# 6. The "Human Rights" Second Bench

The apparent expansive interpretation of the EAC Treaty to include human rights was an issue of concern at the inaugural East African Court of Justice (EACJ) *Judicial Symposium*[326] in Bujumbura.[327] In one of the sessions, a third bench judge raised a question to the panellists, who were concerned about the legal implications of interpreting human rights cases in the EACJ, despite not having the mandate to do so. The judge was anxious about the ambiguous nature of human rights jurisprudence by previous benches, wondering why, despite the lack of an express jurisdiction to render these disputes justiciable, the judges had pronounced themselves on human rights cases. Retired Justice James Munange Ogoola, a former EACJ judge on the second bench, took the chance to set the record straight on how his bench navigated the contentious issue of human rights adjudication:

> "You judges are lucky we already set the tone. The patriots already said, 'We will face the bull notwithstanding that it has an element of human rights.' Therefore, there is every reason to interpret this Treaty expansively, purposively, and historically and not be restricted to narrow grammatical interpretation. […] A matter is coming to us, even though it has some colouring of human rights elements that will not stop us from entertaining it. That is a big opening; if it is a window, make it a door! Make your intellect work as hard as you can. So, I say to myself, 'what is in a name?' That, what they call human rights, could by any other name sound as sweet."[328]

The quote above provides a window into the mindset of the second bench judges' attitude to deliberating on human rights disputes despite the existing jurisdictional challenges. This is a glimpse into the calibre of judges who dared to push the EACJ into a progressive human rights interpretation. For the former judge, who has been perceived as principled and is widely celebrated in the international community, the third bench judges

326 Participant observation, EACJ *Judicial Symposium*, *supra* note 62.

327 It became the topic of lengthy exchanges between legal actors, regional executives, EACJ judges and many judicial allies during the two-day pioneering event.

328 Speech by Retired Justice James Ogoola, November 5, 2021, EACJ Symposium, *supra* note 62.

only needed to follow the precedent set by the older benches and dare to be as expansive in their interpretation as their predecessors were.

As the previous chapter demonstrated, in some instances, the pioneer bench proved to be expansive and purposeful in interpreting legal principles, as in *Katabazi*[329] and *Anyang Nyong'o,* which laid the groundwork for politically salient jurisprudence and human rights jurisprudence at the EACJ, respectively. This chapter will delve into the evolution of human rights jurisprudence in the EACJ by tracing the development of the makings of a human rights bench.

## *6.1 Becoming a Human Rights Bench*

As the previous chapter expounded, the pioneering human rights case of *Kabatazi* set the wheels of human rights jurisprudence in motion. The EACJ judges maintained that:

> "While 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 of a human rights violation."[330]

Instead, the bench drew on existing Treaty provisions to adjudicate human rights issues by framing these violations as general elements of the rule of law, good governance and democratic principles over which the EACJ has express jurisdiction. Following *Katabazi*, the court continued its proactive interpretation of human rights claims, while the litigants also adopted the same strategy to circumvent the limitations brought on by the lack of explicit jurisdiction. This trend has been followed by succeeding benches. As explained by the latest EACJ President, Hon. Justice Nestor Kayobera, the court relies on Articles 6, 7(2), 8(1) (c), 23 and 27(1) of the EAC Treaty to justify its jurisdiction over cases involving human rights.[331] By repurposing the *fundamental*[332] and *operational*[333] founding principles of the EAC, especially the principles of good governance, including adherence to the principles of democracy, the rule of law, social justice and the maintenance

329 *Katabazi, supra* note 282.
330 Ibid., 16.
331 Speech by Hon. Justice Nestor Kayobera, *supra* note 133.
332 Art. 8 EAC Treaty.
333 Article 7 (2) of the EAC Treaty.

of universally accepted standards of human rights, the EACJ has exhibited bold interpretation and intentionality that goes beyond jurisdictional limitations. It is worth mentioning that the EACJ became the preferred avenue for accessing human rights even though the African Court on Human and Peoples' Rights (AfCHPR) had already been established.[334] This court was created to complement the African Commission on Human and Peoples' Rights in promoting and protecting human rights on the African continent but was limited in its jurisdiction (Ebobrah 2011). Restrictions were placed on the court's personal jurisdiction to hear cases brought by individuals, communities, and Non-Governmental Organizations (NGOs).[335]

In the EACJ, on the other hand, rather than shying away from confrontational issues of human rights, judges found recourse in existing legal tools so as to manoeuvre challenges to their limited remedial mandate innovatively. This is the purposive interpretation that Ogoola alluded to in the quote above. It is, thus, no surprise that the second bench avoided narrowly sticking to the semantics of the legal problem but instead drew on various sources to claim human rights and other jurisdiction. Whereas it is not unique to the EACJ, integration courts that start off being ignored could opt for expansively interpreting the legal rules, as was the case in the ECOWAS Court of Justice in relation to the standing of NGOs and the exhaustion of national remedies requirement (Alter, Helfer, and McAllister 2013).

### 6.1.1 Drawing Inspiration from Other ICs

Justice Ogoola also spoke of a historical interpretation, one that draws on understanding the source of the EAC Treaty. In his speech, he reminded the judges that the pioneers had already set the pace for an expansive reading of the Treaty, drawing on the CJEU, and that they only had to follow suit:

334 The AfCHPR began operating in November 2006, eight years after the Protocol to the African Charter on Human and Peoples' Rights had been adopted by the Organization of African Unity (OAU), due to an apparent lack of states' commitment to appointing judges and finding a seat for the court (De Silva 2018a).

335 NGOs with observer status at the African Commission and individuals can file cases directly at the court, provided the State that they are suing has deposited the Article 34(6) declaration recognizing the jurisdiction of the court to accept cases from individuals and NGOs (Plagis 2021).

> "There's also the source from which we got this Treaty, especially the source from which we designed the EACJ. It's common knowledge that we went to the European Union. And we took the provisions that govern their organs in that union and domesticated them here, so to speak. What does the European Court of Justice do? It doubles in human rights. In fact, the choice there is to go to the European Court of Human Rights or go to the European Court of Justice. And you find recourse in there."[336]

The EACJ judge's remarks confirm that the regional court has sought inspiration from the European Court of Justice (CJEU), an older and more established regional court which, in his words, "doubles in human rights." Even though some authors explicitly refer to it as a "human rights adjudicator" (De Búrca 2013, 169–70), the CJEU is *not* a human rights court per se (Rosas 2022). Its primary function is to interpret and apply EU law, but it has recognised fundamental rights as general principles of EU law since the 1970s, drawing on the constitutional traditions of EU member states and international human rights instruments (Rosas 2022). However, since the adoption of the European Union (EU) Charter of Fundamental Rights,[337] the CJEU has grown into adjudicating fundamental and human rights. An important distinction is that the CJEU only deals with human rights in the context of EU law, even though it often aligns its decisions with those of the European Court of Human Rights (ECtHR),[338] which addresses broader human rights violations by states even outside of EU legal matters. Thus, the CJEU plays a critical role in upholding human rights within the framework of EU law, which is the sentiment that the quote above shares. It is noteworthy that in Europe, "member states later ratified the CJEU's jurisprudential advances" instead of shutting down that initiative (Alter, Helfer, and McAllister 2013, 776).

In West Africa, the ECOWAS Court was not established primarily as a forum for human rights litigation, but a new opportunity was presented to the ECOWAS Court in 2005 when its protocol was revised to empower

336 Speech by Retired Justice James Ogoola, November 5, 2021, EACJ Symposium, *supra* note 62.

337 The EU Charter is the "principal source of law applied and interpreted by the CJEU to guarantee fundamental rights rather than human rights" (Rosas 2022, 208).

338 The ECtHR enforces the European Convention on Human Rights, promoting coherence in the protection of fundamental rights across Europe.

it to hear human rights complaints (Ebobrah 2010).[339] This human rights jurisdiction was acquired as the result of "a coordinated campaign in which bar associations, NGOs, and ECOWAS officials–in addition to ECOWAS Court judges themselves–mobilised to secure member states' consent to the transformation" (Alter, Helfer, and McAllister 2013, 738). At the time, observers saw the "unrestrictive requirements" of the ECOWAS human rights system as a potential "gold mine for rights realisation" (Ebobrah 2007, 313). Lawyers have started to turn to the court for resolution of issues dealing with arbitrary detention and free and socio-economic rights. Surprisingly, even though the member states granted the ECOWAS Court a broad human rights jurisdiction, they have eschewed opportunities to narrow the Court's authority when its early rulings generated opposition from some governments.

In Southern Africa, the Southern African Development Community (SADC) Tribunal played a brief but impactful role in human rights (Moyo 2009) before its suspension in 2010. The Tribunal initially had jurisdiction over cases involving the SADC Treaty, which included references to human rights, democracy, and the rule of law. In its landmark ruling in *Mike Campbell v. Zimbabwe* (2008), the court addressed property rights violations and racial discrimination in Zimbabwe's land reforms, affirming the Tribunal's willingness to tackle politically sensitive human rights issues (Achiume 2017). In sum, with the evolution of the CJEU as a "human rights adjudicator" (De Búrca 2013; Rosas 2022) and the same wave sweeping across African REC courts, it is no surprise that the newly created REC court sought inspiration from other similarly positioned international courts in regional integration projects.

339 This agreement was put into effect with the adoption of the 2005 Supplementary Court Protocol (Ebobrah 2007, 313). The ECOWAS Court also has broad access and standing rules that permit individuals and nongovernmental organizations (NGOs) to bypass national courts and file suits directly with the court (Alter, Helfer, and McAllister 2013, 737).

### 6.1.2 Mapping the Human Rights Trajectory

*Table 6: Human Rights Jurisprudence (Second Bench)*

| Year Filed | Case Name | Case Content | Verdict in favour of | Reason for Dismissal |
|---|---|---|---|---|
| 2010 | Plaxeda Rugumba v. Attorney General of Rwanda | Arbitrary arrest and detention without trial | Applicant | n/a |
| | Emmanuel Mwakisha Mjawasi & Others v. Attorney General of Kenya | Defunct EAC employees (pension & benefits) | Struck out | Non-retrospective application of the Treaty |
| 2011 | Attorney General of Kenya v Independent Medical Legal Unit (IMLU) v | Murder, torture, and inhumane treatment | Dismissed | Time barred |
| | Prof. Nyamoya Francois v. Attorney General of Burundi | Unlawful arrest and detention | Dismissed | Non-observance of the Rules of Procedure and time limitations |
| | Samuel Mukira Mohochi v. Attorney General of Uganda | Denial of entry and refusal of a fair hearing | Applicant | n/a |
| | Mbugua Mureithi wa Nyambura v. Attorney General of Uganda | Violation of free movement | Dismissed | Time barred |
| 2012 | Independent Medical Legal Unit v. Attorney General of Kenya | Forceful disappearance, torture and execution of Kenyans (2006 – 2008) | Dismissed | Time barred |
| | Hilaire Ndayizamba v. Attorney General of Burundi | Wrongful arrest, condemnation and life imprisonment | Dismissed | Time barred |
| | Attorney General of Uganda & Other v. Omar Awadh Omar & 6 Others | Unlawful arrests, extradition, tortured and arraigned on terrorism charges | Dismissed | Time barred |
| | Attorney General of Rwanda v. Plaxeda Rugumba | Arbitrary arrest and detention without trial | Respondent | n/a |
| 2014 | Attorney General of Uganda v. East Africa Law Society & Other | Walk-to-work protests (Uganda 2011 General Elections) | Respondent | n/a |

Source: compiled by the author from the EACJ Case Mapping dataset (with the author on file).

Within its seven years, the second bench had heard and fully decided 12 human rights-oriented cases across a varied array of topics. Given that only 35 judgements were issued, the majority (slightly over a third) of these cases favoured human rights issues. Even if a third of the cases do not seem like a significant amount, note that the other category of cases that featured prominently, albeit expectedly, were cases that sought to rectify institutional affairs. Thus, for a non-human rights bench, this was rather impressive. Moreover, the first commercial, environmental, and property rights issues were also raised during this time, which will be explored in subsequent sections.

Before exploring the human rights cases of the second bench, it is important to highlight that half of the human rights cases that were litigated during this time were dismissed. Most strikingly, almost all of these dismissals were justified by the time limitations that will be further explored in detail in the proceeding sections. Likewise, the difference in interventions across the two chambers will also be examined.

