholars in different countries feel that unless they write in American [English], they will not be recognized internationally. At the same time American scholars become lazier about learning any foreign languages except those they have to acquire for the purposes of fieldwork”, and fears that, after all, the warnings of political scientist Karl Deutsch may have been right: “Power means not having to listen!”²⁴.

It is against this backdrop that alternatives to countermand the dominance of the eurocentrism in the EACJ must emerge. After all what is African about the EACJ if the singular most significant tool of shaping the court is Eurocentric? Is it that the subjects are to remain African but not tools used to shape their daily lives?²⁵

DOES SWAHILI STAND A CHANCE?

In several columns and after re-reading him carefully over the years,²⁶ Tanzanian veteran journalist and lawyer, Jeneralali Ulimwengu, has argued for and against the use of Swahili in the East African community. I would like to highlight just two of the instances he has done this. In response to the Chief Justice of Tanzania, Hamis Juma, who had lamented that legal practitioners in Tanzania had a problem with understanding and using the English language, both in articulating arguments and drafting pleadings, Jeneralali responds by stating that the English language is to the legal profession what a plough is to the farmer, and legs are to a footballer.²⁷ He further argues that, given the history of the region and the way it has evolved in legal matters, saying that our legal officers do not have enough working knowledge of English is equivalent to admitting that you have too many people doing a job that is not theirs, just like if you went to the soccer ground to find people pretending to play soccer without legs.²⁸

22 Justina Uriburu, *Between Elitist Conversations and Local Clusters: How Should we Address English-centrism in International Law?*, OPINIOJURIS (Feb. 11, 2020), <http://opiniojuris.org/2020/11/02/between-elitist-conversations-and-local-clusters-how-should-we-address-english-centrism-in-international-law/>.

23 BENEDICT ANDERSON, *A LIFE BEYOND BOUNDARIES: A MEMOIR* (Verso, 2016).

24 See Uriburu, *supra* note 22.

25 Babatunde Fagbayibo, *Critical Pedagogy of International Legal Education in Africa: An Exploration of Fela Anikulapo-Kuti's Music*, in *THE ART OF HUMAN RIGHTS: COMMINGLING ART, HUMAN RIGHTS AND THE LAW IN AFRICA* 314 (Romola Adeola et al. eds, 2019).

26 See Collection of Various Articles on Social Issues Published Between 1993 and 1995 in Rai Newspaper under the Same Title as the Monograph in Jeneralali Ulimwengu, *Rai Ya Jeneralali (E&D Ltd. 2005)*; see also The Chanzo Youtube Channel, *Fursa za Lugha ya Kiswahili Afrika na Duniani*, YOUTUBE (Dec. 17, 2023), <https://www.youtube.com/watch?v=33w7jDyKFe0> (arguing that “asili ya lugha ni siasa, huwezi kuvitenganisha”).

27 See Jeneralali Ulimwengu, *CJ Fix Integrity of Justice System Before Language of the Courts*, THE EAST AFRICAN (Dec. 23, 2020).

28 *Id.*

Be that as it may, a more polemic question is asked, whether there is a necessity of having the ability to use the linguistic tools remains unimpeachable for anyone who intends to plead, interpret, or adjudicate? Otherwise, how do we hold forth on laws that have been passed down onto us from London, via Delhi, to our shores, all in the language of Chaucer, if we cannot even digest Chinua Achebe?²⁹

Conversely, just a year earlier, Jenerali had argued in a separate column, rebuking politicians for not advancing Swahili in the EAC, that the elite in the region treated Swahili as a second-rate lingo to be employed in the marketplace while haggling over the price of beans, or on political platforms while telling the masses lies about “bringing development” to them. Otherwise, to the elite Kiswahili is the tongue of gossip, banter, and light-hearted exchanges.³⁰ This view is not espoused by Jenerali alone, but several others such as Prof Chacha Nyaigoti-Chacha, the pre-eminent Kenyan educationalist, have often bemoaned the shabby treatment of Kiswahili, whether it be in our public speeches, on radio or television.³¹

Reading Jenerali Ulimwengu over time, for whom I have so much admiration, one could be confused that while on one end he always advocates for the use of Swahili at all levels as a tool for decolonization, he seems to be falling for the same sins of imagining that legal systems such as the ones we have inherited from the common law and civil law cannot be decolonized by the use of Swahili. By insisting that languages form an integral part of these legal systems, Jenerali seems to suggest that justice, a local concept of rights inherent to every human being,³² cannot be decolonized by using local languages as a tool in these ivory towers referred to as legal systems. Isn't Jenerali then committing the very sin he accuses the elite of the region of? That of treating Swahili as a second-rate lingo to be employed in the marketplace while haggling over the price of beans, as the colonists³³ insisted during their reign in the region?

29 *Id.*

30 See Jenerali Ulimwengu, *East Africa: Ulimwengu - SADC boosts Kiswahili - Let the Elite Hang Their Head and 'English' in Shame*, ALLAFRICA (Aug. 26, 2019), <https://allafrica.com/stories/201908300333.html>.

31 CHACHA NYAIGOTTI-CHACHA, *THE POSITION OF KISWAHILI IN KENYA* (Uni. of Nairobi, Institute of African Studies, 1981).

32 Grace Mbogo, *Promoting Access to Justice in Africa through Litigation*, RAOUL WALLENBERG INSTITUTE (Apr. 20, 2022), <https://rwi.lu.se/news/promoting-access-to-justice-in-africa-through-litigation/> (arguing that, “Access to justice is a basic principle of rule of law that ensures that human rights are protected. One of the ways of promoting and protecting human rights is through legal empowerment which enables individuals to know and use the law to seek justice.”); see also Martha Wangari Karua v. The Attorney General of the Republic of Kenya, Hon. Anne Mumbi Waiguru, & Hon. Peter Ndambiri (Interveners), EACJ Reference No. 20 of 2019, First Instance Div., ¶ 52.

33 See Ulimwengu, *supra* note 30.

It is against this background that I have decided to debunk this narrative and show how the EACJ can use Swahili as a language to decolonise the court from these shackles left in the region by the colonialists and delocalise justice. As the eminent author and writer Ngugi wa Thiong'o has argued in his famous work on decolonising through languages,³⁴ he believed that writing in Gikũyũ, a Kenyan and African language, is part and parcel of the anti-imperialist struggles of Kenyan and African peoples. He (Ngugi) wanted Kenyans to transcend colonial alienation through this. He correctly argues that we, African, writers are bound by our calling to do for our languages what Spencer, Milton and Shakespeare did for English; what Pushkin and Tolstoy did for Russian; and indeed, what all writers in world history have done for their languages by meeting the challenge of creating a literature in them, a process which later opens the languages for philosophy, science, technology and all other areas of human creative endeavours.³⁵

The continued dependence of most African governments on ex-colonial metropolitan languages has led some African scholars to coin the term “linguistic imperialism.”³⁶ Proficiency in the language of the former metropolis has been a key to elite positions throughout the continent but also access to justice through courts. It is on this premise, just like Ngugi above, that I believe that the EACJ by adopting Swahili as its official and working language would end up achieving the same objectives of decolonizing our systems that people like Ngugi have argued for decades.

