# Book Review Symposium Introduction: The Performance of Africa's International Courts: Using International Litigation for Political, Legal, and Social Change, OUP, 2020 edited by James Thuo Gathii

**By:**

James Thuo Gathii

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I got very interested in Africa's international courts more than a decade ago when I was writing a book on Africa's trade regimes. I was surprised to learn that Africa's international courts, although established as trade courts had ended up being human rights courts. I soon realized that the first generation of scholarship on Africa's international courts had transplanted analytical tools for assessing their performance that did not showcase the entirety of their

impacts. The moment between that realization and *The Performance of Africa's International Courts: Using International Litigation for Political, Legal, and Social Change*, OUP, 2020 was a long five years. This book project has therefore come a long way from April 2016 when I hosted an authors' workshop.

A second objective for writing the book was to collect in one book all of Africa's active international courts:

- The East African Court of Justice
- The Economic Community of West African States Community Court of Justice
- The Southern African Community Development Tribunal (now defunct)
- The Common Market for Eastern and Southern Africa Court of Justice
- The Organization for the Harmonization of Business Law in Africa (OHADA) Common Court of Justice and Arbitration
- The African Court on Human and Peoples Rights
- The Court of Justice of the Economic and Monetary Community of Central Africa (CEMAC) Court of Justice
- The Arab Maghreb Union Judicial Organ is the subject of a chapter I co-authored with Harrison Otieno in part to reflect on why there has been no judicialization in North Africa relative to other parts of Africa.

In editing this book, I also sought to center and amplify the voices of African authors writing about Africa's international courts. In addition an extended, here are the chapters in the book:

- *International Courts as Coordination Devices for Opposition Parties: The Case of the East African Court of Justice*, by James Thuo Gathii
- *Sub-Regional Courts as Transitional Justice Mechanisms: The Case of the East African Court of Justice in Burundi*, by Andrew Heinrich
- *The ECOWAS Court as a (Promising) Resource for Pro-Poor Activist Forces: Sovereign Hurdles, Brainy Relays, and 'Flipped Strategic Social Constructivism*,' by Obiora C. Okafor and Okechukwu J. Effoduh
- *Towards an Analysis of the Mega-Political Jurisprudence of the ECOWAS Community Court of Justice*, by Olabisi D. Akinkugbe
- *Africa's Sub-Regional Courts as Back-Up Custodians of Constitutional Justice: Beyond the Compliance Question*, by Solomon T. Ebobrah and

Victor Lando
- *The African Court of Human and Peoples' Rights as an Opportunity Structure*, by James Thuo Gathii and Jacquelene Wangui Mwangi
- *Backlash Against International Courts in West, East, and Southern Africa: Causes and Consequences*, by Karen J. Alter, James Thuo Gathii, and Laurence R. Helfer
- *Reference Guide to Africa's International Courts: An Introduction*, by James Thuo Gathii and Harrison Otieno Mbori

The central claim made in the book is that Africa's international courts have important impacts that have so far been underemphasized or are entirely ignored in the scholarship on international courts. It departs from approaches that measure the performance of Africa's international courts based on compliance with or effectiveness of their judgments. The book does so by putting the users of Africa's international courts and their broader strategies at the center of the analysis. It adopts an in-depth case study approach that focuses on how the litigation process in these courts is used by litigants to advance and promote their commitment to their ideals. It delves into the messy world of legal, social and political mobilization. It examines the choices made by activists, litigants, and opposition parties who bring cases before these international courts against those in control of dominant and authoritarian party regimes. In doing so, the book complements the attention to legal and doctrinal questions as well as the challenges of compliance with decisions of these courts that the first generation of scholarship on Africa's international courts emphasized.

The chapters in the book emphasize that the type of litigants that bring cases do so for reasons beyond those contemplated in compliance analysis. Such litigants include opposition politicians and political parties who bring cases in Africa's international courts as one venue, among others, for mobilizing support for the promotion of and defense of political freedom. The book argues the context within which these international courts were established and the choices and strategies deployed by litigants should be a crucial starting point for understanding their performance and impact. The availability of regional and sub-regional human rights norms that could be judicialized in international courts created new opportunities for norm entrepreneurs such as human rights victims and their advocates in civil society and opposition parties. International

courts, particularly in East and West Africa positioned themselves as friendly venues for these new norm entrepreneurs.

By filing cases such litigants articulate their grievances in the public and in doing so preserve oppositional norms and values where political opposition survival faces repressive control by authoritarian States. Thus filing a case in an international court presents these politicians and their political parties a forum not controlled by their home State as they seek to build, maintain and defend social and political movements. When these politicians win these cases, they use their judicial success to further mobilize their supporters against their governments. When courts name election offences as constituting treaty violations, they give credibility to opposition party claims a platform to campaign against dominant political parties and offer a window into the type of types of electoral manipulation these dominant political parties engage in. These are not the types of things easily measurable using a compliance or even an effectiveness framework. This is particularly so when one takes into account how opposition political parties and politicians are using these courts in their quest to structure an environment of open and free political competition, and free and fair elections in their countries.