The first human rights case, *Plaxeda Rugumba vs The Secretary General of the EAC and Attorney General of Rwanda,*[340] touched on the arbitrary arrest and detention of political prisoners in Rwanda. It raised human rights violations committed by the Kagame government. The applicant, Plaxeda Rugumba, complained that the Rwandan government had committed human rights violations when they arrested and detained her brother, Seveline Rugigana Ngabo, without a fair trial. Ngabo, a Lieutenant Colonel in the Rwanda Patriotic Front (RPF), was arrested in August 2010 and held incommunicado without justification for this arrest or availing any information to his immediate family. The First Instance Division (FID) issued a declaration stating that Ngabo's detention by the agents of the Rwandan government was in breach of the fundamental principles of the Community under Articles 6 (d) and 7(2) of the EAC Treaty. Borrowing from the pioneer bench, which unequivocally stated that even though it would 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 of human rights violation."[341] The judges took the chance to clarify their intervention,

340 *Plaxeda Rugumba vs The Secretary General of the EAC and Attorney General of Rwanda*, Reference No 8 of 2010. December 1, 2011. https://www.eacj.org//wp-content/uploads/2012/11/Plaxeda-Rugumba-2010-8-judgment-2011.pdf.

341 Ibid., 16.

categorically stating that their interventions were merely putting the two articles to their envisioned use:

> "It would be absurd and a complete dereliction of this Court's Oath of Office to refuse to do so as long as the two Articles are in the Treaty. There is no doubt that the use of the words '*Other original, Appellate, Human Rights and Other Jurisdiction …*' is merely in addition to, and not in derogation to, existing jurisdiction to interpret matters set out in Articles 6(d) and 7(2). That would necessarily include determining whether any Partner State has '*promoted*' and '*protected*' human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights and the Applicant is quite within the Treaty in seeking such interpretation and the Court quite within its initial jurisdiction in doing so and it will not be shy in embracing that initial jurisdiction."[342]

While the pioneer bench set the tone for reading the two articles expansively and issuing orders regarding human rights, the second bench stressed its mandate in adjudicating human rights and proclaimed the Court's authority in this area. For these judges, it would have been incongruous and an utter disregard of their judicial duty to avoid confronting the issue of human rights simply because the Council had not yet conferred explicit jurisdiction on the EACJ to do so. By avoiding the use of human rights violations but clearly linking these violations to EAC states breaching their commitments to adhering to principles of good governance and the rule of law, the second bench continued the successful interpretation of human rights without necessarily stating it as such. Instead, they ruled that "Partner States shall be bound by principles of inter alia, good governance and the rule of Law"[343] and, as such, called Rwanda out on these transgressions. Shortly after this ruling, Colonel Ngabo was "produced by the Rwandan authorities and presented to his family."[344]

As legal scholar Ally Possi explained, the FID judges had taken a "greater judicial activist approach" than that adopted by the pioneer bench in the *Katabazi* case, "simply by directly exercising its interpretation jurisdiction of human rights provisions without linking human rights with a violation of the rule of law." (Possi 2015, 206). Likening their intervention to the SADC Tribunal, Possi emphasised the fundamental difference between the mandates of the two courts: international courts can make reference to

342 Ibid., 16–17.
343 Ibid., 31.
344 Interview, Former EACJ registrar, October 1, 2021, Kampala, Uganda.

human rights in a constitutive instrument of other international courts so as to directly interpret human rights provisions in their own treaties and to make findings in relation to human rights violations if they do not possess strict limitations to doing so (ibid, 207). In this case, the EACJ was restricted by the fact that the Council and the partner states had not yet concluded the protocol that would extend its jurisdiction. This predicament would, in Possi's view, disqualify the bench from assuming that jurisdiction; otherwise, it would be perceived as "activist."

This progressive interpretation was sustained by the FID in *Independent Medical Legal Unit vs Attorney-General of Kenya*[345] when it acknowledged that it had jurisdiction to interpret provisions regarding human rights by proactively and progressively interpreting its jurisdiction and ruling against Kenya. The case against the Kenyan government brought to light instances of murder, torture, and inhumane treatment committed by its security forces during the post-2007 election violence in the Mount Elgon region between 2006 and 2008.[346] It was alleged that the Kenyan government had failed to prevent, investigate and apprehend the perpetrators of the election violence, which led to thousands of civilian deaths in the region. The FID ruled that the Court had jurisdiction to entertain human rights violations, citing *Katabazi*.[347]

Crucially, and proving the second bench's trial court as activist, it did not stick to a restricted reading of the two-month rule, as had been imposed by the Treaty amendments following *Anyang' Nyong'o* in its ruling in *Independent Medical Legal Unit*. Recall that the amendments enforced authoritarian time restrictions on individual litigants, with complaints meant to be filed before the EACJ within two months of the occurrence of the grievance. Failure to meet these requirements meant that the case was time-barred. Drawing instead on the concept of continuous violation – a widely recognised principle in international human rights law – the bench categorically declined to consider the time limitations, siding with the applicant's Counsel, who posited that the "matters complained of are criminal in nature and concern the rule of law, good governance and

345 *Independent Medical Legal Unit vs Attorney-General of Kenya*, Reference No. 3 of 2010. June 29, 2011. https://www.eacj.org/wp-content/uploads/2020/11/Reference-No.-3-of-2010-Independent-Medical-Legal-Unit-Vs-The-Attorney-General-of-the-Republic-of-Kenya-4-Others.pdf.
346 Ibid., 2.
347 Ibid., 4–5.

justice which do not have any statutory limits."[348] Moreover, the judges disregarded the time constraint as a mere inconvenience in the pursuit of justice and emphasised that the gravity of Kenya's alleged violations "cannot be limited by mathematical computation of time."[349] In essence, they were of the view that such violations could not be simply overlooked owing to the two-month time limitation.

While the FID judges were convinced that adhering to a strict computation of time would go against the interest of justice, the Appellate Division (AD) did not exhibit the same level of judicial activism. Instead, the AD opted for a more restrained approach to interpreting human rights violations through a more stringent interpretation of the two-month time limitations. Case in point, the AD bench reversed the trial court's decision in *Independent Medical Legal Unit vs Attorney-General of Kenya*.[350] The AD dismissed the complaint as time-barred and argued against an expansive reading of that Article, arguing that:

> "There is no enabling provision in the Treaty to disregard the time limit set by Article 30(2). Moreover, that Article does not recognise any continuing breach or violation of the Treaty outside the two months after a relevant action comes to the knowledge of the Claimant; nor is there any power to extend that time limit."[351]

The appellate bench maintained that the EACJ judges did not have any power to disregard the limitations enacted by Article 30(2), thereby disagreeing with the trial court's recognition of continuing breaches or continuous violations, which would, in effect, grant the EACJ express or implied jurisdiction to extend the time set in the Article above. Instead, the AD judges chose to highlight the significance of adhering to the rule.

Keeping with this dynamic, the AD displayed a strict reading of the two-month rule in *Attorney General of Uganda vs Omar Awadh Omar & Others*.[352] In this case, the claimants – suspected of involvement in the 2010 Kampala bombings – contended that both Kenya and Uganda had

348 Ibid., 9.
349 Ibid., 10.
350 *Attorney General of Kenya v. Independent Medical Legal Unit*, Appeal No. 1 of 2011. March 15, 2012. https://www.eacj.org/wp-content/uploads/2012/11/appeal-no-1-of-2011.pdf.
351 Ibid., 16–17, as quoted in Possi 2018, 16.
352 *Attorney General (AG) of Uganda and AG of Kenya vs Omar Awadh Omar & 6 Others*, Appeal No 2 of 2012. April 15, 2013. https://www.eacj.org//wp-content/uploads/2013/09/AG_Uganda_v_Omar_Awadh_and_6_Others.pdf.

breached their rights and the rule of law when they were arrested in Kenya and forcibly transferred to Uganda, where they were illegally detained and charged with terrorism charges. In its ruling, the AD reiterated that the EAC Treaty makes no room for continuous violations, arguing that they do not have the power to "extend, to condone, to waive, or to modify the prescribed time limit for any reason."[353]

The Appellate Division appeared to be adopting a more cautious stance, employing a strict interpretation of the two-month rule and the non-declaration of the official human rights jurisdiction to avoid human rights interventions. Ironically, though, it dismissed Kenya's appeal from the *Anyang Ny'ong'o* decision on the grounds of time limitations, yet the former is a creation of the Treaty amendments following this very case.[354] This stance, as assumed by the appellate bench, could also be traced in their off-bench engagements. In his speech at the opening of the sub-registry in Kampala, EACJ President Harold Nsekela urged the Bar Associations, business actors and academic institutions to embrace the Court with careful adherence to the two months' time limitations (Nsekela 2012, 8).

The Appellate Division's strict interpretation trickled down and is reported to have "influenced" the FID in *Prof. Nyamoya Francois vs Attorney General of Burundi*,[355] dismissing the case for not satisfying the time frame, even if the applicant was still held in detention. Scholars worried that the EAC governments' explicit efforts to tame the activist trial bench – by creating a politically restrained appellate bench – were beginning to pay off (Taye 2019, 372).

The FID reversed this worrying trend in *Samuel Mukira Muhochi vs. Attorney General of Uganda.*[356] Mr Mohochi, a Kenyan citizen, instituted proceedings against the government of Uganda for discrimination by airport immigration in Uganda, which denied him freedom of movement, followed by arbitrary arrest and detention.[357] In their response to the accusations,

353 Quoted in Possi 2018, 15.

354 *Attorney General of Kenya vs Prof. Peter Anyang' Nyong'o & 10 others*, Appeal No 1 of 2009. August 2010. https://www.eacj.org/wp-content/uploads/2020/11/Appeal-No.-1-of-2009-Attorney-General-of-Kenya-Vs-Prof.-Peter-Anyang-Nyongo.pdf.

355 *Prof. Nyamoya Francois vs Attorney General of Burundi,* Reference 8 of 2011. February 28, 2014. https://africanlii.org/akn/aa-au/judgment/eacj/2014/84/eng@2014-02-28. *Hereafter Nyamoya.*

356 *Samuel Mukira Muhochi v. Attorney General of Uganda,* Reference No. 5 of 2011. May 17, 2013. https://caselaw.ihrda.org/en/entity/t0eoy29e6yyfxsonrgv9ggb9?page=1. Hereafter *Muhochi.*

357 Ibid., 3.

Uganda argued that the EACJ was "not in a position to answer such a 'political question' since it involved a treaty provision that was 'futuristic and progressive in application' and required the Court to resort to political rather than legal determination" (Odermatt 2018, 231). However, the FID rejected these arguments. Once the applicant met the strict time limitations, the Court heard the case and ruled in favour of the applicant. It held that the Ugandan authorities had denied Mohochi due process by denying him entry into the country without reason and refusing a fair hearing.[358] As Taye rightly states, adjudicating human rights disputes in the EACJ is possible,[359] as set out in *Katabazi*, and has carried on since then; however, "one has to run against time to satisfy the requirement of the two-month rule" (Taye 2019, 371).

In sum, following the opening of the floodgates in *Katabazi* by the first bench, the EACJ's second bench – especially the trial court – adopted an expansive reading of its jurisdiction and continued to decide human rights-oriented disputes, despite frustrationsfrom the appellate bench, which sought to undo its progressive stance. This demonstrates that the punitive response by states in amending the Treaty and creating the appellate court has partially succeeded, helping to tame the "activist" stance in human rights adjudication and general decision-making powers of the court. As the FID judges emphasised in *Prof. Nyamoya Francois v. Attorney General of the Republic of Burundi,*

> "We wish to reiterate what this Court has consistently maintained/ held that the mere inclusion of allegations of human rights violations in a Reference will not deter this Court from exercising its interpretative jurisdiction under Article 27 (1) of the Treaty."[360]

The trial bench did not merely dismiss cases because they were labelled as human rights allegations. Instead, they continued in the footsteps of the pioneers, expansively interpreting the Court's mandate to include human rights decisions. Observers at the time hailed the EACJ as an alternative forum for addressing the rule of law and protecting human rights.[361] While focusing on the agency of individual judges is fundamental, it would not

358 *Muhochi,* 56.

359 Even though the EACJ has continuously maintained that it is not a human rights court, it has decided these issues, disguising them as violation of Art. 6 (d) and 7(2).

360 *Nyamoya*, 17.

