

MISSION CREEP OR A SEARCH FOR RELEVANCE: THE EAST AFRICAN COURT OF JUSTICE'S HUMAN RIGHTS STRATEGY

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INTRODUCTION

The East African Court of Justice (EACJ) was inaugurated in 2001 following its establishment as the judicial organ of the East African

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Community (EAC).¹ A primary objective of the EAC is to establish a customs union, a common market, a monetary union, and ultimately a political federation.² In 2005, the EAC became a customs union, and in 2010 it became a common market.³ Rwanda and Burundi became members of the EAC ten years after its establishment.⁴ Therefore, including the original members (Kenya, Uganda, and Tanzania), the East African Community has five members.

When the EAC was founded, its executive organs did not contemplate an active role for the EACJ in the regional integration process, much less so with respect to human rights.⁵ As a result, they did not adequately fund the court in its initial years—or subsequently—or give much attention to establishing it as an independent judicial organ.⁶

Notwithstanding these challenges, the EACJ exemplifies a new trend in African regional human rights enforcement. Rather than serving as a tribunal to resolve trade disputes, as envisaged by its original designers, the court has evolved into one that seeks to hold member governments accountable for violations of human rights and to promote good governance and the rule of law. Like its counterparts the Economic Community of West Africa Court of Justice (ECCJ) and the now-suspended Southern African Development Community (SADC) Tribunal, the EACJ has become an important human rights court. The human rights jurisprudence that these courts have produced so far stands in sharp contrast to the general reluctance of national courts in EAC member states

1. John Eudes Ruhangisa, Role of the East African Court of Justice in the Realization of Customs Union and Common Market 2–3 (paper presented at the Inter-Parliamentary Relations Seminar, Burundi National Assembly, Bujumbura, Burundi, Jan. 27–31, 2010), available at http://www.eac.int/news/index.php?option=com_docman&task=doc_view&gid=90&Itemid=78. The EAC was reestablished in 2000 following the ratification of the Treaty for the Establishment of the East African Community. *About the Treaty*, E. AFR. COMMUNITY, <http://www.eac.int/treaty/> (last updated Aug. 20, 2007). The original EAC was disbanded in 1977 following major differences among the three original members: Kenya, Uganda, and Tanzania. See JAMES THUO GATHII, AFRICAN REGIONAL TRADE AGREEMENTS AS LEGAL REGIMES 43, 181, 268 (2011).

2. GATHII, *supra* note 1, at 181–202.

3. *Id.* at 182.

4. *Id.* at 181.

5. See, e.g., East African Legislative Assembly [EALA], *Official Report of the Proceedings of the East African Legislative Assembly*, 59th Sitting, 1st Assemb., 1st Meeting, 5th Sess. 17–18 (Dec. 6, 2005), available at http://www.eala.org/key-documents/doc_details/70-6-december-2005.html (quoting the EAC Legal Counsel discouraging EALA members from invoking the EACJ's jurisdiction to issue an advisory opinion on the powers of the executive organs of the EAC relative to those of the EALA).

6. E. AFRICAN COURT OF JUSTICE, STRATEGIC PLAN: 2010–2015, at 14 (2010) [hereinafter EACJ STRATEGIC PLAN], available at http://eacj.huriweb.org/wp-content/uploads/2013/09/EACJ_StrategicPlan_2010-2015.pdf (noting that the EACJ faces “crippling challenges,” including “budgetary constraints” and “undetermined terms and conditions of service for Judges”).

to enforce human rights guarantees.⁷ Remarkably, these courts have construed their powers broadly to allow them to decide human rights cases even though their respective constitutive treaties—in the case of both the EACJ and the SADC Tribunal—do not include a specific grant of jurisdiction to entertain human rights cases.⁸

The EACJ's growing human rights case law is part of a new form of rights-based legal mobilization that must be seen in the shifting normative context in which trade agreements include human rights in their preambles. This mobilization by lawyers, legal groups, and political actors has allowed courts to become new forums for political struggle and the vindication of rights claims.⁹ In addition, the judges have engaged in a strategy to gain, promote, and then protect their institutional power. The EACJ has capitalized on this shifting context and in the process has redefined its role as conceived in the Treaty for the Establishment of the East African Community. The court has decided important human rights cases, including a case involving the military arrest and detention of fourteen individuals after they had been granted bail by the High Court of Uganda; the failure to investigate over 3,000 cases of murder, torture, cruelty, and inhumane or degrading treatment committed by security forces against the government of Kenya; and incommunicado detention by the government of Rwanda.

The EAC member states, however, perceive the EACJ's self-proclaimed human rights jurisdiction as a subversion of their sovereignty.

7. See Yash Ghai, *The Kenyan Bill of Rights: Theory and Practice*, in PROMOTING HUMAN RIGHTS THROUGH BILLS OF RIGHTS: COMPARATIVE PERSPECTIVES 187 (Philip Alston ed., 1999) (discussing the challenges relating to the enforcement of the Bill of Rights in Kenya); Joe Oloka-Onyango, *Judicial Power and Constitutionalism in Uganda: A Historical Perspective*, in UGANDA: STUDIES IN LIVING CONDITIONS, POPULAR MOVEMENTS, AND CONSTITUTIONALISM 463 (Mahmood Mamdani & Joe Oloka-Onyango eds., 1994) (discussing the limitations of judicial review of executive conduct relating to human rights in Uganda); Chris Maina Peter, *Five Years of the Bill of Rights in Tanzania: Drawing a Balance-Sheet*, 4 AFR. J. INT'L & COMP. L. 131, 131 (1992) (stating that, in Tanzania, "[t]he inclusion of the Bill of Rights into the Constitution was basically against the will of the State").

8. See Protocol on Tribunal in the Southern African Development Community arts. 14–15, Aug. 7, 2000, available at http://www.sadc.int/files/1413/5292/8369/Protocol_on_the_Tribunal_and_Rules_thereof2000.pdf; Treaty for the Establishment of the East African Community art. 27(1), Nov. 30, 1999, 2144 U.N.T.S. 255 [hereinafter EAC Treaty] ("The Court shall *initially* have jurisdiction over the interpretation and application of this Treaty" (emphasis added)); *id.* art. 27(2) ("The Court shall have such other original, appellate, human rights and other jurisdiction as will be determined by the Council at a suitable subsequent date. To this end, the Partner States shall conclude a protocol to operationalise the extended jurisdiction"); *infra* Part I.B (discussing the *Sebalu* lawsuit in the context of the failure to operationalize Article 27(2)).

9. Of course, these courts also provide an additional route for political players to resolve their conflicts.

They believe that the court's human rights decisions are creating new understandings of legality to which the states do not subscribe at home. These states are resisting allowing the court to conform their domestic affairs to international understandings of legality. In short, EAC states did not sign EAC treaties as evidence of their commitments to respect human rights; the EACJ is dragging them kicking and screaming towards keeping those commitments.

This paper argues that the remarkable rise of human rights case law in the EACJ represents a significant instance of building and forging judicial autonomy that derives from the entrepreneurship, resourcefulness, and creativity of the judges on the court and of the court's long-standing registrar.¹⁰ This was achieved in large part through court efforts to forge a broad network of lawyers and civil society groups based in Arusha, Tanzania, and throughout East Africa, with support from civil society groups across Africa and beyond and from their Western donors.¹¹ In addition, well-organized civil society groups, such as the East African Law Society, its constituent members, and the national bar associations of each EAC member State, supported this turn every step of the way. Thus, to understand the EACJ's turn to human rights litigation, one has to examine how several key constituencies shaped the context within which the EACJ came to hold that it had "jurisdiction not to abdicate" from the protection of human rights,¹² which it assumed even though the executive organs of the EAC would have preferred otherwise.

Why did the EACJ ignore the formal restrictions on its jurisdiction (and the informal ones, such as funding limits)? Why did it resort to elastic interpretive methodologies to advance the protection and promotion of human rights in its case law? The literature on delegation to international courts has responded to such queries in at least five ways. First, by conceptualizing ICs as Agents and states as their Principals (P-A theory); second, by arguing that ICs are Trustees; third, by demonstrating how ICs alter politics (the Altered Politics framework); fourth, by advancing a theory of constrained independence; and fifth, by advancing a theory of bounded discretion. Part III of this Article extensively discusses each of

10. See EAC Treaty, *supra* note 8, art. 45(4) ("[T]he Registrar shall be responsible to the President of the Court for the day to day administration of the business of the Court. The Registrar shall also carry out the duties imposed upon him by this Treaty and rules of the Court.").

11. See Makau Mutua, *Human Rights NGOs in East Africa: Defining the Challenges*, in HUMAN RIGHTS NGOs IN EAST AFRICA: POLITICAL AND NORMATIVE TENSIONS 13, 19–20 (Makau Mutua ed., 2009) (criticizing these groups for their dependency on Western funding and methodologies).

12. *Katabazi v. Sec'y Gen. of the E. African Cmty.*, Ref. No. 1 of 2007, at 1–2 (Nov. 1, 2007), available at http://eacj.huriweb.org/wp-content/uploads/2012/11/NO_1_OF_2007.pdf.

these approaches and explores the extent to which they explain the EACJ's resort to teleological or purposive interpretive methodologies to decide human rights cases. While each of these approaches provide insights that help to explain the EACJ's human rights decisions, none of them fully fit the EACJ's experience, as the conditions for the application of each are not always present in Africa.

To set the context for the rest of the paper, Part I examines the EACJ's human rights case law. Part II examines the reasons accounting for the rise of this case law. Part III examines what the EACJ experience says about contemporary theories of delegation to international courts, none of which fit the developing country experience, in particular the regional economic courts in Africa. Existing theories of delegation have little or nothing to say about how regional courts in developing countries with poorly functioning political systems and executives and legislatures that have little to no legitimacy have assumed broad powers. To the extent that the conditions for the application of contemporary theories of delegation do not exist in developing countries, there is a huge theoretical gap in the delegation literature.

I. THE HUMAN RIGHTS JURISPRUDENCE OF THE EACJ

In assuming jurisdiction over human rights cases, the EACJ has effectively arrogated to itself the power to establish the validity of the conduct of member states in this newly constitutionalized regional human rights regime. It has exercised jurisdiction over human rights notwithstanding the Council of Ministers' failure to formally extend such jurisdiction to it, a move that the Council has been considering since 2004. Hence, rather than wait for such formal conferral, the court has interpreted its jurisdiction to include human rights cases. As such, its human rights case law goes far beyond the scope that the Treaty explicitly contemplated. The court's human rights jurisprudence also stands in contrast to the plan to make the court the legal engine for creating a common market.¹³ Although the EAC has been a customs union since 2005 and a common market since 2010, the court has not been used to resolve any customs or common market questions.¹⁴ In fact, the protocols establishing the customs union

13. Cf. James McCall Smith, *The Politics of Dispute Settlement Design: Explaining Legalism in Regional Trade Pacts*, 54 INT'L ORG. 137, 147–50 (2000) (arguing that dispute settlement mechanisms in regional integration schemes are intended to reassure private investors but that regional integration arrangements between partners of unequal economic size and bargaining leverage often fail to create such mechanisms).

14. The exception is an advisory opinion that clarified the relationship between “variable geometry” and consensus decisionmaking. See *In re A Request by the Council of Ministers of the East*

and common market grant jurisdiction to alternative bodies, effectively denying the court jurisdiction to decide controversies over any customs or common market rules.¹⁵ This Part examines the court's human rights cases, beginning with the 2007 *Katabazi* case. These cases exemplify the court's activism.

A. The *Katabazi* Case

On November 16, 2005, Ugandan "security personnel" rearrested fourteen Ugandans who had just been granted bail by the High Court.¹⁶ These events have been described as "the worst attack on judicial independence through the siege of the High Court."¹⁷ Not only did the security personnel interfere with the preparation of the bail papers, they also took the arrestees before a military general court-martial, where they were charged with unlawful possession of firearms and terrorism under the same facts that had supported the previous charges, for which they had been granted bail.¹⁸ The Ugandan Constitutional Court, on petition from the Uganda Law Society, declared the detentions unconstitutional and

African Community for an Advisory Opinion, Appl. No. 1 of 2008 (First Instance Div., 2009), available at http://eacj.huriweb.org/wp-content/uploads/2012/11/advisory_opinion_1_of_2008.pdf. Variable geometry, in the African context, means "rules, principles and policies adopted in trade integration treaties that give Member States, particularly the poorest members: (i) policy flexibility and autonomy to pursue at slower paces timetabled commitments and harmonization objectives; (ii) mechanisms to minimize distributional losses by creating opportunities such as compensation for losses arising from implementation of region-wide liberalization commitments and policies aimed at the equitable distribution of the institutions and organizations of regional integration to avoid concentration in any one member; and (iii) preferences in industrial allocation among members in an RTA and preferences in the allocation of credit and investments from regional banks." GATHII, *supra* note 1, at 35.

15. See Protocol on the Establishment of the East African Community Common Market art. 54(2), Nov. 20, 2009, available at http://www.eac.int/index.php?option=com_docman&Itemid=226 (follow "EAC Protocols Update" hyperlink); Protocol on the Establishment of the East African Community Customs Union art. 24(1)(e), Mar. 2, 2004, available at http://www.eac.int/index.php?option=com_docman&Itemid=226 (follow "EAC Protocols Update" hyperlink). In *East African Centre for Trade Policy and Law v. Secretary General of the East African Community*, Ref. No. 9 of 2012 (First Instance Div. May 9, 2013), available at http://eacj.huriweb.org/wp-content/uploads/2013/09/FL_EACCommunity-EACTPL.pdf, the court decided that these provisions were not inconsistent with its jurisdiction and supremacy over the interpretation of all EAC treaties. *Id.* at 33–35. The East African Law Society has filed a suit challenging the legality of sidestepping the EACJ. Press Release, E. African Court of Justice, EALS Asks Court to Nullify Protocol Provisions on Dispute Settlement (May 4, 2012), available at <http://eacj.org/?p=413>.

16. *Katabazi*, Ref. No. 1 of 2007, at 1–2. The case incorrectly lists this date as November 16, 2006. See KITUO CHA KATIBA: E. AFR. CTR. FOR CONSTITUTIONAL DEV., FIVE-YEAR STRATEGIC PLAN 2011–2016, at 10 (2011) (listing the correct date).

17. KITUO CHA KATIBA: E. AFR. CTR. FOR CONSTITUTIONAL DEV., *supra* note 16, at 10.

18. *Katabazi*, Ref. No. 1 of 2007, at 2.

ordered the individuals released from detention.¹⁹ The Ugandan government failed to comply with that decision, and a complaint was thereafter filed in the EACJ.²⁰ The complainants challenged their rearrest, military charges, and detention as inconsistent with the provisions of the Treaty.²¹ They argued that this conduct, together with the refusal by the Ugandan government to comply with the bail order, constituted an infringement of Articles 5(1), 6, 7(2), and 8(1)(c) of the Treaty.²² The respondents, the Secretary-General of the East African Community and the Attorney General of Uganda, challenged the EACJ's jurisdiction to deal with matters of human rights, arguing that the Council had not yet extended that jurisdiction as contemplated under Article 27(2) of the Treaty.²³

Article 5(1) of the Treaty provides that “the objectives of the Community *shall be to develop policies and programmes aimed at widening and deepening co-operation among the Partner States* in political, social and cultural fields, research and technology, defence, security and *legal and judicial affairs.*”²⁴ Article 6 provides that the objectives of the Community include the promotion of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights.²⁵ Article 7(2) provides that the “principles of good governance, including adherence to the principles of democracy, *the rule of law, social justice and the maintenance of universally accepted standards of human rights*” are operational principles of the EAC.²⁶ Furthermore, Article 8(1)(c) obliges EAC partner states to “abstain from any measures likely to jeopardize the achievement of those objectives or the implementation of the provisions of this Treaty.”²⁷ Although the EACJ noted that it did not have jurisdiction to decide human rights cases, it nevertheless held that it could decide such cases.²⁸ Specifically, the EACJ determined that “[w]hile the Court will not assume jurisdiction to adjudicate on human rights disputes, it will not abdicate from exercising its jurisdiction of interpretation under Article 27(1) merely because the reference includes allegation[s] of human rights violation[s].”²⁹ In other

19. *Id.*

20. *Id.* at 2–3.

21. *Id.*

22. *Id.* at 3.

23. *Id.* at 12–14.

24. EAC Treaty, *supra* note 8, art. 5(1).

25. *Id.* art. 6.

26. *Id.* art. 7(2).

27. *Id.* art. 8(1)(c).

28. *Katabazi*, Ref. No. 1 of 2007, at 14–16.

