The Logic of International Courts:
An Exploration of the East African Court of Justice

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Introduction

In 1999, Kenya, Tanzania and Uganda, three countries with a long history of regional cooperation, signed the Treaty for the Establishment of the East African Community. The following year the Treaty entered into force, and the East African Community (EAC) was officially established. (Nearly a decade later, Rwanda and Burundi would join the community, bringing its membership up to five.) The Treaty provided for the creation of a variety of regional institutions, including an East African Legislative Assembly, an East African Council of Ministers, and an East African Court of Justice.

The court, the EACJ, was tasked with ensuring "adherence to the law in the interpretation and application of and compliance with" the Treaty, and it was staffed with judges from all EAC partner states. For half a decade, the EACJ sat unused. Finally, however, in 2005, one case was filed before the court. In 2006, there was another. Over the last decade, the court's traffic has increased substantially, and to date the judges have issued rulings on 33 unique references, along with dozens of additional applications and appeals. Each case has been filed by a private litigant—individual, civil society organization, corporation—against one or more state actors, or against the EAC as a whole. In a number of these cases the plaintiff has been victorious, with the judges finding one or more EAC partner state in violation of the community's treaty. State actors have not always been happy with these decisions; in one case in particular, early in the court's lifetime, the Kenyan government reacted so violently to a ruling that it succeeded in forcing through a series of amendments to the treaty, markedly curtailing the powers of the EACJ. Kenya was largely condemned for its actions, however, and since this time there has been no other significant backlash against the court.

In this thesis, I am seeking to answer two questions. The first is why the East African states created the EACJ in the first place. The second, more significant question is whether or not the court has had any impact in the region. That is, is it an independent institution, or is it merely carrying out the wishes of the countries that established it? And if it is issuing significant, impartial rulings, are states accepting these decisions as legitimate and changing their behavior accordingly?

The Theories

In answering the first question, I identify two theories that might explain the existence of an international court such as the EACJ. Each of these theories has different implications for the second question, that of effectiveness.

The first theory is one of global norms, in which states adopt certain features through, essentially, mimicry. This theory posits that certain characteristics of a state become normalized in the international system, and states will be inclined to adopt these features in order to gain legitimacy in the global order. With international courts popping up at a surprising rate in recent years, most of them seemingly modeled off of the European Court of Justice, this theory of emulation seems entirely plausible. Importantly, the global norms theory does not offer a very promising picture for the courts' effectiveness. Certain institutions (i.e. international courts) are adopted in order to comply with a perceived model of state behavior, but these systems are rarely tailored for the unique political or cultural circumstances in which they are implanted. This can lead to a situation in which there is a decoupling between logics of appropriateness and logics of consequence. Courts are

established because of global expectations and norms, but they are ineffective or inconsequential.

The second theory, functionalism, suggests that international organizations are established in order to allow cooperation between states in certain functional areas (e.g. economic development). An international court here serves a very practical purpose, facilitating this cooperation by raising the costs associated with any one state defecting from its commitments. There is an obvious logic in this case to establishing an international court. Once it is established, however, its fate is less clear. From a realist perspective, its role will be limited to basic problem solving; it can provide missing information or find acceptable areas of compromise, but its rulings will never deviate from the interests of the states that created it. A more liberal argument, on the other hand, suggests that the court, once created, will act autonomously, and it will pressure states to comply with its decision by engaging "compliance constituencies," made up of both domestic and international actors. Finally, a neo-functional argument posits of series of "spillover effects," in which, as international cooperation develops, states will begin to cede more and more sovereignty to the existing international organizations, in order to ensure the success of the initial objectives. In the case of an institution such as the EACJ, this theory suggests that states will gradually come to grant the court more authority than had been anticipated at its inception, in order that it may adequately address new obstacles that arise on the path toward regional integration.

The Argument

I contend that functionalism can largely account for the creation of the EACJ, although the global norms theory helps to explain why it took the particular form that it did.

The EACJ was built to comply with a certain model of international court already seen in the European Union and throughout sub-Saharan Africa. It was created for a purpose, however, to serve as a tool for solving basic problems that arise from the integration program, a mechanism to monitor compliance with the treaty and thereby ensure the longevity of the EAC. In all likelihood, the member states did not anticipate that the court would challenge their state sovereignty in any significant way, which in itself seems to conform with a realist explanation of international organizations. In fact the realist argument falls short, however, for the court was not destined to be a puppet of state interests. This was in part because it has represented three states (or five, beginning in 2007) rather than just one, and as such there is no one set of objectives that it can be expected to reflect. In any given case, it may be in the short-term interest of the state in question to violate its regional commitments with impunity; the other states, however, for whom there are long-term economic benefits to be gained from a successful EAC, have an interest in maintaining the integrity of the regional institutions, including the EACJ, and are therefore unlikely to be sympathetic to short-sighted attempts to undermine it.

Realism, then, is clearly an insufficient theory for understanding the EACJ. This leaves us with the liberal and neo-functional frameworks, both of which, I contend, play a role in explaining the court's trajectory over the last ten years.

When an interim ruling in one of the court's earliest cases exceeded the perceived bounds of its authority, the knee-jerk reaction of the state in question, Kenya, was to quickly curtail the court's powers. Kenya was sharply criticized for its actions, however—both from civil society members speaking out against Nairobi's actions, and from the other member states, who recognized the dangerous precedent to be set by flaunting a blatant disregard for

the court, and who were therefore unhappy to see Kenya sabotaging the EAC programs and the economic development they were expected to promote. Kenya won a partial victory, strong-arming the other states into agreeing to slash the court's authority through a series of amendments that included the creation of an appeals division and the imposition of a two-month statute of limitation for cases filed by non-state litigants. The situation was ultimately rather embarrassing for Nairobi, however; the amendments failed to coerce the EACJ into ruling in the country's favor, and, after months of equivocating, Kenya ultimately complied with the court's decision. Rather than setting a precedent for judicial interference, this case had largely the opposite effect, demonstrating the drawbacks of subverting the court's independence rather than any real advantages to be gained from it.

Over the past decade, the court, though hindered by the restrictions put in place following this early case, has continued to demonstrate neutrality in its decision-making, consistently proving willing to issue rulings against the member states—for which it has received no significant backlash. The five EAC states, most of whom have benefited immensely from the region's economic integration, appear to have accepted the necessary role played by the court in ensuring the community's ongoing stability; the benefits to be gained by membership in a successful East African Community outweigh the cost of relinquishing a small degree of national sovereignty to the court, and the states have therefore largely acquiesced as the court has adopted more authority and autonomy than was initially envisioned for it. This is a fundamentally neo-functional argument. The liberal theory also comes into play, however, for I contend that the court's autonomy has been enabled not merely by the member states' capitulation in the face of economic incentives, but also by an

active effort from the EACJ judges to issue impartial rulings grounded in legal principles rather than in state interests.

The court's rulings have not been, on the whole, hugely consequential in and of themselves; it often issues strongly worded declarations without making any significant demands of the states, and it seems to have internalized to some degree an understanding of what the states will and will not accept. Nonetheless, the EACJ has, however incrementally, become institutionalized within the East African Community, issuing rulings that are largely complied with, and even expanding its own jurisdiction into the realm of human rights, something the EAC Treaty explicitly withholds from the court until an unspecified future time. The court, often assisted by civil society organizations like the East African Law Society, is pushing towards the establishment of a genuine East African rule of law—a notable accomplishment, no matter how slow moving the process may be.

Overview of the Thesis

In Chapter One, I provide an overview of the existing academic literature explaining both why states create international courts, and whether and/or why international courts can influence the behavior of the states that are bound to them. In Chapter Two, I provide contextual information on the East African Community and the East African Court of Justice. I argue that the economic advancements seen by EAC member states over the last 15 years provide strong incentives for the five countries to ensure the continued stability of the community. I also introduce the EACJ itself in more detail, offering insight into the professionalism of the judges and examining the limited extent to which regional laws and legal precedents have been incorporated into national legal and judicial systems. In Chapter

Three, I provide an overview of the judicial decisions delivered by the EACJ to date. I group these cases by subject matter in order to demonstrate that the court has become more than a tool to settle economic disputes, but has instead dwelt at length on human rights related cases, a jurisdiction clearly withheld from it in the EAC Treaty. I then offer a brief synopsis of all cases in which the applicants were successful, signifying the extent to which the court's rulings have diverged from the preferences of the states. Finally, in Chapter Four I provide a richer analysis of three particularly significant cases. The first is the early case, mentioned above, in which the Kenyan government was reprimanded by the court and subsequently sought to undercut its authority. The second is the case in which the court first asserted its right to preside over human rights cases. The third is a recent case in which the court ruled against the Tanzanian government on a very high profile issue.

Chapter I
Literature Review

The questions I am asking about the East African Court of Justice are the same questions that follow from the establishment of any international institution in the world today. Why did it come about? Is it an autonomous institution, or merely the handmaiden of the states that created it? Are its decisions being complied with, and if so, why? And if not, why not? Is it having an impact? Is it changing state behavior? Is it following the path set out for it, or is it behaving in ways its founders would not have predicted?

The purpose of this chapter is to situate some of these questions within the existing academic literature. There are a number of theories that have been developed to explain why states create international courts in the first place, as well as to explain why states do or do not comply with the courts' decisions. I will first offer a brief overview of each of these theories, and suggest which I believe to be most applicable the East African Court of Justice. I will then explore each argument at greater length.

Overview

I am focusing on two broad theories of why states create international courts, a theory of global norms and a theory of functionalism. Each of these theories in turn has different implications for the question of the courts' influence or effectiveness. The first school of thought suggests that institutions like international courts (ICs) are created primarily in order to comply with a certain set of global norms. ICs, for the purposes of this theory, exist not to serve any real functional purpose but instead to project internationally a positive image of the states that have established them. The existence of an IC, for example, might imply a certain respect for governance and rule of law that is looked well upon in the international

community. Another version of this theory posits certain institutions as being established in order to follow a perceived template of the modern nation-state, with little or no thought to the benefits they might reap or the costs they might incur. An IC, in this framework, may be established with little consideration for how it will operate or fit within the larger political and societal context, created instead merely to comply with an ideal model of state behavior.[1] Consequently, this theory does not paint a particularly optimistic picture for the long-term success of ICs. Instead, we would expect a court like the EACJ to remain inactive or ineffective, because it was not designed with functionality in mind.

Functionalism, on the other hand, offers a purely rational-choice explanation for the creation of international courts. International organizations like the EAC allow states to cooperate in particular functional (e.g. economic) areas. Within these organizations, a court serves a specific set of strategic objectives: most obviously, enabling cooperation within the organization by raising the probability that defections will be caught and labeled as such. States cede sovereignty to the court because it benefits them to do so; what they lose by placing themselves under the jurisdiction of this judicial body is made up for by its contribution to the successful operations of the larger organization.[2]

A sometimes corollary of this argument emphasizes the long-term institutionalization promoted by international courts. That is to say, governments enter into these agreements not only to reap the benefits during their tenure in power, but also to bind their successors to a set of commitments that become, over time, increasingly difficult to break from. ICs—which, as

[1] Meyer, Ohn W., John Boli, George M. Thomas, and Francisco O. Ramirez. "World Society and the Nation-State." *American Journal of Sociology* 103.1 (1997): 144-81.

[2] Stone Sweet, Alec and Sandholtz, Wayne. "Neofunctionalism and Supranational Governance." (April 6, 2010). Helfer, Laurence R. and Slaughter, Anne-Marie. "Why States Create International Tribunals: A Response to Professors Posner and Yoo." *California Law Review* 93 (2005).

suggested above, raise the cost of defection—play an important role in ensuring that future state actors, perhaps less personally invested in the agreements than those who initially entered into them, will have difficulty breaking with the commitments put into place by their predecessors.[3]

I find that the functionalism can largely explain the creation of the EACJ. At its inception, the East African Community offered the possibility of significant economic benefits for its member states if the project was successful. Each state therefore had a strong incentive to ensure the successful advancement of the integration efforts; having a court to monitor compliance and settle disputes was an important tool in ensuring that the EAC would not collapse like previous regional cooperative efforts, which had fallen victim to political disputes and self-interested, short-sighted state actors.

The global norms theory, however, also plays a role in this story, for I believe it helps to explain why the EACJ took the shape that it did. The court was modeled closely along the lines of the European Court of Justice, as well as regional courts in South and West Africa, and these preexisting judicial bodies likely served as an easy template for the founders of the EAC to follow.

To say that the EACJ was created to serve a particular functional purpose, however, does not in itself offer much insight into the course that the court has taken in the fifteen years since its inception; it explains why the court was established but not what role it has played in the ensuing years. Therefore, taking the functionalist theory as my initial explanatory framework, I next explore three broad theories of whether, and if so how, ICs can encourage state compliance, or more broadly alter government behavior, once they have been established.

[3] Alter, Karen J. *The New Terrain of International Law: Courts, Politics, Rights*. Princeton UP, 2014. Print.

Realism argues, simply, that they cannot. ICs are empty shells cloaked in the interests of powerful states, and their rulings will consequently always reflect these interests.[4] The only role ICs can play is that of basic problem solving. Courts can settle disputes by revealing new information or identifying acceptable compromises, but its decisions will never deviate from the interests of the states that created it.

On the other hand, several variations of liberal institutionalism counter that international courts—which by their very nature are independent of any one state's interests, and which are staffed by judges whose professional reputation ensures they are beholden to the law itself rather than the governments they serve—are inherently autonomous, at least to a certain degree.[5]

Within this liberal framework, some theories view the autonomy of ICs as real, but limited. States will tolerate rulings that deviate somewhat from their expressed interests, but only somewhat. States are unwilling to blatantly disregard an IC ruling, both because it undermines the success of the larger international organization by setting a dangerous precedent for other member states, and because it will be reflected poorly in the state's international reputation. There are limits, however, to what states will accept. There is, in a sense, an acceptable area of divergence from the state's ideal outcome. Within this area, the decision will be tolerated; outside of it, there will be repercussions. The courts themselves are aware that these limits exist, and will come to learn just how far they can be tested. When a court departs too significantly from states' interests, it will be appropriately sanctioned, and expected to adjust its behavior accordingly.

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[4] Posner, Eric A. and Yoo, John. "A Theory of International Adjudication." U Chicago Law & Economics, Olin Working Paper No. 206 (February 2004).

[5] Alter, Karen. "Agents or Trustees? International Courts in Their Political Context." *European Journal of International Relations* (2008); Helfer and Slaughter.

Other liberal scholars have focused on the role of outside actors in forcing compliance with IC rulings. This can take several different forms. One such argument emphasizes the importance of "domestic embeddedness"—that is, international law and international courts are most likely to effect change when their laws and decisions are embedded into domestic laws and judicial practices.[6] This strategy requires in particular the support of national judges, to uphold the precedents set by the ICs and narrow the gap between national and international rule of law. Similarly, other theorists have stressed the significant role to be played by "compliance constituencies" in encouraging shifts in state behavior. As courts themselves, international or otherwise, have no inherent enforcement mechanisms, these compliance constituencies, which are made up individuals (e.g. national judges) and groups (e.g. national and transnational CSOs) that either actively or passively support the decisions of the IC and pressure the state to abide by them.[7]

The third theory, neo-functionalism, which emerged to explain the remarkable growth of the European Union, argues that while international organizations are created to serve a particular function, there is an ensuing "spillover effect" in which the organization develops new roles and authorities beyond what was initially envisioned. In this framework, ICs are developed to serve a specific function—i.e. raising the cost of defection from international agreements—but, as international cooperation deepens, theyt may ultimately expand beyond this, taking on new roles and asserting new authority.[8]

I find the realist argument entirely inadequate to explain the history of the EACJ, which has regularly issued rulings at odds with the interests of the EAC member states. The

[6] Helfer and Slaughter.
[7] Alter (2014).
[8] Haas, Ernst B. "International Integration: The European and the Universal Process." *International Organization* 15.03 (1961); Sandholtz and Stone Sweet.

first time it ruled against a state, it faced significant backlash from the Kenyan government. Kenya's reputation was ultimately hurt by this, however, and there have been no further acts of overt retaliation against the court.

I contend instead that liberal and neo-functional theories both play a role in explaining the fate of the EACJ. States face pressure to respect the independence of the EACJ, even as its jurisdiction has expanded beyond what was initially envisioned, because undermining the court would compromise the broader integration efforts of the EAC, which offer tremendous economic benefits for the five partner states. This, in conjunction with the judges' proven willingness to issue impartial decisions even in the face of state resistance, has allowed the court to develop into something more than the puppet of state interests seen in the realist framework. Civil society organizations in the region, particularly the East African Legislative Assembly, have also played a role in furthering the EACJ's influence, though "domestic embeddedness" has not yet been a significant factor, for national legal and judicial systems in East Africa do not yet have the capacity to seriously incorporate a regional rule of law.

Why do states make international courts?

The EACJ is an example of what Karen Alter has labeled "new style international courts,"[9] courts which are seemingly unprecedented in their given strength and autonomy. These new style courts have two features in particular which set them apart from their predecessors: "compulsory jurisdiction," meaning that litigation can proceed without the consent of the defendant state, and access for private litigants (i.e. non-state actors). These courts exert jurisdiction in four broad areas: dispute settlement, administrative, enforcement, and constitutional review. Two of these roles, enforcement and constitutional review,

[9] Alter (2014).

represent a more significant infringement on state-sovereignty; they are "self-binding" rather than "other-binding."[10] The enforcement role involves assessing state compliance with the international agreement and naming violations of the law, "thereby increasing the costs of non-compliance."[11] In the role of constitutional review, courts "hold international and state actors accountable to constitutional procedural and rule of law expectations, invalidating legislative acts that conflict with higher order legal requirements."[12] Alter argues that most courts, EACJ included, play all four of these roles to varying degrees. It is from these two "self-binding" roles, however, that the most puzzling questions arise, for in their seemingly blatant infringement on traditional ideas of state sovereignty, they present the greatest challenge to traditional IR theories. If these courts pose a genuine threat to the unchecked assertion of state sovereignty, why are they created in the first place?