361 Batros, Ben. 2012. "Case Watch: East Africa's Fledgling Court Feels its Way." *Open Society Justice Initiative*, February 26. https://www.justiceinitiative.org/voices/east-africas-fledgling-court-feels-its-way.

capture the entire story of the resilience that the EACJ has exhibited, nor would it provide a complete picture of the forging of human rights jurisprudence in the region. Thus, the next one will highlight the role of judicial allies in shaping human rights jurisprudence.

## *6.2 The Role of Allies in Shaping Human Rights Jurisprudence*

Judicial allies played an active role right from the Court's setup by participating in the framing of the EAC Treaty and helping to negotiate the new Court's jurisdiction. Members of the legal complex and human rights-oriented civil society groups were invited to aid in the drafting of the Community's new Treaty (Taye 2020). The regional Bar was instrumental in framing the EAC Treaty – alongside other Civil Society groups[362] – and in looking out for the interests of the new judicial organ.[363] As the former EACJ registrar wrote many years ago:

> "People of East Africa, particularly the business community and law societies, have been agitating for appellate jurisdiction of this Court so that it becomes the apex court in the region. Albeit for different reasons, the East African Magistrates and Judges Association (EAMJA**)** has also joined EALS, the Bar Association, to demand the East Africa Court of Appeal" (Ruhangisa 2011, 26).

It is reported that, during the negotiations, there was "controversy" over the nature and jurisdiction of the Court (Taye 2020, 342). Taye suggests that legal professionals and human rights groups advocated for an appellate court that would not only be similar to the previous Community's Court of Appeal for East Africa (EACA)[364] but also have an extensive jurisdiction that includes human rights. While their efforts were tremendous, they were unsuccessful in both endeavours.[365] However, my interviews showed that

362 Interview, EALS official, February 19, 2022, Arusha, Tanzania.

363 Ibid.

364 Following the "positive mark" that the CAEA left in the region, the participating groups sought to have a similarly authoritative institution that could serve as an appellate body of the region (Taye 2020, 342).

365 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" (Taye 2020, 342). Instead, "the Partner States considered the EACJ an economic court" (ibid.).

not all legal professionals were in favour of an appellate court with human rights jurisdiction:

> "When we were discussing its setup, many lawyers wanted an appellate court. I argued that we do not need an appellate because that will turn out to be a court for states, and states could manipulate by withdrawing jurisdiction here and there. So, we got a regional court, and one of the advantages of having a REC court is that you have a court detached from the business of national courts."[366]

For this seasoned lawyer and academic, who argued in favour of a regional court, the status quo is preferable to having an "appellate model," which would imply the requirement to exhaust local remedies. To complicate the issue further, as partner states had not granted the REC court a human rights mandate that would bind them to their Treaty commitments, the EACJ would "often have to delve into the merits resulting from national law and possibly be hampered by domestic restraints and clawbacks" (Ssempebwa 2021, 11). Moreover, Ssempebwa foresees an impending challenge if the EACJ were granted exclusive human rights jurisdiction as the "total surrender, by the States, of judicial sovereignty over their transgressions, though welcome, can hardly be envisaged" (ibid., 11).

While the EALS pursued the extension of jurisdiction to include human rights, some negotiators sought to protect the newly created regional court from becoming overburdened with human rights affairs because, at its core, it is an integration court. Thus, to make a compromise, judicial allies (the Ugandan Judicial Education Committee (UJEC) and the EALS) proposed including a provision in the new EAC Treaty referring to the African Charter on Human and Peoples Rights (African Charter), which was adopted in Article 6(d) of the EAC Treaty (ibid.,11). Likewise, realising that the wish for appellate and human rights jurisdiction would not materialise, other CSOs "proposed the broadening of the principle of good governance to include the principle of accountability and transparency," which successfully influenced the EAC Treaty provisions in Article 7(2) of the EAC Treaty (Taye 2020, 343).

Having succeeded in negotiating the core *fundamental* and *operational* principles of the Community,[367] these two articles became the basis of

366 Interview, Senior Counsel and Academic, Prof. Ssempebwa, October 21, Kampala, Uganda.

367 Articles 6 (d) and 7 (2) of the EAC Treaty.

most of the litigation at the EACJ. Thus, civil society groups and regional lawyers played a crucial role in the formative stage of the EACJ by actively participating in and influencing the trajectory of the jurisdiction during the process of drafting the Treaty. Following the judicial allies' role in the creation of the EAC Treaty, they have also walked beside the court in its attempts at institutionalisation. As Njiru notes, civil society in the EAC has been "aggressive in holding the partner states accountable for the violations of human rights" (Njiru 2021, 511). The rest of the section critically engages how the court's two most prominent allies – East Africa Law Society (EALS) and the Pan African Lawyers' Union (PALU) – have been influential in steering the EACJ in a human rights-oriented direction and dared to push the court to establish its place in the REC.[368]

### 6.2.1 Evidence and Fact-finding Assistance

As witnessed in the pioneer bench, EALS supported the court by emphasising its implied human rights jurisdictional mandate by appearing as amicus to provide evidence and assist in fact-finding.

*Table 7: EALS as Amicus*

| CEO | President | Case Name | Area of Intervention |
|---|---|---|---|
| Donald Omondi Deya (2002 – 2010) | Prof. Frederick E Ssempebwa (2002–2004) | Calist Andrew Mwatela & Others v Secretary General East African Community, Application No. 1 of 2005 | Political affair (Legislative Power EAC) |
| | Commissioner Bahame Tom Nyanduga (2004–2006) | Prof. Peter Anyang' Nyong'o & 10 Others vs AG of Kenya & 2 Others, Application No. 1 of 2006 | EALA Election Procedure |
| | Prof. Tom Ojiende (2006–2008) | EALS in matters of advisory opinion by the Council, Application No. 2. of 2009 | Principle of variable geometry & consensus in EAC Decision-making |
| | Dr Alan M. Shonubi (2008–2010) | Attorney General of Kenya *v* Independent Medical Legal Unit, Appeal No. 1 of 2011 | Human rights jurisdiction |

Source: compiled by the author from the EACJ Case Mapping dataset (with the author on file).

368 Interview, Former CEO of EALS, March 2, 2022, Arusha, Tanzania.

Given the court's limited research capacity and noting that funding deficiencies constrain its research apparatus, the regional Bar has stepped in to fill the void as its former CEO expounded:

> "We help the court avoid embarrassment by deepening the case, giving them comparative jurisprudence, and bringing out international law principles that they would not otherwise have easily accessed because their research function is not as deep. And if there is a landmine, we guide them, so I think we have got more respect for that role than from the cases of litigants where we were litigants."[369]

Through these interventions as amicus curiae, EALS has earned respect and recognition from the court as a trusted ally whose "very useful and helpful submissions"[370] and guidance were explicitly appreciated. For instance, in *Attorney General of Kenya v. Independent Medical Legal Unit*, EALS advised the court on matters of jurisdiction regarding human rights violations.[371] EALS, in its capacity as amicus curiae, continued to underscore that the EACJ had already pronounced itself on this issue in *Katabazi*.[372] Deliberate engagement by activist lawyers of the regional Bar continues to inform the human rights jurisdiction of the court. It is now standard practice in the EACJ for lawyers to widely interpret and frame human rights violations as resulting from the misapplication of the rule of law and a failure to adhere to principles of good governance (Articles 6(d) to 7(2) of the Treaty).[373]

However, in later years, there has been little intervention as amici, owing to the change in leadership on the FID.[374] As of February 2023, without including pending cases, the EALS had filed four amicus briefs.[375]

The type of cases and the activist role of the regional Bar can only be attributed to the individuals who pushed for the court's interests, especially legal professionals and civil society organisations that were actively

369 Interview, Former CEO of EALS, March 2, 2022, Arusha, Tanzania.
370 *Mwatela, supra* note 240.
371 *Attorney General of Kenya v. Independent Medical Legal Unit*. Appeal No. 1 of 2011. March 15, 2012. https://www.eacj.org/wp-content/uploads/2012/11/appeal-no-1-of-2011l2.pdf. Page 12.
372 Ibid., 8–9.
373 Interview, Former Registrar, October 1, 2021, Kampala, Uganda.
374 Interview, Former EALS official, March 2, 2022, Arusha, Tanzania.
375 Unlike previous research, which lists six amicus cases where the EALS appeared, my search did not verify two of the cases that he presents and are excluded from this analysis (Taye 2020, 357).

preoccupied with the advancement of human rights, the rule of law and good governance in the region. The forerunner president, Ssempebwa, for instance, was involved in drafting several pieces of legislation in the region, participated in the early negotiations and eventual drafting of the EAC Treaty, and thus was well-suited to understand the pressures on the new court and its position in these early years.[376] Likewise, EALS pioneer CEO Donald Deya was influential in steering the new court in a human-rights-oriented direction. He was already a seasoned human rights lawyer in Kenya and the region, who was well respected,[377] passionate about the new organ of the Community, and whose decisions on empowering the court would not be easily swayed by the board.[378] In his own words, the EALS was "activist"[379] and sought to challenge the injustices in the region through the newly established court as an avenue for legal and political mobilisation. Deya was a key player in most of the public interest litigation brought to the EACJ during that time. Even after he left office at the EALS, his commitment to the EACJ did not waver, as he continued engaging the court by mobilising legal scholars and practitioners to support it against the backlash.[380]

Moreover, as of this writing, Deya was the CEO of another critical partner of the EACJ, the Pan African Lawyers Union (PALU). PALU describes itself as a "continental membership forum of and for individual African lawyers and lawyers' associations in Africa."[381] The EALS and PALU are the

376 Interview, Professor Frederick Ssempebwa, October 10, 2021, Kampala, Uganda.

377 Deya's history in legal mobilisation can be traced back to his role as "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" (Gathii 2013, 278).

378 Interview, Donald Deya, March 2, 2022, Arusha, Tanzania.

379 The involvement of EALS has been dwindling over the years as different leadership took on the organisational work at the Secretariat. As the pioneer CEO recounted, after 2010, EALS went through a "bureaucratic" period where they were involved in typical membership organisational duties, like organising conferences, trainings and workshops for its members, without overtly taking a stance on the allyship of the court.

380 For example, at the Inaugural Colloquium of legal scholars on the African Human rights system, PALU raised concerns about "the attacks on the independence, jurisdiction and effective operations" of the EACJ following *Anyang' Nyong'o*, the ECOWAS Community Court of Justice (2009), and the suspension of the SADC Tribunal (2010).

381 The Pan African Lawyers Union (PALU). February 28, 2020. https://www.lawyersofafrica.org/wp-content/uploads/ABOUT-PALU_ENG.pdf. Page 3.

most critical allies of the EACJ, as they not only initiate litigation but go beyond legal avenues to empower the court. For example, in conjunction with the East African Civil Society Organisations Forum (EACSOF)[382] and the Open Society Initiative for East Africa, PALU held a consultation on facilitating a common civil society organisation's "position on proposals for an international criminal jurisdiction for the EACJ."[383] Thus, it is not surprising that the PALU has also appeared as amicus in other politically salient cases to continue the work started while Deya was still with the regional Bar.

Likewise, Deya was important in publicising the court to the international community through his engagement with various donor country initiatives. As already stated in Chapter 4, the EACJ primarily receives its funding from EAC partner states through their contributions to the overall EAC budget. However, like many regional bodies in Africa, the EACJ has also received financial and technical support from foreign donors and development partners to supplement its budget and support specific activities or capacity-building initiatives. Key foreign donors and partners that have provided funding or technical support to the EACJ include the African Development Bank (AfDB), the World Bank; the United States of America and its United States Agency for International Development (US-AID), the European Union (EU), the Federal Republic of Germany and its agencies – *Deutsche Gesellschaft für Internationale Zusammenarbeit* (GIZ) and the *Kreditanstalt für Wiederaufbau* (KfW), the Swedish International Development Agency (SIDA) and the People's Republic of China (East African Community 2019, 56).

Through its engagement as amicus, PALU mobilised against violations of freedom of speech and the press through unlawful media regulation in

382 EACSOF is an umbrella body for Non-Governmental Organizations (NGOs) and civil society organisations (CSOs) in East Africa, and it seeks, among others, to "ensure that East African citizens and their organisations work together to play a more effective role in the integration process" through creating empowered and emboldened CSOs that demand accountability from the Community's leaders. It thus specifically caters to issues affecting citizen participation in regional integration initiatives. See East African Civil Society Organizations' Forum (EACSOF). https://eacsof.net/EACSOF/.

383 PALU Newsletter. "CSOs Discuss Extension of the Jurisdiction of the East African Court of Justice." September – October 2012. Pages 3–4. https://www.lawyersofafrica.org/wp-content/uploads/PALU-Newsletter-6-September-andOctober.pdf.