29. *Id.* at 16.

words, the EACJ held that it could not abdicate its responsibility to interpret the provisions of the Treaty, including those relating to the rule of law, human rights, and democracy. Moreover, it noted that Article 23 provides that the EACJ “shall ensure the adherence to law.”³⁰ Thus, the Court held that it has Article 27(1) jurisdiction to exercise its powers under Article 23. Citing cases from the African Commission on Human and Peoples’ Rights and from the United Kingdom, the court held that it had an obligation to “provide a check on the exercise of the responsibility . . . to protect the rule of law.”³¹ The Court then determined that Articles 5(1), 6, 7(2), and 8(1)(c) require Partner States to abide by the decisions of their courts.³² It held,

[T]he intervention by the armed security agents of Uganda to prevent the execution of a lawful Court order violated the principle of the rule of law and consequently contravened the Treaty. Abiding by the court decision is the corner stone of the independence of the judiciary which is one of the principles of the observation of the rule of law.³³

The court held that to accept Uganda’s defense that the rearrest and detention of the complainants had been necessary for security reasons “would lead to an unacceptable and dangerous precedent, which would undermine the rule of law.”³⁴

B. Post-*Katabazi* Human Rights Cases

Rugumba v. Secretary General of the East African Community was brought on behalf of a Rwandan citizen who had been held incommunicado without trial for five months.³⁵ The Rwandan government objected to jurisdiction.³⁶ The claimant argued that Rwanda had violated the Treaty provisions relating to good governance, the rule of law, and human rights.³⁷ The court asserted its jurisdiction to ensure that Partner States adhere to the principles of good governance and the rule of law.³⁸ The court held that to not determine whether Rwanda had violated Articles 6(d) and 7(2) of the

30. *Id.* at 23 (quoting EAC Treaty, *supra* note 5, art. 23).

31. *Id.*

32. *Id.* at 15–23.

33. *Id.* at 23.

34. *Id.* at 22.

35. Ref. No. 8 of 2010, ¶ 2 (First Instance Div. Dec. 1, 2011), *available at* <http://eacj.huriweb.org/wp-content/uploads/2012/11/Plaxeda-Rugumba-2010-8-judgment-2011.pdf>.

36. *Id.* ¶ 13.

37. *Id.* ¶ 8.

38. *Id.* ¶ 23.

Treaty would be a dereliction of its duty under Article 27(1) of the Treaty.³⁹ The court also rejected Rwanda's argument that the claimant had not exhausted domestic remedies and therefore was not properly before the court.⁴⁰ While the court could not issue an order for the Rwandan's release, it nevertheless held that his incommunicado detention without trial was contrary to Articles 6(d) and 7(2) of the Treaty.⁴¹ The court also invoked provisions of the African Charter on Human and Peoples' Rights, referred to in Article 7(2) of the Treaty, and asserted that these provisions were not decorative or cosmetic parts of the Treaty but were "meant to bind Partner States."⁴² The court declined to hold that exhaustion of the Treaty's statute of limitations was a bar to bringing the suit.⁴³

In *Independent Medical Legal Unit v. Attorney General of Kenya*,⁴⁴ the EACJ entertained yet another case that tested the argument that the court did not have jurisdiction over human rights. This time, the case related to allegations of executions, torture, cruelty, and inhuman and degrading treatment committed by agents of the Government of Kenya in the Mount Elgon area.⁴⁵ The plaintiff was a non-governmental organization that investigates human rights violations using forensic evidence.⁴⁶ As has become the tradition in these human rights cases, the Kenyan government brought an unsuccessful challenge to the jurisdiction of the court.⁴⁷ The court reiterated that even though it does not have human rights jurisdiction under Article 27(2), it has jurisdiction to interpret the Treaty.⁴⁸ Hence, as long as allegations brought before the court involve an

39. *Id.* The Court further noted that it could not "stand idly by and declare itself to be impotent of the capacity to render itself forcefully where the rule of law is threatened in its eyes and in the eyes of the Treaty." *Id.* ¶ 41.

40. *Id.* ¶ 30–31.

41. *Id.* ¶ 36–37.

42. *Id.* ¶ 37.

43. *Id.* ¶ 28 (reasoning that a mathematical computation of time in a criminal case in which the conduct complained of was a chain of continuous events would be inappropriate); *cf.* *Ariviza v. Attorney Gen. of Kenya*, Appl. No. 3 of 2010, at 10 (Dec. 1, 2010), *arising from* Ref. No. 7 of 2010, *available at* <http://eacj.huriweb.org/wp-content/uploads/2013/10/RULING-OF-1ST-DECEMBER-2010.pdf> (holding that internal law cannot be invoked to justify a violation of the Treaty).

44. Ref. No. 3 of 2010 (First Instance Div. June 29, 2011), *available at* <http://eacj.huriweb.org/wp-content/uploads/2012/11/3-of-20101.pdf>. The First Instance Division's opinion incorrectly lists the applicant as the Independent Medical Unit. *See* *Attorney Gen. of Kenya v. Indep. Med. Legal Unit*, App. No. 1 of 2011 (App. Div. Mar. 15, 2012), *available at* <http://eacj.huriweb.org/wp-content/uploads/2012/11/appeal-no-1-of-20112.pdf>.

45. Ref. No. 3 of 2010, at 2.

46. *See* INDEPENDENT MEDICO-LEGAL UNIT, <http://www.commonwealthhealth.org/partner/independent-medico-legal-unit/>.

47. Ref. No. 3 of 2010, at 3–4.

48. *Id.* at 5–6.

interpretation of the Treaty, their relation to violations of human rights does not preclude jurisdiction.⁴⁹ The court noted that the only limitation to its jurisdiction was that a suit against officers of a partner state—other than the Attorney General—is not permissible.⁵⁰

In *Sebalu v. Secretary General of the East African Community*,⁵¹ the court took its biggest step yet towards securing its position in the EAC. An applicant had lost judicial challenges to an electoral result in the Ugandan Supreme Court.⁵² He brought suit against the Ugandan government in the EACJ, arguing that the failure of the Council to extend the jurisdiction of the court since May 2004, when a Draft Protocol to Operationalize the Extended Jurisdiction of the EACJ was written, was an infringement of Articles 6, 7(2), and 8(1)(c) of the Treaty.⁵³ Additionally, the applicant argued that Uganda's failure to make written comments on the Draft Protocol also constituted an infringement of the Treaty, since the people of Uganda could not enjoy the full rights of good governance, democracy, the rule of law, and human rights.⁵⁴ The court held that the delay in extending its appellate jurisdiction contravened the fundamental principles of good governance embodied in Article 6 of the Treaty.⁵⁵ The court also noted that the failure to extend its jurisdiction implied that this function was exclusively the concern of the executive organs of the EAC.⁵⁶ Affirming that the era of unaccountable governance had passed, the court held that holding officers accountable is required by Article 6(d) of the Treaty.⁵⁷ An attempt to appeal the First Division's decision was dismissed for not being timely filed.⁵⁸

The remarkable scope of the EACJ's jurisdiction to interpret the lawfulness of a partner state's conduct under the Treaty has resulted in suits challenging the construction of a highway through the scenic Serengeti

49. *Id.*

50. *See id.* at 7 (striking several Kenyan government officers off the suit and holding that the correct respondent was the Attorney General of Kenya).

51. Ref. No. 1 of 2010 (First Instance Div. June 30, 2011), available at <http://eacj.huriweb.org/wp-content/uploads/2012/11/No-1-of-2010.pdf>.

52. *Id.* at 4.

53. *Id.* at 4–5.

54. *Id.* at 12.

55. *Id.* at 42.

56. *Id.*

57. *Id.*

58. Sec'y Gen. of the E. African Cmty. v. Sebalu, Appl. No. 9 of 2012, at 18 (First Instance Div. Feb. 14, 2013), arising from Ref. No. 1 of 2010, available at <http://eacj.huriweb.org/wp-content/uploads/2013/09/Application-No-9-of-2012-SG-Sebalu.pdf>.

National Park in Tanzania,⁵⁹ a suit challenging the rendition of a terrorist suspect from one partner state to another and subsequent detention without trial,⁶⁰ and a suit challenging the implementation of a Referendum Law in Kenya (although the court ultimately dismissed that case on the merits).⁶¹ The only constraints that the court has placed upon the scope of its jurisdiction are that it refuses to hear cases brought by litigants engaged in forum shopping: bringing before the court proceedings on commercial matters that raise substantially the same matters between the same parties as a case that is pending in the national courts of a partner state.⁶²

II. EXPLAINING THE RISE OF THE EACJ'S HUMAN RIGHTS JURISPRUDENCE

The rise of the EACJ's human rights case law has been a major part of the strategy of its judges and its registrar to escape the court's initial obscurity within the EAC and to overcome its severe institutional weaknesses. The court's human rights jurisprudence stands somewhat paradoxically alongside its institutional weaknesses, which include the ad hoc basis on which most of its judges serve⁶³ and the failure to settle their terms of service, the lack of a permanent location and building, insufficient staff, and an inadequate budget to pay for its operations.⁶⁴ A lack of appreciation of the court's role by the EAC's executive organs is also a

59. African Network for Animal Welfare v. Attorney Gen. of Tanz. (*Serengeti*), Ref. No. 9 of 2010 (First Instance Div. Aug. 29, 2011), *aff'd* App. No. 3 of 2011 (App. Div. Mar. 15, 2012), available at <http://eacj.huriweb.org/wp-content/uploads/2013/10/Final-Ruling-ANAW-vs-AG-TZ-2011.pdf>.

60. Omar v. Attorney Gen. of Kenya, Appl. No. 4 of 2011 (First Instance Div. Dec. 1, 2011), arising from Ref. No. 4 of 2011, *rev'd on other grounds*, App. No. 2 of 2012 (App. Div. Apr. 15, 2013), available at <http://eacj.huriweb.org/wp-content/uploads/2013/10/Omar-Awadh-Omar-Vs-AG-Kenya.pdf>.

61. Ariviza v. Attorney Gen. of Kenya, Appl. No. 3 of 2010, at 5 (Dec. 1, 2010), arising from Ref. No. 7 of 2010, available at <http://eacj.huriweb.org/wp-content/uploads/2013/10/RULING-OF-1ST-DECEMBER-2010.pdf>.

62. See Alcon Int'l Ltd. v. Standard Chartered Bank of Uganda, Ref. No. 6 of 2010, at 8 (First Instance Div. 2011), *rev'd*, App. No. 2 of 2011 (Mar. 16, 2012), *rev'd on other grounds*, Ref. No. 6 of 2010 (First Instance Div. Sept. 2, 2013), available at <http://eacj.huriweb.org/wp-content/uploads/2012/11/Alcon-International-2010-6-judgment-2011.pdf>.

63. Press Release, E. African Court of Justice, EACJ Judge President, Principal Judge Now Full-Time in Arusha (July 2, 2012), available at <http://eacj.org/?p=397>. Since July 2012, the Principal Judge of the First Instance Division and the President of the Appellate Division have been permanently located to Arusha, Tanzania. *Id.* The court also sits for longer sessions when it meets in its quarterly sessions. For example, in November 2013, it had a month-long sitting. Press Release, E. African Cmty., EACJ 4th Quarter Sessions to Resume This Week (Nov. 4, 2013), available at http://www.eac.int/index.php?option=com_content&view=article&id=1401:eacj-4th-quarter-sessions-to-resume-this-week&catid=146:press-releases&Itemid=194.

64. EACJ STRATEGIC PLAN, *supra* note 6, at 14.

significant challenge.⁶⁵

The judges and registrar have engaged in earnest efforts to develop, cultivate, build, and justify the EACJ's relevance and its place within the EAC's integration agenda: in essence, building its political legitimacy. In doing so, the judges and registrar of the court have grounded themselves within a powerful network of lawyer associations and pro-democracy civil society groups. This network has been decisive in the court's foray into deciding human rights cases despite its lack of a mandate and the continued refusal by the EAC's executive organs to extend that jurisdiction.⁶⁶ The court's new legitimacy largely explains why the court's powerful human rights jurisprudence has not been entirely eliminated through "recontracting politics" (i.e., a disbandment of the court).⁶⁷ This sharply contrasts with the backlash that the SADC Tribunal faced following its suspension in August 2012.⁶⁸ Arguably, the SADC Tribunal did not root itself in a network of powerful constituents and was therefore more vulnerable to recontracting politics.⁶⁹

The EACJ's independence and activism has come at a moment when many African governments are beginning to develop their capabilities to

65. The EACJ's mid-term review of its 2010–2015 Strategic Plan at the end of October 2012 was the first time the entire staff of the EACJ met together. A primary theme of the review was developing the best methods for improving the court's design and its "appreciation, visibility and capacity." *EACJ Conducts Midterm Review of its 5-Year Strategic Plan*, EACJ E-NEWSL. (E. African Court of Justice, Arusha, Tanzania), Dec. 1, 2012, at 3, available at <http://www.gghrp.org/wp-content/uploads/2012/12/EACJ-e-Newsletter-December-2012.pdf>. An end of year review session on the court's development was held at the end of the Fourth Quarterly Session in November 2013. EACJ 4th Quarter Sessions to Resume This Week, *supra* note 63.

66. Cf. DANIEL P. CARPENTER, *THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES 1862–1928* (2001) (analyzing how the forging of networks that supported a federal agency's mission were crucial to the success of that agency).

67. Karen J. Alter, *Agents or Trustees? International Courts in Their Political Context*, 14 EUR. J. INT'L REL. 33, 35 (2008); see also *infra* Part III.A (discussing recontracting politics in the context of Principal Agent theory). This jurisprudence is powerful in the sense that it has effectively challenged the conduct of the executive branches of the EAC member states without the traditional reticence that national courts in these countries often display when invited to decide cases involving human rights abuses, particularly those perceived to involve state security, e.g., *Katabazi v. Sec'y Gen. of the E. African Cmty.*, Ref. No. 1 of 2007 (Nov. 1, 2007), available at http://eacj.huriweb.org/wp-content/uploads/2012/11/NO_1_OF_2007.pdf, or other executive prerogatives, e.g., *Nyong'o v. Attorney Gen. of Kenya (Nyong'o III)*, Ref. No 1 of 2006 (Mar. 30, 2007), available at http://eacj.huriweb.org/wp-content/uploads/2012/11/EACJ_Reference_No_1_2006.pdf (involving the appointment of legislators to the East African Legislative Assembly).

68. Erika de Wet, *The Rise and Fall of the Tribunal of the Southern African Development Community: Implications for Dispute Settlement in Southern Africa*, 28 ICSID Rev. 45, 47 (2013).

69. This hypothesis is based on preliminary research. It needs an in-depth examination, a project that the author began pursuing in 2013 with Professors Karen Alter and Lawrence Helfer.

plan, innovate, and author policy in the human rights field.⁷⁰ Although African governments and regional courts are still in the nascent phase of developing this capacity, African civil society organizations have built it up and have been earnestly seeking to influence these governments and regional courts.⁷¹

The place of human rights, the rule of law, and democracy within the EAC governments is still in its formative stage.⁷² For the most part, the executive organs of the EAC would prefer that the EACJ play a larger role with respect to trade, investment, and economic integration and play no role in deciding human rights cases.⁷³ This narrow vision of regional integration has been challenged since the early years of the EAC, particularly by the East African Legislative Assembly (EALA) and civil society groups and eventually by the EACJ's important human rights case law. As one member of the East African Legislative Assembly argued in 2002:

We will take our duties seriously, we will be aware of where we are in the different countries in devolving the new responsibility for our own development, not only for our own transformation, but also for the *respect of the rule of law and the observance of Human Rights*.⁷⁴

70. See, e.g., RWANDA NAT'L COMM'N FOR HUMAN RIGHTS, REPORT OF CONFERENCE OF NATIONAL HUMAN RIGHTS INSTITUTIONS IN THE EAST AFRICAN COMMUNITY 5 (2009), available at http://www.kas.de/wf/doc/kas_18294-1522-2-30.pdf (creating an association of the human rights institutions in each of the EAC partner states).

71. For example, NGOs and law societies played an important role in how the ECOWAS Court of Justice came to acquire a human rights jurisdiction. See Karen Alter, Laurence R. Helfer & Jacqueline R. McAllister, *A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice*, 107 AM. J. INT'L L. 737 (2013).

72. See *EAC Leaders Establish East African Peace and Security Council*, XINHUA AFRICAN NEWS (Nov. 30, 2011, 22:25), http://news.xinhuanet.com/english/africa/2013-11/30/c_132931222.htm. The EAC peace and security framework includes the protection of human rights. See *EAC Peace & Security Strategy Overview*, E. AFR. CMTY., http://www.eac.int/security/index.php?option=com_content&view=article&id=67&Itemid=143 (last visited May 16, 2014).

73. As noted above, the EAC did not give the court jurisdiction over dispute resolution under the Customs Union and Common Market protocols. In its 15th ordinary meeting, the EAC Summit decided to extend the jurisdiction of the EACJ to include commercial, investment and monetary matters, but decided to work with the African Union (rather than the EACJ) on matters relating to human rights and crimes against humanity. See E. AFRICAN CMTY., COMMUNIQUÉ OF THE 15TH ORDINARY SUMMIT OF THE EAC HEADS OF STATE ¶ 16 (2013), available at http://www.eac.int/index.php?option=com_content&view=article&id=1437:communique-15th-ordinary-summit-of-the-eac-heads-of-state-&catid=146:press-releases&Itemid=194.

