

## **HUMAN RIGHTS, THE RULE OF LAW, AND THE EAST AFRICAN COURT OF JUSTICE: LAWYERS AND THE EMERGENCE OF A WEAK REGIONAL FIELD**

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This article represents a first systematic attempt to trace the trajectory that follows the professionalization of a group of East African lawyers committed to the cause of a regional International Court (IC) inspired by the rule of law and human rights. It demonstrates how a group of lawyers participated in the struggle to define law and to construct the East African Court of Justice (EACJ) and build the field of human rights. Lawyers who participated in the creation of the EACJ became “experts” in regional law. This expertise was legitimised not only by the political and social capital deriving from their participation in the drafting of the EAC Treaty, as representatives of states or civil society groups, but also by the capital of knowledge and technical skill accumulated in the course of bringing forth and litigating cases in both the national and transnational spaces. Upon entering the regional IC, as either judges or litigators, these agents became interpreters of the EAC Treaty inspired by the respect for the rule of law and human rights.

The article reports on data from field research in East Africa. This article starts with a discussion of the role of lawyers and civil society groups in the formation of the EACJ before analysing efforts to extend the jurisdiction of the EACJ to include human rights. It then examines the EACJ judges’ off-the-bench efforts at judicial empowerment before looking at how lawyers introduced their litigation experience from the national level to the EACJ. Finally, this article discusses the rule of law and human rights-related case law of the EACJ.

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#### I. INTRODUCTION

This article examines the origin of the rule of law and human rights provisions of the Treaty for the Establishment of the East African Community (EAC Treaty or Treaty). It argues that the introduction of legal expertise on the rule of law and human rights was part of a broader process that involved a group of lawyers in the struggle to define law. These agents, legitimized by their role as “experts,” actively participated in the struggle to define law and to construct the East African Court of Justice (EACJ). The introduction of this tenet shaped the gradual change in the regional legal field from the inclusion of specific provisions in the EAC Treaty geared towards respect for the rule of law and human rights to the creation of the EACJ with jurisdiction to interpret the EAC Treaty. These developments later resulted in the emergence of legal elites in charge of advocacy and litigation at the EACJ. This process produced new legitimating conditions, such as new spaces for professional practices.

In line with post-Bourdieuian sociology, this article represents a first systematic attempt to trace the trajectory that follows the professionalization of a group of East African lawyers committed to the cause of a regional International Court (IC) inspired by the rule of law and human rights. Lawyers who participated in the creation of the EACJ became “experts” in regional law. This expertise was legitimized not only by the political and social capital derived from their participation in the drafting of the EAC Treaty as representatives of states or civil society groups but also by the capital of knowledge and technical skill accumulated in the course of bringing forth and litigating cases in both national and transnational spaces. Upon entering the regional IC, as either judges or litigators, these agents became interpreters of the EAC Treaty inspired by the respect for the rule of law and

human rights.<sup>1</sup> Using data from field research in East and Southern Africa, this article starts with a discussion of the role of lawyers and civil society groups in the formation of the EACJ before analyzing efforts to extend the jurisdiction of the EACJ to include human rights. It then examines the judges' off-the-bench efforts at judicial empowerment before looking at how lawyers introduced their litigation experience from the national level to the EACJ. Finally, this article discusses the rule of law and human rights-related case law of the Court.

## II. THE ROLE OF LAWYERS IN THE ESTABLISHMENT OF THE EAST AFRICAN COURT OF JUSTICE

### A. *The Struggle for the Return of the East African Court of Appeal*

East Africa has had regional institutions since the advent of colonialism. Soon after their independence, East African states adopted colonial-era institutions to create the first East African Community (first EAC), which lasted from 1967 to 1977. The Court of Appeal for East Africa (CAEA), an organ of the first EAC, served as its first IC.<sup>2</sup> The EACJ, the second IC in East Africa, emerged as part of the establishment of the present EAC.<sup>3</sup> The EACJ was inaugurated in 2001 and received its first case in 2005.<sup>4</sup>

The current EAC and the EACJ emerged as part of the proliferation of regional organizations and ICs around the world in the 1990s.<sup>5</sup> The creation of the EAC was

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1. This article is based on data from field research in East Africa in 2013 and 2014, including over fifty interviews with government officials, human rights lawyers, law societies, judges, the staff of the Court Registrar and the Secretariat of the EAC. A review of the background documents on the treaty-making process for the establishment of the EAC, the EACJ case law, non-governmental organization (NGO) press releases and news media reports provide additional context for the analysis. To keep the anonymity of the informants, all of the interview subjects are given an interview a number.

2. See generally L. L. Kato, *The Court of Appeal for East Africa: From a Colonial Court to an International Court*, 7 EAST AFR. L. J. 1, 1–3 (1971); J. W. Katende & George W. Kanyeihamba, *Legalism and Politics in East Africa*, 43 TRANSITION 43, 44 (1973).

3. Victor Lando, *The Domestic Impact of the Decisions of the East African Court of Justice*, 18 AFR. HUM. RTS. L. J. 463, 466 (2018).

4. James Gathii, *Mission Creep or a Search for Relevance: The East African Court of the Justice's Human Rights Strategy*, 24 DUKE J. COMP. & INT'L L. 249, 249 (2013) [hereinafter Gathii, *Mission Creep*]. See generally *Mwatela v. Sec'y Gen. of the E. Afr. Cmty.*, Appl. No. 1 of 2005, (Oct. 1, 2006), available at [http://www.worldcourts.com/eacj/eng/decisions/2006.10.01\\_Mwatela\\_v\\_EAC.htm](http://www.worldcourts.com/eacj/eng/decisions/2006.10.01_Mwatela_v_EAC.htm).

5. Gathii, *Mission Creep*, *supra* note 4, at 292; Karen J. Alter & Liesbet Hooghe, *Regional Dispute Settlement Systems*, in OXFORD HANDBOOK OF COMPARATIVE REGIONALISM 538, 538 (Tanja A. Börzel & Thomas Risse eds., 2016); see Karen J. Alter, *The Global Spread of European Style International Courts*, 35 W. EUR. POL. 135–154 (2012) (describing the international courts

unique in that the public was invited to participate in the treaty-making process. This invitation mobilized the legal profession and civil society groups working on human rights. However, drafting the provisions for the Court in the EAC Treaty was a difficult undertaking because of controversy over the nature of the Court and the scope of its jurisdiction. In the negotiations, human rights non-governmental organizations (NGOs) and the East African Law Society (EALS) advocated for a court of final appellate jurisdiction on all matters, including human rights.<sup>6</sup> The focus of the legal professionals was to create an appellate court with jurisdiction not only over interstate disputes but also over cases involving individual litigants.<sup>7</sup>

The emphasis on individual legal standing emanated from the fact that CAEA, which had left a positive mark in East Africa, had jurisdiction over cases involving individuals.<sup>8</sup> This mark was evident in its authoritative decisions throughout East Africa.<sup>9</sup> The apolitical nature of the CAEA was also an element that played heavily in its positive reputation.<sup>10</sup> Hence, legal professionals and civil society groups were in favor of an appellate court not only similar to the CAEA but also with an extensive jurisdiction that included human rights.<sup>11</sup> However, neither the revival of the CAEA nor the creation of a court with human rights jurisdiction materialized.<sup>12</sup> Instead, the EACJ was established with a very narrow jurisdiction to interpret the EAC Treaty, thereby ensuring adherence to the law in the application of the Treaty. The EAC Treaty explicitly left human rights outside the jurisdiction of the EACJ without closing the future possibility of extension of jurisdiction on human rights. Hence, the Partner States<sup>13</sup> considered the EACJ an economic court.<sup>14</sup>

Although it was not possible to create an appellate court with human rights jurisdiction, human rights NGOs and the legal community successfully influenced

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emerging based on the European model). *See generally* Cesare P. R. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 N.Y.U. J. INT'L L. & POL. 709 (1998); Shane Spelliscy, *The Proliferation of International Tribunals: A Chink in the Armor*, 40 COLUM. J. TRANSNAT'L L. 143 (2001).

6. Interview No. 43 with Human Rights Advocate and Official at Pan African Lawyers Union (PALU), in Arusha, Tanz. (2014).

7. Secretariat of the Comm'n for E. Afr. Co-Operation, *Report of the East African Law Society Workshop to Revisit the Draft Treaty for the Establishment of the East African Community*, at 2 (Nov. 21, 1998) [hereinafter *Report of the East African Law Society Workshop*].

8. *See* Conference on the Tanzanian White Paper and the Draft Treaty for the Establishment of the East African Cooperation, *Summary Report*, 68–71 (Feb. 2, 1999) (explaining how the Treaty should be “people centered.”).

9. Interview No. 1 with EACJ Appellate Judge, in Arusha, Tanz. (2013); Interview No. 51 with Official at the Registrar of the EACJ, in Dar es Salaam, Tanz. (2014).

10. *See generally* EAC Secretariat, *Meeting of the High Level Task Force on the Amendment of the Treaty for the Establishment of the East African Community*, Re. EAC/TF/33/2007 (Aug. 1, 2007) [hereinafter *Meeting of the High Level Task Force*].

11. Interview No. 43, *supra* note 6; Interview No. 51, *supra* note 9; Interview No. 42 with Official at the Office of the EAC Legal Counsel, in Arusha, Tanz. (2014).

12. Interview No. 42, *supra* note 11; Interview No. 51, *supra* note 9.

13. *See About EAC: EAC Partner States*, EAC, <https://www.eac.int/eac-partner-states> (listing Burundi, Kenya, Rwanda, South Sudan, Tanzania, and Uganda as EAC Partner States).