Burundi,[384] where the applicants sought to repeal or amend the Burundi Press Law. Even though the court maintained that it had no jurisdiction to grant those orders, it issued a declaratory judgement citing violations of the Treaty and directed Burundi to implement those changes through its internal legal mechanisms.[385] The relevance of the involvement of CSOs as amicus in politicised cases in the region was clearly articulated in the application for admission as amicus curiae, where Mr Deya unequivocally stated that the role of an amicus curiae would significantly enhance the jurisprudence of the court, as witnessed in the past in proceedings.[386] Equally, he underlined the importance of their involvement in, increasing public participation in court proceedings, which inevitably advances the performance of the court.[387] The judges agreed with Mr Deya, admitting that EACJ was in the "process of settling its jurisprudence" and would highly benefit from "experts and groups with relevant experience and expertise in relevant areas of law" permitting them to engage the cases despite an apparent lack of comprehensive statements of interest from the applicants.[388]

### 6.2.2 Initiating Strategic Litigation

The regional Bar and other interest groups have purposefully supported the EACJ bench as a human rights court through the initiation of strategic litigation.[389] Strategic litigation in the EACJ has been part of a well-defined, structured, and deliberate attempt by various stakeholders to hold EAC partner state governments accountable. The EALS, PALU, and other hu-

384 Nine NGOs, including PALU, joined the case. However, their role was limited to filing submissions. *See Burundian Journalists Union v. The Attorney General of Burundi and several amici curiae*, Reference No. 7 of 2013. May 15, 2015. https://www.eacj.org//wp-content/uploads/2015/05/Reference-No.7-of-2013-Final-15th-May-2c-2015-Very-Final.pdf.

385 Ibid., 41–42.

386 *Burundi Journalists Union versus the Attorney General of Burundi*, Application No. 2 of 2014. August 15, 2014. https://www.eacj.org/wp-content/uploads/2014/08/RULING-IN-APPLICATION-NO-2-OF-2014-Final-REVISED-3.pdf. Page 4.

387 Ibid., 4.

388 Ibid., 9.

389 Strategic litigation is a contested concept, with various working definitions, but it is seldom defined (Barber 2012, 412). For the purposes of this work, it is understood to involve claiming rights in court, with the hope of bringing about legal and social change (unlike Barber who also refers to non-legal methods as part of strategic litigation).

man rights NGOs[390] have filed before the EACJ. While the court's caseload has grown exponentially over the past two decades, from an empty docket to a backlog, there is a need to emphasise the context in which cases arise, the long-term progress of court records, and the litigants' relations and rationale for engaging the court. A brief dive into the most prominent cases lodged by the court's leading allies provides a starting point for appreciating the intentionality behind the filing of these overtly human rights-oriented cases.

Take the *East African Law Society vs Attorney General of Uganda and Secretary General of the East African Community*[391] case, for instance. The EALS raised concerns against Uganda and the EAC Secretary General over violating fundamental human rights during the peaceful 2011 walk-to-work protests in Uganda. In April 2011, various Ugandans protested the rising costs of fuel, transport and living expenses through peacefully organised walk-to-work protests throughout the capital city.[392] Despite seeking police clearance, the police declined to authorise the unarmed protests and instead violently and brutally attacked the participating citizens with the help of the military. Hundreds of protesters were injured, and over ten people died, including two children. Several others were arrested and detained for unlawful assembly, including a violent attack on the leading opposition politician at the time, Dr Kiiza Besigye.[393] Represented by leaders of the EALS, including Prof. Ssempebwa, the regional lawyers' association argued that Uganda's actions violated not only its constitution but also the human rights of its citizens.[394] Even though the case was dismissed (Katungulu 2018), it added to the several cases that would help the court assert itself as "*a court of human rights*"[395]despite not having express human rights jurisdiction.

390 These include, but are not limited to, the Tanzanian NGOs: the Legal and Human Rights Centre (LHRC), the Tanzania Human Rights Defender's Coalition (THRDC), and the Center for Strategic Litigation (CSL).

391 *East African Law Society vs Attorney General of Uganda & Secretary General of the East African Community*, Reference No. 2 of 2011. March 28, 2018. Page 6. https://www.eacj.org/wp-content/uploads/2020/11/Reference-No.-2-of-2011-East-Africa-Law-Society-vs-the-Attorney-General-of-the-Republic-of-Uganda.pdf.

392 Ibid., 4.

393 Ibid., 5.

394 EACJ. 2011. "Uganda given two weeks to respond in 'Walk to Work' case." https://www.eacj.org/?p=448 (Accessed September 21, 2023).

395 Interview, Former EALS CEO, March 2, 2022, Arusha, Tanzania.

Continuing the string of human rights cases against legally disobedient member states, EALS took on Kenya and Uganda in *East African Law Society v. Attorney General of Uganda and 2 others.*[396] The judicial allies sued to support Kenyan nationals *Omar Awadh and Six Others*[397] who had been arrested in Kenya and delivered to Uganda, where they were charged with various criminal offences related to the terrorist bombings in Kampala. However, the regional Bar was not successful in its endeavour. This is the result of the opposing directions taken by the two chambers of the court. While the First Instance Division (FID) has been more permissive in circumventing the statute of limitations as imposed on private litigants in the Treaty amendments, the Appellate Division (AD) adopted a stricter stance. Despite the contradictory approaches taken by the two benches, these cases illustrate that the EALS intervened in the human rights violations against EAC citizens, albeit to no avail in both cases. Nonetheless, despite the dismissal of the cases, the involvement of the regional bar association in contentious human rights violations against Member States illustrates their commitment to mobilising against breaches of the rule of law.

Similarly, EALS dragged Burundi to court over illegally disbarring its then President of the Burundi Bar Association, Mr Isidore Rufyikiri, from the Roll of Advocates by the Burundian Court of Appeal without following the proper procedures and due process over holding a Press Conference in which he made declarations that Burundi considered to be against "the rules, State security and public peace."[398] Burundi also prosecuted Mr Rufyikiri before the Anti-Corruption Court and further prohibited him from travelling outside the country, breaching Articles 6(d) and 7(2) of the Treaty (EACJ Law Reports 2012–2015, 467–8). The court agreed with the applicant and issued a declaratory order directing the Secretary

396 *East African Law Society v. Attorney General of Uganda & 2 others*, Reference No. 3 of 2011. September 4, 2013. Page 2. https://www.eacj.org/wp-content/uploads/2020/11/Reference-No.-3-of-2011-East-Africa-Law-Society-Vs-The-Attorney-General-of-Uganda-2-Others.pdf.

397 *Omar Awadh and Six Others v. Attorney General of Kenya, Attorney General of Uganda, and Secretary General of the EAC,* Application No. 4 of 2011. November 1, 2011. https://www.eacj.org//wp-content/uploads/2013/09/Ruling-in-Application-no-4-of-2011-28th-February.pdf.

398 *East Africa Law Society v. the Attorney General of the Republic of Burundi, and the Secretary General of the East African Community*, Reference No. 1 of 2014. May 15, 2015. https://www.eacj.org//wp-content/uploads/2015/05/REFERENCE-NO-1-OF-2014-EAST-AFRICAN-LAW-SOCIETY-ISIDORE-RUFYIKIRI-15-MAY-2015-Final-1.pdf. Page 3.

General of the EAC to "immediately operationalise the Task Force set up on January 15, 2014, to investigate alleged violations of Treaty provisions by the Republic of Burundi", among other measures.[399] Additionally, EALS went to court in another case,[400] requesting the Court to issue a "quashing order and a stay of the decision"[401] of the Court of Appeal of Bujumbura that has the earlier-mentioned effects on Mr Rufyikiri. The EACJ dismissed the application and preferred to deal with the issues in the main reference.[402] By intervening in Rufyikiri's affliction, EALS joined the conversation around human rights violations in Burundi and also sought to protect its members by initiating these cases at the EACJ.

In the same manner, PALU has been a repeat litigant, filing several cases on various core fundamental principles of the EAC, as stipulated in Articles 6(d) and 7(2) of the EAC Treaty.[403] Continuing the work he started with EALS, PALU CEO Deya continues to challenge the EACJ to advocate for good governance, justice, and the protection of human rights across the EAC through litigation. The judicial ally has recently taken on politically salient cases in Tanzania (land rights among the Maasai population) and South Sudan (arbitrary arrests of citizens).

On behalf of Maasai communities, PALU filed a case[404] in September 2017, challenging their unlawful and forceful eviction from their village land in Loliondo Division, which borders the Serengeti National Park.[405] Filing at the EACJ was intended to order the restitution and reinstatement

399 Ibid., 41.

400 *East African Law Society v. Attorney General of the Republic of Burundi and the Secretary General of the EAC*, Application No. 3 of 2014. August 15, 2014. https://www.eacj.org/wp-content/uploads/2014/08/APPLICATION-NO-03-OF-2014-THE-EAST-AFRICAN-LAW-SOCIETY-AG-BURUNDI-15-AUGUST-20141.pdf. Hereafter *Rufyikiri*.

401 Open Society Justice Initiative. 2015. Case Digest: Human Rights Decisions of the East African Court of Justice (May 2015). https://www.justiceinitiative.org/uploads/8e03c4f9-2950-484b-96a2-be903b9665e8/case-digests-eacj-20150526.pdf. p. 13.

402 *Rufyikiri*, 11.

403 See Table 17 in the Appendix for all cases involving PALU, either as litigant or amicus.

404 *Ololosokwan Village Council & 3 others v. the Attorney General of Tanzania*, Reference No 10 of 2017. September 30, 2022. https://www.eacj.org/wp-content/uploads/2022/11/Reference-No.-10-of-2017.pdf. Hereafter *Loliondo*.

405 The government of Tanzania, claiming that these communities occupied the Serengeti National Park, began violently evicting them from their homes in the Loliondo Game Controlled Area. See https://www.lawyersofafrica.org/court-delivers-judgment-on-loliondo-case/ (last accessed September 21, 2024).

of the property, as well as to obtain monetary compensation for the damages caused.[406] However, the case was unsuccessful at the trial court. An unfavourable judgement from the FID resulted in an appeal, *Appeal No. 13 of 2022*,[407] where the Masaai communities finally received their "vindication."[408] The Appellate Division sided with the Appellants, underscoring that the trial court erred on points of law by failing to examine and consider the evidence presented in support of the case, among others. PALU called the ruling a "significant milestone in the court's jurisprudence and a triumph in a prolonged and closely watched legal dispute."[409] It also perceived the judgement as setting "a powerful precedent for future cases" on a similar matter.[410]

PALU also intervened in the arrest of a South Sudanese citizen, Mr Kerbino Wol Agok,[411] who had been arrested without due process of law.[412] They sought orders to reverse the confiscation of his personal and corporate bank accounts as well as the closure of his businesses. The applicants also filed a Certificate of Urgency, requesting that the EACJ instruct the South Sudanese government to release Mr Agok.[413] Unfortunately, before his case could be finalised at the EACJ, Agok – who was accused of overthrowing the government of Salva Kiir – was shot and killed by the South Sudanese army.[414] Nonetheless, the case was unsuccessful at trial as the applicant failed to adduce the necessary evidence that would point to

406 *Loliondo*, 8.

407 *Ololosokwan Village Council & 3 others v. the Attorney General of Tanzania*, Appeal No 13 of 2022. November 29, 2023. s://africanlii.org/akn/aa-au/judgment/eacj/2023/12/eng@2023–11–29/source.pdf.

408 PALU: Press Statement. November 30, 2023. "Maasai Communities Vindicated by the Appellate Court." https://www.lawyersofafrica.org/press-statement-maasai-communities-vindicated-by-the-appellate-court/.

409 Ibid.

410 Ibid.

411 *Garang Michael Mahok vs The Attorney General of South Sudan*, Reference No. 19 of 2018. June 24, 2022. https://www.eacj.org/wp-content/uploads/2022/06/Reference-No.-19-of-2018-Garang-Michael-Mahok-v.-The-Attorney-General-of-the-Republic-of-South-Sudan.pdf.

412 Ibid., 2–6.

413 *Garang Michael Mahok vs The Attorney General of South Sudan,* Application No. 20 of 2018. December 5, 2019. https://www.eacj.org/wp-content/uploads/2020/02/Application-No.20-of-2018.pdf.