74. EALA, *Official Report of the Proceedings of the East African Legislative Assembly*, 2nd Sitting, 1st Assemb., 1st Sess., 2nd Meeting 22 (Jan. 21, 2002) (statement of Rose Waruhiu, Member of Parliament for Kenya) (emphasis added), available at http://www.eala.org/key-documents/doc_details/35-21-january-2002.html.

This view of EAC integration is shared by a broad coalition of civil society groups that see the EACJ as a pressure point for advancing their goals.⁷⁵ It is therefore not surprising that the court's human rights jurisprudence has won the support of these civil society groups: in particular the East African Law Society (EALS) and Kituo Cha Katiba, two leading regional human rights groups that have deep roots in East Africa.⁷⁶ The court's human rights case law has also been widely embraced by a broad range of civil society groups beyond those involved in constitutional, pro-democracy, and electoral issues, including governmental entities such as national human rights institutions in East Africa.⁷⁷ Although the adoption of human rights as national policy has had varying success across East African countries, the EAC was reestablished at a time when human rights campaigns had gained considerable credibility and experience within civil society groups, particularly in Kenya and Uganda.⁷⁸ The reestablishment provided possibilities for civil society groups to engage in human rights work at a regional level and without the same scrutiny as at the national level.

A. The Early Years: Constructing the Role of the EACJ in the EAC

To understand how the EACJ came to decide its human rights cases, it is important to go back to the EACJ's establishment. While it was inaugurated in 2001, the EACJ did not receive any cases until 2005. That year, a leading human rights scholar and former dean of the University of Makerere Law School in Uganda declared the court effectively stillborn, not only because it had not yet decided any cases but also because the Treaty had given it extremely restrictive jurisdiction by expressly declining to allow it to hear human rights cases.⁷⁹

75. On the East Africa Law Society's strategy of using regional courts to advance human rights and other goals, see *Public Interest Advocacy*, E. AFR. L. SOC'Y, <http://www.ealawsociety.org/index.php/our-programmes/public-interest-advocacy> (last visited Feb. 23, 2014).

76. See *About the East Africa Law Society*, E. AFR. L. SOC'Y, <http://www.ealawsociety.org/index.php/about-us/who-we-are> (last visited May 16, 2014); *History of Kituo Cha Katiba*, KITUO CHA KATIBA: E. AFR. CENTER FOR CONST. DEV., <http://www.kituoachakatiba.org/about-us/history-kituo-cha-katiba> (last visited May 16, 2014).

77. See *EAC States Urged to Respect Human Rights*, GUARDIAN (Dar es Salaam) (Jan. 25, 2012), available at <http://www.ippmedia.com/frontend/?l=37805> (showing the interest of national human rights institutions in joining with civil society groups to promote human rights issues within the EAC).

78. See Hans Peter Schmitz, *Transnational Activism and Political Change in Kenya and Uganda*, in *THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE* 39, 72 (Thomas Risse et al. eds., 1999) (concluding that transnational human rights groups in Uganda and Kenya had, by the 1990s, managed to transfer human rights norms to their domestic systems and had empowered nongovernmental human rights groups).

79. J. Oloka-Onyango, *Who Owns the East African Community?* 4 (Human Rights & Peace Ctr., Occasional Paper Ser. No. 1), available at http://huripec.mak.ac.ug/pdfs/Occasional_series_1.pdf. As the Registrar of the EACJ has noted,

*Mwatela v. East African Community*⁸⁰ was the first case to be decided by the court.⁸¹ It was brought by members of the EALA against the EAC to end an ongoing power struggle between the Council and the EALA over the EALA's legislative power.⁸² Article 49 of the Treaty had established the EALA as the legislative organ of the Community,⁸³ but the Council promulgated 15 Protocols on a variety of EAC integration issues without involving EALA.⁸⁴ Members of the EALA argued that the Council had unilaterally grabbed the EALA's legislative authority⁸⁵ by legislating

some important stakeholders still do not sufficiently appreciate the crucial role that has been entrusted to the Court by the Treaty. The Court should not be seen as an opponent to the policy makers whenever they are not happy with any of its rulings. The court interprets and applies the Treaty provisions for the achievement of the EAC objectives and not for purposes of pleasing any of the interested stakeholders.

John Eudes Ruhangisa, *The Role of the Legal Profession in the Regional Integration Process: A Case of East African Community*, E. AFR. LAW., Nov. 2011, at 9, 14. In addition to political leaders, the Registrar also discussed the EAC's "Policy Organs," which he noted have failed to give the court sufficient jurisdiction and in some instances have taken jurisdiction from it. *Id.* This refusal to extend the court's jurisdiction is reflected in the failure to date of the Council to approve the 2005 Draft Protocol to Operationalize the Extended Jurisdiction of the East African Court of Justice (the Zero Protocol). See Solomy Balungi Bossa, *Towards a Protocol Extending the Jurisdiction of the East African Court of Justice*, 4 E. AFR. J. HUM. RTS. & DEMOCRACY 31, 34–37 (2006) (describing the draft protocol). The Council has not supported, and in fact has formally opposed, extending the jurisdiction of the court to include cases involving human rights and even those under the Customs Union and Common Market Protocols. Interview with Donald Deya, Chief Exec. Officer, Pan African Lawyers Union, in Arusha, Tanz. (May 2012). The decision not to confer jurisdiction over cases under the Protocols was deliberate and meant to cause "mischief." *Id.* One of the court's strategic objectives is "[t]o proactively influence a positive shift in mindset of EAC Policy Organs and other Stakeholders concerning the role and place of the Court." EACJ STRATEGIC PLAN, *supra* note 6, at 19.

80. Appl. No. 1 of 2005 (Oct. 2006), available at http://eacj.huriweb.org/wp-content/uploads/2012/11/EACJ_reference_No1_2005.pdf.

81. Anne Pieter van der Mei, *Regional Integration: The Contribution of the Court of Justice of the East African Community*, 69 ZaöRV 403, 407 (2009) 407 (2009).

82. *Mwatela*, Appl. No. 1 of 2005, at 1.

83. Under this article, the Assembly

- (a) shall liaise with the National Assemblies of the Partner States on matters relating to the Community;
- (b) shall debate and approve the budget of the Community;
- (c) shall consider annual reports on the activities of the Community, annual audit reports of the Audit Commission and any other reports referred to it by the Council;
- (d) shall discuss all matters pertaining to the Community and make recommendations to the Council as it may deem necessary for the implementation of the Treaty;
- (e) may for purposes of carrying out its functions, establish any committee or committees for such purposes as it deems necessary;
- (f) shall recommend to the Council the appointment of the Clerk and other officers of the Assembly; and
- (g) shall make its rules of procedure and those of its committees.

The Assembly may perform any other functions as are conferred upon it by this treaty.

EAC Treaty, *supra* note 8, art. 49.

84. *Mwatela*, Appl. No. 1 of 2005, at 2–3.

85. EALA, *supra* note 5, at 7 (statement of Jared Kangwana, Member of Parliament for Kenya)

through Protocols that required only ratification by member States and not the EALA imprimatur.⁸⁶ EALA members also argued that between 2001 and 2005, the Council had only introduced two substantive bills before the EALA.⁸⁷ EALA members argued that this was contrary to the Treaty.⁸⁸ Furthermore, when members of the EALA introduced private members bills for passage, the Sectoral Council on Legal and Judicial Affairs, which reports to the Council, withdrew them from the EALA agenda.⁸⁹ Enraged, members of the EALA saw the withdrawal as a continuation of executive fiat by the Council.⁹⁰ Therefore, EALA members unanimously resolved to take the Council to the EACJ for a legal determination of the competencies of each of the EAC organs under the Treaty.⁹¹ They also sought to have the court hold that the Council's withdrawal of the private members bills from the EALA agenda had been inconsistent with the Treaty.⁹²

The court agreed with the EALA and held that the Sectoral Council had been constituted inconsistently with the Treaty.⁹³ As a result, it invalidated the Council's decision to withdraw the bills from EALA other

("[T]here is an attempt to legislate through protocols in this Community and thereby avoid bringing Bills into this House, either out of fear or out of a sinister motive to empower the Executive with legislative powers!").

86. *Id.* at 8. EALA members, especially those from Kenya, argued that ratification had not been properly pursued. *Id.* There were shouts of "dictatorship" and "banana republic," indicating the sense within the EALA that the Council had opted to take the easy political route to undertake integration objectives, rather than the legislative process. *Id.*

87. *Id.* at 4 (statement of Med Kaggwa, Chairperson of the Comm. on Legal Affairs, Rules and Privileges).

88. *Mwatela*, Appl. No. 1 of 2005, at 8–9.

89. *Id.* at 4–5.

90. *Id.* at 8.

91. EALA, *supra* note 5, at 14 (statement of Kate Kamba, Member of Parliament for Tanz.) ("[W]e should be taken seriously hence the need to have a proper interpretation of our mandate; whether we are actually needed in the East African Community as a body or we are just redundant. It should be clear so that we leave a legacy . . ."); Sukhdev Chhatbar, *East Africa: EAC Law Makers Go to Court over AG's "Interference" in Assembly*, E. AFR., Dec. 13, 2005, available at <http://allafrica.com/stories/200512130552.html>. EALA's concerns about its own redundancy and relevance were shared by the court and many lawyers, particularly those in EALS, who had been strategizing about the best ways to use the court's judicial authority. Interview with Donald Deya, Chief Exec. Officer, Pan African Lawyers Union, in Arusha, Tanz. (Oct. 2012); Interview with Donald Deya, Chief Exec. Officer, Pan African Lawyers Union, in Arusha, Tanz. (May 2011). Relevance was a concern at the court because no suit had yet been filed with it; the judges were "bored." Interview with Donald Deya, Chief Exec. Officer, Pan African Lawyers Union, in Arusha, Tanz. (Oct. 2012); Interview with Donald Deya, Chief Exec. Officer, Pan African Lawyers Union, in Arusha, Tanz. (May 2011).

92. *Mwatela*, Appl. No. 1 of 2005, at 6–7.

93. *Id.* at 8. The court noted that among the members who sat on the Sectoral Council was the Tanzanian Attorney General, yet the Tanzanian Constitution does not identify the Attorney General as a Minister. *Id.* at 12. The Treaty requires membership in the Council of Ministers, and therefore the Sectoral Council, to be made up of Ministers responsible for EAC cooperation matters. *Id.*

than through the legislative process.⁹⁴ Furthermore, the EACJ determined that the Council had no powers under the Treaty to withdraw bills introduced by private members without observing Assembly bills on the withdrawal of such bills.⁹⁵

At least two consequences followed from the *Mwatela* case, which gave the EACJ its first opportunity to emerge from invisibility and obscurity with headline-grabbing decisions. First, the court began to define itself by decisions that avoid the judicial subservience to political organs that has long characterized judicial decision-making in East African national judiciaries. *Mwatela* represents a successful instance of legislative pushback against the EAC executive organs. The pique between the EALA and the EAC political organs, namely the Council, gave the EACJ an opening to judicially determine the balance of power among EAC organs.⁹⁶ Second, the court indicated its independence from the EAC executive organs, which began to attempt to limit its jurisdiction after the case. The outcome of this case reflected the court's readiness to begin deciding cases independently.

One of the court's boldest decisions involved a rift in the Kenyan Parliament over the election of Kenyan members of the EALA.⁹⁷ The rift was a reflection of deep mistrust between and within political parties.⁹⁸ Instead of holding an election for members of the EALA, as required by Article 50 of the Treaty,⁹⁹ the government-controlled House Business Committee in the Parliament divided up the EALA seats among the Kenyan political parties in proportion to their strength in the Parliament.¹⁰⁰ A dispute arose. Two of the political parties submitted more than one list

94. *Id.* at 18. The court further noted that “the Assembly is a representative organ in the Community set up to enhance a people centred cooperation” and that “its independence under Article 16 of the Treaty should be preserved because the Treaty has not endowed the Council with any power to interfere in the operation of the Assembly.” *Id.* at 20.

95. *Id.* at 18. Furthermore, the court noted that Articles 14(3)(c) and 16 of the Treaty “dispel any notion that the decisions of the Council albeit on policy issues bind the Assembly in respect of any matter within its jurisdiction.” *Id.* at 19. It stated that it had “come to the conclusion that decisions of the Council have no place in areas of jurisdiction of the Summit, Court and the Assembly.” *Id.* at 21.

96. Don Deya, *EACJ Landmark Ruling Will Enhance the Rule of Law in the East African Region*, LEGALBRIEF AFR., Oct. 10, 2006, available at <http://www.legalbrief.co.za/article.php?story=2006101010275202>.

97. Nyong'o v. Attorney Gen. of Kenya (*Nyong'o III*), Ref. No. 1 of 2006, at 2–5 (Mar. 30, 2007), available at http://eacj.huriweb.org/wp-content/uploads/2012/11/EACJ_Reference_No_1_2006.pdf.

98. Interview with an attorney involved in the Nyong'o case, in Nairobi, Kenya (Aug. 2, 2013).

99. EAC Treaty, *supra* note 8, art. 50.

100. *Nyong'o III*, Ref. No. 1 of 2006, at 2–5.

of nominees for the EALA seats.¹⁰¹ Another of the parties submitted its list to a Parliamentary official.¹⁰² The claimants filed suit in the EACJ, alleging a violation of Article 50 of the Treaty.¹⁰³ The issue before the court was therefore whether the election of Kenya's members to the EALA had been conducted democratically and consistently with the Treaty.¹⁰⁴

In *Nyong'o*, the EACJ granted interim orders restraining the Clerk of the EALA and the Secretary-General of the EAC from recognizing the election of the nine Kenyan nominees until the court could decide the case on the merits.¹⁰⁵ The Kenyan government argued that only the High Court of Kenya had jurisdiction to decide the legality of the election of Kenyan legislators to the EALA.¹⁰⁶ It urged that an EACJ decision would, in effect, usurp the authority of the High Court.¹⁰⁷ The Kenyan government further argued that the applicants had no *locus standi* to bring the case since in Kenya, only the Attorney General could bring a suit to enforce the public interest.¹⁰⁸

By contrast, the applicants argued that the legality of the election rules and the process of nomination and approval of the EALA nominees could be challenged before the EACJ under Article 30 of the Treaty,¹⁰⁹ which gives any person who is resident in any of the EAC member states the ability to bring a case to the court.¹¹⁰ The applicants also contended that Kenya had violated Article 50 of the Treaty when selecting its nine members and that the elections were therefore void.¹¹¹ Article 50

101. *Id.* at 3.

102. *Id.* at 4 (noting that one list “was submitted by the party leader through the Clerk to the National Assembly as provided by the election rules. The other was presented to the Committee, in its afternoon session on 25th October, by the Government Chief Whip”).

103. *Id.* at 2.

104. *Id.* at 7–8.

105. *Nyong'o v. Attorney Gen. of Kenya (Nyong'o I)*, Ref. No. 1 of 2006, at 10 (Nov. 27, 2006), available at http://eacj.huriweb.org/wp-content/uploads/2006/11/EACJ_rulling_on_injunction_ref_No1_2006.pdf.

106. *Id.* at 4 (“[J]urisdiction over the interpretation and application of the Treaty does not extend to determining questions arising from elections of members of the EALA.”). The Attorney General pointed out that Article 52(1) of the Treaty expressly reserves the jurisdiction to determine such questions to the appropriate institutions of the Partner States. *Id.*; see also EAC Treaty, *supra* note 8, art. 52(1) (“Any question that may arise whether any person is an elected member of the Assembly . . . shall be determined by the institution of the Partner State that determines questions of the election of members of the National Assembly . . .”).

107. *Nyong'o III*, Ref. No. 1 of 2006, at 13.

108. *Id.*

109. *Id.*

110. EAC Treaty, *supra* note 8, art. 30 (allowing “Legal and Natural Persons” to file references to the EACJ for infringements of the Treaty).

111. *Nyong'o III*, Ref. No. 1 of 2006, at 7.