14. Interview No. 7 with Official at the Kenya Attorney General's Office, in Nairobi, Kenya (2013).

the EAC Treaty provisions on fundamental and operational principles of the Community. The EAC draft treaty recognized respect for human rights and the rule of law as a condition for accession.<sup>15</sup> Specifically, the original draft treaty required aspiring Partner States to “adhere to universally acceptable principles of democracy, rule of law, observance of human rights and social justice.”<sup>16</sup> However, the draft treaty did not impose similar obligations on the original Partner States. Consequently, civil society groups and lawyers, particularly the EALS, actively argued against any distinction between the obligations of aspiring Partner States and the original Partner States in respecting human rights, the rule of law, and good governance.<sup>17</sup>

Therefore, the Ugandan Judicial Education Committee (UJEC) and the EALS proposed the inclusion of a provision in the new EAC Treaty referring to the African Charter on Human and Peoples Rights (African Charter).<sup>18</sup> This proposal reflected civil society’s concern that “the protection of human rights” was “not defined with respect to any particular conception or principles of human rights,”<sup>19</sup> and eventually led to a reference to the African Charter in Article 6(d) of the EAC Treaty. The reference to the African Charter was to avoid any “doubts as to the precise jurisdiction of the court with respect to alleged infringements.”<sup>20</sup> Other civil society groups proposed the broadening of the principle of good governance to include the principle of accountability and transparency,<sup>21</sup> a proposal ultimately adopted in Article 7(2) of the EAC Treaty. After the operationalization of the EACJ, these provisions became the base for the human rights-related case law of the EACJ. Furthermore, the EALS and lawyers, such as Professor E.F Ssempebwa, who also served as Uganda’s Minister, began litigating based on Article 6(d) and 7(2). Thus, civil society groups influenced the creation and institutionalization of the Court by actively participating in the drafting process of the Treaty and later through litigation.

The EACJ provided individuals with an additional advantage of using not only

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15. Solomon T. Ebobrah, *Litigating Human Rights Before Sub-Regional Courts in Africa: Prospects and Challenges*, 17 AFR. J. INT’L & COMP. L. 79, 88–89 (2009).

16. E.F. Ssempebwa, *The Draft Treaty for the Establishment of the East African Community: Is Cooperation for Development* 34, 17 (1998). Article 27 states that “[t]he Court shall initially have jurisdiction over the interpretation and application of this Treaty: Provided that the Court’s jurisdiction to interpret under this paragraph shall not include the application of any such interpretation to jurisdiction conferred by the Treaty on organs of Partner States.” Further, it states that “[t]he 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.” Treaty for the Establishment of East African Community art. 27, Nov. 30, 1999, 2144 U.N.T.S. 255 [hereinafter EAC Treaty].

17. Rep. of the Task Force on the Draft Treaty for the Establishment of the E. Afr. Cmty.: Views and Recommendations by the Ugandan Pub., Annex III (May 1999) [hereinafter Report of the Task Force on the Draft Treaty]; see Ssempebwa, *supra* note 16 (questioning the legitimacy of the absence of obligations to respect human rights and the rule of law in the Draft Treaty).

18. Report of the Task Force on the Draft Treaty, *supra* note 17, Annex III, at 9.

19. *Id.* at Annex III, 8.

20. *Id.*

21. *Id.*

national courts but also regional courts. Indeed, the increasing use of the EACJ today is, among other things, the result of the deterioration of the rule of law, human rights, and the independence of the judiciary at the national level, which has narrowed the space for human rights litigation in domestic courts.<sup>22</sup> Whatever the explanation, the fundamental role of civil society and lawyers in the creation of the EACJ has had a profound impact on the later use of the EACJ by the same actors who pushed for a Court of Appeal with an extensive jurisdiction.

### ***B. The Struggle for the Return of the East African Court of Appeal***

As noted above, despite the advocacy of lawyers and civil society groups to create an appellate court with extensive jurisdiction, it was not possible to include provisions granting the Court jurisdiction over human rights issues in the EAC treaty. Nonetheless, these lawyers and civil society groups continued their advocacy efforts. In 2003, a year after the inauguration of the EACJ, three members of the East African Legislative Assembly (EALA), in a paper presented at Moi University, stressed that the EACJ “should be tailored like that of the [CAEA] in the first EAC, which had appellate jurisdiction all over East Africa.”<sup>23</sup> The proposal included a court with appellate and human rights jurisdiction. The EALA members explained that:

We want the EACJ to have appellate jurisdiction so that if one feels dissatisfied with say the Kenyan Court of Appeal, he/she can appeal against its decision at the EACJ. Those with land and other human-rights cases can also go to the court and say they are dissatisfied with the decision of the High Court of Kenya.<sup>24</sup>

Similarly, the East African Magistrates and Judges Association (EAMJA) and EALS continued to call for the return of an appellate court, with an upgraded jurisdiction, even after the establishment of the EACJ. In January 2004, the President of the EAMJA delivered a speech at the association’s annual general meeting in Dar es Salaam reiterating that:

We in the EAMJA believe that in order to fulfil the objectives of the Community, especially those under Article 126(c) of the Treaty which include, *inter alia* “. . . the harmonisation of legal learning and standardisation of judgments of courts within the Community,” the formation of the East African Court of Appeal is a necessary and overdue step. We need a court of highest resort in East Africa whose decisions bind all our national courts. The world trend now is to use international norms and standards to interpret national laws . . . And further delay in establishing the East African Court of Appeal will just leave us behind while other regions forge ahead.<sup>25</sup>

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22. Gathii, *Mission Creep*, *supra* note 4, at 272–74.

23. Lucas Barasa, *East Africa: MPs: Make EACJ Appeals Court for All East Africa*, EAST AFR. (Mar. 3, 2003), <http://allafrica.com/stories/200303060586.html>.

24. *Id.*

25. John E. Ruhangisa, *Procedures and Functions of the East African Court of Justice*, in PROCESSES OF LEGAL INTEGRATION IN THE EAST AFRICAN COMMUNITY 145, 149 (Kennedy Gastorn et al. eds., 1st ed. 2011) (quoting Hon. Justice Lawrence Mchome, President EAMJA, Welcome Address at Third E. Afr. Magistrates and Judges Assoc. Annual Gen. Meeting

Indeed, a study commissioned by the EACJ a few years after its inauguration revealed that national judiciaries also shared the above views. These judiciaries lamented “the absence of established appeal mechanisms within the EACJ framework for those aggrieved by the decision of the EACJ.”<sup>26</sup> Interestingly, as far back as 2007, there have been considerations about having a Court of Appeal for East Africa. One reason for this consideration has been the delimitation of the jurisdiction of the EACJ, which is not in harmony with the creation of common jurisprudence, a vital requirement of effective integration. Furthermore, the limited jurisdiction of the EACJ did not allow the public to take full advantage of the existence of the Court.<sup>27</sup> However, this proposal was scrapped, perhaps due to the backlash against the EACJ following its ruling against Kenya in *Anyang’ Nyong’o v. Attorney General of Kenya*.<sup>28</sup> To understand the rejection of the proposal, one should look at the context of the efforts to extend the EACJ’s jurisdiction.

### C. *The Effort to Extend the Jurisdiction of the East African Court Justice*

The EACJ has jurisdiction over the interpretation and application of the EAC Treaty. The Treaty explicitly defers the extension of original, appellate, human rights, or other forms of EACJ jurisdiction for future decisions to the Council.<sup>29</sup> Some scholars have argued that conditioning the “future extension of the jurisdiction” shows the phase-by-phase approach preferred by the Partner States<sup>30</sup> to ensure “conflict resolution and confidence building in the region.”<sup>31</sup> According to this line of argument, the EACJ will have full jurisdiction at a time when the EAC

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Conference (Jan. 25, 2004)).

26. Sukhdev Chhatbar, *EA Court of Justice Remains a Mystery*, EAST AFR. (June 7, 2004), <http://www.theeastafrican.co.ke/news/-/2558/243646/-/t6vonsz/-/index.html>.

27. See generally *Meeting of the High Level Task Force*, *supra* note 10.

28. Karen J. Alter et al., *Backlash Against International Courts in West, East and Southern Africa: Causes and Consequences*, 27 EUR. J. INT’L L. 293, 301–02 (2016). In *Nyong’o*, the applicants “contended that the process of electing . . . Kenya’s EALA members and the rules of Kenya National Assembly for EALA elections infringed the EAC Treaty; the EACJ ruled that that the National Assembly of Kenya did not undertake or carry out an election within the meaning of the Treaty. It therefore directed that Kenya start the process of election again to comply with the EAC Treaty.” Angered by the ruling, Kenya moved to amend the Treaty within two weeks by proposing an amendment that would remove judges from office and an amendment that limited access to the EACJ by EAC residents providing the basis for the rejection of many cases. Mary Wandia, *Stop Manipulating and Bullying the EA Court to Serve Interests of Regional Elites*, EAST AFR. (May 12, 2012), <https://www.theeastafrican.co.ke/oped/comment/Stop-manipulating-and-bullying-the-EA-court-/434750-1404590-aae67k/index.html>. See generally *Anyang’ Nyong’o v. Attorney General of Kenya*, Appl. No. 5 of 2007 (First Instance Div. Mar. 30, 2007), arising from Ref. No. 1 of 2006, available at <http://eacj.org/?cases=attorney-general-of-kenya-vs-prof-peter-anyang-nyong-and-others-appeal>.