414 Waakhe Simon Wudu, 2020. "South Sudan army kills leader of new rebel group." VOA News, June 15. https://www.voaafrica.com/a/africa_south-sudan-focus_south-sudan-army-kills-leader-new-rebel-group/6191151.html.

the government's violation of Articles 6(d) and 7(2) of the EAC Treaty.[415] Relatedly, PALU took on the South Sudanese government for another unlawful arrest, detention and disappearance of its national, Mr Morris Mabior Awikjok Bak.[416] Mr Mabior's arrest is linked to his criticism of the government's governance mechanisms.[417]

Despite the result of the case – whether they win or not – judicial allies have filed overt human rights abuses in the EACJ in search of an additional avenue for political and legal mobilisation (Gathii 2020b). Through their mobilisation efforts, EALS and PALU have directly influenced the emergent human rights jurisprudence of the EACJ. Several authors have attributed the burgeoning chain of human rights litigation to the EALS (Alter, Gathii, and Helfer 2016; Ebobrah and Lando 2020; Taye 2020). Indeed, EALS has proactively mobilised to encourage the court to decide human rights cases, which, in turn, draws inspiration from that "mutually supportive relationship [] to successfully overcoming the court's limited jurisdiction and institutional weaknesses" (Gathii 2013, 283). By setting a precedent in human rights jurisprudence at the EACJ, judicial allies are contributing toward the complexity and adaptability dimensions of the institutionalisation of the court (Huntington 1968). By enabling the court to go beyond its limited jurisdiction, it is being challenged to adapt and evolve into a more differentiated and complex structure. For the EACJ to become highly institutionalised, it ought to be adaptable and go beyond the limitations that were set for it.

Likewise, when they appeared as amici, EALS and PALU assisted the court by providing evidence and legal arguments that enabled them to make decisions. Recall that EALS initially limited its role to appearing as amicus. However, in response to developments following the court's first and most contentious case, *Anyang' Nyong'o,* the regional Bar called for more direct involvement as a litigant.[418] Since then, EALS has supported

415 *Garang vs Attorney General of South Sudan* (Reference No. 19 of 2018), 24.

416 PALU: Press Statement. February 25, 2023. "PALU seeks Urgent Interim Orders at the East African Court of Justice (EACJ) against the Governments of South Sudan and Kenya for the production of Mr Morris Mabior Awikjok Bak." https://www.lawyersofafrica.org/palu-seeks-urgent-interim-orders-at-the-east-african-court-of-justice-eacj-against-the-governments-of-south-sudan-and-kenya-for-the-production-of-mr-morris-mabior-awikjok-bak/.

417 Mohammed Yusuf. Voice of America (VOA). "Lawyers Seek Release of Missing South Sudanese Activist." https://www.voanews.com/a/lawyers-seek-release-of-missing-south-sudanese-activist/6988466.html (last accessed September 21, 2024).

418 Interview, Former Registrar, February 18, 2022, Arusha, Tanzania.

the court through litigation under its "public interest advocacy"[419] initiative, daring to challenge human rights violations, rule of law breaches and injustices in the region through the newly established court as an avenue for legal and political mobilisation.[420] Even though EALS has only explicitly appeared as an amicus or applicant 17 times,[421] going by numbers alone would obscure the role that EALS played. EALS, together with the national bar associations,[422] sought to intervene and protect the EACJ from executive meddling, among other interventions. Their strategic and intentional involvement in furthering the court's human rights mandate can be understood as a means of empowering the court.

## *6.3 Beyond Human Rights Jurisprudence*

Beyond human rights jurisprudence, the second bench also covered topics outside the realm of human rights discourse. A case mapping exercise by the author reveals that the second bench issued 62 decisions – one advisory opinion, 26 interim rulings[423] and 35 final judgements.[424] This section will focus on judgements only as interim orders serve as provisional legal measures designed to address specific aspects of a case pending its final resolution. Twenty-three judgements spanned diverse topics, which will be explored here.

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419 East Africa Law Society. "Public Interest Advocacy." https://ealawsociety.org/public-interest-advocacy/ (Accessed June 4, 2021).

420 See Table 16 in the Appendix for all the cases mentioned above.

421 As of February 2023, the EALS had filed 13 cases. See Table 16 in the appendix for a summary of the cases in which the EALS filed a case as an applicant.

422 Throughout the thesis, I focus on the regional Bar rather than individual national Bar associations because EALS has consciously built its national law societies to be more regionally oriented, allowing for both institutional and individual membership. This arrangement implies that the same active members of the national Bar tend to be the most active at the regional level.

423 Also referred to as interim orders. An interim order or decision, as stipulated in Article 39 of the Treaty, empowers the court to issue provisional directives or orders in any case brought before it. Such issuance is contingent upon the submission of an application supported by an affidavit. These interim measures are deemed necessary and desirable by the court and are imposed on terms it deems appropriate (East African Court of Justice 2019, 52).

424 Includes any decision, ruling or order made by the court (East African Court of Justice 2019, 10).

### 6.3.1 Streamlining EAC Institutions

Continuing its role as an arbiter in the institutionalisation of the East African Community (EAC), the Court resolved matters pertaining to its disputed jurisdiction and employment grievances within the regional bloc. It primarily dealt with political affairs amongst EAC organs. For instance, in its first advisory opinion, the EACJ was tasked with clarifying the application of the principle of variable geometry vis-à-vis the requirement for consensus in decision-making by the Council of Ministers.[425] This advisory opinion was symbolic at the time as it solidified the Court's role as the Community's judicial organ.[426] The Court was being called upon to guide the process of decision-making in the EAC, especially in regard to the institutional development of the Community's organs.[427] Indeed, the judicial arm needed to assert its place and take the lead in guiding the Community on "whether or not the principle of variable geometry and decision-making by consensus are in conflict."[428] The Court advised that the two principles are in harmony and that the former can apply to guide the integration process alongside consensual decision-making.[429] As an organ that is meant to ensure compliance with the EAC Treaty so as to drive regional integration, this case was an essential contribution to expanding the Court's authority within REC processes.

Similarly, when the 13th Summit of Heads of State's decided to mandate the Secretariat to undertake the necessary steps in operationalising the Customs Union, Common Market, Monetary Union and the proposed action plan for the EAC political federation, a Tanzanian journalist *Timothy Alvin Kahoho*[430] challenged this decision before the EAC court. Even if the bench disagreed with the applicant's concerns, it used this case to highlight and defend the role of the EAC Secretariat and other organs within the

425 *In the Matter of a request by the Council of Ministers of the EAC for an Advisory Opinion*, Application No. 1 of 2008. https://www.eacj.org/wp-content/uploads/2019/03/Advisory-Opinion-No.-1-of-2008-The-Council-of-Ministers-of-the-East-African-Community.pdf.

426 Ibid., 6.

427 Ibid., 6.

428 Ibid., 10.

429 Ibid., 41.

430 *Timothy Alvin Kahoho v the Secretary General of the East African Community*, Reference No. 1 of 2012. May 17, 2013. https://ealaw.eastafricalaw.org/wp-content/uploads/2021/02/TIMOTHY-ALVIN-KAHOHO-v-THE-SECRETARY-GENERAL-OF-THE-EAST-AFRICAN-COMMUNITY.pdf.

political integration agenda.[431] Similarly, although the EACJ acknowledged the role of the other organs that work part-time (the Summit, the Council of Ministers, the Coordination Committee and Sectoral Committees), the EACJ emphasised the centrality of the Secretariat as the "fulcrum on which the wheels of integration rotate."[432] Likewise, the bench also saw the chance to pronounce itself on the process of attaining the EAC Political Federation. The judges maintained that the process leading to a Political Federation is "not exclusive to the Council, and all Organs must work together to attain it."[433] Besides, the centrality of the participation of EAC citizens was emphasised.[434] Through these cases, the once-threatened but not dissolved Court took the opportunity to address the objectives of EAC regional integration and, at the same time, the institutionalisation of EAC organs.

Still dealing with streamlining EAC institutions, another case, *Legal Brains Trust Limited,*[435] arose from Uganda, challenging whether a Member of the EALA can only hold office for a maximum of two terms. The Court ruled that, indeed, two terms were the maximum duration.[436] In the same case, the applicants raised the issue that the Attorney General of Uganda had not sought an advisory opinion of the EACJ. Even though the Court ruled that it was not a breach of the Treaty if the Attorneys General did not seek an advisory opinion, it used the chance to communicate to EAC officials across the board that:

> "We, however, strongly advise that before any Attorney General or official of any Partner State of the Community makes such a decision or does such an act, he or she should always warn himself or herself of the ramifications of the real possibility of five different interpretations of an Article of the Treaty (from the five Partner States). We therefore find it imperative to remind the Partner States, particularly Attorneys General that the need for consistency in interpretation of Treaty provisions should make it imperative for them to refer questions of interpretation of the Treaty to the EACJ, the organ established, inter alia, for that purpose."[437]

431 Ibid., 22.
432 Ibid., 22.
433 Ibid., 26.
434 Ibid., 26.
435 *Legal Brains Trust Limited v A.G. of Uganda*, Reference 10 of 2011. March 30, 2012. https://africanlii.org/akn/aa-au/judgment/eacj/2012/6/eng@2012-03-30/source.pdf.
436 Ibid., 28.
437 Ibid., 34.

Unsatisfied with the trial court's solution, the applicant advocated for the necessity of an advisory opinion in a subsequent appeal.[438] The appellate bench, which had already been noted to be less progressive, reasoned that the matter was not worth exploring as the question raised was "clearly hypothetical, academic, abstract, conjectural and speculative" in nature and declined to entertain it over a lack of locus standi.[439]

The Court has persistently declined to invalidate the decisions of the EAC Summit, Council or even the Secretariat. Take the cases raised by judicial allies who were seeking the Court to decide whether the amendments to the Treaty, following *Anyang' Nyong'o*, could be stopped. In *East African Law Society and 4 Others v. Attorney General of Kenya and 3 Others*,[440] the applicants challenged the unusual, hasty and the improper nature of the treaty amendment process. The regional Bar argued that the process excluded other EAC Organs (except the Summit), national governments, and the people of East Africa and tasked the Court with invalidating the amendments. While the regional Bar sought to empower the Court, the EACJ declined to invalidate the amendments, emphasising prospective[441] over retrospective annulment. The bench claimed that the infringement of the Treaty "was not a conscious one" and that "after this clarification of the law on the matter, the infringement is not likely to recur."[442] In other words, they excused the lapse in judgement by the Summit. As the former Registrar aptly puts it, "the Court hesitated to nullify the impugned amendments but warned the Partner States not to repeat the same mistake in future" (Ruhangisa 2017a, 235). Instead, the Court "avoided confrontation with the partner states" (Taye 2019, 373) but offered a "strong" recommendation that the amendments be "revisited at the earliest opportunity of reviewing the Treaty."[443]

438 *Legal Brains Trust Limited v A.G. of Republic of Uganda*, Appeal 4 of 2012. May 19, 2012. https://africanlii.org/akn/aa-au/judgment/eacj/2012/9/eng@2012-05-19/source.pdf.

439 Ibid., 16.

440 *East African Law Society (EALS) & 4 Others v. Attorney General of Kenya & 3 Others,* Reference No. 3 of 2007. August 31, 2008. https://www.eacj.org//wp-content/uploads/2012/11/Ref-3-of-2007.pdf.