THE EAST AFRICAN COURT OF JUSTICE (EACJ)

JURISDICTION

The EACJ has a jurisdictional architecture that includes both contentious and advisory jurisdiction.³⁷ It must, however, be stressed that the primary jurisdiction of the court is to interpret and apply the treaties of the East African Community (“EAC”).³⁸ At

34 See wa Thiong'o, *supra* note 16.

35 *Id.*

36 Abdulaziz Y. Lodhi, *The Language Situation in Africa Today*, 2(1) NORDIC J. AFR. STUD. 79, 82 (1993); see also George A. Mhina, *Problems Being Faced in the Process of Developing African Languages with Special Reference to Kiswahili*, 42(1) KISWAHILI 43, 57 (1972); see also John Indakwa, *A 'lingua Franca' for Africa: A Study of the Need for a Common African Language*, 48 KISWAHILI 57, 73 (1978) (Indakwa discusses cultural imperialism); see also L.T. Rubongya, *The Language and Culture of a People*, 94 PRÉSENCE AFRICAINE 13, 30 (1975). There are also some other contributions in the same volume of *Présence Africaine* dealing with African languages and their role in fostering African cultural identity.

37 Treaty for the Establishment of the East African Community (“EAC Treaty”) (1999), Arts. 27– 36.

38 EAC Treaty, Art. 27(1).

the point of establishment, the Court had only one chamber.³⁹ However, in 2007 amendments to the Treaty for the Establishment of the EAC (“EAC Establishment Treaty”) were effected leading to the creation of an Appellate Division making the Court a two-chamber court that came into effect in March 2007.⁴⁰

During the 15th Ordinary Summit of the EAC’s heads of state, a decision was made to defer giving the EACJ jurisdiction over human rights and to instead consult with the African Union (“AU”) on the matter.⁴¹ The Summit, however, extended the Court’s jurisdiction to include trade and investment cases as well as cases arising under the EAC’s Monetary Union treaty.⁴² The Court also has jurisdiction over disputes between the EAC and its employees;⁴³ arbitral disputes arising from commercial contracts between private parties; and agreements to which the EAC, any of its institutions, or EAC Member States are parties if an arbitration clause in such a contract or agreement confers such jurisdiction.⁴⁴

For parties with direct access, the jurisdiction of the Court, subject to the limitation of Article 27(1) of the EAC Treaty that provides that the Court shall be granted jurisdiction over human rights at a future date,⁴⁵ is compulsory once the relevant state has ratified the EAC Treaty. However, under what Gathii and Mbori term as the *Katabazi* doctrine,⁴⁶ the Court assumed jurisdiction over human rights cases based on the premise that in doing so, the Court was simply exercising its jurisdiction to interpret and apply treaty provisions.

39 EAST AFRICAN COURT OF JUSTICE, COURT USERS GUIDE 11 (2013), available at <http://eacj.org/wp-content/uploads/2013/11/EACJ-Court-Users-Guide-September-2013.pdf>.

40 See EAC Treaty, Art. 24. The EAC Treaty provides that the Court, “shall consist of a First Division and an Appellate Division.” *Id.* at Art. 23(2). These amendments were made following a decision of the EACJ that was strongly objected to by the government of Kenya.

41 See Communiqué of the 15th Ordinary Summit of the EAC Heads Of State, EAC SECRETARIAT (Nov. 2013), <https://www.scribd.com/document/188158971/Communique-of-the-15th-Ordinary-Summit-of-The-EAC-Heads-of-State>.

42 See Communiqué of the 16th Ordinary Summit of the East African Community Heads of State, EAC SECRETARIAT (Feb. 20, 2015), ¶ 9.

43 See EAC Treaty, Art. 31.

44 EAC Treaty, Art. 32.

45 EAC Treaty, Art. 27(1).

46 James Thuo Gathii & Harrison Otieno Mbori, *Reference Guide to Africa’s International Courts, in THE PERFORMANCE OF AFRICA’S INTERNATIONAL COURTS* 314, (James Thuo Gathii ed., Oxford Uni. Press, 2020).

The EACJ has robustly tried to convince the other organs and non-state actors of the court's viability through its jurisprudence which has now largely moved to the realm of human rights.⁴⁷ Furthermore, the human rights case law, emanating from the court and notably the Serengeti jurisprudence is sufficient evidence that the EACJ is central to the daily needs of the citizens of the Member States.⁴⁸

The court has, for over a decade now, set up sub-registries in five-member states⁴⁹ to allow easy access to the court by the citizens of the member states of the community and has openly strategized and continues to advocate through workshops and sensitization campaigns for the use of the courts by citizens of member states.⁵⁰ Even more outrightly, the strategic plan of the Court has insisted on prioritising the sensitization of the court as a key method of achieving its mandate.⁵¹

It, therefore, makes more sense that if the court has rationalized its central mandate on the use of the court to cater for the everyday needs of the citizens of the member states, especially on questions of human rights, it would thus try to achieve this by use of a local indigenous language as a way of achieving this aim the court should thus employ this strategy to ensure the ultimate reach of the citizens. If the sensitization campaigns are undertaken in local languages and the sub-registries available in the partner states would cater in a local language, it, therefore, beats logic that the very local language cannot be used as a language of the court.⁵²

47 James Thuo Gathii, *Mission Creep or a Search for Relevance: The East African Court of Justice's Human Rights Strategy*, 24 DUKE J. OF COMPAR. & INT'L L. 249 (2013).

48 *Id.* at 259.

49 The Court's sub-registries are located in the capitals of the following Partner States: Burundi, Kenya, Rwanda, Uganda and the United Republic of Tanzania. See East African Court of Justice, *supra* note 1.

50 East African Court of Justice, *About Registry*, https://www.eacj.org/?page_id=107 ("In order to bring justice closer to the people, the Court established Sub-Registries in the capital cities of the Partner States.").

51 East African Court of Justice, *EACJ to hold sensitization workshop on its role in the EAC integration*, EACJ (Oct. 27, 2011), <https://www.eacj.org/?p=404>.

52 EAC Treaty, Art. 46 (stipulating that the official language of the Court is English and to that effect all documents to be filed before the Court and the judgement should be in English); see also East African Court of Justice, Rules of Procedure (2019), Section 11(1)–(7) on having pleadings in the official language of the court, and Sections 75(1)–(5) on taking of witness evidence in the official language, and Section 98(1) on having appellate procedures in the official language of the court. Also during my field research at the EACJ in April and May of 2022, I interviewed a litigant who was conversant in Kiswahili and French but didn't speak any English. In that regard, he had to provide official translations of all his pleadings from French to English at his own cost and also hire a French translator during his witness evidence. I will not make details of the litigant available in this paper as the case is still before the court.

THE EXPANDING MEMBERSHIP OF THE EAST AFRICAN COMMUNITY

The East African Community as we know it today is not a new grouping as such. Integration in the EAC started during the colonial era with the British who were in charge of Kenya and Uganda. After World War 1, Tanganyika was brought on board to complete its earlier phase.⁵³ Post-independence, the leaders of the EAC at the time led by Julius Nyerere, Jomo Kenyatta and Apollo Milton Obote concluded an agreement for East African Cooperation⁵⁴ that brought the three nations together in 1967. However, this was to collapse in 1977 after the community experienced turbulence brought about by many factors including personality differences amongst the heads of state and disputes over the sharing of benefits. An agreement⁵⁵ was concluded by heads of state to address the issue of the sharing the benefits of the defunct EAC, which agreement implored the states to explore avenues for future cooperation. The processes undertaken by the founder states resulted in the signing of the EAC Treaty on the 30th of November, 1999⁵⁶ coming into force in June 2000. By this treaty, the contracting parties established the East African Community⁵⁷ with the East African Customs Union and a Common Market as transitional stages to and an integral part of the community.⁵⁸

The Treaty was originally signed by the founding States: Kenya under Daniel Toroitich Arap Moi, Uganda under Yoweri Kaguta Museveni and Tanzania under Benjamin Mkapa. The three nations laid the foundation for the now expanding community. Soon thereafter, the community received interest in joining, from Burundi and Rwanda. After lengthy negotiations and deliberations, Rwanda and Burundi were admitted to the fold on the 30th of November, 2006, by the eighth Summit at Arusha. They later acceded to the EAC Treaty on the 18th of June, 2007, and became full members on the 1st day of July, 2007.⁵⁹ They later joined the customs union on the 1st day of July, 2009.⁶⁰

53 Emmanuel Elau, *Membership and Exit from the East African Community* (Oct. 23, 2019), available at <https://ssrn.com/abstract=3474286>.

