

FROM TRADE TO RIGHTS AND GREEN GOVERNANCE: UNVEILING THE EAST AFRICAN COURT OF JUSTICE'S JURISPRUDENTIAL METAMORPHOSIS

*Mihreteab Taye*¹

I. INTRODUCTION

The inception of the East African Court of Justice (EACJ) was a significant milestone in the evolution of the East African Community (EAC), aimed at facilitating dispute resolution within the context of regional economic integration. Endowed with the mandate to interpret and apply the East African Community Treaty (EAC Treaty), the EACJ's primary role was envisioned as adjudicating trade disputes, aligning with the intentions of its founders.² However, the EAC Treaty also acknowledges a future expansion of the EACJ's jurisdiction to encompass human rights issues, contingent upon the formalization of a protocol by the Member States to operationalize this extended mandate.³ Despite the absence of such a formal protocol to date, the EACJ proactively broadened its interpretative reach to include human rights matters, leveraging the provisions of the EAC Treaty. This proactive stance by the EACJ reflects a dynamic interpretation of its role and responsibilities, indicating the court's willingness to address diverse legal issues beyond its initial trade dispute remit. This expansion of jurisdiction, even in the absence of a formal protocol, features the EACJ's evolving role in the regional legal field within the EAC.

The transformation of the EACJ into a human rights-oriented court previously received scholarly attention,⁴ with analogous shifts in

¹* Mihreteab Taye, currently a Lecturer at the University at Buffalo School of Law, has previously served as a research scholar at the Center for Human Rights and Global Justice at New York University School of Law. Additionally, he was a Hauser Postdoctoral Global Fellow at the Center for International Law and Global Justice at New York University School of Law. Dr. Taye earned his Ph.D. in Law from Copenhagen University and holds an LL.M in International Law (cum laude) from Erasmus University Rotterdam.

² James Gathii, *Mission Creep or a Search for Relevance: The East African Court of Justice's Human Rights Strategy*, 24 DUKE J. COMP. & INT'L L. 249, 250 (2013); Mihreteab Tsighe Taye, *Human Rights, the Rule of Law, and the East African Court of Justice: Lawyers and the Emergence of a Weak Regional Field*, 34 TEMP. INT'L & COMP. L. 339 (2019).

³ Treaty for the Establishment of East African Community (As amended on December 14, 2006 and August 20 2007), Article 27(2) (1999), <http://www.eacj.org/docs/Treaty-as%20amended.pdf>.

⁴ Gathii, *supra* note 2, at 250; James Thuo Gathii, *The Variation in the Use of Sub-Regional Integration Courts between Business and Human Rights Actors: The Case of*

other regional courts, such as the Southern African Development Community Tribunal (SADCT),⁵ the Economic Community of West African States (ECOWAS) Court of Justice,⁶ and the Caribbean Court of Justice.⁷ Limited yet intriguing analysis exists regarding changes within the Andean Tribunal of Justice and the Central American Court of Justice.⁸ Furthermore, an exploration of the evolving role of the Court of Justice of the European Union (CJEU), following the formal establishment of the EU Charter of Fundamental Rights in 2009, reveals a significant expansion in the CJEU's involvement in human rights adjudication.⁹ This expansion is evident through increased referencing and substantial consideration of the EU Charter of Fundamental Rights provisions in the CJEU's proceedings.¹⁰

This article broadens the scope beyond the typical emphasis on human rights in current scholarship by not only addressing the expansion of the EACJ's jurisdiction to include human rights issues but also exploring its involvement in environmental issues and its potential to adjudicate on matters related to climate change.

The article is structured as follows: Section II begins by tracing the origins of the EACJ, placing it within the wider context of new international courts emerging across Africa. This backdrop provides an understanding of the court's establishment and its intended role within the EAC framework. It further explores the drafting process of the EAC Treaty, revealing the foundational principles and aspirations that guide the court's operations and mandate. The discussion then transitions to an in-depth analysis of the EACJ's human rights and environmental jurisprudence. Beginning with the evolution of human rights case law, it dissects key judgments and their significance in shaping the court's authority. The narrative progresses to examine the court's foray into

the East African Court of Justice, 79 L. AND CONTEMP. PROBS. 37, 37 (2016); Taye, *supra* note 2, at 343.

⁵ Konstantinos D. Magliveras & Gino J. Naldi, *When Politics Prevail Over the Rule of Law: The Demise of the Sadc Tribunal*, 10 INT'L HUM. RTS. L. REV. 124, 124 (2021).

⁶ Karen J. Alter, Laurence Helfer & Jacqueline R. McAllister, *A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice*, 107 J. OF INT'L L. 737, 737 (2013).