441 Ibid., 44.

442 Ibid., 43.

443 Ibid., 45.

The Court adopted the same approach in another case filed by the East Africa Law Society,[444] which challenged the Common Market Protocols and the Customs Union Dispute Settlement Mechanisms, arguing that they deny original jurisdiction to the EACJ to handle disputes arising from these Protocols.[445] The EACJ did not share the EALS worries, at least not entirely. The court emphasised that it "remains the final authoritative forum" on Treaty interpretation, taking precedence over decisions of the national judiciaries on matters pertaining to the Treaty.[446] However, it argued that since the partner states are "the main users" of these protocols, they ought to bear the "primary responsibility to implement community legal instruments", and thus, national courts are most suited to entertain Common Market and Customs Union disputes.[447]

However, judges, at times, also dared to speak out against the decisions of the EAC's top organs, as seen in the *East African Center for Trade Policy and Law*[448] case. This case also challenged the Treaty amendments, the Common Market Protocol and the Customs Union Dispute Settlement Mechanisms.[449] The judges agreed with the applicant, opining that the said amendments provided a window for partner states to conclude the protocol for the extended jurisdiction of the court, but instead, they made provisions in the Treaty that undermined the supremacy of the EACJ.[450] The judges reiterated that the amendments encroached on the court's previously broad jurisdiction and excluded the EACJ, where partner state organs take precedence on specific issues, which could render the EACJ "powerless" over partner state institutions.[451] Concerning the dispute resolution mechanisms, the bench perceived them as "merely alternative dispute resolution of trade disputes by experts in technical and specialised areas."[452] These arguments are in line with the statements made in the previous case, which

444 *East Africa Law Society vs Secretary General of the EAC*, Reference No 1 of 2011. February 14, 2013. https://www.eacj.org//wp-content/uploads/2013/09/FI_EastAfricanLawSociety_v_EastAfricanCommunity.pdf.
445 Ibid., 7.
446 Nsekela 2010, 4.
447 *East Africa Law Society vs Secretary General of the EAC* (supra note 444), 27–28.
448 *The East African Center for Trade Policy and Law vs the Secretary General of the EAC*, Reference No 9 of 2012. May 9, 2013. https://www.eacj.org//wp-content/uploads/2013/09/FI_EACommunity-EACTPL.pdf.
449 Ibid., 6.
450 Ibid., 29.
451 Ibid., 27.
452 Ibid., 39.

touch on a similar subject matter. It became clear that the court did not see these alternative dispute resolution mechanisms as a threat to its power. Instead, they were seen as "allies" of the court who took on cases to prevent the EACJ from being "bogged down with the nitty-gritty of disputes such as those in the area of trade, customs immigration and employment that are bound to arise on a regular basis as the integration process deepens and widens as a result of the implementation of the Protocols."[453] This progressive stance is a further testament to the quality of judges who occupied the pioneer and second benches.[454]

Perhaps most daring was the second bench's decision in *Honorable Sitenda Sibalu v. Secretary General of the EAC and 2 others*, which challenged the delay in implementing the appellate jurisdiction of the EACJ.[455] The EACJ declared that the delay or failure to operationalise the extended jurisdiction of the EACJ was an infringement of the Treaty.[456] It also declared that "quick action" should be taken by the EAC to remedy the issue.[457] Upon the Council of Ministers' failure to implement the judgement and the subsequent non-payment of the directed costs, the EAC was dragged to the EACJ for contempt.[458] The second bench, FID, under Justice Butasi, declared that the Council had breached the EAC Treaty by failing to comply and ordered the Secretary-General to take necessary action to achieve compliance with the previous ruling.[459] The EAC was also slapped with costs up to US$ 52.534.10 that it had to pay.[460] It is interesting to note that the trial court of the second bench not only made declarations but also issued monetary compensation.

To sum up, it is essential to note that the court was still relatively young – barely a decade old – and was still grappling with its institutional, jurisdictional, and structural roles amongst the other organs, national courts and its general perception within the regional bloc and the international sphere.

453 Ibid., 39.
454 See the previous chapter on judicial biographies.
455 *Honorable Sitenda Sibalu vs. Secretary General of the EAC, Attorney General of Uganda, Honorable Sam Njumba, and the Electoral Commission of Uganda*, Reference No. 1 of 2010. June 30, 2011. https://www.eacj.org//wp-content/uploads/2012/11/No-1-of-2010.pdf.
456 Ibid., 50.
457 Art. 27 EAC Treaty (ibid., 51).
458 *Honorable Sitenda Sibalu vs. Secretary General of the EAC,* Reference No. 8 of 2012. November 22, 2013. https://www.eacj.org//wp-content/uploads/2014/02/REFERENCE-NO-8-OF-2012.pdf.
459 Ibid., 38.
460 Ibid., 39.

Therefore, the cases on Treaty amendments provided a safe avenue for judges to challenge partner state interventions in curbing their authority, thereby giving the court a chance to construct and expand its power. These cases enabled the bench to flex its judicial muscle amidst the uncertainty and lingering threats to its authority. The bench went beyond declaratory orders and issued pecuniary damages, as in the *Sitenda Sibalu* case above, which shows that the judges were not afraid to go above and beyond to assert and reclaim their authority.

### 6.3.2 Judicial Diplomacy in Politically Charged Matters

Since the second bench, judges have operated in vulnerable conditions in which judicial independence is constantly threatened. As litigants push the court to exercise its judicial muscle, and as pushback and backlash accrue, judges must strike a balance between meeting the needs of the regional integration agenda and avoiding confrontation with executive sovereigns, whilst protecting the bench's legitimacy.

As argued by legal scholars, EACJ judges have routinely preferred legal diplomacy over confronting the partner states directly (Taye 2019), especially when deciding on controversial cases with political implications. Interviews revealed the intricacies of the legal diplomacy involved in decision-making, with judges expressing concerns about the potentially harmful impact of their decisions on the fledgling EAC institutional regimes.

> "An international judge is not only writing judgments; you must also be doing diplomacy. Not political, not economic; for us, we are dealing with judicial diplomacy. Of course, as an international court, you must also be aware of the politics. You must be careful about the decision because the purpose of the court is stability, order, and integration. It is not only a matter of reading the Treaty. It is a matter of measuring whatever you do. The court is mandated as an organ of the Community and contributes to the integration agenda. So, we do not make decisions that can dismantle the Community tomorrow."[461]

An interview with the judicial head of the third bench confirmed that he views his role as more than simply writing judgements. For this judge and his colleagues, "*judicial diplomacy*" is an essential guiding principle for

461 Interview, EACJ judge, Bujumbura, November 17, 2021.

international adjudication, and sub-regional court judges perceive their role not only as neutral arbiters who merely stick to the confines of the law but are engaged in diplomacy *on* and *off*-bench. IC judges *are* political actors who carefully balance their judicial role with the existing realities of their political surroundings. Thus, judges have taken on a diplomatic role, in its broadest sense (Sending, Pouliot, and Neumann 2015), attuned to providing justice tailored to the litigants' needs whilst catering to the fragile, weakly democratic, economically disempowered and politically unstable contexts in which governments operate. This careful navigation of judicial behaviour involves them partaking in strategic, politically motivated dialogue with executives to advance their agenda.

As the interviewed judge maintains, doing their job at an IC entails meticulous and cautious navigation of the politics at the sub-regional level. Decision-making is not merely taken at face value – where judges simply interpret and follow the confines of the law, as legalistic approaches to decision-making suggest (Segal 2010; Leiter 2010). Instead, strategic-realist considerations inform their choices (Baum 2010; Posner 2010). For instance, judges consider the court's role within the EAC, prioritising the fact that it is meant to resolve and adjudicate disputes and ensure adherence to the rule of law within the Community. That way, all decision-making ought to take the well-being of the EAC into account, ensuring that they do not pass decisions that may hamper the progress of the regional bloc or have the opposite effect of integration. The extent to which they can achieve that is not the point of emphasis here, but rather *the intent behind the strategy*. Thus, this usage of the term judicial diplomacy *differs* from studies that limit the concept to off-bench relations (Squatrito 2021, 65). Contrary to this understanding, my use of judicial diplomacy in this context draws on my fieldwork, where I observed the term being used not only to refer to off-bench mobilisation but also to encompass the breadth of judicial decision-making practices.

Without reducing the role of these judges to political diplomacy only, these judges are qualified jurists whose fidelity to the law is also observed, even when under threat. REC judges are aware that they are the only judiciary whose mandate and operations are not directly controlled by national governments, which is the genesis of their autonomy. Thus, judges understand their role in these courts as supranational and beyond the direct control of their home governments and assume a supranational watchdog role over the partner states through a delicate balance of political, social and economic contexts. Judges are aware that their decisions can affect

entire polities, and it emerged strongly in my fieldwork that IC judges adopt a political role – not merely interpreting and applying regional Treaty laws but also delicately and craftily balancing regional politics, national interests and their diverse relational attributes to shield them from direct attacks, improve access to justice and grow the political relevance of the court.

The EACJ also has articulated deference to political institutions and processes by refusing to adjudicate certain types of questions, especially those of political significance. While the bench has repeatedly rejected arguments where the parties explicitly argued that it should not hear a particular matter because the dispute raises questions that are political rather than legal in nature (Odermatt 2018, 230), it has applied subtler techniques to get rid of them. These more elusive avoidance techniques enable the court to retain its "image as a body committed to dispute settlement and the rule of law while still carefully navigating the issues that might provoke resistance or political recoil" (ibid, 231). Touching on judicial cautiousness in decision-making and the strict adherence to time limitations, the following section sheds light on how judges employ judicial diplomacy to deal with lingering threats to their existence in regard to decision-making. It also elucidates why the two divisions employed different approaches to judicial activism on the bench, especially regarding their take on furthering/hampering human rights adjudication.

#### 6.3.2.1 Jurisdictional Limitations

Following the success of Kenyan opposition politicians in *Anyang' Nyong'o*, politically salient issues at the national level started to be litigated at the court. For example, the pivotal moment in Kenya's political life – the constitutional referendum – was disputed in the regional court. After the post-election violence of 2007/2008, the country pursued a long-lasting solution to the political turmoil through a new constitution that would address inequality and violence and forge a peaceful existence in the country. Consequently, a new constitution was promulgated on August 27, 2010, by then-president Mwai Kibaki. It was met with renewed hope amongst Kenyan citizens and the international community alike.[462] However, not all

462 Kabutu, Francis. 2020. "The Constitution of Kenya 2010: Panacea or nostrum." Strathmore Law School Blog, October 2. s://law.strathmore.edu/the-constitution-of-kenya-2010-panacea-or-nostrum/.

Kenyans were satisfied with the process, and this was witnessed in *Mary Ariviza and others*,[463] who challenged the promulgation and confronted whether due process was followed in presenting the draft constitution to the referendum and, if not, whether it was a breach of Kenyan national law and, by extension, the EAC Treaty. The court disagreed with the applicants, declaring that Kenya had followed due process.[464] The resulting appeal[465] was also dismissed, citing the fact that the appellants exceeded the jurisdiction of the appellate bench.[466] Even if the court disregarded the anxieties of Ariviza and others, the significance of the case lies in the fact that EAC citizens deemed the EACJ worthy of hearing "a historical event equated by many Kenyans to the rebirth of the nation."[467]

The other overtly political affair originated from Uganda, in *Democratic Party v. Secretary General of the East African Community and Others*.[468] An opposition party, the Democratic Party, brought an action against the EAC and its partner states, alleging failures to make individual country declarations in accepting the mandate of the African Court on Human and People's Rights. Predictably, the respondents argued that the issues raised were not justiciable as they were asking the EACJ to compel partner states to perform a purely executive function.[469] The court agreed with the respondents that the applicant had raised "purely political, rather than legal questions," which risked outplaying the executive and legislative organs of each entity (Odermatt 2018, 230). In essence, the EACJ avoided the question, avoiding direct confrontation with partner states. These developments are unsurprising. For a court that had just survived recent backlash and was still dealing with its repercussions, the second bench chose to exercise caution with political questions, employing legal diplomacy tendencies.

463 *Mary Ariviza & Other vs Att'y Gen. of Kenya & other,* Reference no 7 of 2010. November 30, 2011. https://africanlii.org/akn/aa-au/judgment/eacj/2011/11/eng@2011-11-30/source.pdf.

464 Ibid., 17–23.

465 *Mary Ariviza & Another vs Att'y Gen. of Kenya & other,* Appeal No 3 of 2012. November 8, 2013. https://africanlii.org/akn/aa-au/judgment/eacj/2013/142/eng@2013-11-08/source.pdf.

466 Ibid., 15.

467 Kabutu 2020.

468 *Democratic Party v. Secretary General of the East African Community and Others,* Reference No 2 of 2012. November 29, 2013. https://caselaw.ihrda.org/en/entity/be7kv0d4vdywtp7wmt9996bt9?file=1510827470855pcfb3t7wd9lnmmcpxs6jbrzfr.pdf&page=3.

469 Ibid., 20.

The bench dismissed half of the cases primarily on grounds of time and jurisdictional limitations.

The second bench ruled mainly in favour of applicants in cases that touched on issues challenging the functioning and institutionalisation of the EAC. As these were not controversial cases, the bench perceived them as a chance to clarify the role and position of the EACJ vis-à-vis national courts, pronounce itself on the process of attaining the EAC Political Federation, especially the participation of the citizens, clarify the role of other EAC organs and emphasise the centrality of the Secretariat as the pivot of integration.