54 See The Treaty for East African Co-operation, 6 I.L.M. 932 (June 6, 1967).

55 See The Agreement For The Division Of Assets And Liabilities Of The Former East African Community (May 14, 1984), available at <https://tanzanialaws.com/e/96-east-african-community-mediation-agreement-act>.

56 See generally EAC Treaty.

57 EAC Treaty, Art. 2(1).

58 EAC Treaty, Art. 2(2).

59 EAST AFRICAN COMMUNITY, *History of the EAC in About EAC*, available at https://www.eac.int/customs/index.php?option=com_content&view=article&id=57:tanzania-rwanda-burundi-in-rail-deal-&catid=1:latest-news&Itemid=163#:~:text=1%20July%202007%3A%20Rwanda%20and.

60 *Id.*

A decade later, South Sudan⁶¹ became a member state of the EAC, but this was not an easy decision to make, owing even it is a huge trading partner for both Uganda and Kenya. In June 2010, Sudan made an application to join the EAC. In November of 2011, that request was rejected.⁶² It is believed that Both Uganda and Tanzania raised issues of concern in Sudan, such as their democracy, women rights and religious politics. However, the long-strained relationship between Uganda and Sudan was termed as the biggest source of objection then. Sudan accused Uganda of providing a sanctuary to rebel group from Darfur region, while Uganda disputed Sudan's claims that it had ceased support for the Lord Resistance Army ("LRA"), a rebel group from Northern Uganda.⁶³ South Sudan made its application months after it attained independence, but the first application was rejected.⁶⁴

In June 2019, the Democratic Republic of Congo ("DRC") submitted an application to join the East African Community ("EAC"). The 21st Ordinary Summit of EAC Heads of State, held on 27th February, 2021, then considered this application and directed the EAC Council of Ministers to expeditiously undertake a Verification Mission in accordance with the EAC Procedures for admission of new Members into the EAC. On 29th March, 2022, Kenyan President Uhuru Kenyatta, the Chair of the Summit of the EAC Heads of States, announced that the DRC has been admitted as the seventh member of the EAC.⁶⁵

On 8 April, 2022, the Treaty of Accession of the DRC to the Treaty for the Establishment of the East African Community was signed by President Kenyatta and by President Félix-Antoine Tshisekedi Tshilombo of the DRC, at State House, Nairobi. Ugandan President Yoweri Museveni and his Rwandan counterpart Paul Kagame were also

61 See The Treaty of the Accession of the Republic of South Sudan into the East African Community (April 15, 2016); see also EAST AFRICAN COMMUNITY, *Signing Ceremony of the Treaty of Accession of the Republic of South Sudan in to the East African Community*, available at <https://www.eac.int/component/content/article/147-speeches-a-statements/420-media-briefing-on-the-forthcoming-eac-ivestment-conference.html>.

62 SUDAN TRIBUNE, *Sudan's bid to join EAC rejected as South Sudan's deferred*, <https://sudantribune.com/article40342/> (last visited Apr. 11, 2024).

63 *Id.*

64 SUDAN TRIBUNE, *East African body rejects S. Sudan, Somalia membership bids*, <https://sudantribune.com/article43998/> (last visited Apr. 11, 2024).

65 Gerhard Erasmus, *The Democratic Republic of Congo joins the East African Community: What does this signify?*, TRALACBLOG (May 25, 2022), <https://www.tralac.org/blog/article/15618-the-democratic-republic-of-congo-joins-the-east-african-community-what-does-this-signify.html>.

present at the ceremony.⁶⁶ DRC then deposited its instrument of ratification with the Secretary-General of the EAC on 11 July, 2022.⁶⁷

Somalia also made an application to join the federation.⁶⁸ On 6 June, 2023, the 21st Extra-Ordinary Summit of the East African Community Heads of State Summit held in Bujumbura, Burundi adopted the Report of the Verification of the Application of the Federal Republic of Somalia to join EAC.⁶⁹ The Summit further directed the Council of Ministers and EAC Secretariat to commence the negotiations with the Federal Republic of Somalia with immediate effect and report to the next Ordinary Summit of the EAC Heads of State.⁷⁰ The Federal Republic of Somalia was admitted into the EAC bloc by the Summit of EAC Heads of State on 24th November, 2023 and on 15 December, 2023, Somalia signed the EAC Treaty of Accession.⁷¹ On the 4th March 2024 Somalia deposited her instrument of ratification of the EAC treaty of accession with the EAC Secretary-General in Arusha, Tanzania.⁷²

THE CONUNDRUM OF THE EXPANDING MEMBERSHIP

This analysis of the expanding membership is not without purpose; it is aimed at showing a chronologic growth of the members and ever-expanding diversity, which is elaborated below. At the onset, the community was built up by the three founding members who all now acknowledge Swahili as a national language in their states.

66 EAST AFRICAN COMMUNITY, *The Democratic Republic of the Congo formally joins EAC After Signing of the Treaty of Accession to the Community*, EAC (Apr. 8, 2022), <https://www.eac.int/press-releases/2411-the-democratic-republic-of-the-congo-formally-joins-eac-after-signing-of-the-treaty-of-accession-to-the-community>.

67 EAST AFRICAN COMMUNITY, *The Democratic Republic of the Congo Finally Becomes the 7th EAC Partner State*, EAC (July 11, 2022), <https://www.eac.int/press-releases/2526-the-democratic-republic-of-the-congo-finally-becomes-the-7th-eac-partner-state>.

68 Joint Communiqué: 18th Ordinary Summit of Heads of State of the East African Community, ¶15 (indicating that the heads of states received a verification report for the admission of the Republic of Somalia into the EAC).

69 EAST AFRICAN COMMUNITY, *Summit adopts Verification Report of Somalia to join EAC*, EAC (June 6, 2023), <https://www.eac.int/press-releases/2817-summit-adopts-verification-report-of-somalia-to-join-eac/>.

70 *Id.*

71 EAST AFRICAN COMMUNITY, *Somalia Finally Joins EAC as the Bloc's 8th Partner State*, EAC (Mar. 4, 2024), <https://www.eac.int/press-releases/3049-somalia-finally-joins-eac-as-the-bloc-s-8th-partner-state>.

72 Luke Anami, *Somalia Gains Full Membership of East African Community*, THE EAST AFRICAN NEWSPAPER (Mar. 4, 2024), https://www.theeastafrican.co.ke/tea/news/east-africa/somalia-gains-full-membership-of-east-african-community-4545276#google_vignette; see also *id.*

The Founding Members

Tanzania

Tanzania has always led on this front of growing Swahili, as Mwalimu Nyerere, the first president of Tanzania, advanced the idea of having Swahili as a tool to fight for independence during the famous Sabasaba day on July 7th, 1954. This date is now recognized by UNESCO as World Swahili Day.⁷³ On July 7th 1954, the Tanganyika African National Union (“TANU”), under the leadership of the late Mwalimu Julius Kambarage Nyerere, adopted Kiswahili as a unifying language for the independence struggle.⁷⁴

However, as shown earlier in this paper, the history of Swahili in Tanzania is more complicated.⁷⁵ Saida Othman, Issa Shivji, and Ng’wanza Kamata argue in their writings on the biography of Mwalimu Nyerere that Arab trade, long before German colonialism, set the stage for Kiswahili in most of East Africa.⁷⁶ In Tanganyika specifically, the Germans also played an important role. They founded the first Kiswahili newspaper called *Kiongozi* in 1904 and encouraged the use of Kiswahili as a medium of instruction in primary school and as a subject in secondary school as part of their language policy (the British after them maintained this policy). Here again, we see that Swahili started as a language encouraged by colonialism to promote its interests, but later, the language took a tangent turn of unity towards the fight against colonialism.