Global Norms and Culture

One explanation for the establishment of international organizations emphasizes the diffusion and influence of "global culture" in explaining why modern societies "are structurally similar in many unexpected dimensions and change in unexpectedly similar ways."[13] This is not an argument about courts in particular, but the logic easily applies. The theory posits a process through which certain practices or institutions become standardized among states, despite their drastically different cultural or political circumstances. One can easily examine the establishment of international courts within this framework, for there are today twenty-four permanent international courts, the vast majority of which have "broad

[10] Ibid
[11] Ibid
[12] Ibid
[13] Meyer et al. 145.

compulsory jurisdiction" and authorize non-state actors to initiate litigation—the "new style" court model of the seminal European Court of Justice, as well as that of the EACJ.[14] Most of these courts have come into existence only recently: in Africa alone, the EACJ was established in 2001, the ECOWAS (West African) Community Court in 1991, and the SADC (South African) Tribunal in 1992. Were all of these courts—and, for that matter, the larger regional organizations of which they are each a part—the result of independent rational consideration of the functional benefits that they would provide to their member states? Or did they come out of a preconceived template of regional integration, with perhaps limited consideration given to their actual utility? As Alter notes, "The prevalence of IC design copying…suggests that emulation is a factor in the proliferation of ICs."[15]

Meyer et al. write, "Worldwide models define and legitimate agendas for local action, shaping the structures and policies of nation-states and other national and local actors in virtually all of the domains of rationalized social life."[16] States' development moves almost inevitably in the direction of the structures and practices that are dominant the international system. In part, this is the result of the extent to which legitimacy in the international system has become intrinsically linked to the idea of the "nation-state," with all that that entails. "Out of all the possible forms political entities might take," the nation-state is the only one deemed legitimate by the international community. As the concept of "nation-state" has come to be defined by a certain set of characteristics, states, in order to be validated within the global order, must adopt these features. Notably, there is no rational reason for all states to adopt this particular set of properties, for they are naturally better suited to some states than to others—"global culture," however, defines them as necessary.

[14] Alter (2014) 4.
[15] Ibid. 91.
[16] Meyer et al. 145.

Due in part to this incongruity, the adoption of international norms is often inherently limited and somewhat contradictory. States will go to great lengths to demonstrate that they have adopted a particular new feature—creating a new government agency, for example, or emphasizing rhetorically a greater respect for respect for human rights—without necessarily making any significant policy changes. The new agency lies dormant; human rights are continuously abused. This occurrence is what the authors refer to as "decoupling," a phenomenon "endemic" to the international system "because nation-states are modeled on an external culture that cannot simply be imported wholesale as a fully functioning system."[17]

There are many reasons why these surfaces level adjustments may not result in any notable change within the state. The state may for example adopt an "eclectic" mix of "conflicting principles," or it may adopt features that "are inconsistent with local practices, requirements, and cost structures."[18] Some argue that "world cultural models are highly idealized and internally inconsistent, making them in principle impossible to actualize."[19] States often strive to adopt certain features that have come to be seen as "commonsense," without any real analysis of whether these things will actually "mesh well with practical experience."[20] Alternatively, states may adopt particular policies or institutions because they know it will gain them support from the international community, with little or no intention of following through on their commitments. "Governments might ratify an international treaty without considering what compliance involves, or political leaders might think that they will control how international law is applied."[21]

[17] Ibid. 154.
[18] Ibid.
[19] Ibid.
[20] Ibid. 149.
[21] Alter (2014) 33.

Importantly, this fact of decoupling implies that the institutions adopted will be largely ineffectual. Applied to the EACJ, this theory suggests that the court would perform poorly or not at all. It would not be tailored to the particular needs of the community; its establishment would have been more of a box to check off than anything else, and it would consequently be ill equipped to function with any degree of significance.

It is worth noting here that if there is a trend pointing states towards the creation of international courts, it is not a universal one. Asia, the Middle East and Pacifica have displayed a resistance to the apparent trend of increased international judicialization. Taking these regions together, Alter suggests, "the dearth of near neighbors submitting to robust regional or global judicial oversight dissipates pressure on any one country to submit to international judicial oversight."[22] Erik Voeten argues that in Asia there are "few if any regional rules that create rights and obligations for private parties," thereby precluding the need for any sort of regional court.[23]

In Africa, by comparison, there are at least eight operating international courts. "As in Europe, nearly every African country is part of at least one regional judicial system. But African countries are also more likely to be part of multiple regional systems."[24] Tanzania, for example, is a member of not only the EACJ, but also the SADC tribunal and the African Court on Human and Peoples' Rights.

Clearly then it is not valid to argue that the development of international courts is a truly *global* norm, one that has permeated every region of the world. Nonetheless, with a network of overlapping courts all throughout Africa, Europe, and Latin America, the fact that

[22] Ibid. 98.
[23] Voetn, Erik. ""Regional Judicial Institutions and Economic Cooperation: Lessons for Asia?" *ADB Working Paper Series on Regional Economic Integration* 65 (2010).
[24] Alter (2014) 98.

certain regions have resisted the draw of ICs does not in itself preclude the possibility that there is some degree of mimicry, of formula-following, behind this growing trend.

Functional Benefits

An alternative theory emphasizes the clear functional purpose served by an international court such as the EACJ. States establish international organizations like the East African Community in order to pursue certain objectives—in this case largely economic ones—that will be best achieved through international or regional cooperation.[25] The first steps towards integration occur as "transnational activity and economic interdependence proceeds, revealing both potential to reap joint gains and to deal with the negative externalities created by transnational activity."[26]

An international court can play an important role in facilitating these processes of cooperation and integration. In establishing international organizations like the EAC, member states make a series of commitments that are, in theory, binding. Such commitments mean little, however, if there is no institution in place to detect and label violations, thereby raising the cost of defection. In any given situation, a state might perceive short-term benefits to be gained from violating the agreement; any violation, however, represents a loss for the organization as a whole**.** The existence of a supranational tribunal addresses this dilemma by making violations more costly. ICs "create a mandatory process by which plausible rule violations are investigated and…they publicly identify the state that has violated its commitments. In short, tribunals increase the probability that violations of international

[25] Sandholtz and Stone Sweet 6.
[26] Ibid. 7.

obligations will be detected and correctly labeled as noncompliance."[27] This is an important factor in advancing the objectives of the international organization (e.g. economic development in the EAC). Violations of the treaty may "create short-term material and reputational costs for the state in default. But the detection of these violations also encourages future compliance, maximizing the long-term value of the agreement to all parties to the multilateral regime."[28]

ICs have an additional functional value associated with the reputational benefits that they provide for their member states. For example, "agreeing to international oversight can send a helpful signal, reassuring foreign investors," as well as domestic populations, that the governments are seriously committed to "policies that promote market openness, human rights, and the prosecution of war crimes," as a few examples.[29]

ICs further serve to "entrench politics across time."[30] This is an important function if one assumes that, when entering into international agreements, states are interested not only in short term payoffs but also in ensuring the longevity of these institutions beyond the lifespan of the current government regimes. As there is no way to ensure that future governments will be committed to the same policies of international cooperation as the current set of actors, "states delegate authority to an IC so as to ensure that subsequent governments do not walk away from the set of policies inscribed in the law."[31]

On the whole, I believe that functionalism offers the more compelling explanation for the creation of the EACJ. Certainly, there is evidence to suggest that the EACJ was modeled along the lines of preexisting ICs, and the court's dormancy during its first five years of

[27] Helfer and Slaughter 36.
[28] Helfer and Slaughter 6.
[29] Alter (2014) 244.
[30] Ibid. 22.
[31] Ibid.

existence may have been suggestive of the "decoupling" phenomenon described in the global norms framework. However, the court did eventually find its footing, and it has begun to hear cases and issue rulings with relative frequency. As we will see in the next chapter, the EAC was not the region's first attempt at integration, and previous iterations of the community had fallen prey to political disputes among the partner states. As the EAC was coming into being at the turn of the century, the three nations could clearly see the benefits of instituting new mechanisms for holding themselves accountable to their commitments. While preexisting courts like the European Court of Justice and the ECOWAS Community Court may have provided an easy template on which the EACJ could be modeled, the court seems to have nonetheless been created with a clear functional purpose within the community.

The impact and influence of international courts

If we accept the functionalist premise that ICs are created to fulfill practical roles within international organizations, the next question to be asked is what that role looks like in practice. That is, once established, what sort of impact, if any, are the courts actually having? There are, of course, many ways one could go about measuring the effectiveness of a court. Should it be judged by: the number of cases that have been filed before the court? the number of rulings that the judges have issued? the number of decisions with which governments have directly complied? The key question, however, is this: Do international courts make a difference? This encompasses, I think, many different metrics of a court's impact or influence. Are litigants showing a willingness to bring cases before the court? Are states accepting this litigation as legitimate? Are the judges issuing impartial decision based on valid legal interpretations of the treaty? Are states accepting and complying with decisions ruling in

favor of the plaintiff? If so, why? And if not, why not? Are states sanctioning, or threatening to sanction, the court in retaliation for unwanted decisions? And if so, is this affecting the judges' decision making? And perhaps most significantly—are these courts prompting any actual change in government behavior?

Realism vs. liberalism

A fundamentally realist argument says, of course, that to even consider the possibility of an IC's influence on state behavior is a ridiculous notion; an international court by its very nature is nothing more than a "cipher of state interests."[32] This is true not only of courts, but of all international organizations. "Realists believe states would never cede to supranational institutions the strong enforcement capacities necessary to overcome international anarchy. Consequently, IOs and similar institutions are of little interest; they merely reflect national interests and power and do not constrain powerful states."[33] In this framework, an international court like the EACJ is of little consequence; we would expect the judicial decisions that it issues to be primarily reiterations of the interests of the states that created it.

The only role for ICs in this realist framework is that of basic problem solving. When issues arise that center on a misunderstanding, or a lack of clarity on the rules or information at hand, the court can be of some value. ICs clarify laws, or provide missing information—but always in such a way that the decision firmly reflects the interests of the states. "Tribunals are simply problem-solving devices. They do not transform the interests of states; nor do they cause states to ignore their own interests for the sake of a transnational ideal."[34]

[32] Alter (2014) 19.
[33] Abbott, Kenneth, and Snidal, Duncan. "The Journal of Conflict Resolution Why States Act through Formal International Organizations." *The Journal of Conflict Resolution* 42.1 (1998).
[34] Posner and Yoo.

There are many reasons, however, to question this rather simplistic portrait of international courts. For one thing, international courts, by the very fact of being *international*, are not beholden to any one state and its interests. The ten judges of the EACJ, for example, represent all five nations of the EAC. What's more, no one state has the power to unilaterally seek retaliation against the court as a whole, or against any individual judges, which limits the coercive power of any individual state. "Since ICs are composed of judges from multiple countries, and because each country gets to nominate its candidates of choice, international courts are also independent in that they are virtually impossible to sack."[35]

Liberal international relations theorists like Alter, Laurence Helfer and Anne-Marie Slaughter argue also that the judges appointed to ICs are unlikely to be swayed by the interests of the states; far from being puppets of their respective governments, IC judges are well-qualified individuals who were selected on the basis of their professional merit. They will not pander to the interests of any state actors, because they are unwilling to compromise their professional reputation. "Because the Trustee's reputation as an authoritative actor is so central to their professional and personal identity and success, Trustees care greatly about maintaining their authority and may even choose a political sanction over an action that would be seen as compromising their identity as a moral, rational-legal, and/or expert decision maker."[36] This does not mean that judges are immune to the influence of state actors, but does imply that they are not so easily manipulated as the realist theory suggests.

While the realist argument claims that the decisions of international courts will align perfectly with the interests of the state parties, a more moderate argument suggests that ICs *will* take into account the interests of their member states, but they have some degree of

[35] Alter (2014) 77.
[36] Alter (2008).

latitude in doing so. It is a theory of what Helfer and Slaughter label "constrained independence"—ICs are free to make independent decisions, even ones that are at odds with state interests, so long as they do not overstep certain bounds. Within this framework, states are able to "enhance the credibility of their commitments while signaling to independent courts…when they are approaching—or have exceeded—the politically palatable limits of their authority."[37]

We can imagine that for any given case, the state in question has an ideal outcome; short of this, there are other, less ideal outcomes that the state will still tolerate, rather than violate its commitment to the IC and the international organization. These less than ideal, but nonetheless tolerable, outcomes represent the "strategic space" within which the court is able to make its rulings without risking the wrath of any member state. "This strategic space restricts the range of methodological, interpretative, and decisional choices available to independent judges. Many of these choices will be legally plausible; only a subset will be politically tolerable."[38] When a judicial ruling falls outside of this strategic space, the states will warn the court of its overstep, likely by sanctioning it in some way, which should in turn help clarify for the judges what they are and are not empowered to do.

In this way, the operations of the ICs are acceptable to both the states that created them and the judges that operate them. The judges issue decisions that are "legally convincing to their brethren and that lie within broadly acceptable political parameters. In the process, they will internalize a set of discursive constraints that obviate, or at least reduce, the need for overt correction by the states subject to their jurisdiction."[39]

[37] Helfer and Slaughter 44.
[38] Ibid.
[39] Ibid. 45.

Liberal theories of compliance

Liberal institutionalism posits that international institutions do have a genuine impact, and several strands of this school of thought seek to explain why that might be. One straightforward explanation, more or less suggested at several points above, is simply that states have an incentive to abide by the decisions of the court, even if the decisions are unwanted, because it increases the likelihood that other states will comply as well. The court helps to advance the objectives of the larger international organization, and each state has an invested interest in seeing those objectives achieved. So long as the judicial rulings are not too egregiously at odds with government interests, states will avoid undermining the court's authority, because it is not to their advantage to do so.

A state's international reputation may also be a factor in its interactions with ICs. This includes not only its reputation within the limited group of states with which it has entered into the particular agreement, but also the larger international community. Within the specific international organization in question, states are better off if they are not seen as defecting from the agreement by disregarding an IC ruling, for this might discourage its fellow member states from continuing to cooperate with what now appears to be an untrustworthy partner. States "fear that any evidence of unreliability will damage their current cooperative relationships and lead other states to reduce their willingness to enter into future agreements. Since the opportunity costs associated with this forgone cooperation are substantial, the vast majority of states posses a strong incentive to behave cooperatively."[40]

Reputational concerns are also significant beyond this limited group of states. By undermining an international court that it has committed itself to cooperate with, a state

[40] Downs, George W. and Jones, Michael A. "Reputation, Compliance and International Law." *Journal of Legal Studies*. 31.1 (2002).

demonstrates an inherent lack of respect for the rule of law. Particularly for states that rely on foreign aid and foreign investments, this can be a damaging reputation to develop. Some foreign aid today is conditional; America's Millennium Challenge Corporation (MCC), to name an admittedly unique example, requires potential aid recipients to meet certain benchmarks before they can be eligible for funding; these benchmarks include an indicator of the strength of the country's rule of law. Perhaps more significantly, foreign investors will be hesitant to put their money in a country with a seemingly weak rule of law, as this undermines the ease of doing business; this in turn reduces opportunities for economic development for the given country. As Alter states, "Where governments want to encourage foreign investment…they may happily submit to international judicial oversight."[41]

Another liberal view of international courts emphasizes the role that third party actors (i.e. neither the state nor the court) play in augmenting the influence of ICs. These actors might be national judges who help to incorporate IC rulings into the body of domestic law, or transnational NGOs who call international attention to a state's transgressions, or individuals who exert pressure by demonstrating displeasure with the actions of their elected officials. "ICs can work with domestic and transnational interlocutors to either orchestrate compliance or construct counterpressures that alter the political balance in favor of policies that better cohere with international legal obligations."[42] Alter defines these collections of IC supporters as "compliance constituencies," which are rather amorphous, ever-changing groups "of domestic and international actors that actively or tacitly support compliance with international law."[43]

[41] Alter (2014) 65.
[42] Ibid. 20.
[43] Ibid. 53.

The existence of these compliance constituencies circles back to the question of judicial independence, for ICs will only gain the support of these outside actors if they prove themselves to be impartial arbiters who are willing to rule against powerful governments where violations occur. If an IC is seen as being merely a puppet of the states, there would be no benefit to be gained by groups rallying in support of its decisions. This is particularly important in the first stage of the judicial process—the initiation of litigation. New style ICs like the EACJ allow access for private litigants, and it is these cases that are most likely to directly challenge actions taken by state actors. However, private actors must believe that there is a genuine benefit to initiating litigation, before they will be willing to incur the costs of doing so. If a court is not relatively independent, i.e. if there is no perceived chance of victory for the plaintiff, private litigants will have no incentive to initiate the process. Similarly, there would be no reason for a "compliance constituency" to emerge to pressure governments into cooperating with the judicial process, if the outcome of any given case was expected to always benefit the state actors at the expense of the plaintiff. In order to obtain this network of supporters, then, judges, when presented with a clear violation of the law, must condemn said violation—even if the expected the decision is likely to garner resistance from the state parties.

Alter, Helfer and Slaughter all describe a sort of snowball effect, in which, as ICs gain the support of compliance constituencies, who in turn ensure that the court is being continually used and supported, the process of litigation and compliance will become increasingly institutionalized. "By clarifying the meaning of an agreement, finding facts, and determining whether a particular course of conduct is justified, tribunal rulings can mobilize

compliance constituencies to press governments to adhere to their treaty obligations."[44] As a result, "as governments become habituated to defending their policy in court, and to sometimes losing, litigants become more willing to raise bold cases and judges more willing to apply existing legal rules."[45] Taken together, this process makes up a sort of virtuous circle in which both state and non-state actors become accustomed to, and willing to cooperate with, the international court.

Within this framework, another important factor determining IC influence is the extent to which the international laws that it is tasked with interpreting, as well as its judicial decisions, are incorporated into domestic laws and practices. "In an ideal type of transnational dispute resolution, international commitments are embedded in domestic legal systems," allowing enforcement to occur "directly through domestic courts and executive agents."[46] The more deeply domestically embedded these international laws and principles, the greater a foundation compliance constituencies have to advocate for state compliance. In this sense, national judges are important members of a court's compliance constituency, for they have an unparalleled ability to make international rule of law more formally a domestic concern. "Embedding international law into domestic legal orders makes international litigation locally effective because it increases the prospect that domestic compliance partners will respond to international pressure…The more domestic law mirrors international law, the harder it is for domestic actors to defend behavior that has been condemned by international or foreign judges."[47]

[44] Helfer and Slaughter 37.
[45] Alter (2014) 157.
[46] Keohane, Robert, Andrew Moravcsik and Anne-Marie Slaughter. "Legalized Dispute Resolution: Interstate and Transnational." *International Organization* 54 (2000).
[47] Alter (2014) 159.