“stipulates that the elected members shall, as much as feasible, be representative of specified groups, and sets out the qualifications for election.”¹¹² The court agreed with the applicants. It held that Article 50 must be read to require a process by which members of each partner state’s parliament vote for, rather than appoint, the State’s members to the EALA.¹¹³ Since the Parliament had not voted for its EALA members, the court found that an election as required by Article 50 of the Treaty had not taken place.¹¹⁴ This in turn precluded application of Article 52(1), which would have given Kenya exclusive jurisdiction if an election had taken place.¹¹⁵ The court held that Kenya had violated the provisions of Article 50 of the Treaty by holding a “fictitious election in lieu of a real election.”¹¹⁶ The court noted that the Parliament had not made its rules on electing EALA members “in exercise of sovereignty inherent in a state, but in exercise of a discretionary power conferred on it by the Treaty.”¹¹⁷

The court also declared its supremacy over national courts in the interpretation of the provisions of the Treaty.¹¹⁸ Furthermore, the court concluded that there was neither a requirement of exhaustion of local remedies prior to invoking its jurisdiction¹¹⁹ nor a *locus standi* bar that prevented East African residents from enjoying the cause of action expressly provided by Article 30 of the Treaty.¹²⁰

The public visibility of *Mwatela* was low compared to that of *Nyong’o*. As the next section demonstrates, the *Nyong’o* case so provoked East African presidents that the court witnessed the first reduction of its authority.

112. *Id.* at 3 (emphasis added).

113. *Nyong’o III*, Ref. No. 1 of 2006, at 34.

114. *Id.*

115. *Id.* at 14–22.

116. *Id.* at 43.

117. *Id.* at 42. The court affirmed this conclusion in a similar 2011 challenge from Uganda. *See Democratic Party v. Sec’y Gen. of the E. African Cmty.*, App. No. 6 of 2011 (First Instance Div. Nov. 30, 2011), available at <http://eacj.huriweb.org/wp-content/uploads/2011/11/Democratic-Party-Vs-Secretary-General.pdf> (restraining the Attorney General and Parliament of Uganda from proceeding with the election of EALA members from Uganda until the court could determine whether the rules of election to the EALA set by the Ugandan Parliament were consistent with Article 50 of the Treaty, particularly because they did not allow members of opposition parties to compete in those elections).

118. *Nyong’o III*, Ref. No. 1 of 2006, at 20.

119. *Id.* at 21.

120. *Id.* at 16–17 (concluding that no provision of the Treaty “requires directly or by implication the claimant to show a right or an interest that was infringed and/or damage that was suffered as a consequence of the matter complained of in the reference”).

B. Backlash Following *Nyong'o*

When *Nyong'o* was handed down, outrage from Kenya and the Council quickly followed.¹²¹ The EACJ was criticized for overstepping its jurisdiction.¹²² Treaty amendments to reduce the court's authority were quickly proposed.¹²³ Without broad consultation, the Summit quickly approved the amendments on December 14, 2006.¹²⁴ These amendments included restructuring the court into two divisions, a First Instance Division and an Appellate Division; providing grounds for appeal to the Appellate Division; adding additional grounds for removing a judge from office; limiting the court's jurisdiction "so as not to apply to 'jurisdiction conferred by the Treaty on organs of Partner States'"; and adding a two-month time limit for cases brought by legal and natural persons.¹²⁵ Additionally, the amendments allowed an EACJ judge to be removed from office after being removed from office in a partner state for misconduct.¹²⁶

EALS swiftly came to the court's defense via terse editorials in the press and letters to the three East African presidents.¹²⁷ Invoking Article 30

121. *E. African Law Soc'y v. Attorney Gen. of Kenya*, Ref. No. 3 of 2007, at 1–5 (2008), available at <http://eacj.huriweb.org/wp-content/uploads/2012/11/Ref-3-of-2007.pdf>; *Kibaki Rails at EAC Court as Rwanda, Burundi Join Up*, E. AFR. (Dec. 4, 2006, 00:00), <http://www.theeastafrican.co.ke/news/-/2558/252342/-/t6awg5z/-/index.html>.

122. See *Attorney Gen. of Kenya v. Nyong'o (Nyong'o II)*, Appl. No. 5 of 2007, at 22 (Feb. 6, 2007), arising from Ref. No. 1 of 2006, available at http://eacj.huriweb.org/wp-content/uploads/2007/02/EACJ_application_No5_2007.pdf ("We note that clearly the amendment is a direct reaction to the impugned ruling of the Court. In his response to the reference filed on 30th December 2006, the applicant continues to protest the Court's jurisdiction, an issue that was already decided . . .").

123. *E. African Law Soc'y*, Ref. No. 3 of 2007, at 1–5.

124. *Id.* at 4. While the final decision in *Nyong'o* was not released until four months after the amendments, the court had announced that it was granting the claimants jurisdiction in November 2006. *Id.* at 3.

125. *Id.* at 4–5. Several EAC member states have invoked the two-month time limit to challenge the admissibility of human rights cases coming before the court. See *supra* note 43 and accompanying text (discussing the *Rugumba* case's rejection of such an argument).

126. *E. African Law Soc'y*, Ref. No. 3 of 2007, at 4–5. When this amendment was passed, the two Kenyan judges sitting on the court had been subject to just such a removal, stemming from allegations of corruption made in 2003. *Kibaki Rails at EAC Court as Rwanda, Burundi Join Up*, *supra* note 121. The Kenyan government attempted to have these two judges removed from the EACJ bench pursuant to the amendments, but their efforts were successfully stopped. Mwalimu Mati, *Kenya is Guilty of Judicial Interference*, E. AFR. (Feb. 26, 2007, 00:00), <http://www.theeastafrican.co.ke/opOrEd/-/434748/253402/-/rbk891z/-/index.html>.

127. See, e.g., *East Africa: Why Undermining EA Court is Sheer Folly*, Op-Ed., E. AFR. (Dec. 12, 2006), available at <http://allafrica.com/stories/200612120533.html> ("The Court is under a solemn Treaty obligation to independently interpret, apply and ensure compliance with the Treaty, without fear, favour or prejudice, and without intimidation or ridicule from any person or institution. Ridiculing any one organ of the EAC has the further effect of ridiculing the entire edifice of the EAC, and the people of East Africa who these organs were set up to serve. Proposing amendments that may weaken the EACJ has the added effect of scaring local, regional and international investment.").

of the Treaty, which allows anyone in the EAC to file suit in the EACJ, EALS filed suit against the EAC members, challenging the legality of the amendments under Article 150 of the Treaty on the grounds that the EAC members had not followed the correct procedures for amending the Treaty.¹²⁸ The Attorney General of Tanzania and the Secretary General of the EAC argued “that under international law, the applicants were not competent to challenge the sovereign right of the Partner States to amend the Treaty to which they were parties.”¹²⁹ The Attorney General of Uganda argued that the claim was “incompetent and misconceived because there was no dispute among the parties to the Treaty.”¹³⁰ The Attorney General of Kenya argued that the amendments were actually decisions of the Summit and thus not reviewable under Article 30.¹³¹

The court rejected these objections, reasoning that the claimants were not challenging the partner states’ sovereign right to amend the Treaty but rather the failure to abide by the amendment procedures therein.¹³² The court also held that Article 30 gives legal persons the right to petition the court when there is an infringement of the Treaty.¹³³ The court decided that, although Article 30 makes no mention of this right with respect to Treaty violations by an organ of the Community, restricting the article so that it could not be used in those situations would defeat its purpose.¹³⁴ Furthermore, the court held that

[t]he alleged infringement is the totality of the process of the Treaty amendment, which amendment was, and can only be made by the parties to the Treaty, namely the Partner States, acting together through the organs of the Community. It follows that if in the amendment process the Treaty was infringed, it was infringed by the Partner States. The reference therefore cannot be barred on the ground that its subject matter are decisions and actions of organs of the Community.¹³⁵

Therefore, the court determined that it had jurisdiction. It concluded that

128. *E. African Law Soc’y*, Ref. No 3 of 2007, at 5–6.

129. *Id.* at 9.

130. *Id.*

131. *Id.*

132. *Id.* at 13.

133. *Id.* at 13–14. In *Nyongo*, the EACJ had held that “once a question of infringement of the Treaty is properly referred to this Court under Article 30, the question ceases to be of purely personal interest.” *Nyong’o v. Attorney Gen. of Kenya (Nyong’o III)*, Ref. No. 1 of 2006, at 36 (Mar. 30, 2007), available at http://eacj.huriweb.org/wp-content/uploads/2012/11/EACJ_Reference_No_1_2006.pdf.

134. *E. African Law Soc’y*, Ref. No 3 of 2007, at 15.

135. *Id.* at 16.

the ratification process for the amendments constituted an infringement of Articles 5(3)(g), 7(1)(a), and 150 of the Treaty because the partner states had not allowed the private sector and civil society to participate in the drafting of the amendments.¹³⁶ The court decided, however, not to invalidate the amendments because “the infringement was not a conscious one,” it was “not likely to recur” after the court’s ruling, and “not all the resultant amendments are incompatible with Treaty objectives.”¹³⁷

The significance that Kenya attached to this case is demonstrated by the fact that the Kenyan Attorney General, Amos Wako, traveled to the seat of the EACJ in Arusha, Tanzania, to argue the case, accompanied by leading attorneys from Kenya, including Gibson Kamau Kuria, Kenyan Solicitor General Wanjuki Muchemi, and Senior Deputy Solicitor General Muthoni Kimani,¹³⁸ who had represented several Kenyan governmental officials and the Kenyan government in *Nyong’o*.¹³⁹ This appearance was highly unusual, as each EAC member state has designated lawyers who appear on their behalf.¹⁴⁰ Kuria had reached the rank of Senior Counsel and is one of the best-known human rights lawyers in Africa.¹⁴¹ Kimani is a long-serving and respected Deputy Solicitor General for the Government of Kenya.¹⁴² While in Arusha, Wanjuki and Kimani visited the offices of the two Kenyan judges, one of whom was the president of the court, and asked them to recuse themselves from hearing the case, threatening to file a recusal motion if the judges refused.¹⁴³ The judges informed their colleagues of the request and received unanimous support.¹⁴⁴ The Kenyan team then sought unsuccessfully to have the judges recuse themselves from the case in light of the allegations of corruption pending against them.¹⁴⁵

This incident dramatically represents one of the most courageous acts of judicial officers in East Africa. The judges refused to bow to threats of

136. *Id.* at 30–31.

137. *Id.* at 43–44.

138. Interview with Judge, First Instance Div., E. African Court of Justice, in Nairobi, Kenya (Aug. 2, 2013).

139. Interview with Attorney Involved in the *Nyong’o* case in Nairobi, Kenya (Aug. 2, 2013).

140. See, e.g., *E. African Law Soc’y*, Ref. No 3 of 2007, at 8 (listing counsel that appeared in the case).

141. Marvine Howe, *Kenya Human-Rights Lawyer Urges Economic Sanctions by U.S.*, N.Y. TIMES, July 29, 1990, at 16 (noting that Kamau Kuria is a prominent human rights lawyer and was the 1988 recipient of the Robert F. Kennedy Human Rights Award).

142. BIOGRAPHY OF THOSE AWARDED, available at <http://www.kra.go.ke/pdf/news/BIOGRAPHY%20OF%20THOSE%20AWARDED.pdf>.

143. Attorney Gen. of Kenya v. *Nyong’o* (*Nyong’o II*), Appl. No. 5 of 2007, at 8 (Feb. 6, 2007), available at http://eacj.huriweb.org/wp-content/uploads/2007/02/EACJ_application_No5_2007.pdf.

144. Interview with EACJ Appellate Judge and President in Arusha, Tanz. (July 30, 2013).

145. *Nyong’o II*, Appl. No. 5 of 2007, at 8 (dismissing the application for recusal).

public exposure of allegations of corruption leveled against them. The court asserted its jurisdictional power even though it exercised caution in deciding not to strike down the amendments. The case can thus be viewed as a procedural pushback but a substantive acquiescence to the EAC political organs.¹⁴⁶ This caution is understandable given the amendments following the *Nyong'o* decision and the absence of a tradition in East Africa of courts holding political actors accountable through judicial review. The court's caution in its early years is comparable to that of the European Court of Justice during its early years, when it also often enunciated bold principles that it would apply irresolutely.¹⁴⁷ These principles, such as the supremacy of European Community law, would later become widely accepted, however.¹⁴⁸

By holding that *locus standi* and exhaustion of domestic remedies are not preconditions to filing cases and by establishing that individuals can file cases to establish whether one of the partner states in the EAC had acted consistently with the Treaty, the EACJ's prior decisions opened the door for it to decide its first explicit human rights case in November 2007. The many relationships and networks that the court had built since its establishment also led to the filing of cases that raised even more difficult questions surrounding the sovereignty of EAC member states than were presented in *Nyong'o*.

C. The Role of the Judges and the Registrar in Promoting the EACJ

As noted above, the EACJ's first decision, *Mwatela*, sought to resolve the battle for supremacy between the executive and legislative organs of the EAC, and in the process, the court declared its own supremacy in the judicial resolution of disputes arising between EAC organs. In so doing, the court began cultivating a reputation as an independent and authoritative interpreter of the respective roles of the political bodies of the EAC. The court's judges and registrar understood that their reputation and authority lay not only within the political branches of the EAC, which excluded the court from meetings of its most senior officials,¹⁴⁹ but also outside the

146. I thank Karen Alter for this insight.

147. Karen Alter, *Who Are the "Masters of the Treaty"?: European Governments and the European Court of Justice*, 52 INT'L ORG. 121, 131 (1998) (discussing the European Court of Justice's enunciation of bold principles in its early years in ways that did not threaten backlash from European Community members).

148. *See id.* at 122 (noting that in its early years, the European Court of Justice "developed legal doctrine and thus constructed the institutional building blocks of its own power and authority without provoking a political response").

149. Interview with Donald Deya, Chief Exec. Officer, Pan African Lawyers Union, in Arusha, Tanz. (May 2012).

EAC. Thus, between 2001 and 2005, they cultivated an extensive network of users and supporters, including members of the East Africa Law Society, human rights nongovernmental organizations, the media, professional organizations, and the private sector. These relationships provided a crucial insurance mechanism as the court began to exercise its jurisdiction over human rights cases with very few resources and against the wishes of EAC member states. The judges have capitalized on opportunities to decide controversial cases, which have legitimized them as independent actors not subject to the political control of the EAC's executive organs nor beholden to the conservative and positivist judicial tendencies that characterize national judiciaries. Furthermore, each subsequent set of judges has demonstrated forcefulness in some decisions balanced with restraint in others.¹⁵⁰

The EACJ was established at a moment when a new ideational context involving respect for human rights and constitutional governance was taking shape.¹⁵¹ This new context arose in part as a result of dramatic social and political changes in East Africa during which one-party states gave way to varying degrees of multi-party democracy and competitive politics.¹⁵² For the first time since independence from colonial rule, civil society groups, especially in the human rights, democracy, and rule of law arenas, emerged and became established players in initiatives to hold their governments accountable for excesses that had often gone unchallenged under authoritarian rule.¹⁵³ The judges of the court worked closely with

150. See, e.g., *Nyambura v. Attorney Gen. of Uganda*, Ref. No. 11 of 2011 (First Instance Div. Feb. 24, 2014), available at <http://eacj.org/wp-content/uploads/2014/02/REFERENCE-NO.-11-OF-2011-Final.pdf> (noting that the court has jurisdiction under the Treaty to decide cases involving allegations of violations of human rights but dismissing the case for having been untimely filed); *Attorney Gen. of Uganda v. Awadh*, App. No. 2 of 2012 (App. Div. Apr. 15, 2013), arising out of Appl. No. 4 of 2011 in Ref. No. 4 of 2011, available at http://eacj.huriweb.org/wp-content/uploads/2013/09/AG_Uganda_v_Omar_Awadh_and_6_Others.pdf (narrowly construing the two-month limitation period for filing a suit in the court).

151. EACJ STRATEGIC PLAN, *supra* note 6, at 10 (noting that the court operates in a context in which there “has been an upsurge in advocacy for good governance, human rights and democracy” and in which East African citizens “are more enlightened and more knowledgeable about their rights” and “more assertive and demanding”); see also FRANS VILJOEN, INTERNATIONAL HUMAN RIGHTS LAW IN AFRICA 482 (2d ed. 2012) (noting the rise of pro-democracy movements and human rights advocacy after the cold war in Africa).

152. Chris Maina Peter, *Conclusion: Coming of Age: NGOs and State Accountability in East Africa*, in HUMAN RIGHTS NGOS IN EAST AFRICA: POLITICAL AND NORMATIVE TENSIONS, *supra* note 12, at 305, 308 (noting that NGOs in East Africa have been active in seeking political accountability); see also Manuel Manrique, *Supporting Africa's New Civil Society: The Case for Kenya*, POL'Y BRIEF (FRIDE, Madrid, Spain), June 2011, at 1, available at http://www.fride.org/descarga/PB_83_Kenya.pdf (“Across Africa the post-Cold War period was one of apparent political liberalisation – four competitive multiparty systems existed in 1990; not a formal single party state remained five years later.”).

153. Interview with Donald Deya, Chief Exec. Officer, Pan African Lawyers Union, in Arusha,

these civil society groups, in particular the East Africa Law Society, in defining the court's place among the EAC organs.¹⁵⁴ In 2003, the Raoul Wallenberg Institute of Human Rights and Humanitarian Law provided training on human rights, regional systems, and the role of the judiciary to the judges, with support from the Swedish Agency for International Development.¹⁵⁵ This training included tours to international courts, such as the European Court of Human Rights and the European Court of Justice.¹⁵⁶ These opportunities persuaded the judges to refrain from adopting the conservative judicial ideology that was prevalent in the national courts of the member states during authoritarian rule.¹⁵⁷ Instead, the judges decided to build an independent and credible court based on these new values.