29. EAC Treaty, *supra* note 16, arts. 27(1), 32.

30. See T.O. Ojienda, *Alice’s Adventures in Wonderland: Preliminary Reflections on the Jurisdiction of the East African Court of Justice*, 2 E. AFR. J. HUM. RTS. & DEMOCRACY 94, 96 (2004) (describing how a provision may extend the jurisdiction of the EACJ to appellate and human rights, despite the Treaty’s attempts to limit the jurisdiction).

31. Wilbert T.K. Kaahwa, *The Institutional Framework of the EAC*, in EAST AFRICAN COMMUNITY LAW: INSTITUTIONAL, SUBSTANTIVE AND COMPARATIVE EU ASPECTS 43, 64 (Emmanuel Ugirashebuja et al. eds., 2017).

becomes a political federation,<sup>32</sup> reflecting the Partner States' positions during the Treaty negotiations.<sup>33</sup>

In 2004, the Secretariat prepared a Draft Protocol to extend the EACJ's jurisdiction to address, among other things, human rights issues.<sup>34</sup> The subsequent debates focused primarily on the necessity of an explicit provision in the EAC Treaty or Draft Protocol.<sup>35</sup> Regional integration necessitates the free movements of persons, goods, and services within the Community. Therefore, the action of individuals within one Partner State will potentially affect individuals in another Partner State, whether directly or indirectly.<sup>36</sup> It follows that providing a clear human rights mandate to the EACJ is a crucial issue in such situations.

Implicit from the discussion so far, civil society actors, especially those working on the promotion of human rights, actively participated and shaped the EAC Treaty during its drafting process. The Treaty refers to human rights, including the rule of law and good governance, as fundamental principles of the Community.<sup>37</sup>

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32. *Id.* at 48; *see* Ojienda, *supra* note 30, at 96 (“[Article 33(2)] . . . is an acknowledgement of the fact that national courts and the EAC have concurrent jurisdiction to interpret and apply provisions of the Treaty.”).

33. Email from Ministry of Foreign Affairs and Int'l Co-operation to E. Africa Cooperation (Jun 24, 1999, 14:03 EAT) (on file with author).

34. EAC Secretariat, *Draft Protocol to Operationalise the Extended Jurisdiction of the East African Court of Justice*, Part C (May, 2005) [hereinafter *Draft Protocol*].

35. *See* Edith Kibalama, *Human Rights in the Region: The Community and the Members*, in *THE PROTECTORS: HUMAN RIGHTS COMMISSIONS AND ACCOUNTABILITY IN EAST AFRICA* 208, 212–13 (CM Peter ed., 2008) (describing the debate around maintaining the Treaty's oblique reference to the African Charter on Human and Peoples' Rights or creating a distinct provision as the human rights standard of the EACJ).

36. *See* John Eudes Ruhangisa, Registrar, E. Afr. Court of Justice, Presentation at the Inter-Parliamentary Relations Seminar: The Role of the East African Court of Justice in the Realization of the Customs Union and Market 3 (Jan. 31, 2010) (stating that EAC integration will likely produce more disputes across boundaries).

37. Article 6 provides that “[t]he fundamental principles that shall govern the achievement of the objectives of the Community by the Partner States shall include: (a) mutual trust, political will and sovereign equality; (b) peaceful co-existence and good neighbourliness; (c) peaceful settlement of disputes; (d) good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights; (e) equitable distribution of benefits; and (f) co-operation for mutual benefit.” EAC Treaty, *supra* note 16, art 6. Article 7 provides that “[t]he principles that shall govern the practical achievement of the objectives of the Community shall include: (a) people-centred and market-driven co-operation; (b) the provision by the Partner States of an adequate and appropriate enabling environment, such as conducive policies and basic infrastructure; (c) the establishment of an export oriented economy for the Partner States in which there shall be free movement of goods, persons, labour, services, capital, information and technology; (d) the principle of subsidiarity with emphasis on multi-level participation and the involvement of a wide range of stake- holders in the process of integration; (e) the principle of variable geometry which allows for progression in co-operation among groups within the Community for wider integration schemes in various fields and at different speeds; (f) the equitable distribution of benefits accruing or to be derived from the operations of the Community and measures to address economic imbalances that may arise from such operations; (g) the principle of complementarity; and (h) the principle of asymmetry.” Further, Article 7 states that “[t]he Partner



Therefore, as the extensive human rights related jurisprudence of the EACJ reveals, when the judges encounter an issue pertaining to human rights, unavoidably, they have to interpret the human rights provisions of the EAC Treaty as well as the provisions in the African Court on Human and Peoples' Rights (ACHPR).<sup>38</sup> The Registrar and judges of the Court have emphasised the urgency of the extension of jurisdiction.<sup>39</sup> In 2011, the Court Registrar stated, "the limited jurisdiction of the court is a crippling challenge and the jurisdiction should be extended as envisaged" in the Treaty.<sup>40</sup>

Furthermore, a communiqué of a meeting on the implementation of human rights standards in East Africa echoed the need for both civil society and the EALA to continue lobbying for the extension of the EACJ jurisdiction on human rights matters.<sup>41</sup> The considerable delay in extending the jurisdiction of the Court has resulted in a case before the EACJ in *Sitenda Sebalu v. Secretary-General of the EAC*.<sup>42</sup> Remarkably, in this case, the EACJ held that there was undeniably undue delay by the EAC in determining the issue of extension of the jurisdiction of the Court.<sup>43</sup> Furthermore, the EACJ concluded that the delay "contravenes the principles of good governance as stipulated in Article 6 of the Treaty."<sup>44</sup>

Despite the existence of the Draft Protocol since 2005, and the campaign and push to endorse it, the process has taken rather long, and the Protocol approved at a 2015 summit of Partner States excludes human rights but extends the jurisdiction of the Court to include trade, investment, and monetary union.<sup>45</sup> Indeed, this extension is not surprising because trade and investment matters have never been as controversial as human rights matters.<sup>46</sup> The table 1 in the Appendix shows the timeline, process, and status of the expansion of the EACJ's jurisdiction. Thus, the long-awaited Protocol to extend the jurisdiction of the Court failed to touch the more

States undertake to abide by 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." *Id.* art. 7.

38. Kibalama, *supra* note 35, at 212–13. See EAST AFRICAN COURT OF JUSTICE, [http://eacj.eac.int/?page\\_id=2414](http://eacj.eac.int/?page_id=2414) (last visited Jan. 31, 2020) for human rights related cases.

39. See E. Afr. Court of Justice, *East African Court of Justice Strategic Plan: 2010 – 2015*, at 22 (Apr. 2010) (laying out the required actions for extending the jurisdiction of the EACJ).

40. *EA Court Seeks More Jurisdiction*, NEW TIMES (May 23, 2011), <https://www.newtimes.co.rw/section/read/31421>.

41. See Press Release, East African Legislative Assembly, Roundtable on Strengthening the Implementation of Human Rights Standards in the EAC Region: The Role of the East African Legislative Assembly (May 31, 2011) (statement of Hon. Gervais Akhaabi) ("There is also need for enhancement of the jurisdiction of the East African Court of Justice to deal with issues of human rights. EALA and the Partner States' parliaments in collaboration with the civil society should bring pressure to bear on the Community to operationalise Article 27 of the Treaty.").

42. Ref. No. 1 of 2010 (June 30, 2011), available at [http://eacj.org/wp-content/uploads/2013/09/Sitenda\\_Taxation\\_Ruling.pdf](http://eacj.org/wp-content/uploads/2013/09/Sitenda_Taxation_Ruling.pdf).

43. See *id.* at 30 ("Respondent has laid his country open to accusations by the Applicant that it intends to indefinitely hold back the process of granting any appellate jurisdiction to the EACJ over decisions of national courts.").

44. *Id.* at 42.

45. Interview No. 42, *supra* note 11; Kaahwa, *supra* note 31, at 64.

46. Interview No. 34 with EACJ First Instance Judge, in Arusha, Tanz. (2014).

controversial matter of human rights. Instead, it merely extended the jurisdiction of the Court to less controversial subjects such as trade and investment.

One of the acute problems in the institutionalization of the EACJ has been its limited jurisdiction. The EACJ's jurisprudence exhibits elements of judicial activism, displaying the boldness of the judges to offer broad interpretation and application of the rule of law Treaty provisions, particularly those dealing with the objectives, fundamental principles, and operational principles of the EAC, together with the provisions relating to the general undertaking as to implementation of the Community's goals. Hence, the question of jurisdiction of the EACJ was an essential theme for the Partner States and lawyers in EAC and continues to be so to this day. EAC lawyers have been longing to see the extension of the EACJ jurisdiction beyond the contents of Article 27 of the EAC Treaty.<sup>47</sup> In particular, there is a consensus among legal professionals that the EACJ should have a specific jurisdiction on human rights.<sup>48</sup> However, Partner States have preferred a cautious approach in the institutionalization of the EACJ, a position that they held during the creation of the Court.

#### ***D. Judicial Empowerment through off the Bench Diplomacy of the Judges of the East African Court of Justice***

The Partner States' reluctance to grant a broad jurisdiction to the EACJ has put the EACJ in a situation of seeking empowerment not only through the creation of rapport with Community institutions and Partner States but also through off-the-bench diplomacy to potential users of the Court. Consequently, before the first case in 2005, the judges and registrar nurtured an extensive network of users and supporters.<sup>49</sup> The registrars' and judges' backgrounds were useful in attracting users and supporters.<sup>50</sup> The biographic facts on the first registrar, judges, and the Legal Counsel to the Community offer a synopsis of the initial social construction of the Court concerning the collective social, political, and legal capitals. The collective biography of the Court provides an analytical tool for understanding the institutionalization of the Court in relation to the national levels of law and particularly concerning the pressing issues of operationalization of the Court.<sup>51</sup>

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47. EAC Treaty, *supra* note 16, art 27.