From its inception, Mwalimu Nyerere’s political party; the Tanganyika African National Union (“TANU”) positioned Kiswahili as a language of the struggle for independence.⁷⁷ These efforts were advanced in the 1950s when TANU started adult literacy classes in Swahili.⁷⁸ TANU, like the Germans, founded and published a pamphlet called *Sauti ya TANU* to reach to the masses, with most of the articles written by Mwalimu Nyerere. Ironically, most of his writings were in English.⁷⁹ The British were unhappy with this as the language grew in fold to aid the anti-colonial

73 UNITED NATIONS, *World Kiswahili Language Day - 7 July*, UNDGC (July 7, 2023), <https://indonesia.un.org/en/237769-world-kiswahili-language-day-7-july>.

74 UNIVERSITY OF NAIROBI, *UNESCO declares July 7 World Kiswahili Language Day*, (Nov. 24, 2021), <https://www.uonbi.ac.ke/news/un-declares-july-7-world-kiswahili-language-day>.

75 See Coleman, *supra* note 12.

76 Saida Yahya-Othman, *The Making of a Philosopher Ruler*, in ISSA G. SHIVJI ET AL., *DEVELOPMENT AS REBELLION: A BIOGRAPHY OF JULIUS NYERERE* 185 (Mkuki wa Nyota ed., 2020).

77 *Id.*

78 *Id.*

79 *Id.*

fight. To curb this influence, they made English the medium of instruction rather than Swahili, as the Germans had done.⁸⁰ The language then became the language of struggle and, post-independence, the national language and language of instruction in schools. This was exported to other many African countries during their struggle for independence.

Regarding the dispensation of justice, the law (and practice) permits all Courts/Tribunals in Tanzania to use Swahili and English language since 1985.⁸¹ Primary Courts and Ward Tribunals are required to use Swahili language in oral and written proceedings. Depending on the presiding personnel, District Courts, Resident Magistrates' Court, the High Court, the Court of Appeal and Administrative Tribunals use both Swahili and English languages in oral proceedings. Nonetheless, records and decisions of these Courts/Tribunals must be written in English. Since 1965, Swahili language has been used in debates and the proceedings of the National Assembly.⁸²

In 2020, the Parliament of Tanzania passed a law⁸³ to amend various laws, among others, to declare Kiswahili as the official language of the country's laws and the language to be used in the administration and dispensation of justice. To operationalise this, the Chief Justice of Tanzania, Hon. Prof. Ibrahim Juma, on February 1, 2022, exercising his powers under Section 84A (5) of The Interpretation of Laws Act [Cap.1 R.E 2019], issued the Rules titled 'The Interpretation of Laws (Use of English Language in Courts) (Circumstances and Conditions)' Rules G.N 66/2022 (Rules). The rules⁸⁴ introduce several areas that will impact the conduct of litigation (court proceedings) in Tanzania.

80 *Id.*

81 FB ATTORNEYS, *Swahili proposed as Language of Tanzanian Law and Courts*, FB Attorneys (Feb. 11, 2021), <https://fbattorneys.co.tz/swahili-proposed-as-language-of-tanzanian-law-and-courts/>.

82 *Id.*

83 *See* THE UNITED REPUBLIC OF TANZANIA, *Written Laws (Miscellaneous Amendments) (No. 3) Act, 2021 (June 3, 2021)*.

84 *The Interpretation of Laws (Use of English Language in Courts) (Circumstances and Conditions)*, Rules G.N 66/2022; *see also* Audax Kameja & Evarist Kameja, *Tanzania: Kiswahili the general rule and English the exception as languages of Tanzanian law and courts*, BOWMANS (Apr. 4, 2022), <https://bowmanslaw.com/insights/tanzania-kiswahili-the-general-rule-and-english-the-exception-as-languages-of-tanzanian-law-and-courts/>.

Pleadings to be Filed in Kiswahili

The rules⁸⁵ clearly provides a mandatory requirement for any person who intends to initiate any proceeding and who, in their opinion, falls under the circumstances where the proceedings and decisions are to be conducted in English, to:

- File their pleadings in English with a corresponding translation in Kiswahili; and
- State the grounds upon which they rely to have the proceedings conducted in English.

The court is given discretionary power, after receiving the filed pleadings, to admit the case and direct that the proceedings and decisions be conducted in English; or reject the case and direct the party to file their pleadings in Kiswahili.

English Language to be Used Where Necessary

Rule 3 and the schedules⁸⁶ introduce the circumstances where English may be used in litigation. These include;

- When either of the parties or their representatives are not Kiswahili speakers;
- When the matter is about an international investment dispute related to foreign trade or business;
- Any matter involving finance and monetary affairs, specifically tax and international, regional, or sub regional affairs;
- When matters of science and technology are involved;
- When the law governing the subject matter of the litigation and the practice and procedure involved are not available in Kiswahili; and
- For any other reason the interest of justice demands.

Duty to Interpret

Rule 5⁸⁷ provides that if the proceedings are conducted in English and any party to the proceedings or their representative does not understand English; the proceedings should be translated to them in Kiswahili by or under supervision of the presiding officer.

Furthermore, where the proceedings are in English, they and the decisions will be translated into Kiswahili and made available to the parties within 21 days from the date of the conclusion of proceedings.

85 See G.N 66/2022, Rule 4.

86 See generally G.N 66/2022.

87 *Id.*

It is thus evident from these regulations that the court users in Tanzania have localised Swahili to the point of access to courts.

Kenya

In Kenya, Swahili has been the national language since 1964 and the official language since 2010.⁸⁸ As early as 1974, the first President of Kenya, Jomo Kenyatta, in a speech at State House, Mombasa, is reported as saying, *'A nation without culture is dead, and that is why I decreed that Swahili would be the national language'*.⁸⁹ This came despite earlier opposition from, among others, the then Attorney General of Kenya, who in 1969 stressed the importance of internationalism and efficiency in the use of legal language, asking, 'If we were to introduce Swahili as an official language, what should I do in drafting legislation?'.⁹⁰ The same problem that Jenerali Ulimwengu laments at the start of this work on how Swahili has been left for casual talk as the elite insisted on internationalism has been with us for 60 years now. However, today pieces of legislation in Kenya, including the constitution and debates in Parliament are in Kiswahili without anyone doubting their use of internationalism. Chama cha Kiswahili cha Taifa (CHAKITA) was established in 1998 to research and promote the Kiswahili language in Kenya.⁹¹ Kiswahili is a compulsory subject in all Kenyan primary and secondary schools⁹²

The courts in Kenya have stipulated in the Civil Procedure Rules at Section 86⁸³ that;

- (1) The language of the High Court and of the Court of Appeal shall be English, and the language of subordinate courts shall be English or Swahili.
- (3) Written applications to the High Court and to the Court of Appeal shall be in English and to subordinate courts in English or Swahili.

88 The Constitution of Kenya (2010), Art. 7(1)–(2) (“(1) The national language of the Republic is Kiswahili. (2) The official languages of the Republic are Kiswahili and English.”).