⁷ Salvatore Caserta, *International Courts in Latin America and the Caribbean: Foundations and Authority*, ICOURTS WORKING PAPER SERIES NO. 183 1, 5 (2020).

⁸ See generally Karen J. Alter & Laurence R. Helfer, *Transplanting International Courts: The Law and Politics of the Andean Tribunal of Justice*, ICOURTS WORKING PAPER SERIES, NO. 73, 1, 4 (2017); see generally Caserta, *supra* note 6, at 4.

⁹ Gráinne de Búrca, *After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?*, 20 MAASTRICHT J. OF EUR. AND COMP. LAW 168, 169 (2013).

¹⁰ *Id.*

environmental judicial adjudication, marking a fundamental expansion of its jurisprudential horizon.

In Section III, the focus shifts to climate change litigation, a burgeoning area of legal intervention. Here, we explore how the EACJ's approach to environmental jurisprudence could be adapted to address the complex challenges posed by climate change, setting precedents that could influence future litigation strategies within and beyond the EAC. The article then analyzes the impact of the EACJ's declaratory judgments on state compliance. Section IV critically assesses the court's effectiveness in ensuring adherence to its rulings, a crucial aspect that exemplifies the court's authority and the respect for the rule of law within the EAC Member States.

Concluding the discussion, Section V synthesizes the insights gathered from the EACJ's jurisprudence, reflecting on the court's evolving role and its potential trajectory in the spheres of human rights and environmental protection. This exploration not only highlights the EACJ's contributions but also considers its challenges and opportunities for future growth.

II. THE GENESIS OF THE EACJ AND ITS HUMAN RIGHTS AND ENVIRONMENTAL JURISPRUDENCE

The EACJ emerged as a pivotal institution within the East African Community, initially tasked with interpreting and applying the EAC Treaty primarily for trade-related disputes.¹¹ However, the EACJ's foundation marked a crucial turning point as it transitioned from an economic dispute resolver to a multifaceted institution, extending its jurisdiction beyond economic concerns. Initially excluded from its mandate, human rights became a focal point for the EACJ as it grappled with *James Katabazi et al. v. Secretary General of the EAC et al. (Katabazi case)*.¹²

In the *Katabazi* case, the EACJ asserted indirect jurisdiction over human rights through a purposive interpretation of the EAC Treaty. The EACJ ruled that even though it did not possess explicit human rights

¹¹ Treaty for the Establishment of East African Community (As amended on December 14, 2006 and August 20 2007), Article 27 (1999), <http://www.eacj.org/docs/Treaty-as%20amended.pdf>.

¹² See generally *James Katabazi and 21 others Vs Secretary General of the East African Community and Attorney General of the Republic of Uganda*, at 2 (2007), <https://www.eacj.org/?cases=james-katabazi-and-21-other-vs-secretary-general-of-the-east-african-community-and-attorney-general-of-the-republic-of-uganda> (last visited Apr. 5, 2014).

jurisdiction, it had the authority to interpret the EAC Treaty, even in cases where the alleged grievances encompassed human rights violations.¹³ This case marked an evident shift away from the court's conventional economic orientation, and it ignited debates concerning the court's jurisdiction, given the explicit exclusion of human rights matters within the purview of the EAC Treaty.¹⁴ The *Katabazi* case was a legal marker representing the court's evolving role and reflecting the dynamic contours of the EACJ's jurisprudence.

Fast-forward to June 2014, the EACJ expanded its jurisdiction to environmental protection when it issued another landmark environmental ruling, notably in the case of *ANAW v. Tanzania (Serengeti case)*.¹⁵ This case demonstrated the EACJ's audacity in confronting the actions of a sovereign state, particularly regarding a contentious road construction project in Tanzania.¹⁶ This ruling based its legal foundation on the specific provisions embedded in the EAC Treaty that govern environmental matters.

Both the *Katabazi* and the *Serengeti* cases highlight the EACJ's role in interpreting and applying the provisions of the EAC Treaty thereby expanding its jurisdiction. In the *Katabazi* case, the court skillfully harnessed the operational principles of the EAC Treaty to expand upon the rule of law provisions, and while in the domain of environmental issues, in the *Serengeti* case, it invoked the treaty's provisions tailored to environmental matters.¹⁷ These legal pronouncements not only accentuate the EACJ's power in shaping human rights and environmental jurisprudence, but also illuminate the court's adaptability and expanding mandate.

In the sphere of human rights, the EACJ adopts an approach distinguished by a predominantly interpretative stance, thus affording an avenue for the indirect adjudication of human rights claims.¹⁸

¹³ *Id.* at 16.