While the court itself has embraced human rights as a means of holding governments accountable, however, there is variation in the willingness of individual judges to do so. Many of the judges sit on their national courts as well, although this is not one of the qualifications for membership on the court.¹⁵⁸ Some of the judges continue to exhibit a commitment to a more textualist approach,¹⁵⁹ much as their national courts are often skeptical of their responsibility to protect human rights and to hold authoritarian governments accountable for their human rights violations.¹⁶⁰

Without strong national human rights courts, parties have been forced

Tanz. (Oct. 2012). The spread and effectiveness of the civil society movement in the five East African countries is very uneven. Kenya certainly has the best organized civil society movement, particularly in the rule of law, democracy, and human rights sectors, followed by Uganda, Tanzania, Burundi, and Rwanda. *Id.*

154. *Id.*

155. *Id.* The cooperation between the court and the Institute started in 2003, was funded by the Swedish government, and was initiated by the Swedish Embassy in Nairobi. E-mail from Johannes Eile, Head of the Dep't for Int'l Programmes, Raoul Wallenberg Inst. of Human Rights & Humanitarian Law (Nov.–Dec. 2012) (on file with author). That cooperation continues to date. See *Training for the East African Court of Justice*, RAOUL WALLENBERG INST. OF HUM. RTS. AND HUMANITARIAN L., <http://rwi.lu.se/training-east-african-court-justice/> (last visited Jan. 26, 2014) (“The Institute is currently conducting a two-week training in Nairobi for the judges of the East African Court of Justice, as part of its cooperation programme with the Court under the Regional Africa Programme.”).

156. Interview with Donald Deya, Chief Exec. Officer, Pan African Lawyers Union, in Arusha, Tanz. (Oct. 2012).

157. See Oloka-Onyango, *supra* note 79, at 5 (concluding that the Treaty provisions on the appointment of judges and on the court's jurisdiction add to the “traditional distance” that courts in the region have through their inability to affect the lives of ordinary people).

158. See Interview with EACJ Appellate Judge and President in Arusha, Tanz. (July 30, 2013) (“It is not quite correct to say that all EACJ judges work as judges in their national jurisdiction.”); Interview with EACJ Principal Judge of the First Instance Division in Arusha, Tanz. (July 30, 2013).

159. See *supra* note 150 and accompanying text.

160. Interview with EACJ Judge in Nairobi, Kenya (June 2012).

to turn to regional courts such as the EACJ and ECCJ¹⁶¹ as alternative venues.¹⁶² For instance, *Nyong'o* was brought at a time when the Kenyan judiciary was viewed with much distrust and disdain.¹⁶³ The litigants turned to the EACJ since at the time Kenyan courts were not regarded as being a reliable option to enforce the Bill of Rights.¹⁶⁴ In addition, EAC national courts are swamped with a backlog of cases.¹⁶⁵ Moreover, the African Court on Human and Peoples' Rights has only recently begun its work after many years of stalemate.¹⁶⁶ Its access rules for private parties to file suit are very narrow.¹⁶⁷ Additionally, the EACJ allows the filing of briefs *in forma pauperis*: indigent persons filing meritorious cases can be exempted from paying the fees associated with bringing a case.¹⁶⁸ These low financial costs (relative to the costs associated with filing cases in national courts) combined with the court's low procedural barriers to litigation¹⁶⁹ make the EACJ very accessible.¹⁷⁰

161. See Alter, Helfer & McAllister, *supra* note 71, at 755–56 (arguing that the explicit conferral on the ECCJ of jurisdiction over human rights was the direct result of concerted lobbying by judges of the court and officials of the Economic Community of West African States (ECOWAS)); see also Karen J. Alter, *The Global Spread of European Style International Courts*, 35 W. EUR. POL. 135, 150 (2012) (“[H]uman rights activists have decisively shaped how the ECCJ has evolved.”).

162. See Solomon Tamarabrahkemi Ebobrah, *Legitimacy and Feasibility of Human Rights Realisation Through Regional Economic Communities in Africa: The Case of the Economic Community of West African States* (Sept. 30, 2009) (unpublished LL.D. dissertation, University of Pretoria), available at <http://upetd.up.ac.za/thesis/available/etd-02102010-085034/> (arguing that sub-regional courts such as the ECCJ and the EACJ have become more important venues for the promotion of human rights because of the limited jurisdictional provisions of the African Court of Human and Peoples' Rights).

163. Interview with EACJ Judge in Nairobi, Kenya (June 2012).

164. *Id.*

165. Jacob Ngetich, *Justice on Trial as Case Backlog Returns to Haunt the Judiciary*, STANDARD DIGITAL (Jan. 19, 2014, 00:00), <http://www.standardmedia.co.ke/?articleID=2000102645>.

166. See *African Court in Brief*, AFR. CT. ON HUM. & PEOPLES' RTS., <http://www.african-court.org/en/index.php/about-the-court/brief-history> (last visited May 17, 2014) (noting that the Court was established by a Protocol that was adopted in 1999 but that it only issued its first decision in 2009).

167. Suits are only permissible when a State that has ratified the court's protocol agrees to permit an individual or NGO access to the court in cases involving that person or NGO. Dan Juma, *Access to the African Court on Human and Peoples' Rights: A Case of the Poacher Turned Gamekeeper*, ESSEX HUM. RTS. REV., Sept. 2007, at 2–3. Of the East African States that have ratified the African Court of Human and Peoples' Rights Protocol, only Tanzania and Rwanda have agreed to individual access. Press Release, E. African Court of Justice, SG, Four Partner States Taken to Court for Delay to Deposit the African Charter of Human and Peoples' Rights Declarations (Aug. 22, 2013), available at <http://eacj.org/?p=1344>; *The African Court on Human and Peoples' Rights*, AFR. UNION, <http://www.au.int/en/organs/cj> (last visited June 21, 2014).

168. Ruhangisa, *supra* note 79, at 7–8.

169. See *supra* notes 119–20 and accompanying text.

170. The EACJ rules of procedure were written with a view to removing many of the procedural technicalities that make litigation in East African judiciaries complicated, lengthy, and expensive. Ruhangisa, *supra* note 79, at 7–8.

The judges and the Registrar have ardently sought to convince other organs of the EAC and the public that the viability of the court is crucial.¹⁷¹ The court has opened sub-registries in two of the five EAC member countries to make filing cases easy for East African citizens,¹⁷² has openly strategized and campaigned for more usage of the court in the region, and has participated in sensitization workshops throughout the region informing East Africans about its work.¹⁷³

The EACJ has not waited for the other organs of the EAC to acknowledge its presence, however. Despite the court's institutional weaknesses,¹⁷⁴ its rulings have attracted significant attention from the law societies and civil society groups in the region and from scholars.¹⁷⁵ The judges and registrar have written up a strategic plan for dealing with the court's challenges.¹⁷⁶ According to this plan, the mission of the court is to "contribute to the enjoyment of the benefits of Regional Integration by ensuring adherence to justice, rule of law and fundamental rights and freedoms through the interpretation and application of and compliance with the East African Law."¹⁷⁷ The court's strategic plan includes enhancing the court's capacity, proactively influencing other EAC organs on the issue of

171. See EACJ STRATEGIC PLAN, *supra* note 6, at vii (identifying the court's overall strategy as "raising visibility . . . seeking extended jurisdiction . . . [and] enhancing the [court's] human and material capacity"); Interview with EACJ Appellate Judge and President in Arusha, Tanz. (July 30, 2013); Interview with EACJ Principal Judge of the First Instance Division in Arusha, Tanz. (July 30, 2013).

172. Press Release, E. African Court of Justice, EACJ Opens Sub-registry in Dar-es-Salaam (Sept. 7, 2012), available at http://www.eac.int/index.php?option=com_content&view=article&id=1097:eacj-opens-sub-registry-in-dar-es-salaam&catid=146:press-releases&Itemid=194; Press Release, E. African Court of Justice, Chief Justice of Rwanda Officially Opens EACJ Kigali Sub-registry (Aug. 10, 2012), available at http://www.eac.int/index.php?option=com_content&view=article&id=1072:chief-justice-of-rwanda-officially-opens-eacj-kigali-sub-registry&catid=146:press-releases&Itemid=194.

173. See, e.g., Press Release, African Press Org., EACJ to Hold Sensitization Workshop on Its Role in the EAC Integration (Oct. 27, 2011), available at <http://appablog.wordpress.com/2011/10/27/eacj-to-hold-sensitization-workshop-on-its-role-in-the-eac-integration/>; *East African Court of Justice Sensitization Workshop Opens in Kampala*, Ministry of E. Afr. Cmty. Aff. (Nov. 1, 2011), http://www.meaca.go.ug/index.php?option=com_content&view=article&id=70:east-african-court-of-justice-sensitization-workshop-opens-in-kampala-&catid=42:press&Itemid=18. The Court's strategic plan identifies sensitization as a priority. See EACJ STRATEGIC PLAN, *supra* note 70, at 24.

174. See *supra* notes 63–64 and accompanying text. The court's strategic plan identifies several "Critical issues . . . : i. The Court not being able to optimally discharge its mandate in the integration process[;] ii. Risk of marginalizing the status of the Court[;] iii. Risk of denying the East African citizens the right to access the services of an effective regional court[;] iv. Risk of fragmenting Community jurisprudence." EACJ STRATEGIC PLAN, *supra* note 6, at vii–viii.

175. See, e.g., van der Mei, *supra* note 81, at 405–06 (noting that the court's case law indicates its "willingness . . . to firmly protect the rule of law, to guarantee individual access to justice and to review both acts of the EAC and its Partner States").

176. See EACJ STRATEGIC PLAN, *supra* note 6.

177. *Id.* at vii.

the court's role and place, and making the court "visible and indispensable in matters related to the discharge of its mandate."¹⁷⁸

One of the court's opportunities to advance this plan came in the *Serengeti* case. In that case, an environmental group filed a suit against the government of Tanzania, objecting to the building of a commercial highway across the Serengeti National Park.¹⁷⁹ The Appellate Division ruled against the government of Tanzania, which had argued that the court did not have jurisdiction over the case.¹⁸⁰ The Registrar welcomed conservation and environmental groups and individuals to bring similar suits to the EACJ.¹⁸¹ The Serengeti case has raised the profile of the court, especially among environmental justice groups outside of East Africa. A large transnational network, similar to that involved in the court's human rights case law, has mobilized.¹⁸² These groups have continued to be interested in this case and have established a litigation fund for it,¹⁸³ given that the United Nations Educational, Scientific, and Cultural Organization (UNESCO) has long recognized the Serengeti as a world heritage site.¹⁸⁴ This makes the EACJ very visible in the environmental justice movement, which is an additional constituency in its efforts to build up its profile.

The court's Registrar, judges, and president have invested a significant amount of time and energy advocating for an expanded role for the Court.¹⁸⁵ Their efforts, under difficult resource constraints and without much support from other EAC organs, have undoubtedly ensured that the court has not remained moribund or irrelevant; instead, it has carved out a place for itself and its fledgling jurisprudence. The Registrar has also publicly and quite vigorously argued in favor of using the EACJ's jurisdiction in investor arbitration cases.¹⁸⁶ Harold Nsekela, the court's

178. *Id.* at viii.

179. Attorney Gen. of Tanz. v. African Network for Animal Welfare, App. No. 3 of 2011, at 2 (App. Div. Mar. 15, 2012), available at <http://eacj.huriweb.org/wp-content/uploads/2011/08/African-Network-for-Animal-Welfare-2011-3-appeal-2012.pdf>.

180. *Id.* at 2, 14.

181. Wolfgang H. Thome, *Seek Justice at the East African Court, Registrar Tells Environmentalists and Conservationists*, WOLFGANG H. THOME'S BLOG (Mar. 24, 2012), <http://wolfganghthome.wordpress.com/2012/03/24/seek-justice-at-the-east-african-court-registrar-tells-environmentalists-and-conservationists/>.

182. *See, e.g., About Serengeti Watch*, SERENGETI WATCH, <http://www.savetheserengeti.org/about-us/> (last visited May 18, 2014).

183. *See Serengeti Legal Defense Fund*, SERENGETI WATCH, <http://www.savetheserengeti.org/serengeti-legal-defense-fund/> (last updated Aug. 2013).

184. *See Serengeti National Park*, UNITED NATIONS EDUC., SCI. & CULTURAL ORG. WORLD HERITAGE CONVENTION, <http://whc.unesco.org/en/list/156> (last visited Jan. 27, 2014).

185. Interview with EACJ Appellate Judge and President in Arusha, Tanz. (July 30, 2012).

186. Anne Mugisa, *East African Court of Justice Underutilised*, NEW VISION (Mar. 28, 2012),

president, has urged EAC member states to take advantage of the court's jurisdiction over arbitral matters under the Treaty because its judges are certified arbitrators who understand the "peculiar" circumstances of EAC States, as opposed to arbitrators from outside of Africa, to whom these States often resort.¹⁸⁷ More recently, the Registrar has argued in favor of extending international criminal jurisdiction to the EACJ.¹⁸⁸ As with arbitration, he has argued that the judges are specialists in international criminal law.¹⁸⁹ In his view, such jurisdiction is also warranted because it would reduce the embarrassment of having the International Criminal Court decide cases against East African citizens in The Hague.¹⁹⁰

D. The Role of Interest Groups in Mobilizing the EACJ

The creation of the EAC in 1999 opened up a new frontier for various civil society groups, a broad coalition of professional organizations, and members of the private sector to lobby in favor of human rights. For these groups, East African integration was not simply about free trade liberalization or integration into a customs union and a common market. Rather, issues of political governance, such as human rights, the rule of law, and democracy, were at least as crucial.¹⁹¹ This broad coalition drew its inspiration from domestic struggles for human rights.

Although EAC governments have demonstrated hostility toward human rights jurisprudence, they have built up human rights expertise so that advocacy for human rights is not regarded with the skepticism of earlier periods. Each of them has established a national human rights

available at <http://www.kigalikonnnect.com/article/east-african-court-of-justice-underutilised.html>.

187. *Id.*; see also Polycarp Machira, *Tanzania: Registrar—States Avoid East African Court of Justice*, CITIZEN (Dar es Salaam) (Apr. 26, 2011), available at <http://allafrica.com/stories/201104270129.html>. This preference for non-African arbitrators is perhaps indicative of a common "race to the top" practice, in which poor countries, seeking to defend themselves against investors, hire top-notch law firms or world-renowned arbitrators to match the caliber of the investors' legal team. Eric Gottwald, *Leveling the Playing Field: Is It Time for a Legal Assistance Center for Developing Nations in Investment Treaty Arbitration*, 22 AM. U. INT'L L. REV. 237, 239–40 (2007) ("[M]ost developing countries are forced to hire one of a handful of international law firms who charge the same premium market rates that wealthy individual investors and corporations pay for their services.").

188. Eric Kabeera, *EAC "Competent to Handle International Criminal Cases,"* NEW TIMES (Kigali), Aug. 19, 2012, available at <http://www.newtimes.co.rw/news/index.php?i=15089&a=12611>.

189. Mugisa, *supra* note 186.

190. Kabeera, *supra* note 188.

191. Deya, *supra* note 96; Interview with Donald Deya, Chief Exec. Officer, Pan African Lawyers Union, in Arusha, Tanz. (May 2011) ("East African citizens can engage the EAC . . . from a purely trade/economic perspective or from a more holistic or 'altruistic' perspective. The . . . private sector and civil society associational activity [can be] catalytic of a more people-centered and people-driven EAC.").

commission.¹⁹² Many EAC government officials also have dual roles in sub-regional and regional courts and national institutions with mandates over human rights issues.¹⁹³ Donor funding to support human rights work within national governments and regional economic communities has popularized and legitimized human rights within governments.¹⁹⁴ The groups supported with this money, such as EALS, have in turn supported litigation before the EACJ.

One of the key actors in this movement was Donald Deya, who, in the mid-2000s, was the CEO of the fledgling EALS, now the largest professional membership organization in East Africa.¹⁹⁵ He was the Deputy CEO and Deputy Secretary of the Law Society of Kenya (LSK) during the peak of its multi-pronged pro-democracy struggle against a one-party dictatorship in the 1990s.¹⁹⁶ During Deya's tenure at LSK, the

192. See *Burundi Inaugurates Independent National Human Rights Commissioners*, UNITED NATIONS OFF. IN BURUNDI, <http://bnub.unmissions.org/Default.aspx?ctl=Details&tabid=2961&mid=5312&ItemID=3130> (last visited Jan. 10, 2014); COMMISSION FOR HUM. RTS. & GOOD GOVERNANCE, <http://www.chragg.go.tz/> (last visited Jan. 10, 2014); LA COMMISSION NATIONALE DES DROITS DE LA PERSONNE, <http://www.cndp.org.rw/> (last visited Jan. 10, 2014); KENYA NAT'L COMMISSION ON HUM. RTS., <http://www.knchr.org/> (last visited Jan. 10, 2014); UGANDA HUM. RTS. COMMISSION, <http://www.uhrc.ug/> (last visited Jan. 10, 2014).