89 Lyndon Harries, *The Nationalisation of Swahili in Kenya*, 5(2) LANGUAGE IN SOC'Y 153 (1976).

90 LANGUAGE IN KENYA, (W.H. Whiteley ed., 1974); LANGUAGE USE AND SOCIAL CHANGE (W.H. Whiteley ed., 1973).

91 CHAKITA.ORG, *Swahili version on the History of CHAKITA*, <https://chakita.org/about/> (last visited Sept. 28, 2023).

92 Kenya Broadcasting Corporation, *CS Matiangi: Kiswahili to Remain Compulsory in New Curriculum*, YOUTUBE (July 25, 2017), <https://www.youtube.com/watch?v=FLlWl6zGnU>.

93 See Civil Procedure Act of 2012, Cap 21 Laws of Kenya (2012).

The Criminal Procedure Code in Kenya stipulates that:

“The language of the High Court shall be English, and the language of a subordinate court shall be English or Swahili.”⁹⁴

Kenya, like Tanzania, has put up means and ways of having Swahili as a language of access to courts and has further setup institutions towards its development.

Uganda

Unlike in other Eastern African countries, notably Kenya and Tanzania, Kiswahili did not become an official language or lingua franca in Uganda until very recently. The language has a fraught history in Uganda. In 1972, during the presidency of the dictator Idi Amin Dada, Swahili was declared the national language of Uganda and introduced as a compulsory language on radio and television. Government employees were ordered to use Swahili, increasing its use. But the end of the regime also saw the end of the official use of Swahili.⁹⁵ Today, scholars like Charles Nuwagaba, a professor of economics at Makerere University, state that Ugandan citizens need to learn Swahili to be on equal footing with EAC states.⁹⁶ Angella Kyagaba, a senior curriculum specialist at the Uganda government-run National Curriculum Development Centre, adds that they aim to have every Ugandan schoolchild have a working knowledge of Kiswahili.⁹⁷ Even those who were victims of the military regime that abused Swahili, like Ugandans such as Jocelyn Bananuka Ekocho, whose father was killed by Amin's forces in 1972, acknowledge the importance of the language. She says soldiers and police used Kiswahili as a status symbol that made them feel more powerful, which tainted the language in the minds of Ugandans. However, she believes it should be taught in schools to make it easier for Ugandans to communicate with their neighbours.⁹⁸

94 See Criminal Procedure Code of Kenya, Cap 75, § 198(4) (2012).

95 Ruth Mukama, *The Linguistic Dimensions of Ethnic Conflict in Uganda*, in CONFLICT RESOLUTION IN UGANDA 181–205 (K. Rupensinghe ed., 1989).

96 Edna Namara, *Why it has taken Uganda so long to embrace Kiswahili*, QUARTZ (May 19, 2022), <https://qz.com/africa/2167484/uganda-is-embracing-swahili-in-its-curriculum-after-years-of-resistance>.

97 *Id.*

98 *Id.*

On July 5th, 2022, Uganda's Cabinet approved the adoption of Kiswahili as an official language and directed that it be made a compulsory subject in primary and secondary schools.⁹⁹ The government set up the Uganda National Kiswahili Council in 2019 to guide the introduction of Kiswahili as the second national (official) language.¹⁰⁰

The Cabinet decision was in line with the directive of the 21st EAC Summit held in February 2021, which directed the expedited implementation of Kiswahili, English, and French as official languages within the bloc.

A MISSED OPPORTUNITY OR FATAL MISTAKE?

This review of the three founding members shows the deep-seated roots of Swahili throughout the societies of the founding member states by the time the EACJ was established. It also demonstrates a deep interest in integrating Swahili into official systems, including the courts. It is evident that the founding members would have supported the adoption of Swahili as an official working language of the EACJ at its inception at the start of the new millennium. In fact, I argue that it was a fatal mistake not to introduce Swahili as a language of the EACJ at its inception, as the conundrum of whether having it as an official language of the Court today would not be existent, and I would not certainly be writing this, as newer members would adapt to it while using the English alternative.

There is a big possibility that if the citizens of these countries, save for a few exceptions in Uganda which had not deeply entrenched the Swahili culture had been given an opportunity to suggest languages of the court at its inception, Swahili would have probably ranked very highly. However, it seems that at inception the court was always seen as a court of incremental reforms. Indeed, this mentality of incremental systems and progress of the court by the creators of the Court has been argued by scholars¹⁰¹ since the inception and this was most likely the idea as to why Swahili was not initially included as an official working language

99 Hellen Githaiga, *Uganda finally adopts Kiswahili as official language*, THE EAST AFRICAN NEWSPAPER (July 5, 2022), <https://www.theeastafrican.co.ke/tea/news/east-africa/uganda-finally-adopts-kiswahili-as-official-language-3869770>.

100 *Id.*

101 Tom Ojienda, *Alice's Adventures in Wonderland: Preliminary Reflections on the Jurisdiction of the East African Court of Justice*, 2 E. AFR. J. HUM. RTS. & DEMOCRACY 94, 96 (2004). Ojienda argues that conditioning the "future extension of the jurisdiction" shows the phase-by-phase approach preferred by the Partner States.

102 République du Rwanda, *AXL: Langues et Cultures du Monde*, <https://www.axl.cefan.ulaval.ca/afrique/rwanda.htm> (last visited Sept. 29, 2023).

Deducing from the phase-by-phase argument by Ojienda, it is not far-fetched to think that while Swahili might have been considered by the founders of the court, they, intended it to be adopted in “future” as an official language. However, I believe this was a fatal mistake as it will be even more problematic to introduce it when the community expands further. It would have been less politically charged to introduce Swahili then than it is today. Given that the founding member states had already established national bodies mandated to promote Swahili, funded by taxpayers, was this not the best opportunity to achieve their objectives? It was therefore not just a missed opportunity but a fatal mistake not to introduce Swahili as one of the official working languages of the court at its inception.

THE WIDENING CONUNDRUM WITH NEWER MEMBERS

Rwanda

In April 2017, Rwanda adopted Kiswahili as official language, joining the mother tongue – Kinyarwanda and the existing official languages English and French.¹⁰² Once considered only a dialect, Swahili has gradually entered, officially, into the daily life of the population of Rwanda. The language is currently used in administrative matters and some official documents. Twenty percent of the population is estimated to speak Swahili.¹⁰³

Burundi

Since the school year 2005/2006, both Kiswahili and English have been taught in Burundian primary schools, as a strategy of intensifying political bonds with other countries of the East African Union. Nowadays, Kiswahili is implemented as a widespread but not official language in Burundi, this status only being attributed to French, Kirundi and English (since 2014).¹⁰⁴

South Sudan

Before independence, the 2005 interim constitution of the Southern Sudan Autonomous Region declared in Part 1, Chapter 1, No. 6 (2) that “English and Arabic shall be the official working languages at the level of the governments of Southern Sudan and the States as well as languages of instruction for higher education.”¹⁰⁵

103 INDIANA UNIVERSITY, *National African Language Resource Center (NALRC) Language & Culture*, <https://nalrc.indiana.edu/about/index.html>.

104 Nico Nassenstein, *On the variability of Kiswahili in Bujumbura (Burundi)*, 26 SWAHILI FORUM 205, 208 (2019).

105 The Interim Constitution of Southern Sudan (2005), Archived 2016-03-03 at the Wayback Machine (PDF; 484 kB), Part One, Pages 3–4, No. 6(1)–(2).