*Table 8: Second Bench (2008–2014) Judgements*

| **Judgement type** | | **1st instance** | | **Appellate** | | **Total** | ***Dismissed*** |
|---|---|---|---|---|---|---|---|
| | | **Decisions** | ***Dismissed*** | **Appellate** | ***Dismissed*** | | |
| EAC institutional affairs | EAC Political affair | 2 | 1 | 1 | | 3 | 1 |
| | EACJ Jurisdiction | 4 | 1 | | | 4 | 1 |
| | Employment Grievance | 1 | | | | 1 | |
| Other Integration | Business and Commerce | 3 | 3 | 1 | | 4 | 3 |
| | Electoral dispute | 3 | 1 | 1 | 1 | 4 | 2 |
| | Megapolitical disputes | 2 | 2 | 1 | | 3 | 3 |
| | Environmental issue | 2 | | 1 | 1 | 3 | 1 |
| | Human Rights | 6 | 3 | 6 | 3 | 12 | 6 |
| | Property Rights | 1 | 1 | | 1 | 1 | 1 |
| **Total** | | 24 | 12 | 11 | 6 | 35 | 18 |

Source: compiled by the author from the EACJ Case Mapping dataset (with the author on file).

For the more politically salient cases, the court mostly avoided dealing with them through dismissal, except for the ground-breaking decision in the environmental protection case. For instance, in all three cases deal-

ing with national politics, the second bench avoided overtly politicised jurisprudence by dismissing them. For example, in the *Democratic Party case*, the court declared no Treaty violation as the delay in ratification was simply at the sole discretion of the respective partner states.[470]

### 6.3.2.2 Avoidance through the Statute of Limitations

Most prominently, politically salient cases were largely avoided by dismissal owing to strict interpretations of the two-month rule.[471] The two-month statute of limitations is widely acknowledged to be a result of the contentious *Anyang' Nyong'o ruling,* which saw the Treaty amended to reduce the time within which violations can be lodged heavily (Onoria 2010; Alter, Gathii, and Helfer 2016). Thus, this pace of avoidance – a stricter interpretation of the two-month time limitations – was set by the newly created Appellate Division (AD). The AD seemed to be taking a more careful stance, using the strict interpretation of the two-month rule and the non-declaration of the official human rights jurisdiction to avoid dealing with these issues. As legal scholars have noted, EACJ judges generally opt for legal diplomacy over direct challenges to partner states (Taye 2019), particularly in contentious cases with significant political implications.

Mostly dismissed over the two-month statute of limitations were the business and commerce-related cases and those dealing with overt national politically salient affairs (see *Table 8*). Interestingly, the court generally ruled in favour of applicants in human rights-oriented cases, except for the appellate bench. As stated earlier, issues of human rights still prevailed in the docket. Whereas the FID followed the *Katabazi* example, daring to rule against partner states for their human rights violations, the AD took a stricter interpretation of the two-month time limit and thus was less progressive in resolving these controversial cases.

In *Prof. Nyamoya Francois vs Attorney General of Burundi*, the EACJ bench emphasised the strict reading of time limitations and drew attention to the strict adherence to the rules of procedure of the court:

> "We think that it is high time that we reminded all persons (advocates in particular) who appear before this Court to comply with the said Court

470 Ibid., 27–28.

471 The strict adherence to time limitations as a means of avoidance has also been observed in national jurisdictions as well (Ellett 2013).

> Rules and to strictly adhere to them. Rules were made for a purpose, and that purpose was for orderly conduct of our business in this Court. We are alive to the fact that the Rules of Procedure are only handmaidens of justice and they should not be used to defeat substantive justice, but it is our pious hope and prayer that our remarks will bear fruit and that we shall see no more of what transpired in the instant Reference."[472]

Upon dealing with several cases that had been lodged out of time, the second bench felt compelled to remind litigants that strict adherence to the new Rules was non-negotiable. Complaints from court users about the strict application of time put the bench in a position where it could not remain silent, feeling constrained by the adherence to the newly created rules, but also aware that users perceived them as a means to defeat the acquisition of justice. Observers noted that the strict adherence to time limitations was a deterrent to future litigants who may not opt to use the EACJ for fear of failing to meet time limitations. In the East African context, with limited access to legal advice, literacy and economic hardships, this rule makes individual access to the EACJ grimmer. The small window within which one has to file the complaint does not provide adequate time for litigants to seek legal assistance, conduct the necessary legal research or even secure the required evidence. It is no wonder that, as mentioned earlier, litigants have been granted leniency in submitting their affidavits.

In 2015, concerned EAC members contested the strict time limitation in the *Steven Deniss case,*[473] claiming that it denies access to justice against individuals in favour of partner states.[474] They sought a declaration that it was illegal and needed to be rectified. Nevertheless, the court declined to grant the declaration that the time restriction was restrictive or hindering access to justice[475] and consequently ruled against the prayer to have it rectified. In their words, they "lack jurisdiction to make such orders"[476] that direct partner states and the EAC to amend the Treaty.

Unlike in the ECOWAS Court of Justice (ECCJ), where cases can be filed within three years of a claim arising (Ebobrah 2007), after exhausting local remedies, the EACJ has a stricter regulation on the lodging of cases.

472 *Nyamoya*, 25–26.
473 *Steven Deniss v. Attorney General of Burundi and 5 Others,* Reference No. 3 of 2015. March 31, 2017. https://www.eacj.org//wp-content/uploads/2017/04/Reference-No.3-of-2015.pdf.
474 Ibid., 8.
475 Ibid., 33.
476 Ibid., 34.

The EACJ's stricter stance has been described as "very restrictive, unjust and discriminatory" and "skewed towards the partner states and the EAC" (Taye 2019, 372), much to the detriment of the EAC citizens. Not only is the introduction of this rule illegal, but it also fails to meet the main objectives of a people-centred, market and rule-of-law-oriented regional integration to which the Community aspires (ibid., 372). Worse still, the rule cripples access to justice for ordinary East Africans because it is not equally applied to the partner states and the EAC (ibid., 372). Given that it is partner states, their institutions and the EAC that are frequently sued in the court, this rule serves their interests to the disadvantage of other court users.

#### 6.3.2.3 Vague Explanations

In addition to the strict adherence to the two-month statute of limitations, the EACJ bench, since the creation of the appellate division, has started to see instances where judges resort to ambiguous elucidations in an effort to protect their autonomy. An example of this strategy was used in the *African Network for Animal Welfare (ANAW)* case[477] when the Appellate Division (AD) left a lot to the interpretation of concerned parties.

First, a brief background of the case at the trial level is provided. In a ground-breaking decision, the FID issued a permanent injunction barring Tanzania from constructing a highway across the Serengeti National Park in its first-ever environmental protection case.[478] Experts described the move as "audacious because, as a regional court, it was exercising authority to essentially reverse the decision of a sovereign government to build a road within its own borders" (Gathii 2016a, 397). Defying realist and rationalist assumptions, a court that had just survived backlash would not have dared to pronounce itself on such "extremely broad and significant remedies" (ibid, 389). Instead, we would expect it to exercise more caution to protect itself from the political ramifications of such expansive judicial

477 *Attorney General of the United Republic of Tanzania v. African Network for Animal Welfare (ANAW)*, Appeal No. 3 of 2014. July 29, 2015. http://eacj.org/?cases=the-attorney-general-of-the-united-republic-of-tanzania-vs-african-net work-for-animal-welfare.

478 *African Network for Animal Welfare (ANAW) v. The Attorney General of the United Republic of Tanzania,* Reference No. 9 of 2010. June 20, 2014. https://www.eacj.org//wp-content/uploads/2014/06/Judgement-Ref.-No.9-of-2010-Final.pdf. See (Gathii 2016a) for a discussion of the history and significance of this case.

intervention. The judges considered the local economic and social context within which the case arose, seeking to "stop future degradation without taking away the respondent's mandate towards economic development of its people."[479] This sensitivity to partner states' economic interventions was further underlined when the court said that "the role of the Court in balancing its interpretative jurisdiction against the needs of ensuring that partner states are not unduly hindered in their developmental programs has come to the fore."[480]

The Appellate Division largely upheld the trial court's decision without lifting the permanent injunction. However, as Gathii rightly finds, the appellate bench was murky in its judgement – without clarity on whether Tanzania should be stopped from constructing the road through the Serengeti:

> "This lack of clarity seems purposeful – the Appellate Division may well have realised that expanding the wings of the EACJ to cover environmental disputes would wither on the vine if the Court did not only affirmatively endorse its jurisdiction to entertain such suits, but at the same time realised that it had to make the government of Tanzania happy so that the Court suffered no backlash. [] Clearly, getting an order that could be served on the government of Tanzania pursuant to the judgment was out of the question because of this lack of clarity. Yet Tanzania, on its part, can see the writing on the wall. Should it decide to make concrete plans to build the road, ANAW can go back to the Court and get orders to permanently bar it from building the road" (Gathii 2016, 413).

Gathii links this type of decision-making to legal diplomacy, albeit without clearly stating it as such. The appellate bench was cautious enough not to seem like an environmental activist whilst taking a stand against environmental degradation. Likewise, they left room for the applicants to approach the court again should Tanzania proceed with the impugned project. International court's ability to push the boundaries of environmental conservation – amidst the African government's unrelenting pursuit of mega-development projects that ignore environmental concerns and the undesired impacts it could have on local populations – is only made possible by organised groups that seek to repurpose these courts from mere trade courts to avenues of environmental protection, social, economic and

479 Ibid., 31.
480 Ibid., 31.

political mobilisation (Gathii 2016a, 388). Even if the litigants do not win the cases, the symbolic gains of raising public awareness of these violations by autocratic governments are noteworthy (Gathii 2020b).

Courts could choose to adhere to the legality of texts and dismiss specific questions instead of interpreting them as a self-preservation mechanism. For various political reasons, the court may adhere to the spelt-out norms and evade deciding on highly contentious issues, especially if it has not built a support system. On the other end, they could adjust their stance to signal independence to the "global community of courts" (Slaughter 2003). REC courts are increasingly entertaining issues of high political relevance and are being used by litigants as an additional arena of political mobilisation. Judges recognise the new role they are expected to play and are not shirking it in an attempt at self-preservation. Despite limited jurisdiction and resources, they are fighting for their place as administrators of justice. Even if REC judges are appointed by these governments and, at times, even serve on national benches, they have devised clever ways of asserting their authority whilst minimising backlash.

This section has explored judicial on-bench strategies for expanding or restricting human rights jurisprudence. The chapter also highlights the impact of judicial off-bench activities on the evolution of human rights jurisprudence.

### 6.3.3 Off-bench Diplomacy

The second cadre of judges was from the then-five Member States of the EAC. Judges were appointed to the EACJ bench in October 2008 and served for a seven-year term (between October 2008 and June 2014). This was the first time the EACJ had judges from countries outside of the original three member states of the EAC. Rwanda and Burundi had joined the EAC and could appoint judges to the regional court.

While the bench changed in 2008, the pioneer Registrar served through the first two benches, and only the registry staff and Registrar were permanently residing in Arusha. The Registrar's calls for judicial permanence were partially answered when, in July 2012, President Harold Reginald Nsekela and Principal Judge Johnston Busingye finally assumed their full-time offices in Arusha, while the rest of the members were still serving on an ad hoc basis. This permanence granted the court leadership full-time service and enabled them to take part in off-bench activities, building

judicial constituencies, growing caseloads, and strengthening the court's legitimacy within the region.

*Table 9: Second Bench Judges*

| Appellate Division | | First Instance Division | |
|---|---|---|---|
| President | Harold Reginald Nsekela (Tanzania) | Principal Judge (PJ) | Johnston Busingye (Rwanda) |
| Vice-President | Dr Phillip Kiptoo Tunoi (Kenya) | Deputy PJ | Mary Stella Arach-Amoko (Uganda) |
| Members | James Ogoola (Uganda) | Members | John Mkwawa (Tanzania) |
| | Laurent Nzosaba (Burundi) | | Jean Bosco Butasi (Burundi) |
| | Emily Kayitesi (Rwanda) | | Benjamin Patrick Kubo (Kenya) |
| Registrar | Dr John Eudes Ruhangisa (Tanzania) | | |

Source: Author's compilation from publicly available data and judicial CVs.