Neo-functionalism

The theory of neo-functionalism came out of the more straightforward functionalist argument elaborated on earlier in this chapter, emerging as a way to explain the rather unprecedented process of European integration in the later part of the twentieth century. The theory posits a series of "spillover effects" through which initial international cooperative efforts, deliberately undertaken for particular functional purposes, lead inadvertently to further integration in areas not envisioned when the agreement in question was originally conceptualized. The transformation comes about when initial policies or institutions face obstacles arising from less integrated functional areas. In order to ensure the success of the initial objectives, member states cede more and more authority to supranational institutions, leading ultimately to international programs far more expansive than had ever been intended. Ernst Haas argues that policies are established and changed in response to "demands born from the environment, and the later policies may well change the environment in a wholly unintended fashion."[48]

Neo-functionalism is a theory for understanding the development of international organizations more broadly, but the framework can easily be used to examine the progress of international courts. Regional communities like the European Union and the East African Community, for example, are created with clear economic objectives. Since the potential benefits of these programs can only be achieved if all member states uphold their commitments, it is in the best interest of each state to establish a mechanism for holding their neighbors—and themselves—accountable, as well as for settling the disputes that will inevitably arise over the interpretation of the treaty. An obvious solution is the creation of a tribunal with some degree of authority to interpret the rules of the community and to judge

[48] Haas 375.

whether member states are adhering to them. This argument has been reiterated at several points throughout this chapter.

Neo-functionalism offers a somewhat different explanation, however, for how ICs might in fact come to have a larger impact than this initially straightforward functional role would suggest. As regional integration proceeds, the "body of supranational rules expands in scope and becomes more formal and specific over time, in ways…that are not predictable or expected from the ex ante perspective of those who establish them."[49] For example, the member states may "realize that the objectives of initial supranational policies cannot be achieved without extending supranational policy-making to additional, functionally related domains."[50] Alternatively, certain supranational institutions (e.g. international courts) may develop a level of power and autonomy independent of the political actors who created them, and they may subsequently work "to produce pro-integrative policies, even when they are resisted by the most powerful member states."[51] As these institutions grow in strength and influence, they can mobilize national or regional "lobbying and interest groups, which then become [their] political allies."[52] This ties directly back into Alter's idea of compliance constituencies.

A few examples here can help clarify the way in which this theory might be applied to the development and impact of international courts. Within the history of European integration—the phenomenon which first prompted the theory of neo-functionalism—the European Court of Justice has been one of its most remarkable features. Initially quite limited in its capabilities, the "sum of powers formally conferred upon the Court plus those that the

[49] Sandholtz and Stone Sweet 16.
[50] Ibid. 8.
[51] Ibid. 12.
[52] Ibid. 14.

Court has acquired through its own rulings far outweigh the 'sum of control instruments available' to other centers of authority of including Member States."[53] The court has now become more influential than anyone had anticipated at its inception.

On a much smaller scale than the ECJ, the ECOWAS Community Court (the West African equivalent of the EACJ) was initially quite limited in its access and jurisdiction, with private actors unable to initiate litigation before the court. This significantly reduced the possibility of state actors being held accountable for their violations of the ECOWAS Treaty, which in turn hindered the implementation of policies that were necessary for the long-term success of the community, but not necessarily in the best interest of a given state in the short term. After the first case filed before the Court vividly demonstrated these shortcomings, a new ECOWAS protocol was quickly passed, granting access to private litigants and expanding the court's jurisdiction to cover a range of new areas, including human rights.[54] This can be seen as an illustration of the theory of "spillover effects," in which, as initial international organizations demonstrate debilitating limitations, states are galvanized into augmenting the strength of certain policies or institutions.

Conclusion

Realism is an inadequate framework for examining the EACJ; as will be demonstrated, the court proved with its earliest rulings that it was unwilling to be a puppet of state interests. While the judicial decisions coming out of the EACJ are generally rather

[53] Ibid. 131.
[54] Alter, Karen J., Helfer, Laurence R. and McAllister, Jacqueline R. "A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice." *American Journal of International Law* 107. (2014).

limited in what they prescribe, nonetheless the court has consistently demonstrated its willingness to disregard the preferences of the states involved in the cases brought before it.

Both neo-functionalism and liberal institutionalism, on the other hand, can offer insight into the history of the EACJ. As we will see in the following chapter, the East African Community has displayed significant economic growth over the past fifteen years, and its member states therefore have a vested interest in ensuring the community's continued success. Over the past ten years, states have proven reluctant to ignore or undermine the court, due to the repercussions that would have for the more fundamental objectives of the EAC, and this has allowed the EACJ to continue to rule independently, and even to expand its jurisdiction into areas not envisioned in the original EAC Treaty (namely human rights).

Chapter II
Introduction to the EAC:
Background of the East African Community
and the East African Court of Justice

History of the East African Community

Early Regional Integration

The East African Community is the latest in a series of East African integration efforts that date back to colonial times of British East Africa. Ruling over modern-day Kenya and Uganda, the British did their best to coordinate the economic activities of the two countries. They established a joint Kenya-Uganda railway and an East African Currency Board in the 1890s, and later created a Joint East African Income Tax Board and a Joint Economic Council. An East African Court of Appeal was established in 1902, the "apex tribunal of the region's national legal systems."[1] In 1948, a "quasi-federation"[2] was formed among Kenya, Uganda and Tanganyika (which fell under British domain following Germany's defeat in World War I, and which would ultimately join with the semi-autonomous island republic of Zanzibar to become modern-day Tanzania) when the British established two institutions "to provide legal basis for regional cooperation"—the East African High Commission and the East African Central Legislature.[3] The High Commission, "comprising of the three territorial governors, with a Secretariat manned by technocrats with a region-wide outlook and

[1] Alter, Karen, James Gathii and Laurence Helfer. "Backlash Against International Courts in West, East and Southern Africa: Causes and Consequences." (April 14, 2015): 12.
[2] Kasaija, Philip. "Regional Integration: A Political Federation of the East African Countries?" *African Journal of International Affairs* 7.1 (2006): 25.
[3] Goldstein, Andrea and Ndung'u, Njugunu. "Regional Integration Experience in the Eastern African Region." OECD Development Center Working Paper No. 171 (2001): 9.

expertise, coordinated common services,"[4] while laws issued by the Central Legislature were enforceable in all three countries.

This political federation persisted with the independence of Tanganyika in 1961. By 1963, however, after Kenya and Uganda had also gained independence, tensions among the three fledgling nations began to overwhelm their efforts at regional cooperation. Uganda and Tanganyika were resistant to the prospect of continued integration, for "in terms of growth in GNP, foreign investment, international trade, and the location of the common services headquarters in Nairobi,"[5] Kenya was seen as having "a disproportionate amount to gain from such a federation, to the detriment of her smaller neighbors."[6] The newly independent states ultimately determined that they had collectively more to gain from establishing a regional trade agreement than a full-scale political federation.

This trade agreement took shape in 1967 with the establishment the Permanent Tripartite Commission for East African Cooperation, known as the East African Community, which set provisions for the creation of an East African Common Market. The primary aims of the Common Market were to establish a common external tariff, allow unrestricted freedom of transit for goods between the three countries, and control the import of goods from third party countries.[7]

This initial iteration of the East African Community was plagued with political pitfalls almost as soon as it had begun. In its very first year the East African Currency Board, which had overseen the currency of British East Africa since 1919, broke down, "paving the way for

[4] Kasaija 25.
[5] Ibid. 26.
[6] Goldstein and Ndung'u 10.
[7] Ibid.

the establishment of three separate central banks"[8] and dashing any hopes of a regional monetary union. In 1971, the military regime of Idi Amin came to power in Uganda, challenging "the foundation of harmonized policy and rule of law."[9] Tanzania refused to recognize the new regime in Kampala and "considered its participation in the EAC illegal."[10] Meanwhile, a series of economic shocks throughout the 1970s evoked very different fiscal responses from the three states, further emphasizing their divergences. Kenya suffered a long-term financial crisis, while Tanzania responded to the changing economic environment with an embrace of socialism, manifested in the experimental and ultimately unsuccessful policy of *ujamaa* under President Julius Nyerere. "These differing economic systems made the partnership more and more difficult."[11]

Many of the underlying tensions centered on the fact that Kenya was seen as receiving a disproportionate share of the benefits from the EAC. "Foreign corporations used Kenya as a base to export to the rest of the region, aggravating the trade imbalance and making it virtually impossible to secure an equal distribution of the benefits of trade." Kenya, meanwhile, resented what it perceived as its own undesirable duty to "'carry' the poorer members."[12] Various efforts undertaken to encourage economic redistribution proved largely unsuccessful.

[8] Ibid.
[9] Ibid. 10.
[10] Ibid.
[11] Ibid. 11.
[12] Mugomba, Agrippah. "Regional Organisations and African Underdevelopment: The Collapse of the East African Community." *The Journal of Modern African Studies* 16.2 (1978): 263.

Finally succumbing to these many tensions, the East African Community officially dissolved in 1977 when "member states failed to pay their dues to the Community and Tanzania closed its borders with Kenya."[13]

Formation of the Modern EAC

Despite the obvious failures of the East African Community, the three states remained interested in finding new avenues for regional cooperation—in large part because the rapidly globalizing international system made it increasingly difficult for under-developed sub-Saharan African countries, operating independently, to be significant players in the world economy. In 1984, Kenya, Tanzania and Uganda signed the East African Community Mediation Agreement "for the division of the assets and liabilities of the former East African Community," in which they also agreed "to explore and identify areas for future cooperation."[14]

In 1993, the three governments established the Permanent Tripartite Commission for Cooperation, "to be responsible for the coordination of economic, social, cultural, security and political issues" among the three East African nations.[15] In 1997, this commission was tasked with establishing a Treaty codifying their goals of regional cooperation. This was ultimately presented as the Treaty for the Establishment of the East African Community, which was signed by the three heads of state in 1999. In 2000, the new East African Community officially entered into force, with the stated the aim of establishing a customs union, a common market, a monetary union, and, ultimately, a political federation of East

[13] Goldstein and Ndung'u 11.
[14] The Treaty for the Establishment of the East African Community (1999).
[15] Ibid.

African states. In 2007 Rwanda and Burundi—both of whom had initially applied, unsuccessfully, to join the EAC in 1999—acceded to the Treaty, bringing the Community membership up to five.

The EAC Today

Economic Development

The EAC has accomplished a significant number of cooperative initiatives in its first fifteen years, including the establishment of Customs Union and a Common Market (with plans for a Monetary Union now under way), a

> nontariff barrier monitoring and removal mechanism, currency convertibility, joint infrastructure projects, harmonization of standards for goods, harmonized national budget preparations, mutual recognition of health certificates, adoption of an East African passport, temporary travel documents for intraregional travel by EAC citizens, harmonized immigration procedures, joint military exercises and shared criminal intelligence.[16]

There have been a number of regional institutions established as well, including a Science and Technology Commission, a Health Research Commission, and a Civil Aviation Safety and Security Oversight Agency.

The economic progress of the EAC has been relatively successful so far. The community had an impressive average growth rate of 6.2 percent between 2004 and 2013, placing it in the "top one-fifth of the distribution of 10-year growth rate episodes experienced

[16] Thandrayan, Peter. "The EAC: Regional Engine, African Model." *World Politics Review*. 20 Feb. 2013. Web.

by all countries worldwide since 1960,"[17] and putting it far ahead of most of the rest of sub-Saharan Africa in this same time period.[18] In fact, the EAC is currently the second fastest growing economic bloc after the Association of Southeast Asian Nations.[19] Since 2004, all five EAC members have "displayed average real growth of 4 percent or higher, in most cases substantially above that of the previous decade,"[20] and the region has attracted some $24 billion in foreign direct investment since 2000.[21] Lower tariffs within the EAC have boosted intraregional trade, with trade among the five member states tripling between 2000 and 2010, from approximately $700 million to nearly $2 billion.[22] In response to food and fuel shocks in 2011, the region's central banks "synchronized a tightening of monetary policy to tame inflation, which has since fallen to single digits."[23] The region has also seen improvement on a variety of development indicators with electricity consumption estimated to have accelerated significantly over the last decade, and "health outcomes such as infant mortality rates and life expectancy improved considerably in most countries in the region."[24]

Tariffs within the region "have been cut from an average of 26.1 percent in 1994 to an estimated 9.2 percent in 2011."[25] Exports to other EAC countries are now as high as exports to the Euro Zone. Rwanda's exports have seen the most dramatic increase, from $1.6 million to $156 million, though its economy is still dwarfed by that of Kenya, the economic

[17] Gigineishvil, Nikolaz, Mauro, Paolo and Wang Ke. "How Solid Is Economic Growth in the East African Community?" IMF Working Paper (2014): 3.
[18] Winston, Shelley, and Carolina Castellanos. "Trade in East Africa." *Finance & Development, December 2011*. International Monetary Fund, Dec. 2011. Web.
[19] Drummond, Paulo, and Oral Williams. "East African Community: The Unfinished Agenda." Brookings, 30 Apr. 2015. Web.
[20] Gigineishvil et al.
[21] Drummond and Williams.
[22] Winston and Castellanos.
[23] Drumond and Williams.
[24] Gigineishvil et al.
[25] Winston and Castellanos.

superpower of the region. Burundi has seen the least improvement, with export growth stagnating and imports declining as a result of war and poor infrastructure.[26]

Burundi is in fact rather distinct within the community. Though admitted into the EAC together with Rwanda in 2007, Burundi at the time faced a much different internal environment than its northern neighbor. Not only was it drastically poorer than any other country in the region, with as much as 70% of the population living below the poverty line, but it was also just emerging from a devastating civil war.[27] In the years since joining the EAC, Burundi's limited economic progress has been tempered by intense government corruption. In 2012, the International Crisis Group wrote, "Burundi is facing a deepening corruption crisis that threatens to jeopardize a peace that is based on development and economic growth bolstered by the state and driven by foreign investment."[28] One of the most significant outcomes of this corruption problem has been "the deterioration of its image and relationship with key donors."[29] In 2010, the United Kingdom's Department for International Development announced that it would close its Burundi office, noting "a large scale up would have been required to show a significant impact and therefore demonstrate better value for money."[30]

Though the EAC as a whole is far from a democratic stronghold—Yoweri Museveni has ruled Uganda since 1986, and Paul Kagame is widely expected to amend the Rwandan constitution in order to seek a third term in the country's 2017 election—nonetheless Burundi's particularly poor performance on human rights and civil liberties is often viewed as an obstacle to the country's successful integration in the region. A 2012 op-ed declared, "The

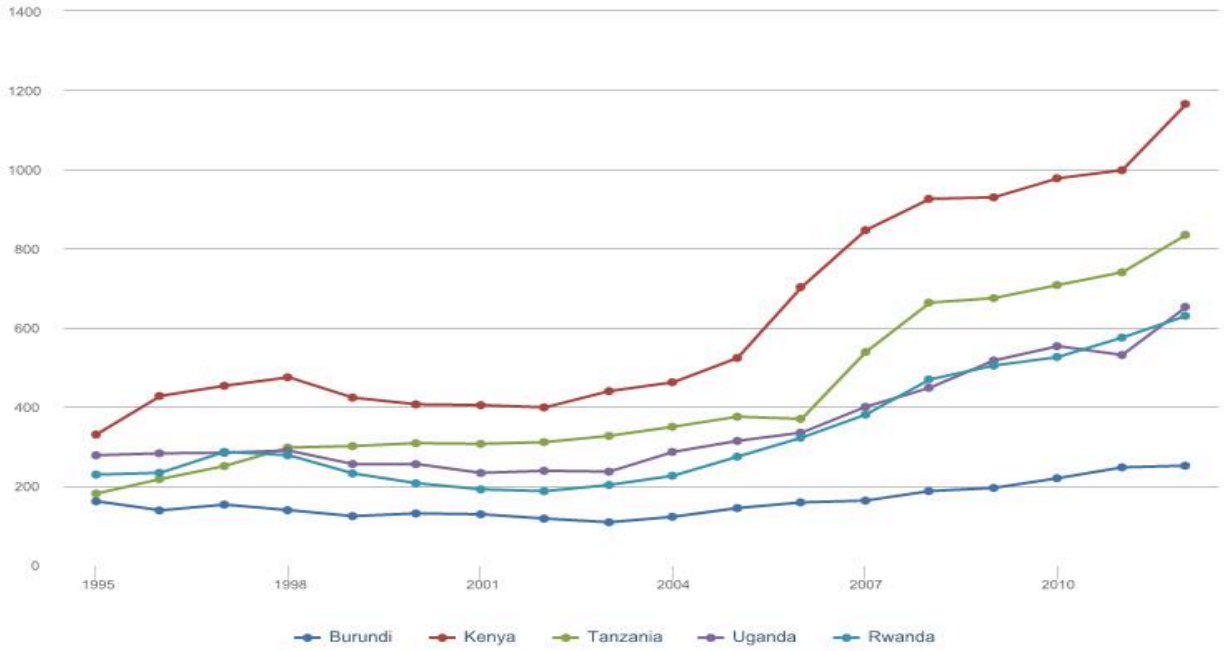
[26] Winston and Castellanos.
[27] "Burundi: How well integrated is it in the EAC?" *The Greater Horn Outlook* 26 (2012).
[28] Ibid.
[29] Ibid.
[30] Ibid.