The government of the new independent state later removed Arabic as an official language and chose English as the sole official language. Part One, 6(2) of the transitional constitution of the Republic of South Sudan of 2011 states that “English shall be the official working language in the Republic of South Sudan”.¹⁰⁶ Kasinof opines that English was chosen to distance South Sudan from Sudan.¹⁰⁷ South Sudan has expressed interest in adopting Swahili as a second official language in order to deepen ties with the East African Community.¹⁰⁸

Democratic Republic of Congo

The Democratic Republic of the Congo is a multilingual country where an estimated total of 242 languages are spoken. Ethnologue lists 215 living languages. The official language, inherited from the colonial period, is French. Four other languages, three of them Bantu-based, have the status of national language: Kikongo, Lingala, Swahili, and Tshiluba.¹⁰⁹ Swahili is the most widespread *lingua franca* spoken in Eastern Equatorial Africa. Many variations of Swahili are spoken in the country, but the major one is Kingwana, sometimes called *Copperbelt Swahili*, especially in the Katanga area. Swahili is estimated to be spoken by about forty percent of the population.¹¹⁰

Somalia

Somalia faces the same problems that Burundi and DRC faced at the point of joining the EAC. The 2021 Joint Multi-Cluster Needs Assessment (“JMCNA”) for Somalia records 11 languages in use. It indicates that Northern Standard Somali is the most widely spoken as a first language (60% of the population), followed by Maay Somali (20%) and Benadiri Somali (18%).¹¹¹ The country’s official languages are Northern Standard Somali and Arabic, but Arabic is used chiefly in religious practice, and for more than 39% of the population, neither is the main language used at home. Other

106 The Government of South Sudan, *The Transitional Constitution of the Republic of South Sudan* (2011), (last accessed July 21, 2011).

107 Laura Kasinof, *For South Sudan, It’s Not So Easy to Declare Independence From Arabic*, FOREIGN POLICY (Nov. 14, 2018, 8:49AM), <https://foreignpolicy.com/2018/11/14/for-south-sudan-declaring-independence-from-arabic-is-not-so-easy-language-politics-juba-khartoum-english/>.

108 See EYE RADIO, *Kiswahili to be introduced to S. Sudan education curriculum*, EYE RADIO (July 3, 2018), <https://www.eyeradio.org/kiswahili-introduced-s-sudan-education-curriculum/>.

109 See TARGET SARL, *Target Survey: French, the most spoken language in DRC, far ahead of Lingala*, TARGET SARL (July 10, 2021), <https://www.target-sarl.cd/up/en/?readstu&enc=utf-8&t=159#>.

110 *Id.*

111 See CLEAR GLOBAL, *Language data for Somalia* (2021), [https://clearglobal.org/language-data-for-somalia/#:-:text=The%202021%20Joint%20Multi%2DCluster,and%20Benadiri%20Somali%20\(18%25\)](https://clearglobal.org/language-data-for-somalia/#:-:text=The%202021%20Joint%20Multi%2DCluster,and%20Benadiri%20Somali%20(18%25).).

minority languages include two Swahili dialects: Bravanese (also known as Chimwiini or Chimbalazi), spoken along the southern coast, and Bajuni or Kibajuni. Mushunguli (or Mushungulu), spoken by the Bantu minority of southern Somalia, is also spoken in Tanzania, where it is known as Zigula or Zigua. An unknown number of people use Somali Sign Language.

English is widely taught in schools and the language of instruction at many Somali universities; it is also a working language of many Somali NGOs. Italian, previously an official language, is now spoken chiefly by older people and government officials. Somali Minister of Information and Culture Daud Aweis addressed journalists in Arusha, ahead of the 23rd Summit of Heads of State and Government, in Swahili and was commended for a good command of the language, showing its permeation in parts of Somalia, although he faced heavy criticism from some quarters.¹¹² At present, Somalia faces prejudice and will do so for a long time because neither Arabic nor Somali is likely to ever be considered as a language of the court. However, since government officials in Tanzania show enthusiasm towards it, Swahili could be a better option for them.

WHAT IS THE FUSS ABOUT?

A close analysis of the newer members reveals that all the arguments against introducing Swahili as an official working language of the court are not coherent and do not stand up to critical scrutiny. The arguments fall flat at the simplest of analysis as I elucidate below. In Rwanda, the 1996 constitution enthroned English as an official language; in 2007, Rwanda joined the EAC; in 2008, English became the medium of instruction at all school levels. So, even at the moment of joining the EAC, Rwandan citizens had only had English as an official language for a decade, and it was only shortly thereafter that English was made compulsory in schools.¹¹³ Therefore, had Swahili been an official working language of the court, Rwanda would have not suffered any prejudice at its joining time, as they could have opted for English. Additionally, there is no difficulty today as it is already nine years since Swahili was introduced as an official language in Rwanda, which is almost the same period as when English had been made an official language in Rwanda before joining the EAC. If the argument is

112 Abdulkadir Khalif, *Somalia Minister Kicks up a Storm After Addressing a Conference in Swahili*, THE EAST AFRICAN NEWSPAPER (Dec. 2, 2023), <https://www.theeastafrican.co.ke/tea/news/east-africa/somalia-faces-swahili-question-as-country-joins-eac-4451830>.

113 See Indiana University, *supra* note 103.

that entrenchment of English then was more rooted, it still fails because the growth of Swahili in Rwanda has progressed significantly in recent years. The same arguments apply to South Sudan.¹¹⁴

Considering Burundi, this is even more straightforward. At the time of joining the EAC, its official languages were French and Kirundi, none of which is an official language of the EACJ. In 2014, Burundi introduced English as an official language; however, while schools teach English, they do not examine it. Therefore, it would have no negative impact on Burundi if they found Swahili at its point of joining the community being one of the official languages of the court as English was not even an official language in Burundi then and only became such seven years later. The same would be true if Swahili is introduced today, as they would have an alternative with English too, and Swahili has grown so much in Burundi that it would most likely become an official language.¹¹⁵ These arguments apply to the Democratic Republic of Congo, which doesn't even have English as an official language and therefore sits at a more disadvantageous place and would be better off with Swahili.

If this analysis is correct on the language architecture of the member states, I opine that the case of not having Swahili as an official working language of the EACJ stems from postmodern anxieties, clouded by the history of the legal culture of colonialism in the member states, and not any genuine concerns about the language being unable to be used at the EACJ.

SWAHILI IN THE EAST AFRICAN COMMUNITY

As the Mazruis have argued,¹¹⁶ there is a historic dialectic between English as the imperial language and Swahili as the preponderant language of East Africa. Almost by definition, an imperial language begins from above as a language of power.¹¹⁷ English in East Africa started as the language of the rulers before it could gradually develop into the language of the people. Kiswahili, on the other hand, probably began as a language of the people before it became the language of its rulers.¹¹⁸

114 See John Hamu Habwe, *Maenezi ya Lugha ya Kiswahili Nchini Sudan Kusini: Mafanikio na Changamoto*, 28 SWAHILI FORUM 68 (2022).

115 See Nassenstein, *supra* note 104.

116 See generally Mazrui, *supra* note 4.

117 See Mazrui, *supra* note 4, at 276.

118 *Id.*

Indeed, when the rulers of Zanzibar were Arabs from the Sultanate of Oman, Swahili triumphed over the conquerors. The language of the colonised assimilated the imperial power, similar to how the Hausa language and culture in Nigeria had substantially assimilated the conquering.¹¹⁹

This is also supported by what Ngugi wa Thiong'o, the famed Kenyan writer and critic of the non-use of African languages terms as *Normalised Abnormality*¹²⁰ in which the colonised had their language taken from them, and a foreign language imposed. English in the EAC is often associated with the elites and is treated as such, whereas Swahili, cuts across the social ties and social fabric as the language of inclusion, identification, transaction, and socialisation. Developed through informal trade, Swahili continues to be used as the language of transaction and trade in both formal and informal trade across the region and the border posts of EAC Partner States with non-EAC countries. In the continued pursuit to enhance integration, a need to popularize the Swahili language to promote a deep-rooted integration approach is necessary. While our multiplicity of languages and dialects thereof, acts as a constant reminder that we belong to different ethnic and communities, the promotion of Kiswahili in paper and deed will facilitate a more feasible process of integration as an efficient exchange and flow of information. It is the uniformity of language that drives the attainment of harmony in people's perceptions of events in reality.