48. Interview No. 1, *supra* note 9; Interview No. 22 with Human Rights Advocate and Official at Pan African Lawyers Union (PALU), in Arusha, Tanz. (2013); Interview No. 34, *supra* note 46; Interview No. 42, *supra* note 11; Interview No. 49 with Lawyer and Member of East African Legislative Assembly (EALA), in Dar es Salaam, Tanz. (2014).

49. Gathii, *Mission Creep*, *supra* note 4, at 262, 272.

50. See *Judges*, E. AFR. CT. JUST., [http://eacj.eac.int/?page\\_id=1135](http://eacj.eac.int/?page_id=1135) (providing background on some of the judges of the EACJ).

51. See Antonin Cohen & Mikael Rask Madsen, *Cold War Law: Legal Entrepreneurs and the Emergence of a European Legal Field (1945-1965)*, in EUROPEAN WAYS OF LAW: TOWARDS A EUROPEAN SOCIOLOGY OF LAW 175, 194–97 (Volkmar Gessner & David Nelken eds., 2007) (describing how the collective biography of the Court provides a key to understanding its institutionalism); Mikael Rask Madsen, *The Protracted Institutionalization of the Strasbourg Court: From Legal Diplomacy to Integrationist Jurisprudence*, in THE EUROPEAN COURT OF HUMAN RIGHTS BETWEEN LAW AND POLITICS 43, 46–48 (Jonas Christoffersen & Mikael Rask Madsen eds., 2011) (discussing how the court appointed judges and commissioners in a manner suited

The first cadre of judges brought with them a wide range of relevant experience, with members ranging from a prime minister to the highest judicial roles at national levels. Although outreach efforts by all of the EACJ judges were vital during the initial formative years of the EACJ, the background of three of the judges and the registrar is worth highlighting by way of example. Hon. Joseph Sinde Warioba was Prime Minister and Vice President of Tanzania from 1985 to 1990 and Chairman of the Tanzanian Constitutional Review Commission.<sup>52</sup> Before becoming Prime Minister, he served as both Attorney General and Minister of Constitutional Affairs and Justice.<sup>53</sup> Later, he became a judge at the International Tribunal for the Law of the Sea from 1996 to 1999.<sup>54</sup> In 1996, he was appointed as Chairperson of the Presidential Commission against Government Corruption known as the Warioba Commission.<sup>55</sup> Hon. Warioba's experience as a politician and a judge was an asset to the outreach efforts. As a politician who served as Prime Minister and Vice President of Tanzania,<sup>56</sup> Hon. Warioba understood the politics and bureaucracy of the region. Having served at the top level of the judiciary in Tanzania,<sup>57</sup> he was familiar with the courts and judges in Tanzania and beyond. Because of his background, he was a valuable resource in the outreach efforts of the EACJ. His distinguished professional experience was the key to the legitimacy of the outreach efforts and institutionalization of the emerging Court.<sup>58</sup>

Another EACJ judge, Hon. Solomy Bossa, served as Judge with the High Court of Uganda for sixteen years (1997 to 2013) and as a judge on the International Criminal Tribunal for Rwanda (ICTR) for nine and half years (2003 to 2013).<sup>59</sup> She also served as a Judge on the Ugandan Court of Appeal or Constitutional Court.<sup>60</sup> As revealed from her background, Hon. Bossa has been a human rights activist since 1980.<sup>61</sup> She has also founded and chaired human rights NGOs and civil society organizations such as the EALS, the East African Centre for Constitutional Development, the Uganda Network on HIV, AIDS, Ethics, and the Law, and the

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towards the making the ECtHR operational).

52. *Joseph Warioba Biography, Career, Family*, AFRICANMANIA, <https://africanmania.com/joseph-warioba/> (last visited Jan. 30, 2020).

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. For similar analysis about how personal and professional background provides a means for the understanding of institutionalization, see Madsen, *supra* note 51, at 46–48. YVES DEZALAY & BRYANT G. GARTH, *ASIAN LEGAL REVIVALS: LAWYERS IN THE SHADOW OF EMPIRE* 117–31 (John M. Conley & Lynn Mather eds., 2010); YVES DEZALAY & BRYANT G. GARTH, *THE INTERNATIONALIZATION OF PALACE WARS: LAWYERS, ECONOMISTS, AND THE CONTEST TO TRANSFORM LATIN AMERICAN STATES* 154–56 (2002).

59. *Justice Solomy Balungi Bossa – Uganda*, AFR. CT. ON HUM. & PEOPLES' RTS., <http://en.african-court.org/index.php/2-uncategorised/38-justice-solomy-balungi-bossa-uganda> (last visited Jan. 31, 2020).

60. *Id.*

61. *Id.*

Uganda Law Society, among others.<sup>62</sup> The role of Hon. Bossa in creating networks with civil society and human rights lawyers in the early periods of the EACJ can be understood in light of her human rights interests and her contributions to the founding of several civil society organizations.

The third judge was the President of the African Peoples and Human Rights Court, Hon. Augustino S.L. Ramadhani, who was a Tanzanian judge at the Court of Appeal from 1989 to 2010.<sup>63</sup> Hon. Ramadhani was also the Chief Justice of Zanzibar from 1980 to 1989.<sup>64</sup> From 1993 to 2003, he was the Vice-Chairman of the National Electoral Commission that conducted presidential, parliamentary, and local government elections in the United Republic of Tanzania.<sup>65</sup> He held the same position in the Zanzibar Electoral Commission from 2002 to 2007.<sup>66</sup> Hon. Ramadhani's writings reflect his advocacy for human rights but also a consciousness for economic stability.<sup>67</sup> As a participant in the drafting process of the Treaty establishing the EAC, Ramadhani promoted the idea of having an appellate court for East Africa with extensive jurisdictional reach.<sup>68</sup>

Finally, the two individuals with institutional memory on the Court and participation in the Treaty-making processes were the former registrar of the EACJ and the former Counsel to the EAC. The former registrar John Ruhangisa, who participated in the debates on the treaty-making of the EAC, came to the EACJ after experience as a registrar in the Tanzania High Court and after helping establish a business bench in the Tanzanian judiciary through Danish financial support.<sup>69</sup> The former Counsel to the EAC Wilbert Kaahwa has seen the Court grow from its inception to its current form. Kaahwa, after having been part of the task force for the drafting of the EAC Treaty, eventually became the first legal Counsel to the Community. He served the EAC from July 2000 to January 2015.<sup>70</sup> These collective biographies are useful to understand the experiences, capabilities, and network connections that the EACJ judges could draw upon as they began the task of operationalizing the EACJ.

During the EACJ's formative period, East Africa had become fertile ground for civil society and human rights movements. One of the leading organizations in this

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62. See *id.* for a biography of Justice Solomy Bossa. Currently, Hon. Solomy Bossa is a judge at the International Criminal Court in The Hague. Press Release, Int'l Criminal Court, Six New Judges Sworn in Today at the Seat of the International Criminal Court (Mar. 9, 2018), available at <https://www.icc-cpi.int/Pages/item.aspx?name=pr1365>.

63. See *Profiles for Former Judges*, AFR. CT. ON HUM. & PEOPLES' RTS., <http://en.african-court.org/index.php/judges/former-judges> (last visited Jan. 31, 2020), for a biography of the Hon. Augustino Ramadhani.

64. *Id.*

65. *Id.*

66. *Id.*

67. See, e.g., Augustino S.L. Ramadhani, *Promoting a New Economic Order in Developing Countries: A Role for Human Rights Organizations*, XI SPEAKING ABOUT RTS. (Can. Human Rights Found. Montreal, Que.), 1996, at 15 (arguing that government spending on elections needs to be controlled as human rights are supported).

68. *Report of the East African Law Society Workshop*, *supra* note 7, at 2.

69. Interview No. 51, *supra* note 9.

70. Interview No. 42, *supra* note 11.

movement was the EALS in which some of the judges of the EACJ assisted in its establishment. The judges and registrar embarked on a mission of reaching out to potential users and supporters of the EACJ, such as the EALS and other human rights NGOs. Some of the civil society groups, especially those with interest in promoting and litigating human rights such as the EALS became “repeat players”<sup>71</sup> in litigation cases before the EACJ and thus played a pivotal role in the construction of the EACJ. Therefore, the EALS was to dominate litigation at the EACJ and unofficially shift the mandate of the EACJ from an economic court to one that increasingly looked like a human rights court. The EACJ judges were not shy from deciding sensitive cases, thereby empowering the Court as an actor in its own right that was independent from the Partner States and Community institutions. The role of the registrar and judges in the institutionalization of the Court is that:

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.<sup>72</sup>

Indeed, the jurisprudence of the Court reveals the judges’ drifting away from the conservative and positivist tendencies exhibited at their national judiciaries.<sup>73</sup> Perhaps the exposure of the judges to human rights movements and other lawyers in East Africa and beyond could explain the difference in approach between national judiciaries and the EACJ.<sup>74</sup> National judiciaries operate in a setting where governments continuously monitor the activities of national courts.<sup>75</sup> Whatever the reasons, however, the existence of strong civil society and human rights NGOs working across East Africa since the 1990s has influenced the bold decisions of the EACJ.