Burundi government must realise that economic integration, especially the full implementation of the Common Market, cannot happen in an environment where countries employ disparate standards on governance."[31]

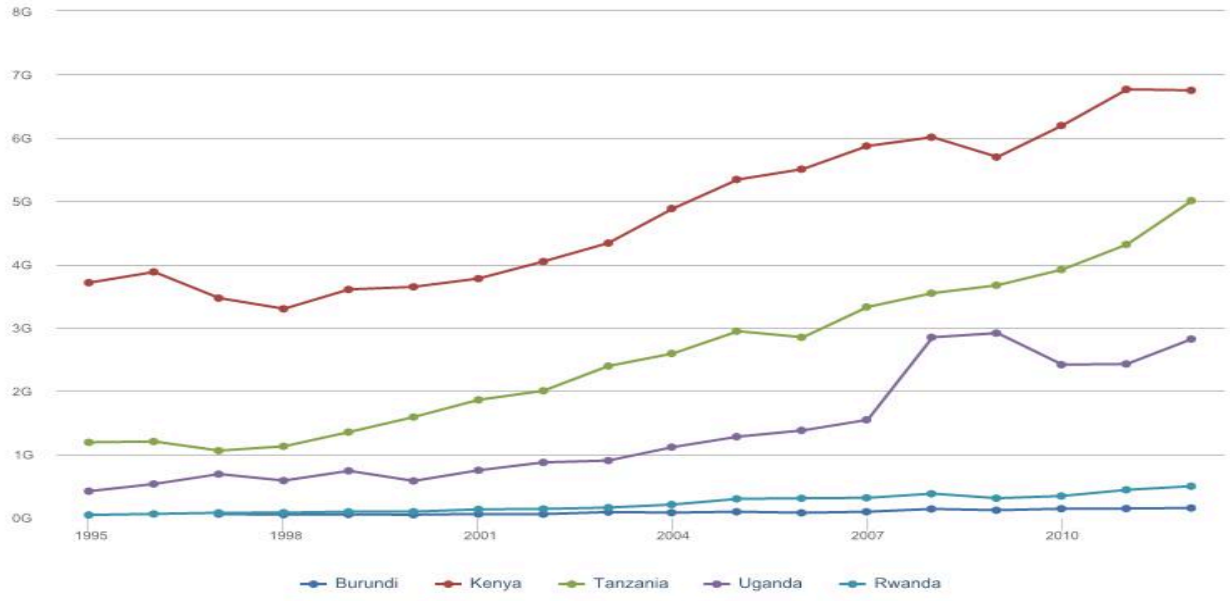
The Burundian government was particularly criticized for a 2013 media bill imposing severe restrictions and harsh penalties on journalists in the country. In March of 2015—after the Constitutional Court of Burundi ruled several of the law's provisions unconstitutional, and after the Burundi Journalists' Union filed a case before the EACJ challenging the bill on the basis of the EAC Treaty (the decision of this case is still pending)—the Burundi National Assembly, seemingly in response to the widespread domestic and international pressure, approved a draft media law which would significantly expand press freedoms.[32]

This showcase of the EAC's general economic success is not to suggest that international institutions can erase the impact of divergent national policies. But nor does the floundering progress of the Burundian economy negate the good that the community has done for the region as a whole. Burundi faced a unique set of challenges when it joined the EAC, with a weaker economy and more crippling internal conflict than any of its fellow members. Regional integration is clearly not a cure-all for a country's problems, and it is perhaps not surprising that Burundi continues to struggle to match the performance of its more stable neighbors. Nonetheless Burundi, which along with Rwanda had sought inclusion in the regional bloc since 1996, clearly joined the EAC for a reason, viewing membership in the community as a mechanism for advancing its own struggling economy through cooperation with the region's more developed nations.

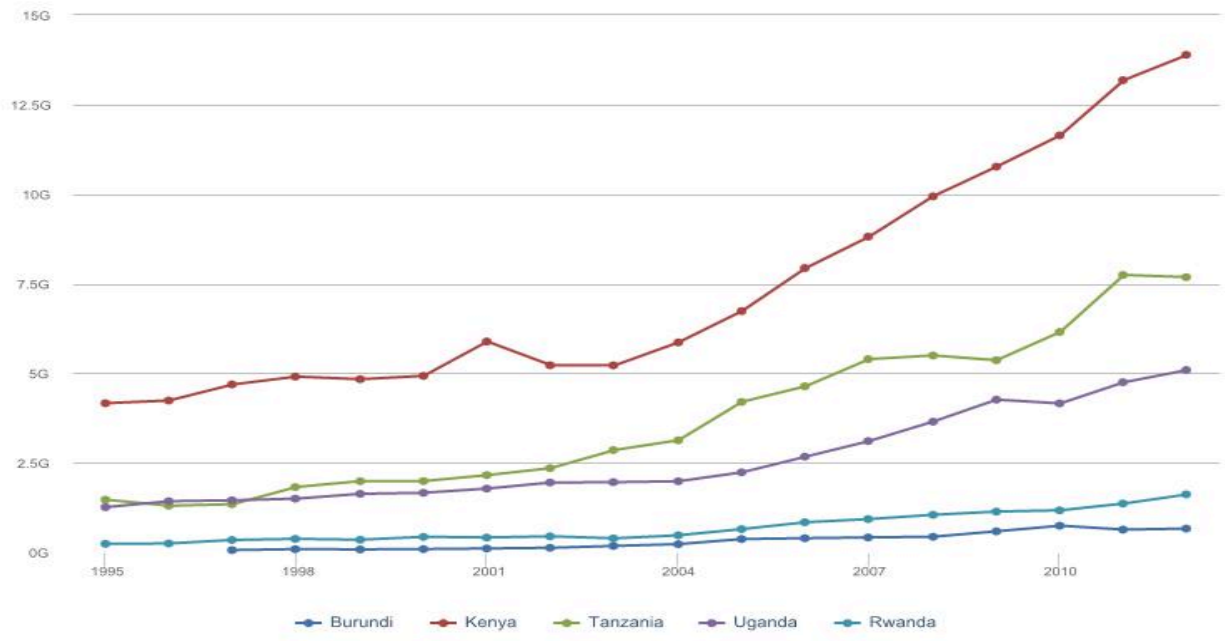
[31] "Does Journalist-jailing Burundi Belong in EAC?" Editorial. *East African* 23 June 2012. Web.
[32] Nduwimana, Patrick. "Burundi Legislators Pass Media Bill to Expand Press Freedom." *Business Day* 5 Mar. 2015. Web.



Series : GDP per capita (current US$)
Created from: World Development Indicators
Created on: 05/01/2015

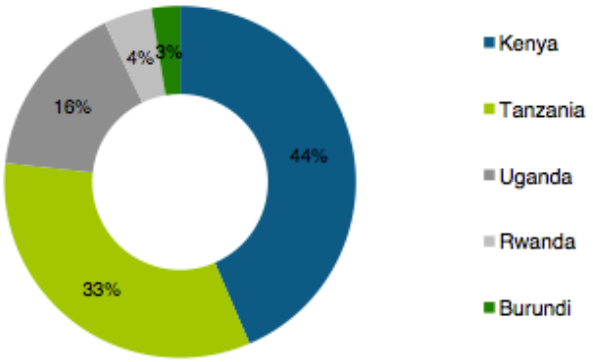


Series : Exports of goods and services (constant 2005 US$)
Created from: World Development Indicators
Created on: 05/01/2015

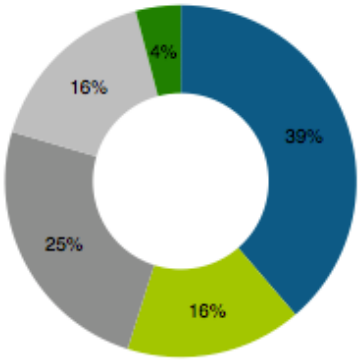


Series : Imports of goods and services (constant 2005 US$)
Created from: World Development Indicators
Created on: 05/01/2015

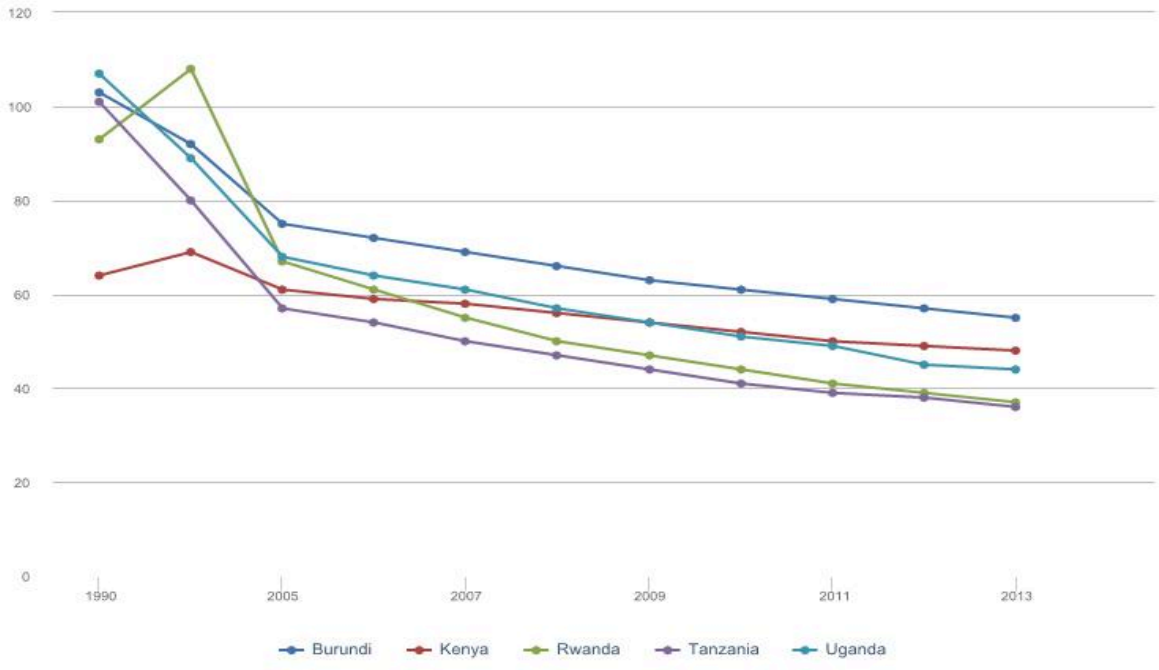
Share of EAC trade with world, US$, 2011



Share of EAC intra-regional trade, US$, 2011



Source: Ecobank



Series : Mortality rate, infant (per 1,000 live births)
Created from: World Development Indicators
Created on: 05/01/2015

The above graphs show the generally positive trajectory of the EAC member states in the years since its establishment. Certainly, there is variation. Kenya continues to outperform its neighbors; Burundi continues to underperform. This is hardly surprising, for, again, international cooperation cannot be expected to neutralize entirely the differences that arise out of divergent national policies and domestic environments. But the tremendous success detailed in this section certainly suggests that these five countries are markedly better off, economically and otherwise, with the creation of the EAC.

Why does this all matter?

What is most important to take away from this section is that there are indeed clear functional benefits to be gained from the successful advancement of the East African Community. The long history of regional cooperation in the region suggests that the modern day EAC did not come out of nowhere. There has existed since the colonial era an understanding that Kenya, Tanzania, and Uganda—and, later, Rwanda and Burundi—were better off working together than they would be apart. Even when the first iteration of the EAC was disbanded in the 1970s, the result of deep-seated tensions among its member states, still the three countries committed almost immediately to exploring new avenues for cooperation. The evident economic success achieved by the members of the new EAC over the past fifteen years—though admittedly to varying degrees—suggests there there is now a stronger incentive than ever to ensure the community's successful continued operations. With impressive regional growth over the past ten years, even in the midst of a crippling global recession, it appears to be in the best interest of all member states to ensure that the continued advancement of the EAC is not compromised by domestic concerns or interstate squabbles.

This insight into the East African Community is important as we transition now into looking at the EACJ itself. If the court was created with a clear purpose in mind, to serve as a tool to facilitate the achievement of the community's functional objectives, than the relationship between the court and its member states cannot be understood without acknowledging the larger regional environment within which it sits.

The Court

The East African Court of Justice (EACJ) was established by the EAC Treaty in 1999, tasked with "ensuring the adherence to law in the interpretation and application of an compliance with" the Treaty.[33] Though the limits of the Court's jurisdiction were not explicitly defined, the Treaty went on to add that the EACJ "shall have such other, original, appellate, human rights and other jurisdiction as will be determined by the Council at a suitable subsequent date. To this end, the Partner States shall conclude a protocol to operationalize the extended jurisdiction."[34] Though this left open the possibility of a future expansion of the scope of the Court's power, it gave no immediate timeline for this to occur, leaving the decision to do so entirely up to the member states' discretion.

The Treaty provided that cases could be referred to the Court by a partner state, by the Secretary General of the EAC, or by "any person who is resident in a Partner state," challenging "the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community."[35] The decisions of the EACJ are granted "precedence over decisions of national courts on a similar matter,"[36] and states are required to take, "without delay, the measures required to implement a judgment of the Court."[37] Individuals are not required to exhaust local remedies before bringing a case before the EACJ.

Though it entered into force in 2001, the EACJ did not hear its first case for nearly half a decade. A 2005 newspaper headline stated, "Regional Court May Close for Lack of Cases,"[38] and the court was widely considered an "effectively still-born" institution.[39] Over

[33] EAC Treaty Article 27(1).
[34] Ibid. Article 27(2).
[35] Ibid. Article 30.
[36] Ibid. Article 33(2).
[37] Ibid. Article 38(3).
[38] Mudi, Maureen. "Regional Court May Close 'For Lack of Cases'" *The Standard* [Nairobi] 20 Aug. 2005. Web.

the last ten years, however, the Court has seen its caseload increase significantly, from the one case it ruled on in 2005 to the more than two-dozen decisions delivered in 2014. In this time, the Court has issued rulings on 33 unique rulings, as well as dozens of additional applications and appeals.

Though initially only one body, the EACJ was later split into a first instance and an appellate division, one of several amendments put into place following a particularly contentious early ruling (elaborated on in Chapter Four). There are currently ten judges appointed to the court, five in each division. They are selected by the EAC Summit (made up of the five heads of state) based on recommendations from the partner states, and are expected to be "of proven integrity, impartiality and independence" and "jurists of recognized competence" in their respective states. No more than two judges of the first instance division or one judge of the appellate division may be appointed based on the recommendation of the same partner state. As such, the current judges represent all five EAC countries. [40]

At the court's inception, all judges were designated to work on a part-time basis. In 2012, citing the "steady increase" in cases, the court submitted a proposal to the Council of Ministers to shift the judges to a full-time basis. The Council assented only in part, granting the Judge President and the Principal Judge full-time status; the other eight judges remain part-time, and several of them retain nationally appointed positions in their home countries. The Deputy Principal Judge of the First Instance Division, for example, is also a current judge on the Kenyan High Court, while one of the appellate judges sits on the Tanzanian Court of

[39] James Gathii, "Mission Creep or a Search for Relevance: The East African Court of Justice's Human Rights Strategy." *Duke Journal of Comparative & International Law* 24 (2013): 18.
[40] The East African Court of Justice. Web. <http://eacj.org/?page_id=1135>.

Appeals.[41] The EAC Treaty states that judges should not hold any office "in the service of a Partner State…that is likely to interfere or create a conflict of interest to his or her position."[42]

Alter and others suggest that IC judges are unlikely to be moved by the preferences of the states that appoint them, because they have been selected based on their professional merit—of which, in the judicial profession, impartiality is an obvious component. These judges would therefore rather incur the wrath of a displeased partner state than tarnish their professional reputations by pandering to state interests.

A closer look at the current judges seems to fit with this general theory, for each of the ten has served a distinguished legal career before coming to the EACJ, and many have held or continue to hold positions with prominent international organizations. One is a member of the Panel of Conciliators at the World Bank's International Center for Investment Disputes; another is a fellow at the United Kingdom's Chartered Institute of Arbitrators. Emmanuel Ugirashebuja, the court's president, holds law degrees from the University of Edinburgh and the University of Rwanda, and is an alumnus of Stanford's CDDRL Draper Hill Summer Fellows Program; he previously served as the dean of the Law School at the University of Rwanda, and is a certified mediator with the London-based Centre for Effective Dispute Resolution.

Domestic Embeddedness? National Laws and the EAC

It is worth taking a moment to examine the extent to which EAC laws have become "embedded" at the national level in the five member states. The Treaty commits each state to "undertake to make the necessary legal instruments to confer precedence of Community

[41] Ibid.
[42] EAC Treaty Article 43(2).

organs, institutions and laws over similar national ones." Different states have chosen different interpretations of this commitment, with the governments of Rwanda, Kenya and Burundi suggesting that partner states ought to implement legislation expressly stating the precedence of EAC laws over domestic ones. Tanzania and Uganda have meanwhile argued that this precedence is inherent, and additional legislation on the subject is unnecessary.[43] A Subcommittee on Approximation of National Laws was established within the EAC to facilitate the process of "legal harmonization" among the five states, and some progress has been made in harmonizing regulations on migration, corruption, judicial services and commercial law. In general, however, the adaptation of national laws has been approached in a very piecemeal fashion, and is far from complete. The process has been described as "painstakingly slow."[44]

Legal coordination is made further complicated by the differences in legal systems. While the three founding members—Kenya, Tanzania, and Uganda—all inherited the British common law system, Rwanda and Burundi come out of the civil law tradition of Germany and Belgium. The EAC political federation, whenever it comes about, is expected to be run on a common law system, and Rwanda and Burundi will need to transition their legal systems entirely, an enormously complicated task. Rwanda has been in the process of legal reform since 2001, and it currently has a sort of "hybrid" system, somewhere in between civil and common law.[45]

There is a case currently before the EACJ calling attention to the relationship between the regional court and national judicial bodies. The High Court of Uganda referred the matter

[43] East African Community. *Meeting On Approximation of National Laws in the EAC Context Held in Nairobi*. 18 Feb. 2010. Web.
[44] Kitonsa, Edward. "The Status of the EAC Legal Harmonsation Process in Uganda." *Uganda Law Reform Commission* (2012): 11.
[45] "EAC Wants Rwanda, Burundi to Adopt Common Law System." *The New Times* [Kigali] 2 June 2009. Web.

to the EACJ, with the goal of determining "whether the national Courts have jurisdiction to interpret and apply the provisions of the Treaty"[46]—which the Ugandan government claims they do not. The attorney for the EAC Secretary General noted that integration would never work if "every aggrieved person would have to come to the East African Court of Justice to claim their rights." He contended that "the framers of the Treaty wanted the National Courts to participate together with the regional mechanism to ensure the Treaty is interpreted and complied with at the National Level,"[47] and that, as the EAC Treaty has the force of law in Uganda, it is applicable to the country's national courts. The Tanzanian government professed its disagreement with Uganda's interpretation, while the Kenyan government argued that national courts do have jurisdiction to interpret the Treaty, but it is dependent on the "subject of the dispute" and must be read in conjunction with the national constitution.[48] The resolution of this case will provide an important clarification of the relationship between the regional court and its domestic counterparts, and the extent to which regional commitments can be incorporated into national rule of law.

Regardless of the legality of this relationship, however, judiciaries in East African have proven to be generally inefficient and slow moving, making them less than ideal for the rapid resolution of EAC-level disputes. "In most EAC countries cases take months and even years to conclude"—this sluggishness the result of "corruption, incomplete prosecution investigations and…negligence by court officials," among other things.[49]

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[46] East African Court of Justice. *High Court Uganda Files a Matter Challenging the Jurisdiction of the National Court to Interpret and Apply the EAC Treaty*. 27 Apr. 2015. Web.
[47] Ibid.
[48] Ibid.
[49] "East Africa: Harmonise Legal Regimes for EAC Success." *East African Business Week* [Kampala] 6 July 2010. Web.

On the whole, then, it seems rather premature to say that "domestic embeddedness" is contributing in any significant way to the effectiveness of the EACJ. Though this may change as integration within the region deepens, the current limits of legal harmonization appear to preclude this particular method of enforcing compliance.