Swahili is widely spoken by EAC citizens which gives it the status of the region's lingua franca. It is a symbol of the identity of EAC citizens and fosters a sense of shared values, culture, and identity. The Treaty Establishing the EAC acknowledges the position of Swahili in the region and provides that Swahili is adopted¹²¹ and developed as the EAC lingua franca, while English remains the official language.¹²²

In furtherance of the spirit of integration, the Community established an institution, the East African Swahili Commission ("EAKC"), which purely deals with the development and research of Swahili.¹²³

119 *Id.*

120 See Carey Baraka, *Ngugi wa Thiong'o: three days with a giant of African literature*, THE GUARDIAN (June 13, 2023), https://www.theguardian.com/books/2023/jun/13/ngugi-wa-thiongo-kenyan-novelist-profile-giant-of-africa-literature?CMP=share_btn_fb&fbclid=IwAR3dRwG-JIDf3JOD5_d2AQRlgwV3_dGuqrllAIrZRLsiCGXzlh-9Lht_Dms.

121 See EAC Treaty, Art. 119(d) ("The Partner States shall promote close co-operation amongst themselves in culture and sports, with respect to the development and promotion of indigenous languages especially Kiswahili as a lingua franca."); see EAC Treaty, Art. 137(2) ("Kiswahili shall be developed as a lingua franca of the Community.") (1999).

122 *See id.*

123 See The Protocol on the Establishment of the East African Kiswahili Commission (Apr. 18, 2007), <https://africanlii.org/akn/aa-eac/act/protocol/2007/east-african-kiswahili-commission-eakc/eng@2007-04-18>.

On August 25th, 2016, the East African Legislative Assembly resolved to introduce Swahili as one of the official languages of the EAC. The Resolution thus urged the Summit of EAC to amend the Treaty for the establishment of the Community to make Swahili an official language. Former President of the United Republic of Tanzania and the Chairman of the Summit of EAC Heads of State, the late Dr. John Pombe Magufuli, addressed the 17th extraordinary Summit of the EAC in Swahili, a first for the bloc.¹²⁴

In February 2021, during the 21st Summit of EAC Heads of States, a decision was made to adopt Swahili and French as Official Languages of the EAC in addition to the already existing English.¹²⁵ In 2022, the East African Community (“EAC”) Sectoral Council on Education, Science and Technology, Culture and Sports (“SCESTCS”) adopted a roadmap for implementing Swahili and French as official languages of the bloc. This was part of the directive from the 21st summit.

These developments of quickly taking up French in anticipation of the joining by DRC raises questions about the willingness of the decision makers at the EAC to adopt French quickly yet Swahili has been delayed. It is during this research that I learnt that the operational modalities of the introduction of the French language in the EAC would be funded by the French government.¹²⁶ In another clear instance of where the community deeply continues to accept colonial languages for a funding of a paltry, forty-three thousand euros,¹²⁷ yet Swahili gets to take a back seat for years on end. Truly, this is the Normalised abnormality of a continuity of linguistic colonization.

124 EAST AFRICAN LEGISLATIVE ASSEMBLY, *Kiswahili takes centre stage at the 17th extra-ordinary Summit in - a first for the Community*, EAST AFRICAN LEGISLATIVE ASSEMBLY (Sept. 15, 2016), <https://www.eala.org/media/view/kiswahili-takes-centre-stage-at-the-17th-extra-ordinary-summit-in-a-first-f> (“I have my speech in both English and Kiswahili – but my colleagues (the Summit Members), have requested me to address you in Kiswahili,” the President said, much to the applause of participants.).

125 See EAST AFRICAN COMMUNITY, *Communiqué of the 21st Ordinary Summit of the East African Community Heads of State*, at ¶ 5 (Feb. 27, 2021), available at <https://www.eac.int/communiqu/1942-communicu%C3%A9-of-the-21st-ordinary-summit-of-the-east-african-community-heads-of-state>.

126 See Umar Kashaka, *French to become EAC official language - Kadaga*, NEW VISION (Dec. 10, 2021), <https://www.newvision.co.ug/category/news/french-to-become-eac-official-language---kada-122026>.

127 *Id*; see also EAST AFRICAN COMMUNITY, *EAC tables US\$103,842,880 Budget Estimates before EALA for the 2023/2024 Financial Year*, EAC (June 13, 2023) (explaining that the 2023/2024 budget that had been allocated to the EACJ was US\$4,450,488 which would represent just about 1% of the budget as granted to do the French translations), [https://www.eac.int/press-releases/2821-eac-tables-us\\$103,842,880-budget-estimates-before-eala-for-the-2023-2024-financial-year#:~:text=The%202023%2F2024%20Budget%20has,for%20East%20Africa%20%2D%20US%2412%2C394%2C945](https://www.eac.int/press-releases/2821-eac-tables-us$103,842,880-budget-estimates-before-eala-for-the-2023-2024-financial-year#:~:text=The%202023%2F2024%20Budget%20has,for%20East%20Africa%20%2D%20US%2412%2C394%2C945).

The above analysis clearly indicates that the systems are in place and acceptance of Swahili in the community has always been a key issue. There is thus no reason not to have Swahili as an official and working language of the East African Court of Justice (“EACJ”).

SWAHILI HAS EARNED ITS PLACE

Nobel Laureate Wole Soyinka, the Nigerian writer, poet and playwright, has since the 1960s repeatedly called for use of Swahili as the transcontinental language for Africa.¹²⁸ The African Union (“AU”), the “united states of Africa,” nurtured the same sentiment of continental unity in July 2004 and adopted Swahili as its official language.¹²⁹ Joaquim Chissano, then the president of Mozambique, put this motion on the table, and addressed the AU in the flawless Swahili he had learned in Tanzania, where he was educated while in exile from the Portuguese colony.¹³⁰ Chissano said that he spoke in Swahili in order to urge African nations to promote and use indigenous African languages. The African Union did not adopt Swahili as Africa’s international language by happenstance. Swahili has a much longer history of building bridges among peoples across the continent of Africa and into the diaspora.

In celebration of 2019 as the International Year of Indigenous Languages, the Southern Africa Development Community (“SADC”), consisting of a group of sixteen-member states, adopted Swahili as an official language. Swahili was not only recognized as an official language, but also as a mode of communication in business in all sectors.¹³¹ South Africa and Botswana have also made plans to have Swahili taught in their schools.

128 See M.M. Mulokozi, *Kiswahili as a national and international language*, 66 KISWAHILI 66 (2003). Following the independence of several African countries, particularly in Sub-Saharan Africa from the mid-nineteen fifties, debates arose about the possibility of the adoption of Swahili as a common language for Africa since it was the most widely-spoken African language at the time. The most notable propagators of this idea were the late Dr. Kwame Nkrumah, the first President of the Republic of Ghana, Professor Wole Soyinka, the Nobel Prize award-winning African writer, Professor Ayi Kwei Armah, author of the popular novel of the African Writers Series, *The Beautiful Ones Are Not Yet Born*, and Professor Ali Mazrui, a renowned Pan-Africanist.

129 See Abdi Latif Dahir, *African languages should be at the centre of educational and cultural achievement*, QUARTZ (June 2, 2017), <https://qz.com/africa/996013/african-languages-should-be-at-the-center-of-educational-and-cultural-achievement>.

130 Deji Adeniyi, *Swahili baffles African leaders*, BBC NEWS (July 6, 2004), <http://news.bbc.co.uk/2/hi/africa/3871315.stm>.