In their outreach efforts, the EACJ judges were consolidating a network that already existed. One of the ways the Court could develop its credibility was through the deployment of outreach strategies and the creation and nurturing of existing networks in East Africa. Therefore, the first step of the EACJ was to conduct a study on the level of awareness of the national judiciaries about the EACJ.<sup>76</sup> Hence, a team composed of judges and the registrar of the EACJ visited the Partner States to survey

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71. For the concept of repeat players, see Kevin T. McGuire, *Repeat Players in the Supreme Court: The Role of Experienced Lawyers in Litigation Success*, 57 J. POL. 187 (1995).

72. Gathii, *Mission Creep*, *supra* note 4, at 260.

73. *Id.* at 272.

74. *See id.* at 273 (stating that EACJ judges were persuaded against adopting the conservative ideology of the national courts through trainings on human rights, regional systems, and roles of the judiciary).

75. *See generally* RACHEL L. ELLETT, *PATHWAYS TO JUDICIAL POWER IN TRANSITIONAL STATES: PERSPECTIVES FROM AFRICAN COURTS* (2013).

76. *See* Chhatbar, *supra* note 26 (stating that a survey was conducted by the EACJ after EAC Council of Ministers expressed concerns that the court had little publicity).

the level of awareness about the EACJ.<sup>77</sup> The results were striking—not only was the general public largely unaware of the EACJ, but many members of the judiciary were as well.<sup>78</sup> The study concluded that most East Africans “know very little about the East African Community and have never read or heard of the Treaty for the establishment of the regional body.”<sup>79</sup> Concerning national judiciaries, an official at the EACJ’s registrar lamented that “most of the Court players are unaware of the Court Rules of Procedures and Rules of Arbitration that were sent out to the heads of institutions for distribution and comments by their respective members.”<sup>80</sup>

The Court’s effort to attract legal professionals, at its early stage, by reaching out to the national judiciaries and other players, was a strategy used to institutionalize the Court. Importantly, EACJ judges are “double agents” because they may be members of the national judiciaries or public servants at the national level.<sup>81</sup> This double agency had given them an advantage in the outreach efforts to the national courts: When they addressed the national courts, they were not communicating to strangers but to their colleagues. The first judges were very experienced and respected, and above all, they held high positions in their respective national judiciaries.<sup>82</sup> For instance, the members of the team that visited the national courts to explain the importance of the EACJ were also highly respected members of their respective national judiciaries.<sup>83</sup>

The judges’ accumulation of very significant legal, social, and political capital at the national level was vital to their effort to institutionalize the Court. To put it differently, operating in a regional legal space was dependent not only upon national political acceptance (secured through the judicial appointment by the Partner State) but also on legal approval at the national and Community level. The composition of the Court, with regional and national elite lawyers coming from the highest national judiciaries or political spheres, was vital to their ability to engage in outreach efforts to attract litigators, thereby making the Court functional. Besides, the judges’ social capital was also essential to impose themselves in important decisions such in *Nyong’o*<sup>84</sup> and *Katabazi v. Secretary General of the East African Community*<sup>85</sup> cases.

Remarkably, one can infer from the collective biography that the “institutional

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77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. See Gathii, *Mission Creep*, *supra* note 4, at 273 (discussing how many EACJ judges sit on their national court as well, though it is not a requirement).

82. Interview No. 1, *supra* note 9; Interview No. 42, *supra* note 11.

83. Six EACJ judges and the registrar were part of the team that visited national judiciaries. Chhatbar, *supra* note 26.

84. Att’y Gen. of Kenya v. Anyang Nyong’o, Appl. No. 5 of 2007 (First Instance Div. Mar. 30, 2007), *arising from* Ref. No. 1 of 2006, *available at* <http://eacj.org/?cases=attorney-general-of-kenya-vs-prof-peter-anyang-nyongo-and-others-appeal>.

85. Ref. No. 1 of 2007 (Nov. 1, 2007), *available at* [http://eacj.org/wp-content/uploads/2012/11/NO\\_1\\_OF\\_2007.pdf](http://eacj.org/wp-content/uploads/2012/11/NO_1_OF_2007.pdf).

habitus”<sup>86</sup> of the Court was a reflection of the collective, more or less, homogeneous profile of the judges.<sup>87</sup> The judges were highly experienced members of their respective national judiciaries. These characteristics were to influence the jurisprudence of the Court, which again was the product of the disagreements that emerged during the EAC Treaty-making process, particularly concerning the Court’s jurisdiction. As a result, the Court produced quite a distinct jurisprudence, which focused overwhelmingly on human rights, rule of law, and governance-related jurisprudence as opposed to economic law cases.<sup>88</sup> Litigation in the EACJ enabled human rights advocates to actively and repeatedly bring human rights-related cases in the EACJ, even though the EACJ does not have explicit jurisdiction to decide human rights cases. “[T]he judges of the EACJ have been proactive in encouraging human rights cases to come before the court.”<sup>89</sup> This unique jurisprudence corresponds to the profiles of those involved in the Treaty-making process, some of whom later became frequent litigators before the Court. Some of these groups and individual lawyers participated and shaped the Treaty by suggesting the incorporation in the Treaty principles enshrined under Article 6 and 7 a legal basis for the overwhelming majority of the cases before the EACJ.<sup>90</sup>

The role of lawyers and civil society groups in the Treaty-making process coupled with the same actors becoming litigators before the Court sent the jurisprudence of the EACJ into a particular direction thereby institutionalizing the rule of law within the Community. One can easily recognize the more interested stakeholders of the Court in the way, for instance, lawyers circulate between the very loose regional fields—participating in the creation of, promotion of, and litigation before the Court. It suffices to mention the experience of Professor Ssempebwa who had, among other things, participated in the drafting of the EAC Treaty, appeared as counsel in various cases before the EACJ, and moves between litigation at the national level and the regional level.

Understanding the role of individuals, including the Registrar, judges of the Court, and advocates from civil society organizations, are critical for fully understanding the Court’s development. Consider, for example, Wilbert Kaahwa,

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86. See Analía Inés Meo, *Institutional Habitus and the Production of Educational Inequalities* (Sept. 6, 2006) (unpublished manuscript) (on file with the University of Warwick), available at <http://www.leeds.ac.uk/educol/documents/157190.htm> (“[T]he concept Institutional Habitus, which is a re-elaboration of the Bourdieuan concept of habitus . . . should be interpreted as the influence of a cultural group or social class on an individual’s practices as it is mediated through an institution.”).

87. This finding is similar to the conclusion of some scholars about the formative years of the ECHR system. According to these scholars, “[t]he ECHR system was a rather homogeneous body of jurists who were for the most part academically highly skilled and respected and had general international/cosmopolitan profiles.” Cohen & Madsen, *supra* note 51, at 195.

88. For an analysis of the variation in the use of the Court between business and human rights actors, see James Thuo Gathii, *Variation in the Use of Subregional Integration Courts Between Business and Human Rights Actors: The Case of the East African Court of Justice*, 79 *LAW & CONTEMP. PROBS.* 37 (2016) [hereinafter Gathii, *Variation in the Use of Subregional Integration Courts*].

89. *Id.*

90. Ssempebwa, *supra* note 16, at 17.

the first legal Counsel to the Community. In this capacity, Kaahwa played a series of remarkable, though very different, roles in the continuous development of the Court and its jurisprudence. Given his position as a Counsel to the Community, his activities were not restricted merely to the new Court. In the Treaty, the Counsel to the Community was the Community's legal adviser.<sup>91</sup> Together with the Secretary-General and the Minister responsible for East African Community affairs from each Partner State, the Counsel to the Community is an ex-officio member of EALA.<sup>92</sup> The Counsel to the Community appears in Court for (i) any matter involving the Community; (ii) any matter involving the Community institutions; or (iii) any time he or she thinks that his or her attendance is required.<sup>93</sup>

These roles of double or triple engagements of the Counsel to the Community are essential for understanding the institutionalization of the Court. As first Counsel to the Community, Kaahwa took part in several cases at the EACJ, acting as a lawyer representing the Secretary-General and "has remained the only consistent lawyer in almost every case."<sup>94</sup> Thus, he has played a fundamental part in the process of litigation. Sometimes, the outcome of the litigation depended on the Counsel to the Community, no less than the judges who sit on the bench. In many cases, the Counsel was able to adopt a given position in the litigation that shaped the framework of the anticipated litigation.<sup>95</sup> Because of Counsel's institutional memory, his submissions

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91. Article 69 states: (1) "[t]here shall be a Counsel to the Community who shall be the principal legal adviser to the Community;" (2) "[t]he Counsel to the Community shall perform such duties as are conferred upon him or her by this Treaty and by the Council;" (3) "[t]he Counsel to the Community shall be appointed on contract and in accordance with the staff rules and regulations and terms and conditions of service of the Community;" and (4) "[t]he other terms and conditions of service of the Counsel to the Community shall be determined by the Council." EAC Treaty, *supra* note 16, art. 69.

92. Article 48 states: (1) "[t]he membership of the Assembly shall be (a) twenty-seven members; and (b) five ex-officio members consisting of: (i) the Minister responsible for regional co-operation from each Partner State; and (ii) the Secretary General and the Counsel to the Community;" (2) "[t]he Speaker of the Assembly shall preside over and take part in its proceedings in accordance with the rules of procedure of the Assembly;" (3) "[t]he Assembly shall have committees which shall be constituted in the manner provided in the rules of procedure of the Assembly and shall perform the functions provided in respect thereof in the said rules of procedure;" and (4) "[t]he Council shall appoint a Clerk of the Assembly and other officers of the Assembly whose salaries and other terms and conditions of service shall be determined by the Council." *Id.* art. 48.

