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

**By:**

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Even though Africa has proven to be a fertile ground for testing international legal regimes, most scholarly accounts remain pessimistic in assessing these experiments (page vi). This book seeks to counter these depictions in a manner consistent with epistemologies of the Global South - arguing that theories and concepts developed in the Global North do not transfer with ease to other regional settings and prompts scholars to identify alternative ways of knowing.

The framing of the book is consistent with Third World Approaches to International Law (TWAIL) perspective - challenging existing IL scholarship on epistemological, methodological and geographical fronts - thereby offering a more nuanced explanation for the performance of Africa's international courts (ICs). This approach resonates with James Gathii's earlier works, and *The*

*Performance of Africa's International Courts: Using Litigation for Political, Legal and Social Change* reads like a continuation of his dedication to achieving what Boaventura de Sousa Santos calls cognitive justice.

Gathii's introduction provides an effective entrance into this thought-provoking and innovative work by problematizing popular analyses measuring the impact of ICs. The edited volume also strives for intellectual equality by framing Africa's ICs as sites of knowledge production rather than mere contexts of reception of transplanted legal norms (pages 4-5). Gathii emphasizes that state-driven compliance and effectiveness measures do not adequately capture the types of impact emanating from Africa's ICs, reasoning that such approaches minimize the roles that judges and non-State actors play in shaping and using litigation processes, both on and off-bench (pages 4-8). Therefore, to understand the impact of African ICs, it is important to foreground the actors behind the decisions, and their constituencies, rather than narrowly focusing on the State reactions to the rulings. This approach is in line with arguments that prioritize the judges' off-bench behaviour and the role of key social actors in shaping judicial processes in African national settings.

Methodologically, the edited collection relies on in-depth case studies and thick descriptions to emphasize non-compliance metrics of Africa's ICs and to draw attention to their broader impact whilst foregrounding the actors behind the litigation, situating the litigated cases in their localized contexts, and debunking knowledge universalisms (pages 16-18). Moreover, most contributors adopt a sociological interpretivist lens to study IC performance, accounting for actors' motivations and strategies within their historical, socio-political, and contemporary contexts. Through rigorous comparative cross-national studies rooted in practice and context-specific particularities of Africa's ICs, the book engages with, challenges, builds on and transcends current theorizing of the performance of ICs, thereby drawing our attention to the complex processes of African international adjudication. However, scholars interested in comparative inquiry may find that the wide range of methodologies across the book makes it difficult to compare and assess each chapter's findings and arguments.

Structurally, there is a high degree of coherence among the chapters - reflecting several years of collaboration among the contributors. Besides speaking to the recurring themes, the book also offers guidance on making

links to its chapters and reading them more effectively. For instance, chapter 8 by Harrison Mbori and James Gathii is a toolkit to understanding the courts' structure and rules which feature throughout the previous chapters. The reference guide contains a summary of each court's subject matter jurisdiction, year of creation, first ruling, the number of member States bound by its jurisdiction, and the sum of binding rulings issued thus far (pages 341-43). Written with the consideration of non-specialists on Africa's ICs, this chapter is a valuable asset to understanding the earlier analytical chapters in the book.

One prominent theme in the book is litigation as a tool of social, political and legal mobilization. Africa's ICs provide an additional avenue through which citizens can wage their political, social, and legal struggles. Drawing on legal mobilization scholarship, the contributors illustrate that legal mobilization is a complex process, where actors often negotiate the dynamics of litigation. Urging readers to go beyond State-driven compliance processes, the book highlights the symbolic impact of litigation - underlining the broader political, social and economic contexts within which litigation arises. The contributors perceive the growing strategic litigation in Africa's ICs as both a strategic resource and constraint. The courts provide activists and litigants with an additional avenue to name and shame political foes, publicize their grievances and mobilize their supporters, providing access that may otherwise not be possible in their national jurisdictions (pages 12 -18). For example, as Andrew Heinrich spells out in Chapter 2, litigants from Burundi have resorted to the East African Court of Justice (EACJ), instead of their national courts, to address human rights abuses and authoritarian governance. Even though the EACJ cannot resolve the contentious and often violent politics of repressive governments, in the absence of transitional justice mechanisms, opposition parties, politicians, and civil society groups seek solace and external support through litigation. Departing from sub-regional courts, but keeping with this theme, James Gathii and Jacquelene Mwangi (Chapter 6) employ an actor-centred analysis to show how politicians, political parties and imprisoned opposition members resort to the African Court to articulate their political grievances. The authors argue that the cases before Africa's ICs must be analyzed within the broader political context within which they arise (page 249).

In contrast, where courts overstep their boundaries, legal mobilization poses constraints, as illuminated in Chapter 7. Using empirical analysis and a critical overview of the backlash against three sub-regional courts, Karen Alter, James Gathii, and Laurence Helfer elucidate how African governments have contested IC's authority and legitimacy. The chapter captures the broader implications for ICs in fragile political environments, showing that legal mobilization could pose irreparable damage, such as the disbandment of the SADC Tribunal in Southern Africa and the permanent modification to the jurisdictional structure and rules of the EACJ in East Africa. Their pioneering comparative research on the backlash in Africa's ICs highlights and explains variation in the severity of counter-attacks. They find that backlash results from the extent and political influence of the involvement of key constituencies (civil society groups, regional secretariats and parliaments) in mobilizing support for the courts in each sub-region (page 255).