Timeline of the Modern East African Community

1993
- First Summit of East African Heads of State sign agreement establishing the Permanent Tripartie Commission for East African Cooperation

1996
- Secretariat of the Commission for East African Cooperation launched in Arusha, Tanzania

1997
- Creation of 1st East African Cooperation Development Strategy (1997-2000)
- East African Flag and East African Passport launched
- Began process of upgrading EAC agreement into Treaty

1998
- Permanent Tripartite Commission launches draft Treaty
- EAC Memorandum of Understanding on Cooperation in Defence Signed
- Tripartite Agreement on Road Transport and Inland Waterway Transport Agreement signed

1999
- Treaty for the Establishment of the East African Community signed

2000
- Treaty enters into force; EAC comes into being

2001
- 1st Summmit of the EAC held in Arusha
- Members sign protocols on Rules of Procedure for the Summit of Heads of State, Rules of Procedure for the Admission of other countires
- Inauguration of East African Legislative Assembly (EALA) and East African Court of Justice (EACJ)

2004
- Protocol for Establishment of the EAC Customs Union

2005
- Customs Union becomes operational

2007
- Rwanda and Burundi join the EAC

2009
- Rwanda and Burundi join the Customs Union
- Protocol for the Establishment of the EAC Common Market signed

2010
- Common Market Protocol enters into force

2013
- Protocol for the Establishment of the EAC Monetary Union signed

Chapter III
The Jurisprudence of the EACJ

The EACJ did not get off to a very active start. Officially established in 2001, the court lay dormant for the better part of the next five years. Finally, in 2005, a single case was brought before it, filed by a group of private citizens. The case, *Calist Mwatela and others vs. the East African Community*, challenged the EAC on the validity of a meeting of the Sectoral Council on Legal and Judicial Affairs, and the decisions that came out of it. Nearly a year after the case was filed, the EACJ issued its first decision, ruling largely in favor of the applicants. The decision was lauded as an important step forward for rule of law in the region. The East African Law Society praised the court for rendering "a fair and comprehensive ruling that will enlighten, empower and embolden the various EAC organs as they go about their mission of delivering a meaningful, beneficial and people-centred integration for the people of East Africa."[1]

The flow of cases has picked up significantly since 2005. In the past ten years, the court has ruled on 33 unique cases, along with dozens of additional applications and appeals. In total, it has issued 97 rulings in the past ten years—not a large number, by any means (the European Court of Justice has ruled on literally thousands of cases), but also not a negligible number for a court made up of 10 judges (5 each in the appeals and first instance divisions), of which only two work on a full-time basis.

To date no state actor has brought a case before the EACJ, though this is not uncommon for an international court. Alter writes that states are often reluctant to initiate litigation, concerned that it might "antagonize other governments and undermine the achievement of other goals" or "provoke actors in other countries to scrutinize their own

[1] Deya, Donald. "EACJ Landmark Ruling Will Enhance the Rule of Law in the East African Region." *Legalbrief Africa* 202 (2006).

compliance record and raise a retaliatory legal suit."[2] In the EACJ's ten years of operation, there have been 22 cases filed by individuals, seven by civil society organizations, and four by private businesses. Interstate disputes among partner states have been continually taken to arbitration courts in Europe and elsewhere, rather than referred to the EACJ.

These cases have centered on a range of different topics, which, for the sake of simplicity, I have grouped into five broad categories, each of which I will briefly review: (1) purely economic issues; (2) human rights and the rule of law; (3) the East African Legislative Assembly; (4) infringement on the jurisdiction of the EACJ itself; (5) defining the limits of integration (the catchall group for cases that didn't fall easily into one of the first four).

Economic Issues

There are seven cases that I have classified as purely economic in nature—a surprisingly small number if one has anticipated the court to be primarily an instrument for facilitating economic integration and development. The subjects covered in these seven cases are varied; they include allegations of negligence by the Kenya Ports Authority; work benefits; a contract dispute; property rights; the takeover of a private business by a local government; a Memorandum of Understanding signed between the governments of Uganda and China; and a proposed highway in Tanzania.

Five of the seven cases were dismissed on technicalities; the other two ruled in favor of the applicants. Of the latter group, one case, *Venant Masenge vs. the Attorney General of Burundi*, centered on an alleged encroachment of a citizen's private property. The court ruled that the failure of the Burundian government to protect the applicant's property rights was "fundamentally inconsistent" with Burundi's obligations to observe "the principles of good

[2] Alter (2014) 7.

governance including in particular, the principles of adherence to the rule of law, and the promotion and protection of human rights."[3] In the second successful case, *African Network for Animal Welfare (ANAW) vs. the Attorney General of Tanzania* (one of the case studies explored in the following chapter), the court ruled against the Tanzanian government's proposed plan for a paved highway traversing the Serengeti National Park.[4]

Human Rights

The EACJ, at its inception, was granted jurisdiction over the "interpretation and application" of the EAC Treaty, with an additional provision stating, "The Court shall have such other original, appellate, human rights and other jurisdiction as will be determined by the Council at a suitable subsequent date. To this end, the Partner States shall conclude a protocol to operationalise the extended jurisdiction." Though it has been the subject of much debate over the past few years, this protocol has yet to be implemented. Nonetheless, the EACJ has consistently maintained that the mere existence of human rights allegations within a case is not a sufficient reason to dismiss the reference. The court has explicit jurisdiction over interpretation and application of the treaty, and that treaty contains the provision, "The Partner States undertake to abide by the principles of good governance, including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights."[5] The court has therefore determined that, while it "will not assume jurisdiction to adjudicate on human rights disputes, it will not abdicate from exercising its jurisdiction of interpretation [of the treaty] merely because the reference

[3] Venant Masenge vs. Attorney General of Burundi. Ref. No. 9 of 2012. 19.
[4] African Network for Animal Welfare (ANAW) vs. the Attorney General of Tanzania. Ref. No. 9 of 2010.
[5] EAC Treaty Article 7(2).

includes allegations of human rights."[6] This precedent was set in the court's 2007 *Katabazi* ruling (explored at length in the following chapter), and it has been upheld on several occasions in the ensuing years.

The court has heard nine human rights cases, more than in any other category. The majority of these cases, seven of the nine, have centered broadly on allegations of unlawful detention. A sixth case case concerned alleged mass executions, torture, and other "inhuman and degrading treatment" of over 3,000 individuals in Kenya, while the final case challenged the member states' failure to pass legislation granting individuals and NGOs access to the African Commission on Human and Peoples' Rights (ACPHR).

Of these nine cases, only three resulted in a favorable ruling for the applicants. Of the remaining six, four were dismissed because they had been filed outside of the two-month statute of limitation, and a fifth because there was no discernible cause of action. The only human rights case in which the court ruled substantively in favor of the respondents was *Democratic Party vs. the Secretary General of the EAC & 4 Others*; the judges ruled that the speed with which countries were expected to expand civilian access to the ACPHR was to be "left to the sole discretion of the State Party."

In the three winning cases, the court did not hesitate to assert states' violations of fundamental principles of human rights and the rule of law. In *Katabazi*, the court declared that actions undertaken by Ugandan security forces had "violated the principle of the rule of law and consequently contravened the Treaty."[7] *Plaxeda Rugumba* declared that continued imprisonment without trial constituted a "breach of the fundamental and operational

[6] James Katabazi and 21 others vs. Secretary General of the East African Community and Attorney General of the Republic of Uganda. Ref. No. 1 of 2007. 16.
[7] Ibid. 23.

principles of the East African Community."[8] Finally, in *Samuel Mukira Mohochi vs the Attorney General of Uganda*, the judges ruled that the actions of the respondent "were illegal, unjustified, unlawful and inconsistent with transparency, accountability, [and] rule of law."[9]

The EACJ is not a human rights court; if and when the additional protocol is operationalized and the court's jurisdiction is extended, the EACJ is still a civil court rather than a criminal one, and therefore its scope is necessarily limited. Nonetheless, with a largely inactive ACHPR and an abundance of human rights violations, there is certainly a niche to be filled for judicial solutions to human rights in the region. In however small a way, the EACJ appears to be taking steps towards playing that role.

> EAC member states have repeatedly contested the EACJ's jurisdiction to entertain these human rights suits. Yet the court, while acknowledging that it is not a human rights tribunal as such, has just as frequently reasserted its power to interpret every provision in EAC legal instruments.[10]

In nearly all of the above cases, the respondents raised a preliminary objection averring the court's lack of human rights jurisdiction. Yet time and again, the EACJ has refused to be convinced by this argument.

I should not over-exaggerate the significance of these rulings, of course, for the court is rather limited in what it can prescribe. The *Katabazi* decision simply stated that Uganda had violated the principle of rule of law as enshrined in the EAC Treaty, and it directed the state to pay the legal costs of the applicant. Similarly, in *Plaxeda Rgumba*, the court condemned the actions of the Rwandan government and ordered it to pay the plaintiff's legal costs. The

[8] Plaxeda Rugumba vs. the Secretary General of the EAC and the Attorney General of the Republic of Rwanda. Ref. No. 8 of 2010. 30.
[9] Samuel Mukira Mohochi vs the Attorney General of the Republic of Uganda. Ref. No. 5 of 2011. 48.
[10] Alter et al (2015) 12.

Samuel Mohochi ruling was slightly more extensive, noting that the state's actions had violated the treaty, and that that any "provisions of…Uganda's Citizenship and Immigration Control Act formerly inconsistent with provisions of the Treaty" were rendered inoperative when the EAC entered force. These rulings made no real demands, and as such it is difficult to judge their impact.

East African Legislative Assembly

There are eight cases dealing broadly with the East African Legislative Assembly, which has proven a particularly contentious feature of the East African Community. Regarding the election of representatives to the Assembly, the EAC Treaty states,

> The National Assembly of each Partner State shall elect, not from among its members, nine members of the Assembly, who shall represent as much as it is feasible, the various political parties represented in the National Assembly, shades of opinion, gender and other special interest groups in that Partner State, in accordance with such procedure as the National Assembly of each Partner State may determine.[11]

In formulating national laws to dictate the Assembly elections, the member states opted for divergent interpretations of this provision, resulting in each state choosing a slightly different process for appointing its representatives. In seven different cases, these processes were challenged at the EACJ—once against the government of Kenya, twice against Tanzania, and four times against Uganda.

In four of the seven cases, the court ruled in favor of the applicants. The first of these decisions, *Nyong'o*, invalidated Kenya's nine nominees for the second Assembly, so

[11] EAC Treaty Article 50(1).

infuriating the Kenyan government that it pushed through a set of amendments imposing new restrictions on the EACJ.[12] These included the division of the court into a first instance and appeals division, the addition of new grounds on which to remove judges from office, and the establishment of a two-month statute of limitation for cases filed by private actors. Ultimately, however, Kenya changed its election procedures in compliance with the decision.

In *Democratic Party and Mukuasa Mbidde vs. the Secretary General of the EAC and the Attorney General of Uganda*, the applicants contended that the Ugandan government had failed to amend its rules of procedure for EALA elections in compliance with the EAC Treaty, after a national case in Uganda had nullified said rules.[13] The court agreed, restraining Uganda from conducting elections until the process had been changed. Uganda took the ruling seriously, and intense negotiations were undertaken among the competing political parties to redefine the rules of procedure. The success of these negotiations, however, was dubious at best, and several opposition parties boycotted the ensuing EALA elections, claiming the nomination process the country had settled on was illegitimate.

In *Among Anita vs. Attorney General of Uganda*, the court made a limited ruling in favor of the applicants, ordering a small facet of Uganda's nomination process to be brought into conformity with the EAC Treaty before the next EALA election.[14] In *Antony Calist Komu vs. the Attorney General of Tanzania,* the court found that Tanzania too had violated the EAC Treaty in certain aspects of its nominating procedures, but it made no demands of the Tanzanian government besides paying a part of plaintiff's legal fees.[15]

[12] Prof. Peter Anyang' Nyong'o vs. Attorney General of Kenya and Others. Ref. No. 1 of 2006.
[13] Democratic Party and Mukasa Mbidde vs. the Secretary General of the EAC and the Attorney General of Uganda. Ref. No. 6 of 2011.
[14] Among A. Anita vs. Attorney General of Uganda and Secretary General of the EAC. Ref. No. 6 of 2012.
[15] Antony Calist Komu vs. Attorney General of Tanzania. Ref. No. 7 of 2012.

The final case related to the East African Legislative Assembly, which was ultimately withdrawn by the applicants, centered on attempts within the EALA to remove the speaker from office.[16]

Infringement on EACJ Jurisdiction

There are four cases that deal directly with the jurisdiction of the EACJ. In two of them, the applicants challenged the dispute resolution mechanisms attached to the EAC Common Market and Customs Union, contending that the establishment of these alternative pathways for dispute resolution undermined the authority of the EACJ. Another case, brought in the wake of the contentious *Nyong'o* case, challenged the amendments—pushed through by the Kenyan government but ultimately backed by all three member states at the time—that placed new restrictions on the authority of the court. The final case took issue with the lack of progress by member states towards operationalizing an extended jurisdiction for the EACJ, as envisioned in the EAC Treaty.

The EACJ has mostly refused to be its own advocate in these cases. The two cases on alternative dispute resolution mechanisms were dismissed, with judges arguing that the establishment of these new problem solving tools represented "a pragmatic approach" to addressing particular problems without going through the "long and often tedious court litigation approach."[17]

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[16] Mbidde Foundation Ltd & Hon. Margaret Zziwa Vs The Secretary General of the East African Community & The Attorney General of the Republic of Uganda. Ref. Nos. 3 & 5 of 2014.

[17] The East African Law Society vs. the Secretary General of the EAC. Ref. No. 1 of 2011; The East African Centre for Trade Policy and Law vs. the Secretary General of the EAC. Ref. No. 9 of 2012.

In the other two cases, the judges did rule, in part, in favor of the applicants, but they only went so far. In *East African Law Society vs. Attorney General of Kenya and 3 Others*, the judges faulted the governments of Kenya, Tanzania, and Uganda for the lack of widespread consultation they engaged when amending the Treaty to include new restrictions for the court, but they nonetheless declined to invalidate the amendments.[18] Only in *Sitenda Sebalu vs. Attorney General of Uganda and 3 Others* did the judges side fully with the applicants, ruling that "the delay to extend the jurisdiction of the EACJ contravenes" the Treaty, and declaring "that quick action should be taken by the EAC in order to conclude the protocol to operationalize the extended jurisdiction."[19]

Outside of its rulings, the EACJ has made clear its belief that the jurisdiction of the court ought to be expanded. In 2011, the court registrar declared, "The limited jurisdiction of the court is a crippling challenge and the jurisdiction should be extended as envisaged under" the treaty.[20]

Limits of Integration

This is an admittedly rather ambiguous category, and it primarily serves the purpose of catching the cases that don't fall easily into one of the other groups. Nonetheless, each of these four cases sought in one way or another to clarify the bounds of regional integration in the EAC. The very first case filed with, *Calist Mwatela and Others vs. the East African Community*, challenged the validity of a meeting of the Sectoral Council on Legal and Judicial Affairs. The court ruled in favor of the applicants, nullifying the decisions handed down in the

[18] East African Law Society and 4 Others vs. Attorney General of Kenya and 3 Others. Ref. No. 3 of 2007.
[19] Hon. Sitenda Sebalu vs. Secretary General of the EAC, Attorney General of Uganda, Hon. Sam K. Njuba and Electoral Commission of Uganda. Ref. No. 1 of 2010.
[20] Muramira, Gashegu. "Region's Court Seeks More Jurisdiction." *The New Times* [Kigali] 21 May 2011. Web.

meeting.[21] This case was perhaps most significant for establishing the EACJ as a legitimate judicial player in the region. The court based its opinion on valid legal arguments and ultimately sided with the private litigants against the EAC; this ruling was seen as a boon for regional rule of law.

Another case challenged the validity of the constitutional review process undertaken by the Kenyan government, but the judges determined that this was not an issue that fell within their jurisdiction.[22] The third centered on the establishment of a Protocol on Immunities and Privileges for the EAC; the applicant contended that this was outside the scope of regional cooperation as envisioned by the EAC Treaty. The court ruled against him, asserting that the Treaty "envisages areas of cooperation which may not have existed in 1999," and hence leaves open the possibility to create protocols "in other fields."[23] In the final case, the plaintiffs challenged the decision of the EAC member states to open negotiations with the government of South Sudan on the county's potential future entrance into the community. The judges ruled against the applicants, asserting that the states were acting well within their rights.[24]

Dismissal of Cases

The EAC Treaty states, "The Court shall consider and determine every reference made to it pursuant to this Treaty in accordance with rules of the Court and shall deliver in public

[21] Calist Mwatela, Lydia Wanyote Mutende, Isaac Abraham Sepetu vs. East African Community. Ref. No. 1 of 2005.
[22] Mary Ariviza and Okotch Mondoh vs. Attorney General of Kenya and Secretary General of the EAC. Ref. No. 7 of 2010.
[23] Timothy Alvin Kahoho vs. Secretary General of the EAC. Ref. No. 1 of 2012.
[24] Patrick Ntege Walusimbi and 2 Others vs. the Attorney General of Uganda and 5 Others. Ref. No. 8 of 2013.

session, a reasoned judgment."[25] In order to rule against the applicant, the judges must either determine that the reference lacks merit, or else dismiss the case on a technicality—ruling that the reference is, for one reason or another, outside the purview of the court, but without offering insight into its more substantive content.

Eight of the 33 rulings issued by the EACJ to date were decided substantively in favor of the respondents (i.e. member states and/or the EAC). An additional 12 cases were dismissed on a technicality, either by the first instance division or, later, on an appeal. In four cases, the Court found that it did not have jurisdiction over the particular issues in question. In four others, the judges were forced to dismiss cases that had been filed outside the two-month statute of limitation put into place following the 2007 *Nyong'o* case. In one case, the court found that there was no cause of action; in another, the judges ruled that the Kenya Ports Authority could not validly be sued under the terms of the EAC Treaty. Two cases were dismissed when the judges found the matter at hand to be retroactive in nature, and therefore outside the scope of the court's jurisdiction (one of these two was initially dismissed because a similar case was being heard at the same time in a Ugandan national court, leading the judges to accuse the applicants of "forum shopping," but this was overturned by the appeals court).

Technicalities on which cases have been dismissed
• Lack of jurisdiction (4) • Time-barred (4) • No cause of action (1)

[25] EAC Treaty Article 35(1).