93. Article 37 outlines appearance before the Court. Article 37 states: (1) "[e]very party to a dispute or reference before the Court may be represented by an advocate entitled to appear before a superior court of any of the Partner States appointed by that party;" and (2) "[t]he Counsel to the Community shall be entitled to appear before the Court in any matter in which the Community or any of its institutions is a party or in respect of any matter where the Counsel to the Community thinks that such an appearance would be desirable." *Id.* art. 37.

94. Interview No. 34, *supra* note 46.

95. Interview No. 42, *supra* note 11. In many cases, the Legal Counsel to the Community has influenced the framework of litigation by relying on the two months rule to bring a case before the Court, introduced with the treaty amendment following the Nyong'o case. Anyang' Nyong'o v. Att'y Gen. of Kenya, Appl. No. 5 of 2007, Ref. No. 1 of 2006 (Nov. 27, 2006), *available at* <http://eacj.org/?cases=attorney-general-of-kenya-vs-prof-peter-nyong'o-and-others-appeal>. For some of the cases where the Legal Counsel represented the Secretary General before the EACJ, see Sec'y Gen. of the E. Afr. Cmty. v. Amudo, Appl. No. 15 of 2012 (May 2, 2013), *available at*



trace the evolution of the Court and its jurisprudence.<sup>96</sup> This institutional memory has been helpful in clarifying the life and development of the Court to “new applicants and to the new judges” as well as to understand the institutionalization of the Court.<sup>97</sup>

Apart from the vital function in litigations, since the beginning, the Counsel played an even more significant role in the process that follows litigation. It is hardly a secret that institutional constraints highly compromise the Court’s ability to enforce compliance.<sup>98</sup> Like any other IC, the EACJ typically needs cooperation from other players within and beyond the Community to implement its decisions. The Court often expects the legal bureaucracy of the Community and the Partner States to serve as its “agents” to ensure compliance and implementation.<sup>99</sup> The Counsel to the Community has been the direct link in translating the Court’s decisions to the Community institutions.<sup>100</sup> For example, the Counsel appears in Court representing the Secretary-General, thereby linking the latter to the Court and translating messages of the Court to the Secretary-General. Similarly, as an *ex officio* member of EALA, he has been essential in clarifying the institutional and jurisprudential developments of the Court and in translating messages of the Court to the Assembly.<sup>101</sup> Therefore, “if there is one man who understands all these institutions, it is the Counsel to the Community.”<sup>102</sup> Thus, rather than merely being the representative of the Community in litigation, the Counsel forms an essential link between the Court and other Community institutions as well as indirectly to the Partner States as the Counsel sits, as an *ex officio* member, together with ministers for integration at the EALA.

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<http://eacj.org/wp-content/uploads/2013/05/Angella-Amudo-Vs-Secretary-General.pdf>; *Omar v. Att’y Gen. of Kenya*, Appl. No. 4 of 2011 (Dec. 1, 2011), *available at* <http://eacj.org/wp-content/uploads/2013/09/Ruling-in-Application-no-4-of-2011-28th-February.pdf>; *Indep. Medico Legal Unit v. Att’y Gen. of Kenya*, Appl. No. 2 of 2012 (June 29, 2011), *available at* <http://eacj.eac.int/wp-content/uploads/2019/03/Application-No.-2-of-2012-Appellate-Division-Independent-Medical-Legal-Unit-Vs-The-Attorney-General-of-the-Republic-of-Kenya.pdf>; *Att’y Gen. of Tanz. v. Afr. Network for Animal Welfare*, Appl. No. 3 of 2011 (Aug. 29, 2011), *available at* <http://eacj.org/wp-content/uploads/2012/10/No-9.-of-20102.pdf>.

96. Interview No. 34, *supra* note 46.

97. *Id.*

98. Interview No. 51, *supra* note 9; see John Eudes Ruhangisa, *The Scope, Nature and Effect of EAC Law*, in *EAST AFRICAN COMMUNITY LAW: INSTITUTIONAL, SUBSTANTIVE AND COMPARATIVE EU ASPECTS* 139, 153 (Emmanuel Ugirashebuja et. al. eds., 2017) [hereinafter Ruhangisa, *The Scope, Nature and Effect of EAC Law*] (describing how the EACJ does not have mechanisms in place to demand compliance by State to comply with its decisions).

99. Interview No. 51, *supra* note 9; Ruhangisa, *The Scope, Nature and Effect of EAC Law*, *supra* note 98, at 146, 153 (“The effect of the EACJ not having execution mechanisms of its own is that under Article 44 of the Treaty it will depend on the process of execution in the Partner States regarding matters of pecuniary nature. However, where execution regards matters where the Court has made declaratory decisions then it will rely on the goodwill of the Partner States to implement or comply with the decisions of the Court.”).

100. Interview No. 34, *supra* note 46.

101. See EAC Treaty, *supra* note 16, art. 48(1)(b)(ii) (establishing that the Counsel is an *ex officio* member of EALA).

102. Interview No. 34, *supra* note 46.

In sum, the Partner States consider the EACJ as an economic court with no role in human rights matters.<sup>103</sup> However, civil society groups and lawyers have always pushed to expand the Court's limited jurisdiction. These groups challenged the limited jurisdiction of the Court during the drafting process of the EAC Treaty and continue to challenge it even today. These groups and lawyers "see the EACJ as a pressure point for advancing their goals."<sup>104</sup> The experience of litigation at the national level of some of the individuals and civil society groups was also crucial to the foundation of the EACJ. Lawyers from Uganda and Kenya brought this very experience of litigating human rights cases from the national level to the EACJ, which the judges were ready to accommodate.

***E. From Nairobi and Kampala to Arusha: Civil Society Litigating at the East African Court of Justice***

The EACJ judges' off-the-bench diplomacy converged with the interest of civil society groups, mainly those working on human rights, the rule of law, and governance matters. The public engagement of the EACJ provided a timely opportunity for civil society groups to shift their advocacy and litigation from the national to the regional level. Also, the creation of the Court and the coordinated outreach efforts by its judges and Registrar opened the opportunity for litigation by individuals, who already had an interest in the creation of an active Court in East Africa, as exhibited from the history of the drafting process of the EAC Treaty. Professor Ssempebwa and Donald Deya, two prominent lawyers in East Africa, responded favorably to the judges' efforts to attract potential users of the Court. Professor Ssempebwa, who served as a president of the East African Law Society from 2002 to 2004, not only participated in the drafting Treaty of the new EAC during the negotiations and presented a paper on this experience, but he also later became a frequent litigator before the EACJ.<sup>105</sup> Donald Deya, a former CEO of the EALS, had been Deputy Secretary of the Law Society of Kenya (LSK).

In most cases, the LSK represented individuals embroiled in the political struggle with the government in Kenyan Courts. The LSK was aggressively using litigation and advocacy to bring political change and judicial transformation in Kenya. The creation of the EACJ and the efforts of the judges to attract potential users of the Court opened a new opportunity for Deya and others to elevate the litigation experience of the law society in Kenya and other Partner States to the regional level.<sup>106</sup> The judges of the Court were willing to accommodate even cases that touched on human rights through a systematic and broad interpretation of the EAC Treaty. Once the Court decided *Katabazi*,<sup>107</sup> discussed below, it opened the door for other similar cases. It now attracts not only human rights leaning litigators

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103. Interview No. 7, *supra* note 14.

104. Gathii, *Mission Creep*, *supra* note 4, at 262.

105. Ssempebwa, *supra* note 16.

106. Gathii, *Mission Creep*, *supra* note 4, at 278–79.

107. *Katabazi v. Sec'y Gen. of the E. Afr. Cmty.*, Ref. No. 1 of 2007 (Nov. 1, 2007), available at [http://eacj.org/wp-content/uploads/2012/11/NO.\\_1\\_OF\\_2007.pdf](http://eacj.org/wp-content/uploads/2012/11/NO._1_OF_2007.pdf).

but environmental activists as well.<sup>108</sup> In the beginning, the strategy of the EALS had been not to bring contentious cases directly to the EACJ but rather to appear as amicus.<sup>109</sup> In its capacity as amicus, the EALS submitted briefs in *Mwatela v. East African Community*<sup>110</sup> and *Nyong'o*<sup>111</sup> as well as in the first advisory opinion of the Court. It subsequently appeared as amicus in several other cases. Interestingly, in the EACJ's first case, while Deya appeared with the EALS team that presented the amicus brief, a group of lawyers headed by Professor Ssempebwa represented the applicants. The EALS appeared in following cases, from 2006 to 2014, as amicus: (i) *Mwatela*,<sup>112</sup> (ii) *Nyong'o*,<sup>113</sup> (iii) *In re A Request by the Council of Ministers of the East African Community for an Advisory Opinion*,<sup>114</sup> (iv) *Independent Medico Legal Unit v. Attorney General of Kenya*,<sup>115</sup> and (v) *Forum le Renforcement de la Societe Civile (FORSC) v. Burundian Journalists Union*.<sup>116</sup>

Of course, initially, the role of the EALS was not just limited to presenting amicus briefs. The EALS has also initiated cases before the EACJ. For instance, in 2011, it brought three cases before the EACJ. These include (i) against the EAC Secretary-General, "challenging certain provisions in the Common Market Protocol and Customs Union Protocol that purport to oust the [j]urisdiction of the EACJ as granted by the EAC Treaty;" (ii) 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 (iii) against the Attorneys General of Uganda and Kenya and the EAC Secretary-General "relating to the rendition of Kenyan Citizens to Uganda."<sup>117</sup>

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108. For a thorough analysis of environmental judicial activism in Africa in general and the role of the EACJ, in particular, see James Thuo Gathii, *Saving the Serengeti: Africa's New International Judicial Environmentalism*, 16 CHL J. INT'L L. 386 (2015).