193. For example, Justice Ben Kioko, a judge on the African Court on Human and Peoples' Rights, was previously the Legal Counsel at the African Union Commission, where he was responsible for establishing the legal framework for the regional economic communities' relationship to the African Union. AFRICAN COMM'N ON HUMAN & PEOPLE'S RIGHTS, AGENDA OF THE SPECIAL 52ND ORDINARY SESSION IN COMMEMORATION OF THE 25TH ANNIVERSARY OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS 19 (Oct. 9–22, 2012), available at http://www.achpr.org/files/sessions/52nd/info/agenda/session_agenda_eng.pdf. Justice James Ogoola from Uganda serves on the Appellate Division of the East African Court of Justice and the COMESA Court of Justice and was a judge in Uganda. *Current*, COMESA CT. JUSTICE, <http://comesacourt.org/en/judges/current/> (last visited May 18, 2014); *Judges*, E. AFR. CT. JUSTICE, http://eacj.org/?page_id=1135 (last visited May 18, 2014). The first EAC National Human Rights Institutions meeting was hosted by the EAC in February 2008. Press Release, E. African Cmty., EAC Strengthens Promotion and Protection of Human Rights (Feb. 14, 2008), available at <http://appablog.wordpress.com/2008/02/15/eac-strengthens-promotion-and-protection-of-human-rights/>.

194. See *The Open Society Initiative for Eastern Africa*, E. AFR. CIV. SOC'Y ORGS. F., <http://eacsof.net/osiea.html> (last visited Jan. 10, 2014) (describing the funding available to support local and regional groups in East Africa working to advance democratic governance and public accountability, challenge corruption, and strengthen free media).

195. *Mr. Donald Deya*, CENTRE FOR CITIZENS' PARTICIPATION ON AFR. UNION, http://ccpau.org/?page_id=501 (last visited June 21, 2014); see Lusekelo Philemon, *EACJ Jurisdiction "Should Cover Investment Litigation"*, GUARDIAN, Feb. 2, 2014, available at <http://www.ipmedia.com/frontend/?l=64357> (noting that EALS has 15,000 individual members).

196. *Mr. Donald Deya*, *supra* note 195; Frank Khachina Matanga, *Civil Society and Politics in Africa: The Case of Kenya* 14, 28, 30 (paper presented at the Fourth International Conference of ISTR, Dublin, Ir., July 5–8, 2000), available at http://c.ycmdn.com/sites/www.istr.org/resource/resmgr/working_papers_dublin/matanga.pdf (discussing the efforts of the two LSK chairs to democratize Kenya during the heyday of one-party rule).

Society was involved in defending unpopular political clients before corrupt courts that had often happily acquiesced to the government.¹⁹⁷ LSK was led by progressive lawyers who sought to change the political system, including the Kenyan judiciary.¹⁹⁸ It established a vast network of progressive civil society groups, churches, and labor unions, among others.¹⁹⁹ In addition to litigation pressing for political accountability and an end to one-party politics, LSK was involved in civic education, organizing and lobbying for policy change, attending conferences, and holding press conferences to push its agenda.²⁰⁰

Deya took advantage of this experience when he helped to found EALS, where he attempted to replicate LSK's successes. EALS would become a leading litigator in the EACJ. EALS and its corporate members, the Law Societies of Kenya, Tanganyika, and Uganda, filed amici briefs in the *Mwatela* and *Nyong'o* cases.²⁰¹ EALS has been crucial in facilitating the civil society network that has supported broadening the East African integration agenda from trade and economic issues to human rights litigation before the court.

One of EALS's primary mandates is public interest advocacy.²⁰² This

197. ROBERT M. PRESS, *PEACEFUL RESISTANCE: ADVANCING HUMAN RIGHTS AND DEMOCRATIC FREEDOMS* 83 (2006). Donald Deya was also Deputy Chief Executive Officer and Head of Programmes at the Kenya Section of the International Court of Justice, another very active human rights civil society group in Kenya. *Mr. Donald Deya, supra* note 195. For a very similar example of the domestic growth of a human rights advocacy movement, see Kathryn Sikkink, *From Pariah State to Global Protagonist: Argentina and the Struggle for International Human Rights*, 50 *LATIN AM. POL. & SOC'Y* 1, 15–17 (2008). Argentine groups were able to organize effectively because “they had organizational, financial, social, and cultural resources to draw on that were not available to activists in all countries that suffered extreme human rights violations.” *Id.* at 19.

198. See AFRICA WATCH, *HUMAN RIGHTS WATCH, KENYA: POLITICAL CRACKDOWN INTENSIFIES* (1990), available at <http://www.hrw.org/reports/pdfs/k/kenya/kenya905.pdf> (discussing President Moi's repression of lawyers such as Paul Muite and Muite's leadership of the LSK against that repression).

199. PRESS, *supra* note 197, at 108, 123 (discussing the coalition of groups that sought to institutionalize opposition to authoritarian governance in Kenya).

200. Stanley D. Ross, *The Rule of Law and Lawyers in Kenya*, 30 *J. MOD. AFR. STUD.* 421, 435–38 (1992); see also WILLY MUTUNGA, *CONSTITUTION-MAKING FROM THE MIDDLE: CIVIL SOCIETY AND TRANSITION POLITICS IN KENYA, 1992–1997* (1999) (discussing the various strategies used by civil society groups seeking democratization and promotion of human rights in Kenya).

201. *Nyong'o v. Attorney Gen. of Kenya (Nyong'o III)*, Ref. No. 1 of 2006, at 9 (Mar. 30, 2007), available at http://eacj.huriweb.org/wp-content/uploads/2012/11/EACJ_Reference_No_1_2006.pdf; *Mwatela v E. African Cmty.*, Appl. No. 1 of 2005, at 5 (Oct. 2006), available at http://eacj.huriweb.org/wp-content/uploads/2012/11/EACJ_reference_No1_2005.pdf; Deya, *supra* note 96 (“In a bold stroke, the Court ruled that it is in the interests of justice that EALS be allowed as impartial Amicus Curiae . . .”); Interview with Donald Deya, Chief Exec. Officer, Pan African Lawyers Union, in Arusha, Tanz. (Oct. 2012) (discussing EALS's appearance as amicus curiae in *Nyong'o*).

202. Under its public interest advocacy programs, EALS seeks to leverage “its human and intellectual resources [to] promote the common good of the people of the region through targeted

includes public interest litigation that seeks “judicial re-affirmation” of the obligation of East African states to promote and protect human rights.²⁰³ In 2010, EALS convened a Colloquium of Legal Scholars on Litigation Strategies before the EACJ and the African Court on Human and Peoples’ Rights, which was attended by judges from national courts and regional tribunals (including the African Court on Human and Peoples’ Rights), as well as lawyers from East and Southern Africa.²⁰⁴ Among the outcomes from this meeting were offers for technical support from individual lawyers and EALS, both of whom have expertise complying with the legal rules of these courts, and offers to file three cases in 2011.²⁰⁵ These cases were Reference No. 1 of 2011 against the EAC Secretary-General, “challenging certain provisions in the Common Market Protocol and Customs Union Protocol that purport to oust the jurisdiction of the EACJ as granted by the EAC Treaty”; Reference No. 2 of 2011 against the Attorney General of Uganda and the EAC Secretary-General, “relating to the Human Rights Violations in Uganda during the walk to work processions”; and Reference No. 3 against the Attorneys General of Uganda and Kenya and the EAC Secretary-General “relating to the rendition of Kenyan Citizens to Uganda.”²⁰⁶ At the end of October 2012, the Pan African Lawyers Union, in conjunction with the East African Civil Society Organizations’ Forum (EACCSOF) and the Open Society Initiative for East Africa, organized a consultation to facilitate a common position among civil society groups on the extension of the court’s jurisdiction, which was one of the goals agreed on at the Colloquium.²⁰⁷ EALS has also promoted the rule of law and human rights through other strategies, such as courtesy calls to key EAC officials, including the Office of Legal Council and the Secretary-General, and meetings with top EAC decision-makers, such as the president of Tanzania.²⁰⁸

EALS has, in effect, marshaled a coalition of key stakeholders among

interventions on the issue of the public interest, particularly on the rule of law, democracy, respect for human and peoples’ rights and peace building.” *Public Interest Advocacy*, *supra* note 75.

203. *Id.*

204. E. AFRICA LAW SOC’Y, ANNUAL REPORT: NOVEMBER 2010–NOVEMBER 2011, at 14 (2011), available at http://www.ealawsociety.org/images/publications/annual_report/annual_report_2011.pdf.

205. *Id.* Following the Colloquium of Scholars conference, EALS’s Human Rights and Strategic Litigation Committee and its Regional Integration and International Relations Committee met to approve the institution of the cases. *Id.*

206. *Id.* at 15.

207. *CSOs Discuss Extension of the Jurisdiction of the East African Court of Justice*, PAN AFR. LAW. UNION NEWSL. (Pan African Lawyers Union, Arusha, Tanz.), Sept.–Oct. 2012, at 3–4, available at <http://lawyersofafrica.org/wp-content/uploads/2013/06/PALU-Newsletter-6-September-andOctober.pdf>.

208. E. AFRICA LAW SOC’Y, *supra* note 204, at 19, 21–22.

organizations and professionals from a variety of backgrounds who support human rights, democracy, and the rule of law as central ideals of the regional integration process.²⁰⁹ This coalition, which extends to national human rights commissions, national parliaments, and law reform commissions,²¹⁰ has been critical to building the demand for human rights litigation in the EACJ and subsequently defending the legitimacy of the court's human rights jurisprudence.²¹¹

EALS, the East African Civil Society Forum, and Kituo Cha Katiba have run a variety of programs over the years, including conferences, formal and informal consultations, and capacity-building initiatives for

209. See generally Byenkya Tito, *The Role of Bar Associations in Promoting Good Governance and Enhancing Access to Justice*, E. AFR. LAW., June 2011, at 4, available at http://www.ealawsociety.org/images/publications/magazines/lawyer_mag_issue_17.pdf (discussing the importance of such networks of professionals in the regional human rights and justice sector). Among these groups are Kituo Cha Katiba: the East African Centre for Constitutional Development, the East Africa Human Rights Network, the East African University Academic Network, the East African Women Parliamentary Union, the East African Magistrates and Judges Association, the Coalition for an Effective African Court, and the East African NGO Council. Interview with Donald Deya, Chief Exec. Officer, Pan African Lawyers Union, in Arusha, Tanz. (Oct. 2012). As noted above, EALS is probably the most significant of these groups in terms of the court's work and plays host to the East Africa Good Governance and Human Rights Platform, a coalition of human rights and good governance civil society groups in East Africa. *Id.* This coalescence has been facilitated by the location in Arusha, Tanzania, of the temporary headquarters of the court and the headquarters of the EAC and other human rights and international law-oriented groups. African Union [AU], *Decision on the Establishment of an African Institute of International Law in Arusha, the United Republic of Tanzania*, 18th Ordinary Sess., Doc. Assembly/AU/14 (XVIII) Add.5 (Jan. 29–30, 2012). Arusha has been flush with donor funding for this reason. Interview with EACJ Appellate Judge and President in Arusha, Tanz. (July 30, 2013); Interview with EACJ Principal Judge of the First Instance Division in Arusha, Tanz. (July 30, 2013).

210. Interview with Donald Deya, Chief Exec. Officer, Pan African Lawyers Union, in Arusha, Tanz. (Oct. 2012).

211. These civil society groups have supported the broadening of the EAC's integration agenda to include human rights and governance issues and have engaged in activities such as election monitoring in each of the EAC member states and monitoring and challenging human rights violations in the region. E. AFRICAN CIVIL SOC'Y ORGS. FORUM, THE 6TH ANNUAL EACSO FORUM: THEME: "STRENGTHENING THEMATIC FOCUS IN THE EAST AFRICAN INTEGRATION PROCESS" 10 (2012); REPORT OF THE CONSULTATIVE ROUNDTABLE ON RECENT DEVELOPMENTS AT THE EAST AFRICAN COURT OF JUSTICE 2 (2012) (on file with the *Duke Journal of Comparative and International Law*); *EAC Partner States Urged to Do More to Uphold People's Rights*, E. AFR. COMMUNITY (Jan. 23, 2012), http://www.eac.int/index.php?option=com_content&view=article&id=892:eac-partner-states-urged-to-do-more&catid=146:press-releases&Itemid=194; Francis Ayieko, *EAC Receives Proposed Regional Bill of Rights*, E. AFR. (Oct. 23, 2007), available at <http://www.afrimap.org/newsarticle.php?id=1045>; E. AFR. GOOD GOVERNANCE & HUM. RTS. PLATFORM, <http://www.gghrp.org/> (last visited June 21, 2014). They successfully lobbied for the formulation of the EAC's Draft Protocol on Good Governance, the East African Human Rights Strategy of 2008, and the Draft East African Bill of Human and Peoples Rights. *Working with Partners in EAC Integration: The Perspectives of the EA Good Governance and Human Rights Platform*, E. AFR. GOOD GOVERNANCE & HUM. RTS. PLATFORM, <http://www.gghrp.org/working-with-partners-in-eac-integration-the-perspectives-of-the-ea-good-governance-and-human-rights-platform> (last visited Jan. 28, 2014) [hereinafter *Working with Partners in EAC Integration*].

judges and staff members, to promote the use of the EACJ as a human rights court.²¹² These institutions have prompted the Council to direct the EAC Secretariat to formulate a framework for the EAC's engagement with civil society.²¹³ EALS has obtained observer status in the EAC and has been invited to Council meetings.²¹⁴

The conferences that these civil society groups have hosted²¹⁵ have begun making the legal case for including human rights as a central part of regional integration. They have looked to the fundamental and operational principles of the Treaty, which include adherence to principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, and gender equality, as well as the recognition, promotion, and protection of human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights.²¹⁶ For these groups, this treaty language was not a dead letter; member states were required to comply with these ideals as a central objective of East African regional integration.²¹⁷

Ultimately, the organizational efforts of the judges and the registrar is an important explanation for the rise of the court's human rights case law.²¹⁸ In addition, lawyers and lawyer associations in East Africa have

212. See E. AFRICAN CIVIL SOC'Y. FORUM, REPORT OF FIRST ANNUAL EAST AFRICAN CIVIL SOCIETY FORUM: AGENDA SETTING: THE ROLE OF CIVIL SOCIETY IN THE EAST AFRICAN COMMUNITY (2006), available at <http://eacsof.net/upload/REPORTS/THE%20REPORT%20ON%20THE%201ST%20ANNUAL%20E.%20A%20CSO%20FORUM.pdf> (discussing the activities of the East African Civil Society Forum); Donald Deya, *Constitutionalism and the East African Community in 2004*, in CONSTITUTIONALISM IN EAST AFRICA: PROGRESS, CHALLENGES AND PROSPECTS IN 2004, at 79, 92, available at <http://www.kituoachakatiba.org/sites/default/files/publications/Constitutionalism%20in%20East%20Africa%202004.pdf> (noting that several civil society groups "undertook research, publication, training and dialogue activities for their members, stakeholders and/or the public at large; lobbied or engaged in advocacy with the national and regional governments; and also engaged in networking with each other, with other East Africans and sometimes with stakeholders further afield.").

213. KITUO CHA KATIBA: E. AFR. CTR. FOR CONSTITUTIONAL DEV., *supra* note 16, at 7.

214. Interview with Donald Deya, Chief Exec. Officer, Pan African Lawyers Union, in Arusha, Tanz. (Oct. 2012); *Working With Partners in EAC Integration*, *supra* note 211. Council meetings are often planned at the last minute, and there is often little prior notice given to EALS so that it can secure attendance of one of its officers. Interview with Donald Deya, Chief Exec. Officer, Pan African Lawyers Union, in Arusha, Tanz. (Oct. 2012).

215. See, e.g., E. AFRICA LAW SOC'Y, *supra* note 204, at 1, 14–15, 19–20, 22.

216. Interview with Donald Deya, Chief Exec. Officer, Pan African Lawyers Union, in Arusha, Tanz. (Oct. 2012); Interview with Donald Deya, Chief Exec. Officer, Pan African Lawyers Union, in Arusha, Tanz. (May 2011).