- Invalid respondent (1)
- "Forum shopping" (1 – appealed)
- Non-retroactivity (2)

Lack of Jurisdiction

"The declaration that two persons were improperly elected and that they are not Members of the Legislative Assembly is the domain of the High Court of Tanzania and not this Court." – *Christopher Mtikila vs. Attorney General of Tanzania and Others*

"In our respectful view, the matters which this Court can, in exercise of its original jurisdiction, inquire into under Article 30(1) do not include judicial decisions. The latter can only be subjected to requisite inquiry or review in exercise of appellate or review jurisdiction." – *Mary Ariviza and Okotch Mondoh vs. The Attorney General of the Republic of Kenya and the Secretary General of the EAC*

"The restriction of this Court's jurisdiction to the interpretation of the Treaty would defer legal disputes that fall outside that ambit to the jurisdiction of national courts or other related bodies. Accordingly, we find that the question as to whether or not the Respondent's actions were in compliance with Rwanda's internal laws is not a matter of Treaty interpretation and is therefore not an issue for determination by this Court." – *Union Trade Centre (UTC) vs the Attorney General of the Republic of Rwanda*

"It is not the role of this Court to superintend the Republic of Uganda in its executive or other functions. Whereas of course where there is obvious and blatant violation or breach of the principles of good governance and rule of law, this Court will, without hesitation, so declare, we are unable to do so in the present case." – *Henry Kyarimpa vs the Attorney General of the Republic of Uganda*

Winning Cases

Realism suggests that the EACJ should be nothing more than a puppet of the states that created it. The fact that one third of the court's rulings, 11 out of 33, were decided in favor of the applicant suggests that this is not the case. I will give a brief overview of each of these winning cases, and then, in the following chapter, I will delve into a closer analysis of three of them. While some of this might be redundant, given the case descriptions above, for the sake of clarity I think it will be helpful to group together here all of the cases in which the plaintiffs were successful. I will offer some preliminary conclusions at the end of this chapter, which I hope will be further clarified by the subsequent case studies.

Calist Mwatelam Lydia Wanyoto Mutende, Isaac Abraham Sepetu vs. East African Community

This case, the first ever filed with the EACJ, challenged as illegitimate the establishment of the EAC's Sectoral Council on Legal and Judicial Affairs, and a subsequent meeting of the same council. The particular point of contention was that the treaty grants the Council of Ministers the right to appoint sectoral councils "from among its members," to deal with particular areas of concern. The Sectoral Council on Legal and Judicial Affairs, however, was made up of the attorneys general of the partner states, only one of whom was a designated minister within his country, and the council's very existence was thus in violation of the treaty. Furthermore, the applicants contended, even if the council itself was presumed to be legitimate, one meeting in particular was clearly invalid, for the attorneys general of Kenya and Tanzania were absent, represented instead by their countries' solicitor general and secretary of the Ministry of Justice and Constitutional Affairs, respectively.

The court found that the sectoral council was in fact improperly founded, but, since the "purported Sectoral Council has been in place from 2001 and by now has undoubtedly made a number of decisions, which would be unwise to disturb, we are of the the considered opinion that this is a proper case to apply the doctrine of prospective annulment." As for the second issue, the court agreed fully with the applicants, asserting that the meeting in question "was not a valid meeting of a Sectoral Council and that the decisions it handed down" during this meeting were therefore invalid.

Prof. Peter Anyang' Nyong'o and Others vs Attorney General of Kenya and Others

This was the infamous case that led to the rapid curtailing of the Court's powers in 2007, and it will be described in greater detail in the following chapter. The applicants claimed that Kenya's election process for the East African Legislative Assembly were in violation of the Treaty." It centered on the process through which Kenya's nine representatives to the East African Legislative Assembly were elected, a process that the applicants claimed was in violation of the EAC Treaty. Article 50 of the treaty states that the national assembly of each state shall elect nine Assembly members; the applicants contended that no such election took place. Instead, the representatives were appointed by the House Business Committee, with each political party receiving seats proportional to their representation in parliament. The Kenyan government averred that the words "shall elect," as specified in the treaty, were open to interpretation, but the court was unconvinced. The judges ruled that it "would lead to unnecessary uncertainty, if not absurdity," if there were no real meaning attached to the words "election" and "to elect." As such, "the National Assembly of

Kenya did not undertake an election within the meaning of Article 50 of the Treaty, and that the election rules in issue infringe the same Article."

James Katabazi and 21 others vs. Secretary General of the East African Community and Attorney General of Uganda

This case, also the subject of closer examination of the following chapter, was the first decision to assert a limited human rights jurisdiction for the EACJ. The case centered on an incident from 2005, when the applicants', who had been imprisoned on treason charges for the better part of two years, were released on bail per the instructions of the Ugandan High Court. Immediately following their release, the applicants were surrounded by security personnel, rearrested and taken back to jail. They were ultimately taken before a military General Court Martial on charges of unlawful possession of firearms and terrorism. "Both offences were based on the same facts as the previous charges for which they had been granted bail by the High Court."

The respondents raised a preliminary objection contending that this was a human rights case, and as such it fell outside the jurisdiction of the EACJ. In what has come to be considered somewhat of a landmark decision for the court, the judges determined that, while the Court would not "assume jurisdiction to adjudicate on human rights disputes, it will not abdicate from exercising its jurisdiction of interpretation…merely because the reference includes allegations of human rights violations."

Having upheld their jurisdiction, the judges went on to rule that, by arresting the applicants following their lawful release by the High Court, the Ugandan security forces prevented "the execution of a lawful Court order," and they thereby "violated the principle of

the rule of law and consequently contravened the Treaty. Abiding by the court decision is the corner stone of the independence of the judiciary, which is one of the principles of the observation of the rule of law."

East African Law Society and 4 Others vs. Attorney General of Kenya, Attorney General of Tanzania, Attorney General of Uganda, and Secretary General of the EAC

The focus of this case was the restrictions placed on the EACJ following the controversial *Nyong'o* decision. The East African Law Society, a regional bar associations, as well as national bar associations from Kenya, Uganda and Tanzania, filed the case, challenging the legality of the amendments and seeking "declarations that the amendment process infringed provisions of the Treaty and norms of international law and was of no legal effect."

The Court ruled nominally in favor of the applicants, lambasting the lack of popular participation in the amendment process. "[C]onstruing the Treaty as if it permits sporadic amendments at the whims of officials without any form of consultation with stakeholders would be a recipe for regression to the situation…that led to the collapse of the previous Community," the decision read. The judges therefore ruled that the "failure to carry out consultation outside the Summit, Council and the Secretariat was inconsistent with a principle of the Treaty and therefore constituted an infringement of the Treaty." The applicants' victory, however, was little more than rhetoric, for the judges "decline[d] to invalidate the amendments," assuming that "the infringement was not a conscious one" and that "after this clarification of the law on the matter the infringement is not likely to recur."

Plaxeda Ruguma vs. the Secretary General of the EAC and the Attorney General of the Republic of Rwanda

This case centered on Seveline Rugigana Ngabo, the brother of the applicant and a lieutenant colonel in the Rwandan Patriotic Front, who was arrested by the Rwandan government in 2010 and detained in an undisclosed location for several months. At the time the case was filed, his location was still unknown. In January 2011, after the case had been filed but before a decision had been issued, Ngabo was "put in preventive detention by an Order of Court as provided by the Laws of Rwanda."

The respondents alleged that the case ought to be time barred, for the arrest had occurred more than two months before the case was brought to the attention of the EACJ. The court ruled, however, that "it would be against the principles known to the rule of law to dismiss the complaint on the basis of strict mathematical computation of time." Declaring that "Partner States should apprehend and prosecute criminal suspects in accordance with established laws ," the judges ruled that the Ngabo's detention by the Rwandan government through January 2011 "was in breach of the fundamental and operational principles of the East African Community."

Honorable Sitenda Sebalu vs. Secretary General of the EAC, Attorney General of the Republic of Uganda, Honorable Sam K. Njuba and the Electoral Commission of Uganda

In defining the jurisdiction of the EACJ, the EAC Treaty states: "The Court shall have such other original, appellate, human rights and other jurisdiction as will be determined by the Council at a suitable subsequent date. To this end, the Partner States shall conclude a protocol

to operationalize the extended jurisdiction."[26] Such a protocol had not yet been operationalized, however, and the applicant in this case argued that the "continuous delay to establish the East African Court of Appeal as stipulated by Article 27 of the Treaty is a blatant violation of the rule of law and contrary to the Treaty and East African integration."

The judges found that their had been unlawful delays by the Ugandan government in submitting written comments on the draft protocol, as well as a failure on the part of the EAC Secretary General to ensure that the matter was concluded as quickly as possible. The court ruled "that the delay to extend the jurisdiction of the EACJ contravenes the principle of good governance as stipulated" in the Treaty, and "that quick action should be taken by the EAC in order to conclude the protocol to operationalize the extended jurisdiction."

To this day, the protocol has yet to be concluded.

Samuel Mukira Mohochi vs. the Attorney General of the Republic of Uganda

The applicant in this case was a human rights activist, who was flying from Kenya to Uganda. Upon arriving in Uganda, he was promptly arrested and detained by immigration authorities, and eventually put on a flight back to Nairobi. At no point was he given a reason for his detention.

The respondent claimed that this was clearly a matter of Ugandan sovereignty, but the judges objected to this line of reason. By accepting to be bound by the provisions of the EAC Treaty, the court asserted, "Uganda also accepted that her sovereignty to deny entry to persons, who are citizens of Partner States, became qualified and governed by the same." Sovereignty, therefore, "cannot take away the precedence of Community law, cannot stand as

[26] EAC Treaty, Article 27(2)

a defense or justification for non-compliance with Treaty obligations and neither can it act to exempt, impede or restrain Uganda from ensuring that her actions and laws are in conformity with requirements of the Treaty or the Protocol." The court saw no evidence that the applicant was truly a prohibited immigrant under Ugandan law, and it therefore ruled that the "actions and decisions to declare the Applicant a prohibited immigrant, deny him entry into Uganda, detain him and return him to Kenya were illegal, unjustified, unlawful and inconsistent with transparency, accountability," and the rule of law The judges also asserted that any provisions of Uganda's immigration law that were inconsistent with the EAC Treaty and the Common Market Protocol "were rendered inoperative and have no force of law" the moment the treaty entered into force.

Democratic Party and Mukasa Mbidee vs. the Secretary General of the EAC and the Attorney General of Uganda

This case, like *Nyong'o*, challenged the rules of procedure governing EALA elections, this time in Uganda. The applicants contended that the Ugandan government was unwilling to amend the rules in order to bring them into conformity with the EAC treaty, as stipulated by a ruling of the Ugandan Constitutional Court. The EACJ left the determination of the validity of the country's election rules "to the appropriate national courts in Uganda." This had already been determined, however, with the national constitutional court declaring the "impugned rules of procedure" null and void. The Ugandan government was, in theory, in the process of revising its laws accordingly.

The judges did not grant the majority of the applicants' requests, deciding instead to give the Ugandan government the "benefit of the doubt" that the process of revision was

underway—this despite the fact that the government's "conduct regarding amendment of the 2006 rules leaves a lot to be desired." The court did agree, however, to grant orders "restraining and prohibiting the EALA, the Attorney General of Uganda and the Parliament of Uganda from conducting and carrying out elections" under the old rules, adding that this would be of practical value and ought not be an imposition on the Ugandan government (as the amendment process was, theory, already under way).

The Ugandan government did undertake to change these rules, and negotiations were soon under way among the political parties represented in the Ugandan parliament, attempting to establish a new set of election procedures. The result were largely unsatisfying for opposition parties, however. EALA seats were allocated based on representation in parliament, with the most seats therefore going to the majority party. Several opposition groups boycotted the ensuing EALA election in protest.

Venant Masenge vs. the Attorney General of the Republic of Burundi

The applicant in this case alleged that, following an encroachment on his property rights, he referred the matter to the Minister of Home Affairs, who ignored the complaint. The court found the Burundian government at fault, declaring that the "failure by the appropriate authorities of Burundi to ensure the protection of the Applicant's land property rights was fundamentally inconsistent with Burundi's express obligations under…the Treaty to observe the principles of good governance, including in particular, the principles of adherence to the rule of law, and the promotion and protection of human rights." Furthermore, the "occupation and exploitation of the Applicant's property is unlawful and is an infringement of" the Treaty.

At the same time, however, the judges disallowed the applicant's other requests—namely a declaration that all of the land in question belongs to the applicant and "all illegal constructions have to be immediately demolished," an order that Burundi "restitutes the full property to the Applicant," and a declaration that the applicant has "a full right to enjoy the property right on the land."

Antony Calist Komu vs. the Attorney General of the Republic of Tanzania

The applicant in this case had sought election in Tanzania as a representative to the EALA, in an election conducted by the National Assembly of Tanzania. He was unsuccessful in his efforts, and he filed this case to challenge the election process, alleging that Tanzania had violated the terms of the Treaty. The National Assembly had conducted the elections in four categories—women, opposition political parties, Zanzibar, and Tanzania mainland. As the sole candidate for his political party, the applicant believed he ought to have been guaranteed election; he was bypassed, however, in favor of candidates from smaller political opposition parties. The applicant argued that, in properly representing the political parties found in the National Assembly, there ought to be a category for both "official opposition party" and "other opposition parties."

On this subject, as we have seen above, the Treaty merely states the National Assembly of each states shall elect the EALA members "who shall represent as much as it is feasible, the various political parties represented in the National Assembly, shades of opinion, gender and other special interest groups in that Partner State"—a naturally vague guideline. In its own legislation, the Tanzanian government had determined that "proportional

representation of the various political parties with representation in parliament" would be the primary criteria for abiding by the terms of Article 50 of the Treaty.

The judges did not agree firmly with either side. They ruled that "to the extent only that the rules for election of Tanzania's representatives to the EALA are framed in such a way as to make political parties the sole grouping under Article 50 to form the basis for an election, then there was a violation of the Treaty." No specific demands were made of the Tanzanian government, aside from paying part of the applicants' legal fees.

African Network for Animal Welfare (ANAW) vs. the Attorney General of Tanzania

The subject of this case, which shall be examined at length in the following chapter, was a proposal by the Tanzanian government to construct a highway that cut through the Serengeti National Park. The applicants challenged the proposal on environmental grounds, referencing irreversible damage that such a road would cause to the park and the massive ecosystem that it contains. Multiple provisions within the EAC Treaty commit the member states to "conserve, protect and manage the environment and natural resources" in the region.

The case was decided primarily against the Tanzanian government, with the judges ruling that the highway as it was initially proposed (i.e. a paved road), constituted an infringement of the EAC Treaty, though it left open the option for a road to be constructed in a slightly different form.

Conclusion

There are several relevant points to note at the end of this chapter, which has given a broad overview of the EACJ and the cases that have come before it. The first is that these

cases have covered a wide range of topics. This is significant in and of itself, for if the EACJ was indeed created merely as a tool to facilitate economic growth through regional integration, it has without question become something more than that in the ensuing years. Less than twenty-five percent of the cases ruled on in the past decade have been wholly economic in nature. And even though many of the other issues adjudicated on—elections to the EALA, the addition of South Sudan to the EAC, etc.—could easily be seen as relevant for the larger success of the integration program, the existence of nine human rights-oriented cases still suggests that this court has become about something more than simply enabling economic growth.

The restrictions imposed on the court in 2007 were implemented very early on in the EACJ's lifespan; the *Nyong'o* decision that sparked them was, in fact, only the second decision the court had ever issued. This will be examined in greater detail in the following chapter, but there can be little doubt that these amendments demonstrated the Kenyan government's discomfort with the court's willingness to issue decisions in conflict with the interests of the state, or that they represented an effort to curtail the court's ability to undermine said interests. This in itself is not particularly surprising, and would suggest that the states had never wanted the EACJ to be anything more than an empty shell, an organ of the EAC that would consistently uphold their own decisions, or else just languish in its disuse.

What is perhaps more striking, however, is what happened next. To be sure, the restrictions have proved a significant check on the court's abilities; the overview above demonstrates in particular how human rights cases have been easily blocked by the two-month statute of limitation. The court has not stopped functioning, however. Nor has it resigned itself to being a puppet of the states that created it. On 11 different occasions, or one

third of all decisions issued, the judges have ruled against either individual member states or the EAC as a whole—several of which cases centered on the rules of procedure for national elections to the EALA, the very subject of discussion in the *Nyong'o* case.

The rulings have not been sweeping, perhaps, but nor have they been insignificant. The court has demonstrated a willingness to hold states accountable to their commitments. The court may at times have been timid, and it has not been overly activist in extending its own authority and jurisdiction—multiple cases were dismissed because the court found that it lacked jurisdiction over the case, and even some decisions that were made in favor of the applicant did not actually demand any action on the part of the respondent to redress the situation. At the same time, however, the court has made demands of the member states, it has issued injunctions prohibiting certain behavior, and it has even carved itself a niche in the region's human rights jurisprudence, something that seems not to have been envisioned by the partner states at the time of founding. And while it would be misleading to suggest that states have instituted sweeping policy changes in order to comply with the court's decisions. nonetheless there has been a demonstrated unwillingness to ignore these rulings either.

In the following chapter, I offer a closer, more detailed examination of three of the aforementioned winning court cases, which will give a better sense of what these decisions have looked like and how they have been received by the member states involved. After that, I will endeavor to provide some more lengthy conclusions.

Chapter IV
Three Case Studies of the EACJ

The following three cases offer insights into particular aspects of the EACJ. The first, *Nyong'o*, demonstrates an early source of conflict between the EACJ and its member states, when the court's demonstrated unwillingness to serve as a pawn of state interests provoked fierce and rapidly implemented backlash by an apoplectic Kenyan government. The second, *Katabazi*, resulted in the EACJ's first assertion of a human rights jurisdiction, despite the refutations of the Ugandan government. Finally, *ANAW vs. Tanzania* is a recent and particularly high profile example of the court openly flouting the expressed preferences of a member state. Taken together, the three cases give a sense both of the willingness of the EACJ to issue politically controversial decisions in the face of clear state resistance, and of the obvious limits faced by the court in undertaking this.

Early Backlash: The Nyong'o Case

In 2006, a case, *Prof. Peter Anyang Nyong'o and Others vs. the Attorney General of Kenya and Others*, came before the EACJ, challenging the process through which the Kenyan government had selected the country's nine representatives to the East African Legislative Assembly. Instead of an election, as stipulated by the Treaty, "the Kenyan government had divided up the EALA seats among the country's political parties in proportion to their strength in the Parliament."[1] This was seen by many as "part of a broader procedural maneuver to control the domestic legislative agenda and renege on promises to share power."[2] An op-ed entitled "East Africans Deserve Better Representation," written by the CEO of the

[1] Alter et al. (2015) 13.
[2] Ibid.