109. Interview No. 22, *supra* note 48; Interview No. 39 with Officials at the East Africa Law Society (EALS) in Arusha, Tanz. (2014); Interview No. 43, *supra* note 6; Interview No. 46 with Human Rights Advocate and Official at the Pan African Lawyers Union (PALU) in Arusha, Tanz. (2014).

110. Appl. No. 1 of 2005, (Oct. 1, 2006), *available at* [http://www.worldcourts.com/eacj/eng/decisions/2006.10.01\\_Mwatela\\_v\\_EAC.htm](http://www.worldcourts.com/eacj/eng/decisions/2006.10.01_Mwatela_v_EAC.htm).

111. Anyang' Nyong'o v. Att'y Gen. of Kenya, Appl. No. 5 of 2007, Ref. No. 1 of 2006 (Nov. 27, 2006), *available at* <http://eacj.org/?cases=attorney-general-of-kenya-vs-prof-peter-anyang-nyongo-and-others-appeal>.

112. *Mwatela*, Appl. No. 1 of 2005.

113. *Nyong'o*, Appl. No. 5 of 2007, Ref. No. 1 of 2006 (Nov. 27, 2006), *available at* <http://eacj.org/?cases=attorney-general-of-kenya-vs-prof-peter-anyang-nyongo-and-others-appeal>.

114. Appl. No. 1 of 2008, at 4 (2009), *available at* [http://eacj.org/wp-content/uploads/2012/11/advisory\\_opinion\\_1\\_of\\_2008.pdf](http://eacj.org/wp-content/uploads/2012/11/advisory_opinion_1_of_2008.pdf).

115. Appl. No. 2 of 2012 (Mar. 1, 2013), *available at* <https://www.eacj.org/?cases=attorney-general-of-the-republic-of-kenya-vs-independent-medical-legal-unit-arising-from-appeal>.

116. Appl. No. 2 of 2014 (Aug. 15, 2014), *available at* <http://eacj.org/wp-content/uploads/2014/08/RULING-IN-APPLICATION-NO-2-OF-2014-Final-REVISED-3.pdf>.

117. Gathii, *Variation in the Use of Subregional Integration Courts*, *supra* note 88, at 58 n.159 (citing E. Afr. LAW SOC'Y, ANNUAL REPORT: NOVEMBER 2010–NOVEMBER 2011, at 15 (2011) [http://www.ealawsociety.org/images/publications/annual\\_report/annual\\_report\\_2011.pdf](http://www.ealawsociety.org/images/publications/annual_report/annual_report_2011.pdf)). *See generally* E. Afr. Law Soc'y v. Sec'y Gen. of the E. Afr. Cmty., Ref. No. 1 of 2011 (Feb. 14, 2013), *available at* [http://eacj.org/wp-content/uploads/2013/09/FI\\_EastAfricanLawSociety\\_v\\_EastAfricanCommunity.pdf](http://eacj.org/wp-content/uploads/2013/09/FI_EastAfricanLawSociety_v_EastAfricanCommunity.pdf); E. Afr. Law Soc'y v. Att'y Gen. of Uganda, Ref. No. 2 of 2011 (Sept.

The analysis above reveals that the emergence of the EACJ is the result of rather complex, interconnected, and competing conditions in East Africa. The discussion so far highlights the role of lawyers and civil society players, including the judges of the Court, in the emergence of the EACJ and its nascent institutionalization. The changed role of lawyers and civil society players from founders of the EAC Treaty to litigators at the EACJ has resulted in the emergence of a weak regional legal field characterized by limited autonomy and State control.<sup>118</sup> The weak regional field emerged because of the unique process of drafting of the new EAC Treaty and the effort of the registrar and the judges to institutionalize the EACJ, supported by legal professionals and civil society organizations, particularly those working in the advancement of human rights, the rule of law, and good governance.

The following section analyses the institutionalization of the Court through jurisprudence, which exhibits the tension between the Partner States and the EACJ, as well as a pronounced tension between community law and national politics. Despite the contribution of civil society and human rights lawyers, the institutionalization of the EACJ has not been simple. Although the combination of efforts by judges of the Court and human rights lawyers, to some extent, eased the pressure coming from the Partner States, the road to its institutionalization has not been smooth and remains to be so.

### III. THE MAKING OF A LANDMARK DECISION AND THE CONSOLIDATION OF HUMAN RIGHTS JURISDICTION

Article 27(2) of the EAC Treaty controls the human rights jurisdiction of the EACJ. That article provides that “[t]he 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 State shall conclude a protocol to operationalise the extended jurisdiction.”<sup>119</sup> Thus, the Court cannot automatically exercise human rights jurisdiction. However, the Court can exercise its jurisdiction to interpret the EAC treaty including Articles 6(d) and 7(2), which oblige Partner States to respect good governance and the rule of law and to recognize, promote, and protect human rights in accordance with the provisions of the African Charter on Human and Peoples’ Rights. In the absence of an express provision on human rights jurisdiction, lawyers have brought forward human rights-related cases based on these provisions. Indeed, several of the EACJ judgments refer to Articles 6(d) and 7(2) of the EAC Treaty. An assessment of the references to these provisions would entail an analysis of the case-law of the Court. Without delivering an exhaustive list, there are over thirty cases that refer to Articles 6(d) and 7(2), starting with *Katabazi*.<sup>120</sup>

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11, 2014); E. Afr. Law Soc’y v. Att’y Gen. of Uganda, Ref. No. 3 of 2011 (Sept. 4, 2013), available at [http://www.worldcourts.com/eacj/eng/decisions/2013.09.04\\_EALS\\_v\\_Atty\\_Gen\\_Uganda.pdf](http://www.worldcourts.com/eacj/eng/decisions/2013.09.04_EALS_v_Atty_Gen_Uganda.pdf).

118. See Antoine Vauchez, *The Force of a Weak Field: Law and Lawyers in the Government of the European Union (For a Renewed Research Agenda)*, 2 INT’L POL. SOC. 128, 136–38 (2008) (discussing the concept of a weak field).

119. EAC Treaty, *supra* note 16, art. 27(2).

120. Ref. No. 1 of 2007, at 9, 16 (Nov. 1, 2007), available at [http://eacj.org/wp-content/uploads/2012/11/NO.\\_1\\_OF\\_2007.pdf](http://eacj.org/wp-content/uploads/2012/11/NO._1_OF_2007.pdf); Mihreteab Tsighe Taye, *The Role of the East*

*Katabazi* is the first human rights-related case. It is the type of case that a small number of lawyers who were eager to test the implementation of the rule of law provisions of the EAC Treaty waited several years for. Until *Katabazi*, the Court's interpretation of the rule of law provisions of the EAC Treaty remained uncertain. As early as 2005, the Court began the interpretation of the Treaty, but none of its interpretations of the Treaty concerned human rights. However, the initial cases opened the way for subsequent cases to appear before the Court. Evidence shows that unlike the *Nyong'o* case discussed below, which triggered a backlash from the Partner States, *Katabazi* raised little interest. However, national human rights lawyers and the EALS were mainly concerned with that case. Through *Katabazi*, the EALS took the opportunity to test how the Court would entertain human rights related matters. For national human rights lawyers, *Katabazi* was a symbol of the struggle for the protection of human rights in Uganda. By bringing the case before the EACJ, the lawyers revealed the changed avenue for battling the State—from the national to the regional level.

In *Katabazi*, the claimants were charged for the crimes of treason and misprision of treason in Uganda and hence remanded to custody.<sup>121</sup> The case received considerable attention when the Ugandan High Court released the suspects on bail, but the suspects were re-arrested and charged in a military court.<sup>122</sup> The re-arrests of the suspects resulted in the condemnation and resignation of the presiding judge.<sup>123</sup> The action of the government was challenged before the Ugandan Constitutional Court,<sup>124</sup> which ruled the acts of the government unconstitutional.<sup>125</sup> Nevertheless, the suspects remained in detention, and the case reached the EACJ.<sup>126</sup> The question before the Court related to the EAC Treaty's rule of law provision—the exact provisions the EALS and other organizations had successfully lobbied to be included in the Treaty. For the EACJ, the rule of law provision found in Article 6(d) of the Treaty encapsulates the intention to safeguard against arbitrary governance, whether by a totalitarian leader or by mob rule. The rule of law is hostile to both dictatorship and anarchy.

The applicant claimed that Uganda violated Article 6, 7(2), and 8(1)(c) of the EAC Treaty.<sup>127</sup> They framed the application not for the determination of a violation of human rights but as a claim for the determination of whether Uganda violated the fundamental principles of the EAC.<sup>128</sup> The applicants skilfully refrained from

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*African Court of Justice in the Advancement of Human Rights: Reflections on the Creation and Practice of the Court*, 27 AFR. J. INT'L & COMP. L. 359, 364 (2019).

121. *Katabazi*, Ref. No. 1 of 2007, at 1–2.

122. *Id.* at 2–3.

123. For example, Ugandan Judge James Ogoola referred to the act of storming the court as a “rape of the temple.” JAMES OGOOLA, *Rape of the Temple*, in SONGS OF PARADISE: A HARVEST OF POETRY AND VERSE 125 (2009).

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

125. *Id.*

126. *Id.* at 2–3.

127. *Id.* at 3.