Likewise, the book underlines the relevance of key judicial constituencies in pushing strategic litigation to create its desired impact. The contributors demonstrate that courts do not act in isolation but in concert with well-organized constituencies who are often willing to mobilize legal resources for change. For instance, Gathii highlights, in Chapter 1, the role of organized constituencies who have supported opposition parties in filing cases against the dominant parties in the member states where organizational rights are much more suppressed. The chapter nuances the varying organizational dynamics across the member states, and their mobilization strategies, allowing us to understand variation in the utilization of the EACJ. Similarly, Obiora Okafor and Okechukwu Effoduh illustrate in Chapter 3 that activists and their allies use the ECOWAS court to advance their moral obligations to the poor by adjudicating human rights cases - seeking to start conversations about new norms and ideas about their rights. These authors underscore the value of the ECOWAS court in activism through its optimization of human rights jurisprudence.

Most importantly, the book illuminates that even apparent losses in court tantamount to symbolic wins, keeping in conversation with the socio-legal literature on legal mobilization as political pressure. Even if litigants lose cases, there are auxiliary gains that come with strategic litigation, proving useful to their legal mobilization agenda. Thus, in both East and West Africa, litigants have innovatively and strategically approached the ICs, without necessarily

seeking a win or compliance but instead pursue additional symbolic gains.

Another recurring theme through the chapters is the judicialization of mega politics within African ICs. The judicialization of politics refers to the increasing reliance upon courts to address matters of outright political significance – usually controversial, morally contentious issues which can define or divide polities. As a result of the political salience of such matters, the courts pass landmark rulings that seem to stray into the purview of the political, inciting social, legal and political change. For instance, Olabisi Akinkugbe's chapter (Chapter 4) captures the increasing mega-political jurisprudence before the ECOWAS Community Court. The chapter discards legal-formalist approaches for a sociological lens and teases out two interesting aspects to megapolitical adjudication: Why do litigants strategically file megapolitical cases before the ECOWAS Community Court, knowing that they will not win? Why does the court entertain such cases, and how does it use these cases to cement its legitimacy? Drawing on six mega-political disputes, the author convincingly demonstrates that even though the ECOWAS court lacks jurisdiction over these disputes, it has been proactive in assuming such jurisdiction where litigants have framed their political grievances within the language of human rights violations. Especially in national election disputes, opposition politicians have sought symbolic gains - such as drawing attention to political contestation issues that may otherwise not be entertained at the national level - rather than court victory. On their part, the ICs have been very cautious in entertaining mega political cases, using the chance to strengthen their legitimacy by affirming their boundaries and asserting that they work in conjunction with national courts. Akinkugbe concludes by providing an alternative to thinking about these courts: they should be interpreted as "an alternative forum for the mobilization of opposition politics" and not "as a case for renaming or fundamentally jettisoning the previous important jurisprudence of the Court mainly in the realm of human rights" (page 177).

Similar to the experience from the ECOWAS court, election violations in the EACJ have been framed as treaty breaches to enable opposition political parties and politicians to mobilize their constituencies, as Gathii's chapter on challenging elections to the East African Legislative Assembly (chapter 1) elucidates. Both accounts illustrate, through in-depth empirical analyses, that opposition parties and politicians have resorted to using these ICs, among other

mechanisms, to seek alternative avenues of open political competition within fragile democratic contexts. In the same vein, Chapter 5 by Solomon Ebobrah and Victor Lando reveals the innovative means that the ICs and litigants adopt to avoid direct confrontation with governments whilst tackling matters of megapolitical relevance. Such strategies include issuing declaratory judgments in the EACJ over litigating human rights claims, purposefully mobilizing the language of human rights to call attention to member States' authoritarian tendencies in an effort to save their existence while creating room for political mobilization. In sum, rather than dismissing the cases altogether, litigants are innovatively framing political issues in terms of justiciable claims, which grants them legal avenues to judicialize political questions.

This book will prove enlightening for anybody with a keen interest in the role and functioning of Africa's ICs from an Afrocentric perspective. Spanning all African ICs, this engaging book digs into the complexities of the influence and performance of ICs to show that assessing their performance is best achieved by prioritizing the users of the courts and probing their intrinsic motivations. Furthermore, moving beyond the usual preoccupation with court victories and compliance, the book's conceptual and methodological sophistication coupled with its empirical depth make it a ground-breaking contribution to the study of ICs. In conclusion, the book contributes to ongoing debates about the performance of ICs and the development of the rule of law in Africa whilst opening up plenty of room for further research to strengthen some of its pioneering ideas. For example, would a systematic comparison that abandons compliance and effectiveness measures tell us which one of the four most active courts has proved more 'impactful' than the others? What factors would be relevant in such an assessment? These unanswered questions may be useful starting points for future comparative research.

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