217. Deya, *supra* note 96.

218. For a similar account of the role of lawyer associations in the early life of the European Communities, see KAREN J. ALTER, *Jurist Advocacy Movements in Europe: The Role of Euro-Law Associations in European Integration (1953–1975)*, in THE EUROPEAN COURT'S POLITICAL POWER: SELECTED ESSAYS 63 (discussing jurist advocacy movements in the evolution of the European

mobilized to encourage the court to decide human rights cases. The mutually supportive relationship between these groups and the court has been critical to successfully overcoming the court's limited jurisdiction and institutional weaknesses.

III. IMPLICATIONS OF THE EACJ'S EXPERIENCE FOR THEORIES OF DELEGATION

This Part considers the ways in which the EACJ's experience relates to contemporary theories of delegation, which seek to explain why states delegate to international courts (ICs), in an attempt to show how they explain the court's human rights jurisprudence.²¹⁹ Specifically, it examines five approaches: (1) Principal-Agent Theory, (2) International Courts as Trustees, (3) the Altered Politics Framework, (4) Constrained Independence Theory, and (5) Bounded Discretion Theory. Ultimately, these theories are largely inadequate in the East African context. As such, it is important to develop more relevant and applicable frameworks to account for delegation to international courts in Africa.

A. Principal-Agent Theory

Under Principal Agent (P-A) theory, the Agent is under the control of the Principal.²²⁰ As such the Principal can fire the Agent or rewrite the contract between the parties.²²¹ In the context of ICs, states, as appointing authorities, are the Principals, while judges are the Agents. According to P-A theorists of dependent international adjudication, states address agency slack, or the propensity of judges to overstep their authority, by appointing dependent tribunals when a dispute arises.²²² As such, dependent tribunals are more vulnerable to states and are more likely to decide cases before them in ways that reflect the interests of the appointing state at the time of appointment.²²³

Community legal order).

219. Darren G. Hawkins et al., *Delegation Under Anarchy: States, International Organizations, and Principal-Agent Theory*, in DELEGATION AND AGENCY IN INTERNATIONAL ORGANIZATIONS 1 (Darren G. Hawkins et al. eds., 2006).

220. See Alter, *supra* note 67, at 34 ("A number of scholars have used the ideas of Principal-Agent theory (P-A) to argue that states are actually controlling what merely appear to be independent International Courts."); cf. MARK A. POLLACK, THE ENGINES OF EUROPEAN INTEGRATION: DELEGATION, AGENCY, AND AGENDA SETTING IN THE EU (2003) (using P-A theory to explain the evolution of European integration).

221. Alter, *supra* note 67, at 34.

222. See Eric Posner & John Yoo, *Judicial Independence in International Tribunals*, 93 CALIF. L. REV. 1, 33 (2005).

223. *Id.* at 23, 26-27.

The experience of the EACJ defies these assumptions. Under P-A theory, the court would be expected to act consistently with the wishes of the Principals.²²⁴ This has hardly been the case. The Principals in the EAC context have explicitly declined to extend jurisdiction over human rights to the court, yet the court has assumed such jurisdiction. Under P-A theory, one would also expect that the EAC Principals would punish the court for overstepping its authority. While EAC states have certainly expressed their disapproval of the court by amending the Treaty to circumscribe the court's jurisdiction, EAC Principals have not suspended the court, nor has the court retreated from its rulings that it has jurisdiction over human rights cases.

Furthermore, P-A theorists would have predicted that the sovereignty-maximizing tendency among EAC states suggests that they would have been hesitant to create a court that they could not control. Yet EAC states created the EACJ as an independent tribunal, and the risks that P-A theorists suggest correlate with such tribunals, including decisions that conflict with the interests of the appointing states and the propensity of such tribunals to be influenced by moral ideals or ideological imperatives, are absent. In short, P-A theory does not fully account for the court's growing human rights jurisprudence.

B. ICs as Trustees

Conceptualizing ICs as Trustees discards the view that judges are merely agents of their appointing authorities. Trustees are professionals that bring their own legitimacy and authority to ICs.²²⁵ That reputation is important enough to their personal and professional identities that they may choose a political sanction rather than compromise it.²²⁶ When Trustees act on behalf of their beneficiaries, their determinations become part of the political process, thereby changing the "nature of the political game"²²⁷ and

224. See KAREN J. ALTER, *THE NEW TERRAIN OF INTERNATIONAL LAW: COURTS, POLITICS, RIGHTS* 30 (2014). Contrary to dependent PA theorists, Alter argues that ICs sometimes challenge and sometimes extend the power of the state. *Id.* As such, in dispute settlement and administrative review roles, where IC and state interests tend to be most aligned, ICs act as agents of the state. *Id.* at 30–31. By contrast, in the roles focused more on sovereignty limitation and constitutional review, ICs act as Trustees. *Id.* at 9–10.

225. Alter, *supra* note 67, at 33 ("Principals choose to delegate to Trustees, as opposed to Agents, when the point of delegation is to harness the authority of the Trustee so as to enhance the legitimacy of political decision-making. Trustees are (1) selected because of their personal reputation or professional norms, (2) given independent authority to make decisions according to their best judgment or professional criteria, and (3) empowered to act on behalf of a beneficiary.")

226. *Id.* at 39.

227. *Id.* at 44 (noting that Trustees do more than merely exploit "slippage," or the exercise of authority not explicitly conferred on a tribunal, which is a frequent consequence of delegation to an Agent).

“undermin[ing] state power or the interests of the powerful.”²²⁸ Ultimately, conceptualizing ICs as Trustees, as opposed to Agents, clarifies how ICs like the EACJ come to undertake “ambitious and systematic legal construction” that goes beyond what is specifically authorized or delegated.²²⁹ Seeing ICs as trustees also opens up space for additional actors and sources of power besides Principals and Agents to account for the behavior of judges on an international court or tribunal,²³⁰ focusing on how ICs give sub-state actors, such as civil society groups that favor compliance with the law, leverage over states.²³¹

The EACJ has adopted ambitious interpretations of the Treaty that partly reflect the assumptions of Trustee theory and that are consistent with the urging of compliance constituencies,²³² such as the East Africa Law Society, that have utilized the court’s access rules to bring human rights cases. The court has identified the people of the EAC as the beneficiaries of its human rights jurisprudence and ultimately of EAC integration treaties. Seeing ICs as Trustees, however, is based on a set of background assumptions. One of them is that an IC has the full institutional support of the other organs of the international institution within which the IC serves. For example, more often than not, the European Court of Justice (ECJ) has had the support of the European Commission.²³³ This has not been the case in East Africa, where the court’s jurisprudence on human rights has come notwithstanding efforts, particularly by the Council, to deny it the authority

228. *Id.*; but see *id.* (noting that Trustees “can also be a tool of the powerful, promoting shared interests and goals”).

229. *Id.* at 34. P-A theorists “assume that Agents automatically self-censor because they can rationally expect sanctions if they act in ways the Principal does not want.” *Id.* at 37.

230. Alter, *supra* note 67, at 36 (“The Trustee argument provides analytical boundaries that help one know when to expect Principals’ sanctioning tools to be politically significant. It also redirects the analyst to look at a broader range of actors that shape Trustee behavior, showing how actors with no real ability to change the Trustee’s contract may nonetheless be equally influential in shaping Trustee politics, and thus Principal politics.”).

231. ALTER, *supra* note 224, at 4 (“An international court’s political influence comes from its authority to say what the law means for the case at hand, its jurisdiction to name violations of international law, and its ability to specify remedies that follow from international legal violations.”); Alter, *supra* note 67, at 55 (describing Trustee politics as an environment “where internationally negotiated compromises can be unseated through legal interpretation, where states can come to find themselves constrained by principles they never agreed to, and where non-state actors have influence and can effectively use international law against states”).

232. See ALTER, *supra* note 224, at 53 (defining compliance constituencies as the set of actors that has the power to decide whether to comply with international law).

233. See Karen J. Alter and Jeannette Vargas, *Explaining Variation in the Use of European Litigation Strategies: European Community Law and British Gender Equality Policy*, 33 COMP. POL. STUD. 452 (2000) (discussing the European Court of Justice’s support of the European Commission’s agenda on gender equality).

to decide human rights cases and the resources to operate without having to worry about its long-term viability.

There is another version of the theory of ICs as Trustees, however. Under this theory, states intentionally create ICs to act independently of the influence of their appointing states:²³⁴ as, for example, when the EAC states created the EACJ, which assumed jurisdiction over human rights despite the Treaty not extending such jurisdiction to it. In this version of the theory, “courts are trustees of the values that inhere in the treaties that constituted them, discharging various ‘fiduciary’ duties in the service of the overarching objectives of the regime.”²³⁵ Three conditions must be satisfied under this theory for trustee courts to dominate their regimes: “(1) important disputes alleging noncompliance with treaty law are routinely brought to the court, (2) the judges produce defensible rulings, and (3) states treat the reasons the court gives to justify rulings as having precedential effect.”²³⁶ Under such conditions, judges tend to produce rulings that reflect what states might do under majoritarian decision rules.²³⁷ This helps to limit the growth of IC authority and to address IC legitimacy problems.²³⁸

This version of trustee theory does not explain the EACJ’s human rights jurisprudence, primarily because two of its main assumptions are not met in East Africa. First, disputes on noncompliance with EAC law do not routinely go to the court. Unlike the ECJ and the European Court of Human Rights, the EACJ is a very young court, and resorting to it, even for human rights cases, is the exception rather than the rule. Second, EAC member states have not treated the human rights case law as creating precedent, as indicated by their continuing challenge of the court’s jurisdiction over human rights.

234. See Alter, *supra* note 67, at 54 (“Even where ICs lack sufficient authority to induce respect for their rulings, they influence the political process by providing a focal tool to organize political coalitions within and across states, and a legitimacy boost to actors trying to challenge arguably illegal state policy.”); see also Alec Stone Sweet & Thomas L. Brunell, *Trustee Courts and the Judicialization of International Regimes: The Politics of Majoritarian Activism in the European Convention on Human Rights, the European Union, and the World Trade Organization*, 1 J.L. & CTS. 61, 65 (2013) (“[A] trustee court operates in an unusually permissive *zone of discretion*. The zone of discretion is determined by the sum of competences explicitly delegated to a court and possessed as a result of its own lawmaking, minus the sum of control instruments available for use by the principals to override the court or to curb it in other ways.”).

235. Stone Sweet & Brunell, *supra* note 234, at 62.

236. *Id.* at 62–63.

237. *Id.* at 63–64.

238. *Id.* at 64.

C. The Altered Politics Framework

The altered politics framework further extends the conceptualization of ICs as independent actors. Under this framework, rather than limiting state power, “new style” ICs—those with compulsory jurisdiction and access for nonstate actors—extend their own power.²³⁹ When deciding cases, ICs take into account litigant interests, rather than government preferences.²⁴⁰ In fact, new style ICs are likely to decide cases in which governments are reluctant participants.²⁴¹ This theory also hypothesizes that ICs influence governments through the alliances that the ICs build with compliance constituencies.²⁴² ICs rely on the continued support of civil society groups, government officials, members of administrative agencies, militaries, and other actors who “increase the shadow of international law in domestic and international politics.”²⁴³ This mobilization of litigants and connection to compliance constituencies, in turn, decreases the likelihood that states will want to continue violating international law.²⁴⁴

The altered politics model “allows for circumventing elected political bodies and domestic judges and by substituting international legality for domestic legality.”²⁴⁵ This, in turn, increases the credibility of the commitments that governments make to their population, to other governments, and to investors.²⁴⁶ ICs thereby assist governments in adopting policies that may be domestically controversial but are consistent with international legal regimes.²⁴⁷ Four conditions are necessary for ICs to alter domestic and international politics: 1) litigants must be able to seize the court, 2) actors within states must care about legality, 3) entrepreneurs must invoke a court and help to build compliance constituencies, and 4) international rules must enjoy the political support of constituencies that

239. ALTER, *supra* note 224, at 10.

240. *Id.*

241. *Id.* at 7.

242. *Id.* at 19.

243. *Id.* at 16 (“Political mobilization and the legal, symbolic, and political resources supplied to compliance constituencies generated costs for violating international law.”).

244. *Id.* at 15 (“IC rulings also provided legal, symbolic, and political resources that those actors who preferred law compliance could use as levers for their cause.”).

245. *Id.* at 67.

246. *Id.* at 64–65 (“Where governments want to encourage foreign investment and where governments want to bolster a promise to their own population or to other states, they may happily submit to international judicial oversight and readily respect IC rulings to provide proof of the government’s commitment to the rules in question.”).

247. *Id.* at 65 (noting that IC’s facilitate the “ability of state and nonstate actors to seek an international legal remedy, and thereby circumvent domestic legal and political barriers”).

have power.²⁴⁸

The experience of the EACJ is consistent with the altered politics framework: compliance constituencies have used the court to advance their goals and achieve domestic political objectives that are unattainable through domestic channels. Groups and individuals have been “empowered” to challenge EAC governments for deviating from the Treaty.²⁴⁹ A key element of the altered politics model is not present in the court, however. International laws—particularly those that relate to human rights—do not enjoy the political support of constituencies that have power, such as EAC governments and the Council. EAC governments have not strongly adhered to protecting and promoting human rights. They have been reluctant to enforce human rights even within their own domestic courts, if not sometimes hostile to such enforcement. This is a major reason why these governments have chosen not to confer human rights jurisdiction on the court.

D. Constrained Independence Theory

Under the constrained independence theory, the enhanced credibility that states receive for establishing tribunals that may rule against them outweighs the costs involved.²⁵⁰ ICs promote the credibility of a state’s international commitments “by raising the probability that violations of those commitments will be detected and accurately labeled as noncompliance.”²⁵¹ The short-term material and reputational costs of such violations, in turn, maximizes the long-term value of the treaty commitments to all parties.²⁵² States can “then use a range of more fine-grained mechanisms to limit the potential for [judicial] overreaching.”²⁵³ Furthermore, this theory explains “how independent tribunals can flourish in an international legal system in which enforcement authority resides predominantly in states themselves.”²⁵⁴

One would expect that East African governments established an independent international court to decrease the likelihood that, in a region

248. *Id.* at 62.

249. *Id.* at 19 (“The existence of an international legal remedy empowers those actors who have international law on their side . . .”).

250. Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 Calif. L. Rev. 899, 904 (2005).

251. *Id.*

252. *Id.* The constrained independence, P-A, and trustee theories have one commonality: that delegation to ICs empowers non-state actors who mobilize to use the court.

253. *Id.* at 901.

254. *Id.* at 931.

characterized by high trade barriers,²⁵⁵ an EAC member would defect from its market liberalization commitments. That has not been the case, however, as the EACJ has hardly entertained any cases involving EAC market integration commitments. EAC states seem to overwhelmingly prefer negotiations and political solutions, rather than adjudication, to resolve their trade disputes.²⁵⁶ While this preference for political negotiation rather than litigation may well help these states meet their expectations, it comes at the expense of using the dispute settlement process to propel the economic integration process forward. In this sense, the court's experience seems to be at odds with the view that its role is to enhance the credibility of EAC international commitments.

Furthermore, one would expect that political and discursive constraints in East Africa, including weak judicial enforcement of human rights at the national level, criticism of the court's activism by the member states,²⁵⁷ the exclusion of human rights from the court's jurisdiction, noncompliance with its rulings, and threats to further restrict its jurisdiction, do not bode well for human rights jurisprudence at the regional level, yet they do not seem to have played a salient role in restricting it. The EACJ's human rights jurisprudence shows that its formal attributes, including its ad hoc nature, the explicit exclusion of human rights from its jurisdiction, and the lack of formal terms of service for its judges, have not been a barrier to its broad constructions of the Treaty.²⁵⁸ The fact that these "informal signaling devices"²⁵⁹ have not substantially moderated the

255. E. AFRICAN CMTY., THE SECOND EAC DEVELOPMENT STRATEGY 2001–2005, at 12 (2001), available at http://www.eac.int/index.php?option=com_docman&task=doc_view&gid=3&Itemid=163 (identifying non-tariff barriers as major impediments to trade in East Africa and noting that they can be more significant than tariffs).

256. See James Thuo Gathii, *The Variation in the Use of Sub-regional Courts Between Business and Human Rights Actors: The Case of the East African Court of Justice*, 77 LAW & CONTEMP. PROBS. (forthcoming 2014) (discussing this preference). Thus the EACJ was not given jurisdiction over the Customs Union and Common Market Protocols. The Common Market Protocol gave a quasi-administrative agency the power to determine any disputes under the Protocol. Cf. Helfer & Slaughter, *supra* note 250, at 940 ("Diplomatic negotiations, threats of tit-for-tat reciprocity, reprisals, and other self-help measures are standard modes of interaction in bilateral settings.")

257. Cf. *id.* at 952 (identifying criticisms of a tribunal's rulings as an example of a political *ex post* control mechanism, even where the decision is purely hortatory).