131 See Karen Mwandera, *Karibu! SADC Adopts Kiswahili As An Official Language*, FORBES AFRICA (2019), <https://www.forbesafrica.com/current-affairs/2019/08/26/karibu-sadc-adopts-kiswahili-as-an-official-language> (last visited Sep. 28, 2023).

Swahili is the first African language recognized by the UN through the adoption of the UNESCO resolution 41 C/61.¹³² The 41st session of the General Conference of UNESCO adopted resolution 41 C/61, which recognized the role the Kiswahili language plays in promoting cultural diversity, creating awareness and fostering dialogue among civilizations. It noted the need to promote multilingualism as a core value of the United Nations and an essential factor in harmonious communication between peoples, which promotes unity in diversity and international understanding, tolerance and dialogue. The resolution proclaimed 7 July of each year as World Kiswahili Language Day. This resolution marks July 7 as the World Kiswahili Language Day, in honour of professor Julius Nyerere's *Ujamaa* (brotherhood/unity) philosophy.

At its heads of state meeting in February 2022, the African Union adopted Swahili as an official working language.¹³³ The action draws inspiration from the need for Africa to steer away from “languages of power,” which are often coming from western countries.

Today, Swahili is the African language most widely recognized outside the continent. The global presence of Swahili in radio broadcasting and on the internet has no equal among sub-Saharan African languages.

There is thus no need for further justification as to why the EACJ should not have Swahili as an official and working language of the court. There is a clear, demonstrable need, as Swahili is today highly ranked equal in status to any world top language and thus must be adopted as a working language of the court.

SHAPING COURTS THROUGH LANGUAGES

The EACJ should champion the “others” of international law by having Swahili as a working language. As al Attar theorises¹³⁴, there is a Ngugi-Esque (referencing his work)¹³⁵ quality to the idea that we should develop knowledge of and in these systems, rather than settling for their colonial constructs. In doing so, we can achieve

132 See UNESCO Digital Library, *World Kiswahili Language Day*, UNESCO (Nov. 5, 2021), <https://unesdoc.unesco.org/ark:/48223/pf0000379702> (Document code 41 C/61).

133 See Andrew W. Shimanyula, *African Union adopts Swahili as official working language*, ANADOLU AJANSI (Oct. 2, 2022), <https://www.aa.com.tr/en/africa/african-union-adopts-swahili-as-official-working-language/2498467>.

134 Mohsen al Attar, *Must International Legal Pedagogy Remain Eurocentric?*, 11 ASIAN J. OF INT'L L. 176 (2021).

135 NGUGI WA THIONG'O, *MOVING THE CENTRE: THE STRUGGLE FOR CULTURAL FREEDOMS* (James Currey ed., 1993).

decolonization by renouncing the singularity of European epistemology in the adjudication of Supranational courts¹³⁶(deduced) and ways of adjudicating permeate other civilizations too. This rationale informs my push for the “*Swahilinization*” of the EACJ.

Moreover, it is important to note that the choice of language in the case of a regional court such as the EACJ cannot be said to be neutral regarding its consequences. This is because it largely determines how the law is interpreted by the court and applied.¹³⁷ The legal traditions behind the dominant language exert influence over the interpretation and application of law when the law is drafted in that language. With perhaps some exaggeration, some authors warn that using English in the international sphere threatens to make it into an instrument of political hegemony.¹³⁸ Therefore, it is advised that for a regional court such as the EACJ must have at least one other indigenous working language or knowledge of other traditional languages in order to avoid “*déformation linguistique*.”¹³⁹

As Cohen¹⁴⁰ opines on his thesis on the capture of multinational courts by the French language, international judges can be seen as forming “epistemic communities,” meaning they are knowledge-based experts who share certain beliefs and values.¹⁴¹ It would appear that the choice of language by the Court would have a big impact on the legal culture and even inform the common aims and ideas of the court members, particularly considering that appointment and staffing decisions would often turn on the knowledge of chosen language of the court.

A lawyer’s command of a language often goes hand in hand with socialisation in a given legal system, especially when that language, such as English, is no longer a major vehicular language used to communicate among the citizens of the member states of the now expansive East African Community. These citizens do not share official languages, and even when they do, the levels of variance of articulation are quite high.¹⁴²

136 *Id.*

137 See Justina, *supra* note 22.

138 Christian Tomuschat, *The (Hegemonic?) Role of the English Language*, 86 NORDIC J. INT’L L. 196 (2017).

139 *Id.*

140 Mathilde Cohen, *On the linguistic design of multinational courts: The French capture*, 14 INT’L J. CONST. L. 501 (2016).

141 See also Anne-Marie Slaughter, *Court to Court*, 92 AM. J. INT’L L. 708 (1998); Peter M. Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 INT’L ORG. 1 (1992).

142 See Cohen, *supra* note 140.

If this assumption is true, then courts such as the EACJ fall in the abyss of legitimacy. The EACJ is not a relatively new judicial body, but it must still prove herself to the world. It needs mechanisms to ensure that it preserves the appearance of being for the people of the member states. Indulging in idiosyncratic capture of international courts by use of colonial languages might run contrary to these aims. The *Swabilinization* judicial model is an attractive solution to address this challenge. A regional court culture that privileges superficial unanimity and double talk is particularly not well suited to transnational adjudication.

CONCLUSION

As Ngugi argues, “The effect of a cultural bomb is to annihilate a people’s belief in their names, in their languages, in their environment, in their heritage of struggle, in their unity, in their capacities, and ultimately in themselves.”¹⁴³ Colonial language domination in the legal systems of the member states has been transposed to the community court, and the erasure of local language and culture continues to this day. Ultimately, whenever the language of court does not belong to the culture of the users, those courts become sites of oppression and erasure, simple yet effective instruments in the colonial project.¹⁴⁴

It is by pure design that throughout this paper, I have avoided spending a single line arguing for a comparative analysis of the languages used by other multinational courts because I do not want to legitimise the illegitimate. I would have wasted all the efforts put into this work had I engaged in a comparative analysis to justify my thesis from other courts suffering from the very same malaise- courts built on languages founded on a history of subjugation, imposition, and colonial continuities while refusing to adopt their very own. If the EACJ is to adopt Swahili as a working language, it would contribute to a more diverse, equal, and representative justice at the court and a learning point for other regional courts.

Juxtaposing Anghie,¹⁴⁵ a court represents a tradition, whether that tradition is understood in terms of an approach, subject matter, or actors, there is a tradition.

143 NGŪGĪ WA THIONG’O, *DECOLONISING THE MIND: THE POLITICS OF LANGUAGE IN AFRICAN LITERATURE* 9 (1986).

144 View the Juxtapositions of the Palestinian and Iranian schools advanced in, Hala Espanioly, *Education as a Tool of Empowerment*, in *INDIGENOUS MINORITY EDUCATION: INTERNATIONAL PERSPECTIVES ON EMPOWERMENT* 42, 45 (Duane Champagne & Ismael Abu-Saad eds., 2005).

145 Antony Anghie, *Welcoming the TWAIL Review*, 1 *Third World Approaches to International Law (“TWAIL”)* Rev. 1, 2 (2020), available at <https://twailr.com/wp-content/uploads/2022/04/Anghie-Welcoming-the-TWAIL-Review.pdf>.

Courts may present themselves as people-centred, universal, and open to all forms of inquiry, intent only on administering equal justice. But that be as it may, it is through the lens of a particular tradition that any regional court is inevitably assessed and gains its ultimate legitimacy. If the EACJ wants to be rightfully engaged, it must address the very issue of tradition. The tradition is that of making Swahili a working language of the court, a language that most of its users speak and use in their daily lives.