128. *See id.* (noting that claimant sought enforcement only of Treaty and Fundamental Principles of EAC).

claiming a violation of substantive human rights.<sup>129</sup> However, despite the applicants' tactic, Uganda contended that the submission concerned human rights.<sup>130</sup> The EACJ admitted it lacked human rights jurisdiction, stating that it "may not adjudicate on disputes concerning violation of human rights per se."<sup>131</sup> Nevertheless, the Court argued that the simple reference to human rights violations does not preclude it from exercising the jurisdiction to interpret the Treaty itself.<sup>132</sup> Therefore, it continued to determine the existence of a breach of the fundamental principles of the EAC and found a violation of the principle of the rule of law, a fundamental principle of the Community.<sup>133</sup> Specifically, the EACJ held that Uganda violated the independence of the judiciary, a cornerstone of the principle of the rule of law.<sup>134</sup>

The significance of *Katabazi* rests in how the EACJ used the case to demarcate its competence. The principle of the rule of law is not in itself a human right but a precondition for the protection of human rights. Seen in this way, the EACJ does not consider itself competent to deal with the substance of human rights. It can be presumed that the Court would have tread more carefully had the matter of substantive interpretation of the content of the rights been presented given the express exclusion of such jurisdiction.<sup>135</sup> The EACJ held that it has jurisdiction over matters falling under Article 27(1) through the exercise of its powers to ensure the adherence to the law under Article 23. Finally, the EACJ concluded that it has to "provide a check on the exercise of the responsibility . . . to protect the rule of law."<sup>136</sup> The Court then determined that Articles 5(1), 6, 7(2), and 8(1) (c) require Partner States to comply with the decisions of national courts. The Court held that "abiding by the [C]ourt decision is the cornerstone of the independence of the judiciary which is one of the principles of the observation of the rule of law."<sup>137</sup> Instead of directly determining whether the rights of the applicants had been violated, the Court framed the issue as to whether the State violated the principle of the rule of law. In doing so, the EACJ systematically "avoided the effects of Article 9(4) of the Treaty which requires that organs of the EAC would function and act within the limits of the powers conferred by the Treaty."<sup>138</sup> From *Katabazi* and subsequent cases, human rights litigation before the EACJ is possible when the act violating the rights in question also amounts to a violation of the EAC Treaty.<sup>139</sup>

Interviews confirmed that the EACJ's approach has been that when Article 6(d)

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129. See Section II.C *supra* for a discussion on how human rights jurisdiction has yet to be extended for the EACJ. See EAC Treaty, *supra* note 16 at art. 27 (showing the lack of jurisdiction over human rights cases until a later date).

130. *Katabazi*, Ref. No. 1 of 2007, at 12.

131. *Id.* at 15.

132. *Id.* at 16.

133. *Id.* at 21, 23.

134. *Id.*

135. Interview No. 4 with EACJ First Instance Judge, in Arusha, Tanz. (2013).

136. *Katabazi*, Ref. No. 1 of 2007, at 23.

137. *Id.* at 23.

138. Ebobrah, *supra* note 15, at 82–83.

139. *Id.*

is invoked, the Court would not per se declare a direct human rights jurisdiction.<sup>140</sup> Instead, its jurisdiction involves principles such as good governance, the rule of law, and the invocation of the African Charter on Human and Peoples' Rights.<sup>141</sup> Although one may argue that the Court engaged in "excessive judicial activism" and legislated from the bench, the approach of the Court, coupled with "the proper wording of the claim and innovative advocacy on the part of the lawyers" opened the doors for human rights litigation.<sup>142</sup>

To date, no case has come to the EACJ as a direct violation of substantive human rights.<sup>143</sup> However, an interview confirmed that "to get a torture case [the EACJ would] probably not grant order because [it] will see that it is a direct torture case and there are provisions in the constitutions against such violations."<sup>144</sup> Nevertheless, "as long as a case of violation of human rights could be related to violation of Article 6(d), the EACJ would determine it."<sup>145</sup> While the *Katabazi* case came close to postulating the existence of an indirect human rights mandate, it did not adequately establish the possible response of the EACJ in cases that require an examination of the substantive content of human rights. However, perhaps because of the absence of a backlash from the Partner States,<sup>146</sup> together with the declaratory nature of the Court's judgments, *Katabazi* indirectly opened the gate for human rights-related cases by using Article 6(d). This development, although narrow, is against the Partner States' intention of not granting the Court an express human rights jurisdiction because of the fear of opening the "floodgates" for human rights cases.<sup>147</sup>

In *Katabazi* and subsequent cases, the EACJ adopted a standard of human rights protection based on Articles 6(d) and 7(2).<sup>148</sup> The power of the EACJ is limited to the interpretation of the EAC Treaty. As it is not a human rights court, the EACJ has no formal legal role in guaranteeing the protection of substantive human rights. Nevertheless, respect for the rule of law and good governance is a fundamental principle and objective of the EAC Treaty that requires judicial interpretation. Thus, the EACJ developed the *Katabazi* approach by interpreting Article 6(d) and 7(2). The EACJ's need to resort to this rather indirect approach was made necessary by the combination of the absence of a provision containing classic human rights in the EAC Treaty and the absence of explicit human rights jurisdiction, together with the

140. Interview No. 34, *supra* note 46.

141. *Id.*

142. Ebobrah, *supra* note 15, at 82.

143. Interview No. 34, *supra* note 46.

144. *Id.*

145. *Id.*

146. For an analysis of backlash against the EACJ after the Nyong'o, see Alter et al., *supra* note 28, at 300–06.

147. Interview No. 7, *supra* note 14.

148. *Rugumba v. Sec'y Gen. of the E. Afr. Cmty.*, Ref. No. 8 of 2010, Judgment, ¶ 6 (Dec. 1, 2011), available at <http://eacj.org/wp-content/uploads/2012/11/Plaxeda-Rugumba-2010-8-judgment-2011.pdf>; *Indep. Medico Legal Unit*, Appl. No. 2 of 2012, at 5; *Mohochi v. Att'y Gen. of Uganda*, Ref. No. 5 of 2011, ¶ 9 (May 17, 2013), available at [http://eacj.org/wp-content/uploads/2013/09/FI\\_Uganda\\_v\\_Muhochi.pdf](http://eacj.org/wp-content/uploads/2013/09/FI_Uganda_v_Muhochi.pdf).

delay in establishing human rights jurisdiction. Thus, via the convoluted route of the principles of good governance and the rule of law enshrined in Article 6(d), human rights matters became part of EACJ case law.

#### IV. CONCLUSION

The unprecedented participation of lawyers and civil society groups in the creation of the EAC and the EACJ stands as an example of direct engagement of lawyers and civil society in the building of the Court. As the analyses illustrate, today this comes in the form of litigation, exemplified by civil society groups such as the EALS. The degree of activity exerted currently by both the judges of the EACJ, the Counsel to the EAC, lawyers, and civil society groups in expanding the scope, meaning, and application of the provisions, such as on the rule of law, is remarkable from the perspective of the founding Treaty in the late 1990s. The achievement of the CAEA was still vivid in the minds of lawyers who forcefully pushed for its revival during the Treaty negotiations. However, the Partner States were cautious about the type of court, especially about its jurisdiction. The EACJ was designed to have a limited jurisdiction because of the Partner States' unwillingness to attribute more power to the Court.

Interestingly, however, lawyers and civil society groups succeeded in shaping the EAC Treaty provisions, especially those on the operational and fundamental principles. Specifically, Articles 6(d) and 7(2) were the product of the efforts of lawyers and civil society groups. The same group also succeeded in introducing into the Treaty the reference to the ACHPR. Through the interpretation of Articles 6(d) and 7(2), the EACJ built its jurisprudence, which ranges from human rights-related matters to the protection of the environment. These findings suggest that the process of Treaty-making and litigation has influenced and is still influencing the institutionalization of the EACJ.



## APPENDIX

Table 1:

Phase	Date	Result
<b>First</b>	November 2004	Sectoral Council on Legal and Judicial Affairs (SCLJA) decides for the extension of the EACJ jurisdiction. <sup>149</sup>
<b>Second</b>	April 2005	Council of Ministers approves the above Decision. <sup>150</sup>
<b>Third</b>	July 2005	SCLJA adopts the “Zero Draft” prepared by the Counsel to the East African Community and authorizes public consultations. <sup>151</sup>
<b>Fourth</b>	2006 to 2007	Public consultations are held in Kenya, Tanzania, and Uganda through national and regional workshops. <sup>152</sup>
<b>Fifth</b>	January to February 2009	Upon report on above Consultations, Sectoral Council on Law and Judicial Affairs (SCLJA) decides, <i>among other things</i> : <ul style="list-style-type: none"> <li>• Hold public consultations in Burundi and Rwanda; and</li> <li>• Remove proposals for human rights and appellate jurisdictions.<sup>153</sup></li> </ul>
<b>Sixth</b>	2010	<i>Sebalu</i> is filed. <sup>154</sup>
<b>Seventh</b>	2011	EACJ decides <i>Sitenda Sibalu</i> . <sup>155</sup>
<b>Eighth</b>	2015	Protocol extends jurisdiction on investment, trade, and monetary union, but excludes human rights. <sup>156</sup>

149. *Sitenda Sebalu v. Sec’y Gen. of the EAC*, Ref. No. 1 of 2010, at 7. *See generally Draft Protocol*, *supra* note 34.

150. *See generally Draft Protocol*, *supra* note 34.

151. *Sebalu*, Ref. No. 1 of 2010, at 7.

152. *See id.* 7–8 (laying out a timeline of consultative meetings including among Partner States).

153. *Id.* at 36.

154. *Id.* *See generally Sebalu*, Ref. No. 1 of 2010.

155. *Id.*

156. Interview No. 42, *supra* note 11.