East African Law Society shortly after the nominees were selected, stated that in Kenya, as well as in Uganda, "the bigger political parties have arrogated themselves the power to decide how East Africans will be represented in the regional assembly," and that the "noble objectives and ideal processes" laid out in the EAC Treaty had been "thrown out of the window."[3]

This was only the EACJ's second case, and it ultimately ruled in favor of the plaintiffs, declaring that the Kenyan government held a "fictitious election in lieu of a real election" and had therefore breached the Treaty.[4] Months before this final decision, however, the court issued an interim ruling barring "Community officials from recognizing Kenya's slate of nominees until the court had decided the case on the merits."[5] Nairobi was furious. Kenyan president Mwai Kibaki stated at a meeting of the EAC heads of state that their countries had yet to cede sovereignty to regional institutions like the EACJ, and that any attempt by an EAC institution to exceed the power granted to it would "amount to gross violation of the letter and spirit of the Treaty and serve to undermine the vision" of the East African Community.[6] The Kenyan attorney general stated in no uncertain terms that the nomination of candidates for the EALA was a matter "to be left to the partner states."[7]

Before a final ruling on the case had even been issued, the Kenyan government, incensed by the court's effrontery, spearheaded a campaign "to kill the sub-regional court or bring judges under greater member state control."[8] It found little support, however, from the Ugandan and Tanzanian governments, who were resistant to the idea of "regionalizing

[3] Deya, Donald. "East Africans Deserve Better Representation." Editorial. *The East African* 29 Aug. 2006. Print.
[4] *Nyong'o* 43.
[5] Alter et al. (2015) 13.
[6] "Kibaki Rails At EAC Court As Rwanda, Burundi Join Up." *The East African* 5 Dec. 2006. Web.
[7] "Wako - EA Court Has No Power Over Nomination of Assembly." *Daily Nation*. 26 Nov. 2006. Web.
[8] Alter et al. (2015) 13.

Kenya's domestic political squabbles."[9] Kenya's campaign also provoked a response from civil society, most notably the East African Law Society, which "published editorials in the press and sent letters to the presidents of the three EAC member states."[10] In a statement released in the aftermath of the interim order, the law society cautioned against the "disparaging and ridiculing tone" that the Kenyan government had taken towards the court. The statement declared, "The comments may be interpreted as trying to bully and intimidate the court into ruling a particular way, which would be in violation of the Treaty."[11]

When killing the court altogether proved an impracticable course of action, Kenya threatened to oust the two sitting Kenyan judges, one of whom was the court's president. The judges were asked to recuse themselves from the case. When they did not, the Kenyan government filed an application before the court requesting their disqualification, on the grounds that the two judges were biased against the Kenyan government after having been suspended from their national posts on corruption charges. These corruption charges quickly came under "critical scrutiny," however, creating a somewhat embarrassing situation for the Kenyan government.[12] The EACJ dismissed the application, stating bluntly,

> We are constrained to say that any reasonable court would conclude as we are inclined to do, that this application was brought more out of a desire to delay the hearing of the reference than a desire to ensure that the applicant receives a fair hearing. In our view, this is tantamount to abuse of court process, and we would be entitled to dispose of the application on that finding alone.

[9] Ibid. 14.
[10] Ibid. 13.
[11] "Wagging Tongues over EALA Ruling 'is Contempt of Court'." *The Arusha Times* 9 Dec. 2006. Web.
[12] Alter et al. (2015) 15.

Meanwhile, the Kenyan government had no power to oust the judges from their post unilaterally; EACJ judges could only be removed from office if the EAC appointed a "tribunal to investigate their conduct…Any decision taken by the Judicial Service Commission in Kenya, which recommends the appointment of judges, has no influence over the conduct" of the Court.[13]

With this plan also foiled, Kenya tried a third approach, proposing amendments to the EAC Treaty that would reduce the authority of the Court. These amendments were proposed, drafted, and adopted with such "exceptional haste" as to suggest "the depth of Kenya's desire to limit the EACJ's review powers and to circumvent EAC institutional processes that might have blocked or weakened its proposal."[14] News coverage at the time suggested that Kenya had "arm-twisted" its fellow member states into agreeing to these amendments.[15]

Principal among the amendments were a restructuring of the Court into two divisions (a First Instance Division and an Appellate Division) and the establishment of a two-month statute of limitation "for cases brought by legal and natural persons." [16] In addition, new grounds were added for removing judges from the EACJ; a judge could now be removed if he or she held public office in a partner state and was removed, or resigned, from that position as a result of misconduct or an inability to perform his or her duties. This seemed to draw directly from the present case, in which Kenya had been foiled in its efforts to remove two judges for alleged wrongdoing in their national posts. There was also an amendment denying the EACJ's jurisdiction over "matters delegated to another member state organ"—essentially

[13] "Kibaki Rails At EAC Court As Rwanda, Burundi Join Up." *The East African* 5 Dec. 2006. Web.
[14] Alter et al. (2015) 16.
[15]"Irate Kibaki Clips Wings of EAC Judges." *The East African*. N.p., 19 Dec. 2006. Web.
[16] Gathii 24.

allowing the governments alternative fora for settling issues they did not want to see before the court.[17]

Shortly after these changes were put into effect, the East African Law Society, along with national law societies from Tanzania and Uganda, filed a case with the EACJ challenging the legality of the amendment process under the Treaty, asserting that it would "sound the death knell for the EAC" if the said amendments were implemented. The Court, in response, found that "the failure to carry out consultation outside the Summit, Council and Secretariat was inconsistent with a principle of the Treaty and therefore constituted an infringement of the Treaty," and it rejected as "veiled intimidation" the allegation of the Kenyan government that "the hurried process…was necessitated by the loss of public confidence in the court."[18] The court declined, however, to invalidate the amendments, stating that the "infringement was not a conscious one" and was "not likely to recur."[19]

Despite the furor the *Nyong'o* decision evoked from the Kenyan government, the ruling was ultimately complied with. Kenya initially argued that the EALA should be sworn in with the current set of nominees, advocating for an interpretation of the court's decision that did not call for a fresh set of elections. The governments of Uganda and Tanzania, however, rejected this plan. The Ugandan government said that it would be unlawful "to swear in the very individuals whose selection has been found to be in contravention of the Treaty," and suggested that Kenya revise the "impugned rules and thereafter select its representatives." Tanzania "observed that the judgment is binding on all partner states."[20]

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[17] Alter et al. (2015) 17.
[18] East African Law Society and 4 Others vs. Attorney General of Kenya and 3 Others. Ref. No. 3 of 2007.
[19] Ibid.
[20] Nyamboga, Nyakundi. "Partner States Decline to Support Kenya's Plea." *The Standard* [Nairobi] 9 May 2007. Web.

Eventually, Nairobi undertook to revise the election process. The Kenyan attorney general, who had so doggedly defended the country's nominations in the weeks following the court's decision, eventually acknowledged, "The nomination rules must provide for direct election of representatives, which was not the case before."[21] Kenya ultimately submitted the names of its nominees under a new set of rules, and the EALA was sworn in after nine months in limbo.

There are several things to take away from the *Nyong'o* case. As one of the court's earliest rulings, the response from Nairobi is telling. Even as the partner states were investing in the successful integration of the East African Community, the Kenyan government seemed entirely unprepared for an EACJ ruling that subverted its own immediate interests. Kenya saw this case as a straightforward matter of state sovereignty, and was incensed that the court would dare to infringe upon that. Apparently to ensure that it would never again be undermined, the government promptly took action to lessen the court's authority, implementing new policies that limited the jurisdiction of the EACJ, including establishing new methods of removing judges from office. Helfer and Slaughter's theory of constrained independence suggests that states will warn ICs when they have exceeded the limits of their power. When one considers, however, the severity of the restrictions imposed on the court in the wake of its interim ruling, and the ferocity and rapidity with which Kenya pursued this campaign, it looks less like a warning than an attempted death sentence. Kenya was doing more than cautioning the court against overstepping its authority; it was putting into place the mechanisms to ensure that the EACJ would not have the capacity to do so again.

If we stop the story there, then the realist theory begins to seem rather plausible. The court, it would appear, was never meant to be anything more than a handmaiden of the states'

[21] Otieno, Jeff. "East Africa: Kenya to Name New Members." *Daily Nation* [Nairobi] 11 May 2007. Print.

interests. Perhaps the member states had created it to facilitate the region's economic development. Perhaps they saw similar courts in the ECOWAS and SADC regions and determined it to be a reasonable model to follow. Perhaps they anticipated that it would serve a basic problem-solving function that would be useful in their ongoing integration efforts, without taking on any more problematic roles. That the court's first ruling against a member state would provoke such intense backlash certainly conveys that Kenya, at the very least, had never truly intended to cede any real power to this institution. That the Kenyan government then proceeded to put into place a new series of checks on the EACJ's authority, bringing it, in theory, closer into alignment with the realist model, only further proves this point.

The story does not stop there, however. Even as Kenya raged, even as the court saw its own powers slashed in a matter of days, the EACJ nonetheless refused to be intimidated. First it dismissed the application for the recusal of the two Kenyan judges, calling this request out as an essentially baseless ploy. It then issued its final ruling in favor of the applicants, upholding its decision in the interim order rather than backing down. What's more, Kenya, for all of its loudly voiced outrage, ultimately complied with the court's decision, changing its rules of procedure accordingly.

The Kenyan government, meanwhile, was sharply criticized for its actions throughout the whole ordeal. Uganda and Tanzania urged compliance with the court's decision, as the progress of the community was stalled for months before Kenya finally adjusted its process and the Assembly was sworn in. The media also cast an unfavorable light on Nairobi at the time, with headlines throughout the region reading: "Kenyan Madness Has Reached EAC,"[22]

[22] Okungu, Jerry. "Kenyan Madness Has Reached EAC in Arusha." Editorial. *The New Vision* [Kampala] 21 Nov. 2006. Print.

"Wagging Tongues Over EALA Ruling is Contempt of Court,"[23] "Kenya Is Guilty of Judicial Interference,"[24] "Kibaki rails at EAC Court,"[25] "State Faulted on EA Judges,"[26] "Kenya's Move Shows Political Immaturity,"[27] "Kenya's Plot to Amend EAC Treaty Deemed 'Illegal,'"[28] and "Jobless MPs Blame Kenya Over Crisis."[29]

The *Nyong'o* case, and all that ensued from it, also demonstrate the limits of the court's boldness, however. When regional law societies filed the subsequent case challenging the validity of the Treaty amendments, the court was only willing to go so far in its own defense. Even while acknowledging that these amendments—undertaken as they were without any input beyond the community heads of state—represented a violation of the EAC Treaty, nonetheless the court refused to annul them, making instead the rather spurious claim that the violation was unintentional and was unlikely to happen again.

The post-*Nyong'o* amendments have certainly helped to shape the trajectory of the EACJ. Several cases have been dismissed on the grounds that they are "time-barred," filed outside of the two-month statute of limitation that now applies to all private litigants. The establishment of the appeals court, meanwhile, has created new means for states to challenge the initial rulings, and a handful of decisions have been overturned in this way. It is worth noting, however, that, despite the addition of new grounds on which to remove EACJ judges from office—a seemingly blatant response to Nairobi's failure to remove its own nationals from their post in the *Nyong'o* case—that particular amendment has never been evoked; in the ten years that it has been operating, the EACJ has never seen a judge removed from office.

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[23] "Wagging Tongues over EALA Ruling 'is Contempt of Court'." *The Arusha Times* 9 Dec. 2006. Web.
[24] Mati, Mwalimu. "Kenya Is Guilty of Judicial Interference." Editorial. *The East African* 26 Feb. 2007. Web.
[25] "Kibaki Rails At EAC Court As Rwanda, Burundi Join Up." *The East African* 5 Dec. 2006. Web.
[26] Ngige, Francis. "Tate Faulted On EA Judges." *The Standard* [Nairobi] 13 Dec. 2006. Web.
[27] Waiswa, Abudu. "EACJ - Kenya's Move Shows Political Immaturity." Editorial. *East African* 2 Jan. 2007. Web.
[28] "Kenya's Plot to Amend EAC Treaty Deemed 'Illegal'" *The East African* 30 Jan. 2007. Web.
[29] "East Africa: Jobless MPs Blame Kenya Over Crisis." *Daily Nation* [Nairobi] 16 Apr. 2007. Web.

It is also worth noting that, despite these new limitations, the *Nyong'o* backlash was far from a death sentence for the EACJ. As we saw in the previous chapter, the court has gone on to rule in favor of the applicants in one third of the decisions it has issued to date. Two more such cases will now be examined in greater detail in the remainder of this chapter.

The *Katabazi* Case and the establishment of a human rights jurisdiction

In late 2007, the same year as the *Nyong'o* ruling, the EACJ issued what would become a landmark decision for the unofficial human rights jurisdiction of the Court. The case, *James Katabazi and 21 Others vs. the Secretary General of the East African Community and the Attorney General of the Republic of Uganda*, involved a group of 16 individuals in Uganda who had been detained on charges of treason in 2003. The men were members of the People's Redemption Army (PRA), and were charged—along with Kizza Besigye, president of the opposition party Forum for Democratic Change (FDA)—for their alleged membership in a rebel movement.[30] The individuals were held in detention for two years, before they were finally released on bail by the Ugandan High Court in 2005. On the day of their release, however, the plaintiffs were surrounded at the Kampala courthouse by the Black Mamba squad, a "sinister heavily-armed anti-terrorism division of Ugandan government security."[31] The individuals were promptly rearrested and returned to maximum security prison, and they were later brought up on terrorism and firearms charges before the General Court Martial.[32] This siege on the court was condemned by the chief judge of the Ugandan High Court as a

[30] "Uganda: Government Gunmen Storm High Court Again." *Human Rights Watch*. 6 Mar. 2007. Web.
[31] Dewey, Gudrun. "A Reflection on Real Security for Uganda." *Commonwealth Human Rights Initiative* 14.1 (2007). Web.
[32] "Uganda: Government Gunmen Storm High Court Again."

"despicable act" and a "rape of the judiciary."[33] He declared that this was "the most naked and grotesque violation of the twin doctrines of the rule of law and independence of the judiciary."[34] The Ugandan military at the time defended the deployment of the security forces and re-arrest of the 16 men by saying they had reason to believe the individuals were likely to skip bail if released.[35]

Despite two rulings by the Ugandan Constitutional Court declaring the court-martial of the PRA suspects illegal and ordering their immediate release, much of the group nonetheless remained in detention. Some were released through the national Amnesty Act, "which provides individuals with amnesty from criminal prosecution in exchange for renouncing armed rebellion."[36] In 2007, a hearing was convened in the Ugandan High Court to hear a challenge by the government to the original November 2005 bail order. The court ultimately ruled that five of the nine men still imprisoned were to be released "pursuant to the original 2005 bail conditions."[37] Following this decision, just as had happened in 2005, "approximately 30 prison officers and 25 armed men [who were] believed to be members of the army…stormed the registrar's office" and attempted to seize the men.[38] A standoff ensued, ending hours later when the security forces agreed to leave the premises. However, when the newly freed men attempted to leave the building, they were apprehended by security forces, beaten, and taken away in police vehicles. The following day, all five of them, as well as five other PRA suspects, were "presented before magistrate courts" in two separate regions in Uganda "on murder charges stemming from 2002 and 2003."[39]

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[33] Ibid.
[34] "Ugandan Judge's Fury at Military." *BBC News* 18 Nov. 2005. Web.
[35] Ibid.
[36] "Uganda: Government Gunmen Storm High Court Again."
[37] Ibid.
[38] Ibid.
[39] Ibid.

Furious at the actions of the Ugandan security forces, judges and lawyers in Uganda went on a weeklong strike, declaring that "organs of the government have repeatedly disregarded the authority of the judiciary by ignoring its directives."[40] The International Commission of Jurists "condemned the incident and urged Uganda to respect the independence and freedom of the judiciary."[41] Human Rights watch called on Museveni to ensure "a full and impartial investigation" of the incident, "to act in accordance with international policing standards," and to "ensure that proper procedures are followed in the new cases opened against the PRA suspects."[42]

The *Katabazi* case was filed in August 2007 by the 16 individuals who had been rearrested in the first raid on the Ugandan High Court in 2005. The lawyers for the applicants stated that they were "appealing to the court of public opinion," and would reach out to civil society organizations like the East African Law to voice their support.[43] The applicants sought declarations that the actions of the armed men to prevent the enforcement of the Ugandan High Court's decision was an infringement of the EAC Treaty, that the action further infringed on the "fundamental principles of the Community in particular regard to peaceful settlement of disputes," and that the refusal of the Attorney General to enforce the decision of the High Court and the Constitutional Court was a violation of the Treaty, as was the "continual arraignment of the applicants who are civilians before a military court."[44] The overarching argument was that "the acts complained of violated one of the fundamental

[40] Ugandan Judge's Fury at Military."
[41] Ibid.
[42] "Uganda: Government Gunmen Storm High Court Again."
[43] Olupot, Milton. "East Africa: People's Redemption Army Take Case to EA Court." *The New Vision* [Kampala] 8 Jan. 2007. Web.
[44] *Katabazi* 3.

principles of the Community…that is, the rule of law."[45] The lawyer for the plaintiffs "pointed out that the acts complained of constituted contempt of court and also interference with the independence of the judiciary. He concluded that both [of these] contravene the principle of the rule of law."[46]

The respondents argued both that, as this same case was already before the Ugandan Constitutional Court, the EACJ had no jurisdiction with which to decide it, and also that the EACJ did not have "jurisdiction to deal with matters of human rights until jurisdiction is vested under Article 27(2)," and the reference should therefore be dismissed.[47] The court countered the first point by noting that, though the issues may be similar, the parties in this case were not the same as those before the Ugandan Constitutional Court—and while the Constitutional Court case was to determine whether there had been a violation of the Ugandan constitution, this case was to determine whether there had been a contravention of the EAC Treaty.

As for the second point, the EACJ readily acknowledged that it did not have jurisdiction over human rights issues. It went on to note, however, that in the EAC Treaty, the partner states "undertake to abide by the principles of good governance, including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights."[48] It therefore determined that though the Court would not "assume jurisdiction to adjudicate human rights disputes, it will not abdicate

[45] Ibid. 9.
[46] Ibid. 10.
[47] Ibid. 12.
[48] Ibid. 16.

from exercising jurisdiction of interpretation…merely because the reference includes allegations of human rights violation."[49]

With this matter settled, the court turned to the more substantive matters of the case. The respondents had argued that all the actions undertaken—"the surrounding of the Court, the re-arrest, and therefore, the non observance of the grant of bail, and the re-incarceration of the complainants"—were all done "in good faith to ensure that the complainants do not jump bail and go to perpetuate insurgency." The judges ruled this explanation "unjustified," asserting that "the end does not justify the means." While acknowledging "the responsibility of the executive…to ensure the security of the State," nonetheless the decision stated, "the role of judiciary to provide a check on the exercise of the responsibility in order to protect the rule of law cannot be gainsaid." The court therefore ruled that the armed intervention to "prevent the execution of a lawful Court order violated the principle of the rule of law and consequently violated the Treaty."