258. Cf. *id.* at 945 ("Precision in drafting commitments is perhaps the most obvious formal control mechanism that states can exercise [on international tribunals] *ex ante*. Clearly defined substantive rules impose real constraints on tribunals and the parties that wish to use them. They encourage early settlement of disputes, and they inhibit the creation of expansive jurisprudence by requiring judges to provide a persuasive justification for departing from a shared textual meaning."); Posner & Yoo, *supra* note 222, at 9 (arguing that the formal attributes of a tribunal, such as its permanence, compulsory jurisdiction, and judge tenure, are important for tribunal independence).

259. Helfer & Slaughter, *supra* note 250, at 930.

court's human rights jurisprudence indicates the court's relatively high level of independence.

This raises a number of questions, however. What explains this level of independence? Has the court's human rights jurisprudence enhanced the credibility of the court rather than of the states? Why has it invoked teleological or purposive techniques to highlight and promote the protection of human rights, the rule of law, and good governance, which are identified as broad goals of the EAC, while ignoring the textual and informal restrictions of its jurisdiction over human rights cases? Under what circumstances is it likely that the judges will feel constrained, formally or informally, not to transgress the limitations imposed by the Treaty?

The EACJ's human rights case law is now part of a broader transnational jurisprudence. There is no doubt that the expansion, through "justice cascades,"²⁶⁰ of accountability principles for violations of human rights has reached East Africa, as human rights NGOs and activists have increasingly resorted to using the court for remedies that they could not get in their national courts. That EACJ judges see themselves as embedded within a larger set of international courts, connected by the types of cases and issues that come before them, is demonstrated by their citation to cases from other international courts.²⁶¹ As predicted by the constrained independence theory, this jurisprudence helps to set the internal boundaries that IC judges use to limit their own authority and to retain their reputations.²⁶²

E. Bounded Discretion Theory

Under the bounded discretion theory, a state will not delegate to ICs unless they serve the state's interests.²⁶³ Furthermore, explicit and implicit

260. See KATHRYN SIKKINK, *THE JUSTICE CASCADE: HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING WORLD POLITICS* 4–5 (2011) (describing the emergence of individual accountability mechanisms in the twentieth century).

261. The EACJ has often cited the European Court of Justice. See, e.g., *E. African Centre for Trade Policy & Law v. Sec'y Gen. of the E. African Cmty.*, Ref. No. 9 of 2012, at 28 (First Instance Div. May 9, 2013), available at http://eacj.huriweb.org/wp-content/uploads/2013/09/FL_EACCommunity-EACTPL.pdf (citing Case 6/64, *Costa v. ENEL*, 1964 E.C.R. 585, 594) (noting that the Treaty requires partner states to "ensure uniform interpretation and avoid conflicting decisions and uncertainty in the interpretation of the Treaty"); see also van der Mei, *supra* note 81, at 420 (arguing that the EACJ has drawn inspiration from the case law of the European Court of Justice).

262. Cf. Helfer & Slaughter, *supra* note 250, at 953 (arguing that this self-restraint is part of the theory of constrained independence).

263. Tom Ginsburg, *Bounded Discretion in International Judicial Lawmaking*, 45 VA. J. INT'L L. 631, 632 (2005).

strategic constraints, including control over appointments and budgets²⁶⁴ and the fact that judges internalize “a limited conception of their lawmaking role,” limit judicial discretion.²⁶⁵ IC judges may internalize passivity or employ strategies, such as dismissing cases for being nonjusticiable, that avoid displeasing their appointing authorities.²⁶⁶ Therefore, IC judges have limited lawmaking power. These limits are crucial to the willingness of states to delegate to ICs.²⁶⁷ As most people share an “abhorrence of retroactive law,” a judge’s ability to go beyond the written law to answer a legal question is limited, since to do so would be rewrite the rules.²⁶⁸ These constraints explain why states delegate to ICs, since they would otherwise “be reluctant to delegate *any* authority to dispute resolvers when judges resist political control.”²⁶⁹ States thus create vague treaties and establish ICs as part of “an explicit strategy . . . to help them coordinate their behavior long after the ink has dried on the agreement.”²⁷⁰

Bounded discretion does not fit the EACJ human rights jurisprudence. Since the Council has explicitly declined to extend such jurisdiction to the court, the court’s human rights jurisprudence is an anomaly given the assumption in this theory that states leave treaties vague with a view to having ICs coordinate state behavior. By arguing that it has implicit jurisdiction over cases involving human rights by virtue of references to human rights, the rule of law, and good governance in the operational and fundamental principles clauses of the Treaty, the court’s experience is at odds with the theory of bounded discretion.²⁷¹

F. How the EACJ Defies IC Theories

International courts have been created with increasing frequency outside of Europe and North America as regional trade pacts around the

264. *Id.* at 665.

265. *Id.* at 668; *see also* Manfred Elsig & Mark A. Pollack, *Agents, Trustees and International Courts: The Politics of Judicial Appointment at the World Trade Organization*, EUR. J. INT’L REL. 3–4 (Sept. 5, 2012) (discussing control over the appointment of members of the WTO Appellate Body as WTO Members have become more concerned with Appellate Body activism).

266. Ginsburg, *supra* note 263, at 660 n.110.

267. *Id.* at 644 (concluding that states are more likely to delegate to ICs “when the expected policy losses resulting from the agency problem are outweighed by the joint benefits to the parties from enhanced coordination”).

268. *Id.* at 635.

269. *Id.* at 663.

270. *Id.* at 673; *see also id.* at 641 (“At the international level, the residual lawmaking capacity of judges may well be part of the intended design of the treaty regime.”).

271. Judicial lawmaking is least effective when it is nonconsensual. *Id.* at 641.

world have continued to proliferate.²⁷² Africa has not been left behind.

Theories accounting for the spread of ICs, however, only partially account for the experience of the EACJ. A key assumption of these theories is that governments establish ICs to signal the credibility of their commitments to each other and/or to third parties. That is perhaps why the ECJ's judicial activism did not provoke the ire of other European Commission institutions but rather retained their confidence.²⁷³ Unlike in the ECJ, whose decisions have largely aligned with the European Commission's preferences,²⁷⁴ the EACJ's human rights decisions have not closely conformed to the desires of the Council. Thus the assumption that the court was established to signal EAC state commitment to the Treaty may not necessarily be true.²⁷⁵ This is further buttressed by the Council's refusal to explicitly grant the court jurisdiction over human rights. Thus, under these theories the growing human rights jurisprudence of the EACJ is an anomaly. It seems that the court is leading EAC states towards meeting the commitments they have made.

Thus, this Article has demonstrated that these theories do not provide much guidance for understanding what has happened in East Africa. One would expect, under existing theories on IC delegation, that the constituent states would simply pull the rug from under the court's feet: for example, by disbanding the court.²⁷⁶ A key component of the court's human rights jurisdiction, however, has been its ability to carve out its autonomy and independence, defying both other EAC organs, such as the Council, and EAC member states.²⁷⁷

272. See generally James Thuo Gathii, *The Neoliberal Turn in Regional Trade Agreements*, 86 WASH. L. REV. 421 (2011) (discussing the spread of regional trade pacts); ALTER, *supra* note 224, at 116–18, 143–54 (2014) (discussing the proliferation of international courts around the world after the end of the cold war).

273. See Koen Lenaerts, *Some Thoughts About the Interaction Between Judges and Politicians*, 1992 U. CHI. LEGAL F. 93, 111 (1992) (asserting that European politicians had not “lost confidence” in the ECJ when they decided to pursue European integration through legislation rather than judicial decisions).

274. Stone Sweet & Brunell, *supra* note 234, at 71.

275. However, one explanation consistent with this assumption is that disbanding the EACJ would send inappropriate signals to EAC trade partners such as the European Union. The assumption here is that the EAC was formed, like the EU, as a signal to third parties that EAC states are committed to market liberalization. See GATHII, *supra* note 1, at 24–27 (2011) (showing that African regional trade agreements have multiple objectives, including trade liberalization). That assumption is simply that: an assumption.

276. Thus Posner & Yoo would argue that, as in the case of a dependent tribunal, the EACJ would be subject to EAC control through threats of reappointment and retaliation. See Posner & Yoo, *supra* note 222, at 14 (discussing state strategies for controlling dependent tribunals).

277. Cf. Shannon Smitley, *Strategic Activism: A Comparative View of Judges as Institution Builders* 4 (unpublished manuscript) (on file with the *Duke Journal of Comparative and International*

While the EACJ may behave like ICs in other regions, particularly in terms of its broad construction of the Treaty, the context in East Africa is very different. East Africa has no history of judicial activism, and national judiciaries in general have been very passive. There are simply no examples of judicial power operating independently of governments. For the court to have been as active as it has been is a remarkable achievement, rather than a general pattern of courts in the region. Rather than extending the power of EAC states, as the altered framework theory argues that ICs do, the court has come to be regarded by EAC states as a check on their sovereignty because they perceive the court's rulings that the Treaty requires member states to comply with the rule of law, good governance, and human rights as strengthening the authority of regional and human rights law over national law and as a result strengthening the EAC over its members.

Establishing democratic legitimacy for the EACJ when it adjudicates issues that are viewed as exclusively within each country's sovereign control is therefore a major concern. This issue is closely linked with questions of ensuring democratic control of competences delegated to international institutions, such as courts. This question is not uniquely African,²⁷⁸ but it is particularly relevant in the African context because of the special attachment to sovereignty that African countries often exhibit.²⁷⁹

Yet, notwithstanding this strong attachment to sovereignty in Africa, the story of the EACJ's human rights jurisprudence is about the ways in which the court has definitively established its autonomy from the EAC political organs and member states, in which the court has pushed back against attempts to establish hierarchical relations among EAC organs that would allow the Council to commandeer the roles of the EACJ and the EALA at will. In so doing, the court has been able to preserve for itself a significant amount of discretion in judicial decision-making that surpasses

Law) (discussing the role that judges assume in the protection of their own institutional authority).

278. For a European perspective, see Peter L. Lindseth, *Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community*, 99 COLUM. L. REV. 628, 643 (1999) (“[T]he key obstacle to supranational legitimacy is the difficulty in reproducing democratically-legitimate, hierarchical control outside the confines of the nation-state.”). Supranational legitimacy has been justified by criteria such as “technocratic assertions of efficiency and expertise,” transparency, and participation. *Id.* at 634 (proposing that the best way to think of the EU's legitimacy is by analogizing it to the modern administrative state rather than to the nation-state, which derives its legitimacy from the people).

279. See Stanlake JTM Samkrange, *African Perspectives on Intervention and State Sovereignty*, 11 AFR. SECURITY REV. 73 (2002) (“[T]he exploitation and degradation that resulted from African societies losing sovereignty and control to a foreign colonial entity, has prompted post-colonial states in Africa to be fiercely attached to international rights, protections and the recognition of that regained sovereignty.”).

that of national judges of EAC member states. Instead of internalizing a restrictive understanding of their roles, as national judges in EAC member states often do, EACJ judges have pushed the boundaries. In doing so, they may have begun drawing the contours of judicial supremacy in the EAC. For now though, the Council prefers political negotiations as the driver of the integration process.

CONCLUSION

Rather than remain faithful to its lack of jurisdiction to decide human rights cases, the East African Court of Justice has deployed an elastic interpretive methodology that has allowed it to push the textual boundaries of its jurisdiction. This teleological or purposive methodology has emphasized the EAC Treaty's broad aims with respect to human rights, the rule of law, democracy, and good governance, while underemphasizing the textual limitations of the court's mandate.²⁸⁰ In doing so, the court has failed to closely track the positions of EAC member states, particularly insofar as these states have specifically decided not to extend jurisdiction over cases involving human rights to the court.²⁸¹ By deciding that it has such jurisdiction, the court has engaged in expansive judicial policymaking. This is all the more remarkable because EAC states have seldom sought to debate their economic integration goals in the language and logic of law, much less of human rights law.²⁸² Only once, when political negotiations on the common market were at a near impasse, did the EAC States resort to the court, and there they sought an advisory opinion.²⁸³

This paper has sought to account for the EACJ's activism. In particular, why did EAC states risk delegating jurisdiction over the interpretation of the Treaty to the court? Did they expect that the court

280. This has been similar to the experience of the ECJ. See Anne-Marie Burley & Walter Mattli, *Europe Before the Court: A Political Theory of Legal Integration*, 47 INT'L ORG. 41, 68 (1993) (arguing that the European Court of Justice used the "teleological method of interpretation" to justify its decisions in light of the common interests of the EC members that were enshrined in both the specific and general objectives of the Rome Treaty).

281. This is also similar to the experience of the ECJ. See *id.* at 51.

282. By contrast, the ECJ's human rights case law bolstered its authority to develop a uniform community law and its authority over recalcitrant national courts that did not want to give up their authority to decide whether claims based on EC law were consistent with domestic constitutions. See Anne-Marie Burley, *Democracy and Judicial Review in the European Community*, 1992 U. CHI. LEGAL F. 81, 87 (1992) ("Human rights review bolstered the ECJ against rebellious national courts claiming the necessity and exclusive power to review claims that Community actions violated the human rights provisions in their national constitutions.").

283. See *In re a Request by the Council of Ministers of the E. African Cmty. for an Advisory Op.*, Appl. No. 1 of 2008 (First Instance Div. 2009), available at http://eacj.huriweb.org/wp-content/uploads/2012/11/advisory_opinion_1_of_2008.pdf.

would be faithful to the restrictions on its jurisdiction? Why did they fail to control appointments to the court, to prevent the possibility of a runaway court, in the same way that they have done domestically? Why did they fail to require the publication of the judges' votes in individual cases? And why have they not engaged in disbanding the court in the same way that member states of the SADC Tribunal did?

In answering these questions, this Article has borne in mind that in the early period of the ECJ, the six original EC members often objected to the court's power to interpret their respective national laws and to hold that certain conduct was inconsistent with EC law.²⁸⁴ Rather than weighing the costs and benefits of compromising the sovereignty of member states as a result of the expansion of EC law, the ECJ asserted that law's full effectiveness.²⁸⁵ The EACJ's expansive jurisprudence has been similarly resisted by member states.

This paper tested the EACJ's expansive human rights jurisprudence against six contemporary theories that seek to explain delegation to international courts. None of these theories fits the East African experience.

The EACJ's activism is the culmination of three influences. First, it is a reflection of the determined efforts of the judges to make the court relevant and accessible to East Africans, who built the EACJ's role in the integration process through innumerable formal and informal contacts with lawyers, civil society groups, and governmental agencies of EAC member States, among other groups.²⁸⁶ Second, by developing human rights case law, the judges have created a regional avenue in which East Africans can seek judicial confirmations of violations of human rights, the rule of law, and good governance, despite the reluctance of national judiciaries to enforce human rights and the lack of confidence in the court among national representative institutions. The court is now regarded as a

284. Lenaerts, *supra* note 273, at 98–99.

285. *Id.* at 101 (“[A]ny ‘impediment to the full effectiveness of Community law’ had to be rejected. . . . [T]he ECJ is not ready to engage in a balancing test, weighing the effectiveness of Community law against the possible cost in terms of national resentment toward the ECJ’s ruling.” (footnote omitted)).

286. The judges have acknowledged the value of a regional body that can opine on states' compliance with international law, even if that court has no enforcement power. See *Sebalu v. Sec'y Gen. of the E. African Cmty.*, Ref. No. 1 of 2010, at 41 (First Instance Div. Jun. 30, 2011), available at <http://eacj.huriweb.org/wp-content/uploads/2012/11/No-1-of-2010.pdf> (“The EACJ is a legitimate avenue through which to seek redress, even if all the Court does is to make declarations of illegality of the impugned acts, whether of commission or omission. It would be well to remember that the court is a primary avenue through which the people can secure not only proper interpretation and application of the Treaty but also effective and expeditious compliance therewith.”).

valuable contribution to the EAC's integration process.²⁸⁷ This case law has dovetailed very well with anti-impunity movements in East Africa and has laid a strong foundation for the court's legitimacy. Third, and as a result, the court has developed a strong reputation within multiple networks of civil society, professional, and other groups at the national and regional levels as a defender of human rights, the rule of law, and good governance. In effect, these groups have served as an insurance mechanism against extensive reductions in or suspensions of the court's jurisdiction. They have also provided a continuing stream of cases that have demonstrated that there is a demand for the court's human rights case law.

Ultimately, human rights litigation in the EACJ is part of a broader strategy of political mobilization that is giving voice to actors who did not have such legal recourse to advance their claims in the past. This mobilization is particularly important because discredited political institutions—parties, legislatures, and executives—are not regarded as avenues for addressing the concerns of ordinary citizens in their own national jurisdictions at the moment.

287. In his 2013 New Year Message, the EAC Secretary General congratulated the EACJ for opening registries in EAC member states and thereby bringing justice closer to the people. Richard Sezibera, Sec'y Gen., E. African Cmty., New Year Message (Dec. 31, 2013), *available at* http://eac.int/index.php?option=com_content&view=article&id=1455:amb-dr-richard-seziberas-new-year-message-&catid=146:press-releases&Itemid=194