Tanzanian judge Harold Nsekela was appointed to head the second bench of the EACJ as court president. Nsekela was a Justice of Appeal in Tanzania at the time of his appointment and had extensively served in public corporations and academia.[481] Rwandan representative Johnston Busingye served as the Principal Judge (PJ) of the First Instance Division of the second bench. Busingye had amassed leadership skills through his broad service in running the Ministry of Justice, prosecution, and as President of the High Court of Rwanda.[482] The two court leaders on the second bench worked with Registrar Ruhangisa, who had already witnessed the court's critical point during earlier backlash and understood the types of legitimacy-building initiatives that ought to have been implemented. As the first two leaders to work for the court permanently and reside in Arusha, Nsekela and Busingye were involved in a number of empowerment activities off-bench.

#### 6.3.3.1 Opening of Sub-registries

Having only been around for seven years, the court lacked visibility in the region. Judge Nsekela and his team embarked on publicising the EACJ's developments through various engagements. Most notable was the opening

481 CV, Harold Reginald Nsekela.
482 CV, Busingye Johnston.

of EACJ sub-registries[483] in various partner states, thereby broadening the court's reach (Nsekela 2012). Hosted at national judiciaries of partner states, five sub-registries were established, staffed and supervised by the EACJ in 2012.

Sub-registries participate in various outreach programs to educate and sensitise their national public on the role of the court.[484] They participate in trade fair exhibitions and other law-related events[485] in the EAC partner states. One such event is the EAC Micro, Small and Medium Enterprises (MSME) Trade Fair Exhibition, an annual event held across the EAC partner states on a rotational basis, bringing together business actors to enhance and boost the socio-economic integration in the region. The court, through its sub-registries, participates in this event. The Bujumbura,[486] Kigali,[487] Kampala,[488] and Dar es Salaam[489] sub-registries have all participated and exhibited the EACJ booth containing informational leaflets, reports and court staff who engage visitors to the stand.

As the court reports, these exhibitions are meant to improve the attendees' "knowledge on the general mandate, jurisdiction and role of the court in the EAC integration agenda, its jurisdiction of the court in dispute settlement on cross border trade issues and private access to the EACJ."[490] Working together with national[491] and regional bar associations,[492] the sub-

483 The court intended to bring justice closer to the people by establishing Sub-Registries in the capital cities of each of the partner states where litigants can file cases that are then immediately transmitted to main registry via electronic case management system, thereby reducing travel costs to Arusha.

484 East African Court of Justice 2021, 38–43.

485 Such as the Law Society Law Week in Nairobi in which the court exhibited its material and the booth (East African Court of Justice 2021, 42).

486 Reported to have reached over 1500 exhibitors from the private sector, civil society, academia and others (East African Court of Justice 2021, 37).

487 Participated in five exhibitions, and reports reaching out and sensitizing a total of 1600 exhibitors (ibid., 40).

488 In 2013, 2014 and 2015, participated in 3 respective exhibitions in Kampala "to educate the public about the role and functions of the Court" (ibid., 42).

489 Attended 3 exhibitions between January 2020 and July 2021 and reported reaching over 900 residents within that time (ibid., 42).

490 East African Court of Justice 2021, 42.

491 The Nairobi sub-registry participated in the "Law Society of Kenya's legal awareness week held at Milimani law courts in Nairobi in September 2016, where over 100 people were sensitized" (ibid., 39).

492 The Kigali sub-registry participated in the Annual Conference of the East African Magistrates and Judges Association (EAMJA) in 2017 and the 24th EALS Annual Conference in 2019 (ibid., 41).

registries aim at enlightening the "public on the role played by the EACJ in the advancement of legal literacy and advocacy."[493] The court's 2021 Annual Report describes reaching over 20,000 people in the last nine years since it started engaging in these sensitisation activities.[494]The operation of the REC court through sub-registries is unique to the EACJ. The Courts of Justice of the Economic Community of West African States (ECOWAS) and the Common Market for Eastern and Southern Africa (COMESA) do not operate through a system of sub-registries. In both courts, filings are made through the centralised registry in Abuja, Nigeria and Lusaka, Zambia, respectively. Likewise, the Southern African Development Community (SADC) Tribunal operated centrally before its dissolution.

#### 6.3.3.2 Engaging Academic Audiences

Like the pioneer bench, the second bench judges were also involved in academic writing to elucidate the role and functioning of the court. During Nsekela's leadership, he wrote extensively and presented at various venues on the position of the EACJ vis-à-vis national courts, emphasising that the EACJ works in collaboration with domestic courts to complement each other in the regional integration process. He spoke about the role of regional courts in protecting and developing human rights jurisprudence, and emphasised the delay in extending the EACJ's express human rights mandate (Nsekela 2010). The court president also addressed the ad hoc nature of judicial service at the EACJ (Nsekela 2012) and clarified the institutionalisation, functioning, challenges and future aspirations of the EACJ (Nsekela 2009; 2011). The court leader also noted in a paper presentation that the court's arbitration jurisdiction was "almost unknown" among its stakeholders (Nsekela 2009), and it, unfortunately, remains the case 15 years later, despite sensitisation campaigns to create essential awareness.

In addition to engaging in academic discourse, court judges and the Registrars have produced, published and shared their written or verbal statements – like those made during speeches and press conferences – to engage diverse audiences on issues affecting the court. Judicial speeches have been held across the region to emphasise the court's jurisprudence,[495]

493 Ibid., 39.
494 Ibid., 37.
495 Kiryabwire, Geoffrey. June 2018. Presentation: "Jurisprudence at the EACJ Appellate Division." Available with author.

its role in integration,[496] and its relationship with national courts. Likewise, they have criticised the ad-hoc nature of judicial service (East African Court of Justice 2018, 12). Judges have also emphasised threats to their financial and administrative autonomy, the statute of limitations, and the need for sensitisation about community law and practice at the EACJ to various members of the public, including targeted EAC institutions (ibid., 12). Though varied in their approach, these statements share a common discontent with the status quo and specify the judicial position on perceived threats to their independence and performance. Additionally, they clearly articulate the legal basis for these claims, citing the necessary Treaty rules and addressing the potential reproduction of such threats to their work. In this way, judges were afforded the agency to explain and frame their strategic interactions through carefully written dialogue.

As already alluded to in earlier chapters, REC judges operate within a multitude of authoritative decision-makers and thus have the additional burden of mobilising alliances amongst those different groups to enable them to conduct their work without interference. While the pioneer bench set the groundwork by mobilising judicial allies and raising awareness of the court's mandate among its potential users, the second bench's judicial leaders were involved in a number of empowerment activities off-bench that contributed to its becoming a human rights bench. EACJ judges grew their human rights jurisdiction, established judicial constituencies, and sought inspiration from the global network of lawyers by purposefully and expansively interpreting the EAC Treaty. This joint effort has paid off in human rights jurisprudence, where the court heard and ruled mainly favouring applicants in human rights-oriented cases.

Despite the earlier-mentioned stringent measures, which seemed to be taking a more careful stance in issuing human rights decisions, repeatedly emphasising that it is not a human rights court, the EACJ still appeals to its litigants as such. Even if it remains cautious of pushback or potential backlash to interpreting human rights in a progressive manner, "the Court does not want to lose its legitimacy with litigants by being seen as abdicating its interpretive duties" (Possi 2015, 209). Therefore, through tactical balancing and employing legal diplomacy, the EACJ has craftily managed to adjudicate "cases with human rights allegations so as not to exercise its jurisdiction beyond the established boundaries" (ibid., 209).

496 Kiryabwire, Geoffrey. 2019. "The role of the East African Court of Justice in the East African integration process." Presentation at the 1st Annual East African Community Conference, March 15. Skyz Hotel, Naguru Kampala.

## 6.4 From Human Rights to Commercial Bench

The chapter highlights two outstanding factors that could serve as a starting point in making sense of the judicial restraint adopted by the second bench's appellate division in adjudicating human rights. Firstly, the backlash following the *Nyong'o* led to Treaty amendments that resulted in the imposition of stringent time restrictions, limiting case filing to two months from the occurrence or awareness of the matter, which sought to hamper access to the EACJ. As the chapter has shown, this rule was established to limit access to the EACJ, as litigants are often turned away due to time restrictions. The appellate judges were unwavering in exercising this rule, especially when confronted with cases that seemed like politically salient and involved human rights, to avoid confrontation with partner states.

Secondly, the second bench judges were appointed after the contentious *Anyang' Nyong'o* case, in which the court rendered an unfavourable decision that almost ended it. A watershed in the history of the EACJ, this case highlighted the potential political muscle of the new judicial organ and thus influenced appointees' stance on controversial human rights jurisdiction. The creation of an appellate chamber – as a result of this case – which would review unfavourable rulings from the trial bench created an opportunity for EAC governments to politicise appointments (Stroh and Kisakye 2024). As executives in the various member states started to grapple with the court's growing political intervention, they developed a closer interest in monitoring candidates for the bench. Instead of sending "activist" judges who would dare to turn the court into a human rights court or a "bold" bench (as the pioneer bench was usually fondly referred to in our research), member states exhibited caution in their appointments. For instance, Uganda's political will to signal a commitment to East African regional integration by judicial appointment had to give way to the court's desire for more commercial judges. Consequently, this concern was reflected in the succeeding politicisation of appointments.

Uganda's picks for the second bench were both specialised commercial law experts, differing from its previous politically attuned or human rights judges. Mary Stella Arach-Amoko, the Ugandan judge on the trial bench, was a commercial judge whose bench did not shy away from exercising a human rights mandate.[497] In the case of Justice James Ogoola at the

497 Arach-Amoko was appointed Deputy PJ. She had been the deputy head of the Commercial Division of the High Court of Uganda.

appellate division, Uganda favoured a tried-and-tested judge at a former REC court. Appellate judge and legal powerhouse Ogoola was Head of the Commercial Court Division of the High Court of Uganda (2001) at the time of his appointment.[498] Ogoola had been a key figure in drafting the East African Treaty and played a vital role in establishing the EACJ as an organ of the EAC. Moreover, he had already served two terms on a REC bench at COMESA (CCJ) before being appointed to the EAC Court. A prominent judicial officer with evident experience in political processes, Justice Ogoola is hailed for speaking against the "Black Mamba's Urban Hit Squad" storming the High Court of Uganda in November 2005 under the sponsorship of the Ugandan government (Ellett 2013, 1). Being Principal Judge of the High Court at the time, Ogoola is reported to have referred to the attack as a "rape of the temple of justice" (ibid., 1), which was a direct message to President Museveni and his aides. Already a highly respected senior judicial officer at the time of their appointment, both at home and abroad, Justice Ogoola was more than just a specialised commercial law expert.

Tracing Ogoola's previous role at a typically commercial international court (COMESA court) and his own rich background as a celebrated judge (see above), as well as his Ugandan counterpart's background, shows a turn in the types of judges on the second bench. It could point toward the turn the appointers sought to achieve by shaking up the mostly human rights-oriented first batch. Ironically, despite actively trying to populate the bench with more 'commercial judges', the second bench still emerged as a human rights court, so much so that even Ogoola's own narrative above reinforces the notion that the second bench was indeed an activist human rights favouring cohort. Turning to the judicial biographies of the second bench reveals an evolution in the court's judicial structure and caseload. It explains the stance these judges adopted toward empowering themselves and the court and, by extension, provides a window into understanding why this bench is dubbed the "human rights bench."

Even though the EACJ was forging relevance as a human rights court, it was still struggling to assert itself as such. Scholarly work towards the end of the second bench suggests that the court found itself in a "difficult position" (Possi 2015, 213) as a human rights adjudicator. The EACJ First Instance Division judges had been accused of practising "judicial activism by interpreting the EAC Treaty in conjunction with various international

498 CV, James Munange Ogoola (available with the author).

human rights instruments" (Possi 2015, 213). Interviews with judges on the third bench showed they did not identify with the label "activist."[499] Recall that most of these judges are still employed in public office or on the bench in their national jurisdictions. Therefore, as younger judges still in active service start to perceive their reputation as stained by "judicial activism," they may seek to distance themselves from such a label and, instead, move the bench into a less politicised direction: economic intervention. Likewise, the change in judges, over time, has impacted the trajectory, firmness and audacity of the regional bench. This chapter finds that the trajectory of the EACJ's second bench as a human rights court is a product of appointments, the precedent set by the pioneer bench and the off-bench activities that garnered support for human rights jurisprudence. In the next chapter, the study advances the idea that the third bench was populated by specialised commercial law experts who were strategically selected to bring the court back from bold political ambitions and human rights jurisdiction to its core business of economic integration.

499 Justices Geoffrey Mupeere Kiryabwire (interviewed June 18, 2020) and Justice Monica Mugenyi (interviewed September 29, 2021) emphasised that the EACJ is not an activist court.