In other words, to fully appreciate this view of African international courts, this book shows it is mistaken to regard them as independent actors isolated from other sites of political, social, and legal contestation and change. Rather, this book shows that they are one option for activist and litigant action within a broader set of institutions including domestic courts. In addition, African international courts amplify political contestation between activists and litigants, on the one hand, and their governments, on the other, in ways that may not be possible in other forums exclusively controlled by their governments. This is because once governments begin participating in proceedings before these international courts, they become drawn into the struggles that brought the litigants to the Court in the first place. Litigants and activists involved in these cases do not wait for the final judicial decision. Instead, these litigants and activists use their ongoing participation in the proceedings to educate the public about their cause, to build their movement and to seek legal validation of their cause. Sometimes, judicial decisions of these international courts challenge the status quo in favor of the litigants and activists. This in turn helps them to build political momentum for their causes.

Ultimately, the book makes four major claims:

First, that measuring the compliance and effectiveness or effectiveness of international courts focuses too much on the behavior of States as well as State-based and State-driven compliance processes and in so doing ignores or underplays the roles non-State actors and judges play in shaping and using litigation processes both inside and outside of the courtroom. Thus compliance and effectiveness inadequately measure the impact of international courts in Africa.

Second, that contrary to assumptions embedded in compliance analysis that the primary reason for bringing cases to these courts is to seek compliance with favorable rulings, a primary reason that litigants and opposition politicians bring cases in Africa's international courts is to involve them in their controversies both with their government as well as with dominant political parties. While they would hope for a favorable ruling, activists, litigants, and opposition parties and politicians fully well understand that non-compliance with favorable rulings is a very likely outcome. The chapters in this book show that these litigants fully understand this. What is more, they have goals that go beyond whether or not governments will comply with those rulings when and if they prevail. For these litigants, filing cases before Africa's international courts helps them in a variety of ways including exposing the misdeeds of their governments.

Third, that foregrounding compliance inaccurately presupposes litigation is being pursued in these non-European courts because litigants see them as primary change agents. Such an assumption is based on the experience of structural reform litigation in North America and Latin America. This assumption is further fortified by theoretical priorities that are based on experiences that have no direct relevance to non-European courts. Yet, as the chapters in this book show, there is no assumption by users of Africa's international courts that they are structural reformers. Further as alluded to already, compliance-centric analysis do not also capture how litigating cases in international courts gives litigants opportunities to engage in political mobilization that would otherwise be difficult if not be impossible in the absence of such litigation.

Fourth, that measuring the performance of Africa's international courts solely on compliance and effectiveness presupposes there is a set of universal benchmarks that must necessarily form the benchmark for assessing the efficacy of international courts everywhere. Since compliance and effectiveness reflect the priorities and concerns developed in academic circles in the West, using these as the only measurements to establish the impact of international courts in Africa invariably marginalizes and trivializes the international law and other impacts of these and other non-European international courts. This book therefore also seeks to de-marginalize the theoretical and doctrinal contributions of Africa's international courts.

Ultimately, this book expands the aperture for examining the work of international courts by looking at the roles Africa's international courts play beyond measuring compliance and effectiveness. To demonstrate how these courts facilitate this role, the chapters in this book adopt an in-depth case-study approach that emphasizes thick description and analysis about how these cases filed in these courts enable, spur, and embolden political and legal mobilization. By foregrounding thick description, this approach differs from those whose starting point is to measure the impact of courts based on a set of defined and discrete variables such as data-sets of litigated cases isolated from the particular and localized contexts where these cases sprang from and were litigated.

This does not mean dismissing empirical approaches out of hand or insisting on viewing Africa in terms of its unique specificities. Rather it is to recognize that the analytical framework adopted here offers a different starting point that better suits the primary objective of this book than that adopted in other analytical frameworks. However, the framework adopted here is not an end in itself. By foregrounding thick description, this book uses these descriptions as a springboard for further analysis and to ask further questions. Some of the questions that arise from thick description differ from those methodologies that foreground measuring compliance and effectiveness.

I am delighted that a stellar group of scholars studying Africa's international courts are part of this book review symposium. In the order in which their reviews will appear, these scholars are:

Prof. Tomasz Milej
Kenyatta University School of Law

Diana Kisakye M.A., Doctoral Candidate / Research Associate, Africa Multiple Cluster of Excellence

Grace Wakio, Advocate High Court of Kenya, and *Head of the African Court on Human and Peoples' Rights' Legal Division (but participating in her personal capacity)*

Dr. Rahina Zarma who recently defended her PhD thesis on the ECOWAS Court of Justice at the Osgoode Hall Law School and currently a researcher at the @CSiWproject

Salome Addo Ravn, Ph.D Fellow, University of Copenhagen, Faculty of Law iCourts, Centre of Excellence for International Courts

Adedamola Gbolahan, Doctoral Student, Open University Law School Faculty of Business and Law, The Open University

I thank them for their insightful reviews and for agreeing to continue this conversation about how best to assess the performance of Africa's international courts. I am sure the readers will also appreciate the effort they put in writing their excellent reviews.

**Contributors**

Tomasz Milej: A Venue or a Decision Maker? The Constitutional Function of African Regional Courts

Diana Kisakye: Book Review: The Performance of Africa's International Courts: Using Litigation for Political, Legal and Social Change

Grace Wakio Kakai: Book Review: The Performance of Africa's International Courts, Using Litigation for Political, Legal and Social Change

Rahina Zarma: Book Review: The Performance of Africa's International Courts: Using Litigation for Political, Legal, and Social Change

Salome Addo Ravn: Book Review: The Performance of Africa's International Courts Using Litigation for Political, Legal, and Social Change

Adedamola Gbolahan: The Performance of Africa's International Court: Book Review

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