Other than requiring the state to pay the legal costs of the applicants, the ruling made no explicit demands of the Ugandan government.

Like in the *Nyong'o* case, the EACJ had public opinion on its side with *Katabazi*. The court case itself, admittedly, did not receive a great deal of attention, but the issue on which it centered certainly did. In both instances of judicial interference by the security forces, in 2005 and 2007, the Ugandan government was strongly censured by domestic and international observers alike. There was significant media coverage of the incidents, amplified, in 2007, by the strike of lawyers and judges that followed.

The EAC has yet to operationalize a protocol granting human rights jurisdiction to the EACJ. Yet, as the last chapter demonstrated, this de facto human rights jurisdiction has

[49] Ibid.

continually been referred back to by the court. While member states continue to question the court's jurisdiction to rule on such cases, no serious efforts have been undertaken to strip the court of this authority, and it has subsequently ruled on more human rights cases than any other topic.

ANAW vs. the Attorney General of the United Republic of Tanzania

One of the EACJ's most recent cases sparked a significant amount of buzz both in and out of the EAC, for it centered on an issue that has been highly controversial over the past several years, and it was followed closely by interested observers well beyond East Africa. The case, *African Network for Animal Welfare (ANAW) vs. the Attorney General of the United Republic of Tanzania*, dealt with a proposal by the Tanzanian government under President Kikwete to construct a tarmac highway across the Serengeti National Park—the iconic East African game reserve, UNESCO World Heritage Site, and home to the annual great migration, considered one of the most spectacular wildlife events in the world, in which over a million wildebeest travel en masse between the Serengeti in Tanzania and the Maasai Mara in Kenya.

The proposed highway, which would stretch 300 miles, traversing the Serengeti for some of that distance, was initially brought to the world's attention in the lead-up to Tanzania's 2010 presidential elections. President Kikwete, facing what some called "the feistiest presidential race" in Tanzania's history, made the project's completion one of his campaign promises.[50] "Officially, the road was supposed to boost Tanzania's economy by linking isolated, impoverished Serengeti villages outside the park with the Tanzanian city of Arusha, to the east, and the shores of Lake Victoria and other central African nations, to the

[50] Gettleman, Jeffrey. "Serengeti Road Plan Offers Prospects and Fears." *New York Times* 30 Oct. 2010. Web.

west."[51] There were other economic benefits anticipated as well. Natural resources like gold, soda ash, oil and minerals, found in Tanzania and its neighboring countries, "could enrich the country, if only they could get from one end of Tanzania to the other. The highway would link the ports of eastern Tanzania with not only the mineral-rich areas of Lake Victoria but also the bordering interior countries to the west."[52] A road already existed along much of this path through the Serengeti, but it was almost entirely dirt, used by tourists and the Tanzania National Parks Authority (TANAPA).

The international backlash against Kikwete's plan was swift and fierce. Environmentalists and conservationists, appalled at the damage this highway would do to one of the world's most precious ecosystems, began a steady campaign to change the government's mind. Impassioned op-eds were published (including a piece in the *New York Times*) emphasizing the irreparable harm that would be done by this construction project. Of particular concern was the probability that such a highway would disrupt, or halt altogether, the annual wildebeest migration, a spectacle that not only brings in hundreds of thousands of tourists each year, but is also instrumental in maintaining the delicate balance of an ecosystem that includes not only the Tanzanian park but also its Kenyan neighbor, the Mara. A study was commissioned to explore the possibility of constructing an alternate road, one that skirted the boundaries of the park. A change.org petition entitled "Stop the Serengeti Highway" received over 17,000 signatures.[53]

In late 2010, chief executives from UNESCO, the International Union for Conservation of Nature, and the World Wide Fund for Nature, three prominent global

[51] Than, Ker. "Hold the Champagne: Highway to Split Serengeti After All?" *National Geographic News*. National Geographic, 28 June 2011. Web.
[52] Seal, Mark. "The Fight Over the Serengeti Highway." *Departures*. 19 Sept. 2013. Web.
[53] "Petitioning Prime Minister Hon. Mizengo Kayanza Peter Pinda and 5 Others STOP THE SERENGETI HIGHWAY." *Change.org*. Web.

environmental organizations, appealed Kikwete's plan, asking him to reexamine the proposal. "Your country's national parks play a vital role in conserving biodiversity and therefore providing a solid foundation for the prosperity and health of your citizens," their letter read.[54] "Modern economy should not by any means be at the expense of nature," stated the UNESCO director general.[55]

In the midst of all this, in December 2010—just over a month after Kikwete was reelected with 63% of the vote, in elections that were deemed to be largely free and fair—a case was filed with the East African Court of Justice by the African Network for Animal Welfare (ANAW), a registered Kenyan NGO and a self-declared "pan-African animal welfare and community-centered organization."[56] ANAW asserted that the highway being proposed by the Tanzanian government "would have deleterious environmental and ecological effects and is likely to cause irreparable and irreversible damage to the delicate ecosystem of the Serengeti and adjoining national parks."[57] More importantly, the applicant alleged that the proposed project was a violation of the EAC Treaty, which committed the partner states "to conserve, protect and manage the environment and natural resources," and to "cooperate in the management and utilization of natural resources within the Community and to abstain from any measures that would jeopardize the attainment of the objectives of the Treaty in that regard."[58]

It would be nearly four years until the EACJ issued a decision on this case. In the meantime, Kikwete appeared to be quickly losing resolve in the face of sustained, highly

[54] Liganga, Lucas. "Govt Still Undecided On Serengeti Highway." *The Citizen* [Dar Es Salaam] 12 Dec. 2010. Web.
[55] Ibid.
[56] *ANAW* 2.
[57] Ibid. 4.
[58] Ibid. 5.

vocal international pressure. In June 2011, a letter, signed by the Tanzanian Minister for Natural Resources and Tourism, was sent to the UNESCO World Heritage Centre, clarifying the government's plans for the highway. Stepping back from its original plans for a paved tarmac road, the letter stated that "the 53 km section traversing Serengeti National Park will remain gravel road and continue to be managed by TANAPA mainly for tourism and administrative purposes as it is now."[59] The letter went on to say that the road would "not dissect the Serengeti National Park and therefore will not affect the migration and conservation values of the Property."[60]

While some praised the Tanzanian government for its apparent concession to environmental concerns, others were less convinced. The referenced "53 km section traversing Serengeti National Park" appeared to be referring to a "currently existing, poor-quality access road" that is off limits to commercial vehicles without special permissions. Experts pointed out that this existing road was primarily dirt, and the idea that it would "remain gravel" was therefore antithetical.[61] Whether gravel or paved, in the eyes of many conservationists, a road with expanded access to commercial activity, cutting through the park, would be "devastating to the Serengeti wildlife."[62] What's more, many doubted that, once an upgraded gravel road was constructed, it would actually remain gravel for long—anticipating instead that a paved road would eventually be needed to accommodate the levels of traffic the government was expecting to see passing over this highway. According to some

[59] Maige, Ezekial. "State of Conversation of Serengeti National Park." Letter to Director, World Heritage Centre. 22 June 2011. MS. Dar Es Salaam.
[60] Ibid.
[61] Than.
[62] Ibid.

sources, a government report estimated that within twenty years, over one million vehicles would be using the Serengeti highway annually.[63]

This was more or less where the project stood when the EACJ released its decision on the ANAW case in June 2014. No construction was yet underway on the highway, apparently due to a lack of funding, but for Kikwete and his administration the plan was, seemingly, as alive as ever. Though the government had shown no inclination as of yet to contradict its 2011 statement that the Serengeti section would be gravel rather than tarmac, there was also no commitment that a gravel road wouldn't one day transform into a paved highway to accommodate the increasingly heavy traffic.

In *ANAW vs. the Attorney General of Tanzania*, the respondent contended that the road through the Serengeti "has been in existence and in use and has had no negative impacts on the Serengeti ecosystem," and that "the road is merely be upgraded…to stimulate the socio-economic growth of over two million of its citizens and to reduce the prevailing costs of transport."[64] For the section traversing the Serengeti, Tanzania argued, the government's plan was to "upgrade it to gravel status only."[65]

In forming its decision, the court focused not on this revised version of the government's plan, but instead on the initial proposal to construct the entire highway out of asphalt. The judges found that there was "no doubt that [Tanzania] had initially intended to construct a bitumen road…and 53 km of it would have had to go through the park."[66] Noting that the Tanzanian government itself had seemingly been swayed by the environmental concerns associated with this proposal (for not only had the project stalled since its initial

[63] Hance, Jeremy. "Regional Court Kills Controversial Serengeti Highway." *Mongabay.com*. 23 June 2014. Web.
[64] *ANAW* 9.
[65] Ibid. 10.
[66] Ibid. 25.

conceptualization in 2005, and particularly over the last five years, but the government had also revised its plan to include only gravel in the section crossing the Serengeti), the ruling asserted that "all parties now agree that if the initial proposal is implemented, then the adverse effects would not be mitigated by all the good that the road is intended to bring." More pertinent, the judges determined that "there is not doubt that if implemented, the road project as *initially conceptualized* would be in violation of the Treaty."[67]

The court found no legitimacy in the government's argument that, as Tanzania had not yet ratified certain environmental protocols within the EAC, it could not be held accountable on these grounds. The judges instead contended, "Whereas it is true that a protocol is expected to be concluded for each area of cooperation including on the environment and natural resources, non-conclusion of a protocol does not oust obligations placed on a Partner State by the Treaty itself." And the Treaty itself has plenty to say about environmental responsibility. Article 5(3)(c) states that the community partner states shall ensure "the promotion of sustainable utilization of the natural resources of the Partner States and the taking of measures that would effectively protect the natural environment."[68] Article 111(2) commits states to "preserve, protect and enhance the quality of the environment."[69]

In their ruling, the judges acknowledged that they must balance their "interpretative jurisdiction against the needs of ensuring that Partner States are not unduly hindered in their developmental programs."[70] Even with this in mind, however, they were unwilling to give the Tanzanian government carte blanche in continuing this project. If the highway were to be constructed along the lines of the initial proposal, i.e. a paved road, the damage would be

[67] Ibid.
[68] EAC Treaty.
[69] Ibid.
[70] *ANAW*. 31.

"irreversible." In making this decision, the judges "restrained ourselves from merely approving the decision of the United Republic of Tanzania because it may be a popular decision with its policymakers…Whatever orders we must make therefore should be preventative and for obvious reasons: the environment, once damaged, is rarely ever repaired."[71]

In the ruling, the court's final orders were, if limited, then at least firm in what they did assert. First, the court issued a declaration "that the initial proposal or the proposed action by the Respondent to construct a road of bitumen standard across the Serengeti National Park is unlawful and infringes" the Treaty.[72] Second, a permanent injunction was issued "restraining the Respondent from operationalizing its initial proposal or proposed action of constructing or maintaining a road of bitumen standard across the Serengeti National Park."[73]

In the days following the court's ruling on the ANAW case, headlines throughout the region and beyond declared that the EACJ had effectively blocked the construction of the proposed Serengeti highway. In reality, what the decision had blocked was, very specifically, the construction of a *paved* highway across the Serengeti, something the Kikwete had already ostensibly rejected in favor of the gravel road. If the Tanzanian government was genuine in its assertion that the road would remain gravel, this ruling should have had little impact.

Tanzania has, however, responded fairly negatively to the EACJ ruling in the ANAW case. Government representatives have consistently asserted that the court has no jurisdiction over this issue, and that there exists no basis in the EAC Treaty on which to issue a permanent injunction against the construction of the paved road. In September 2014, Tanzania sparked further controversy by refusing to sign onto the EAC environmental protocol, which Kenya

[71] Ibid. 32.
[72] Ibid.
[73] Ibid.

and Uganda had already signed. In October 2014, Tanzania filed an appeal to the ANAW decision, the result of which is still pending.

The EACJ's decision seems, if daring, then limitedly so. On the one hand, in the face of a highly controversial question, one that has been seemingly very important to the Kikwete administration for many years, the court ruled against the Tanzanian government, asserting explicitly its unwillingness to make a certain decision simply because it was politically palatable for the Tanzanian government, and foiling what appears to be the government's true plan—even if it's no longer stated outright—to one day see a paved road cutting through the Serengeti. On the other hand, the court had, for all intents and purposes, the full force of the international community behind it in this ruling, and it was at the same time careful not to expand the scope of this case too far. The ruling dealt only with the hypothetical of a tarmac road traversing the Serengeti, even as conservationists around the world recognized the range of disastrous environmental outcomes that could arise with an upgraded road project short of the paved highway.

Limited or not, however, the decision clearly hit a nerve, for the Tanzanian government was quick to fire back. It is not insignificant, however, that the government's first step was not to undermine the court, or to disregard its ruling entirely, but instead to file an appeal, challenging the decision through the official channels of the EACJ.

Conclusion

Throughout this thesis, I have painted a cautiously optimistic portrait of the East African Court of Justice. It seems obvious that the court's impact is, today, still minimal; it has only two full-time judges and a limited jurisdiction, and it has ruled on just a few dozen unique cases in the fifteen years that it has been operational. And yet, the EACJ has not been insignificant. Most importantly, the court has defied the realist prediction that it would be merely a pawn of the states that created it, issuing rulings strictly in line with state interests. On the contrary, the EACJ has proven itself to be largely independent. Though not sweeping in its judgments, the court has nonetheless shown a consistent willingness to rule against the EAC member states on a variety of issues.

The explanation I offer for the court's qualified success over the last ten years combines elements of functionalist, neo-functional, and liberal theories of international relations. The three founding states of the East African Community had a lot to gain from regional integration, and, subsequently, a lot to lose if the new EAC went the way of its predecessor, disintegrating in the face of seemingly insurmountable political differences. The establishment of a supranational court such as the EACJ served a clear functional purpose—it would raise the costs associated with any one state defecting from its regional commitments, and thereby help ensure the long-term success of the community. Each state was, in theory, willing to cede some degree of sovereignty to the court, in order that it could ensure the cooperation of its neighbors in pursuing the underlying economic objectives of the EAC.

It is easy to look at the backlash following the *Nyong'o* ruling and adopt a fundamentally realist view of the EACJ. Kenya's reaction to the judgment suggested that it had never expected the court to undermine its own interests in this way, and Nairobi promptly

pushed through a series of treaty amendments aimed at bringing the court more firmly under state control. In fact, however, although this incident certainly suggested that the Kenyan government was more concerned, in the moment, with its own immediate-term interests than with the long-term success of the EAC as a whole, this in itself is not sufficient evidence to write the EACJ off as destined to be a puppet of state interests.

Not only did the court stick with its decision against the Kenyan government in the *Nyong'o* case, but in the decade since then it has continued to issue rulings that are at odds with state preferences, facing very little overt resistance from the member states. What's more, even at the time of the *Nyong'o* case, the other EAC countries were clearly unhappy with the idea of allowing one self-interested state to compromise the success of the whole regional program. Though Tanzania and Uganda did ultimately back the treaty amendments proposed by Kenya, they also demonstrated an obvious disapproval of Nairobi's actions, and they pressured the Kenyan government to comply with the court's decision.

I believe the story of the court, after its establishment, can be explained in part by the persistent objectivity of the EACJ judges, helped along at times by civil society in and out of the region, and also by the reluctance of the member states to undermine the court and risk compromising the broader goals of the EAC.

The EACJ judges have, from the beginning, showed an unwillingness to bow to the wishes of the member states. When Kenya lashed out following the interim ruling in the *Nyong'o* case, the court refused to be intimidated, making its final judgment against the Kenyan government even as Nairobi moved to rapidly strip the court of its powers. Since then, the EACJ has continued to prove itself willing to assert its independence in forming judgments at odds with the professed interests of the EAC partner sates.

Meanwhile, though I have not explored this relationship in much depth in this thesis, I believe the court has also been supported at times by civil society members both inside and outside of the EAC. The East African Law Society has been a particularly prominent supporter of the EACJ—it has filed several cases with the court, and it has been very vocal both in praising the court and in condemning governments when they fail to adequately cooperate. More broadly, the three case studies in the last chapter showed how domestic and international forces (e.g. environmental groups in the *ANAW* case, human rights groups in *Katabazi*, the media in all three cases) may have played a role pressuring states to alter their behavior. The role of these "compliance constituencies" is fundamentally in line with the liberal institutional theories of Alter and others.

All of these liberal factors would be largely irrelevant, however, if states had been unwilling to tolerate rulings that did not align with their own preferences. This, I argue, has not been the case. I will not go so far as to say that the establishment of the EACJ has marked a tremendous sea change in state behavior; after all, its rulings often make relatively limited demands of the respondents. Still, the EAC member states have regularly demonstrated, however begrudgingly, a respect for the legitimacy of the court's rulings. The most blatant demonstration of state resistance to the court's autonomy was the *Nyong'o* case, and indeed Kenya's wrath did result in a drastic stripping down of the court's authorities. Yet the regional community did not look kindly upon Nairobi for its behavior, and the Kenyan government, under pressure from its EAC partners, ultimately made the necessary changes to its election procedures.

As the court's caseload has increased over the past decade, member states have found themselves engaged in litigation more and more often. Despite the costs accrued in each of

these legal battles, and in spite of states' regular attempts to dispute, rhetorically, the jurisdiction of the court over any issue believed to be within the realm of state sovereignty, nonetheless the EAC countries have continued to largely cooperate with the judicial body—whether by filing appeals claims through the appropriate channels or by convening negotiations at the national level to determine how best to comply with a ruling.

My explanation for this is grounded in theories of functionalism and neo-functionalism. The EACJ was created to serve a particular practical purpose in the region. At the time of its creation, however, the states could not have known just what this role would look like in the years to come. In its first fifteen years of operation, the court has seemingly moved beyond the bounds of its jurisdiction as initially envisioned by its founders—its move towards a de facto human rights jurisdiction is one particularly noteworthy example of this. Yet it is ultimately in the best interest of the states to allow the EACJ to incrementally expand its authority, rather than sabotaging the court and risking subsequent damage to the economic benefits being reaped from the success of the EAC as a whole.

As the EAC has proven more and more successful over the last fifteen years, bringing significant economic gains to all of its members, the costs of obstructing the community's development for the sake of short-term political gains have become higher and higher. In this way, the EACJ, in slow incremental steps, has become more deeply institutionalized within the region, with relatively little pushback from the states. For the time being, the implications of the court might be limited. And yet, the slow progress of its early history nonetheless offers a potentially promising picture of the development of regional rule of law in the years to come.

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