¹⁴ Liza Chula, *The East African Court of Justice and Human Rights Jurisdiction: Drawing the Line*, 3 STRATHMORE L. REV. 1, 2-3 (2018).

¹⁵ See generally African Network for Animal Welfare (ANAW) v. The Attorney General of the United Republic of Tanzania, 1, 2 (2014), https://leap.unep.org/sites/default/files/court-case/Tanzania_APPEAL-NO-3.pdf (last visited Apr. 5, 2024).

¹⁶ *Id.* at 28-29.

¹⁷ James Katabazi and 21 others Vs Secretary General of the East African Community and Attorney General of the Republic of Uganda, *supra* note 12, at 23; African Network for Animal Welfare (ANAW) v. The Attorney General of the United Republic of Tanzania, *supra* note 12, at 28-29.

¹⁸ See generally James Katabazi and 21 others Vs Secretary General of the East African Community and Attorney General of the Republic of Uganda, *supra* note 11, at 23; see Gathii, *supra* note 1, at 260; Mihreteab Tsighe Taye, *The Role of the East African*

Conversely, in the arena of environmental litigation, the court assumes a more direct role, grounded in the precise treaty provisions germane to environmental matters.¹⁹ As the EACJ Appellate Division acknowledged, the *Serengeti* case's distinction as “the first [e]nvironmental [c]ase of its kind” within the East African region heightened the court's pioneering role in protecting the environment and through the *Katabazi* case in protecting human rights.²⁰

The implications of these decisions transcend the precincts of the courtroom, exerting an influence on the legal landscape regarding human rights and the environment and informing the conduct of Member States. These developments symbolize a new epoch in the dynamic evolution of the EACJ, representing a transition from its original economic jurisdiction to an institution of substantive influence in the domain of human rights and environmental concerns across the East African region.

A. The EACJ in the Context of New International Courts in Africa

In the early 2000s, “new international courts” emerged in Africa, primarily as regional economic courts.²¹ These courts differed from traditional international courts through innovative accessibility and admissibility criteria, allowing non-state actors to initiate legal proceedings.²² Established to adjudicate economic disputes, three of these courts, the East African Court of Justice,²³ the Southern African Development Community Tribunal,²⁴ and the West African Community Court of Justice,²⁵ are the primary adjudicators of human rights cases today. The rise of new international courts is significant, as national courts in many African countries are often subordinate to powerful

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

¹⁹ African Network for Animal Welfare (ANAW) v. The Attorney General of the United Republic of Tanzania, *supra* note 15, at 28-29.

²⁰ Attorney General of the United Republic of Tanzania v ANAW, (2011), <https://www.eacj.org/?cases=appeal-no-4-of-2015-simon-peter-ochieng-john-tusiime-vs-attorney-general-of-the-republic-of-uganda>.

²¹ KAREN ALTER, *THE NEW TERRAIN OF INTERNATIONAL LAW: COURTS, POLITICS, RIGHTS* 87-88 (2014).

²² Solomon T. Ebobrah, *Litigating Human Rights Before Sub-Regional Courts in Africa: Prospects and Challenges*, 17 AFR. J. INT'L. & COMP. L. 79, 85-87 (2009).

²³ Gathii, *supra* note 2, at 249-250.

²⁴ Frederick Cowell, *The Death of the Southern African Development Community Tribunal's Human Rights Jurisdiction*, 13 HUM. RTS. L. REV. 153, 153 (2013).

²⁵ Alter, Helfer, and McAllister, *supra* note 6, at 737-38.

executives, providing little to no check on executive power.²⁶ The EACJ's shift towards becoming a human rights court exemplifies a broader African phenomenon wherein regional movements gained significance in advancing human rights. Regional movements responded to the incapacity of domestic mechanisms to address human rights violations; they bridged the void left by national courts, often under authoritarian governance, by approaching regional courts to fill the void.²⁷ Consequently, sub-regional courts progressively assumed a role in the advancement of human rights.

The transformation toward human rights application can be attributed to several contributing factors. First, the "third wave of democratization"²⁸ swept across sub-Saharan Africa in the early 1990s, shifting many states from one-party or military regimes to multi-party systems.²⁹ The establishment of regional institutions and international courts accompanied this transition.³⁰ Second, during the late 1990s, a growing desire to involve the public in establishing international courts emerged, coinciding with the rise of vibrant civil society organizations that became integrated into regional frameworks, particularly in East Africa.³¹ Lawyers from civil society organizations, such as the East African Law Society (EALS), wielded substantial influence in shaping the provisions of the EAC Treaty that established the EACJ and made notable contributions to incorporating principles related to the rule of law, good governance, and human rights in the EAC Treaty.³² Third, the emergence of judges who were deeply committed to upholding human rights and the rule of law profoundly impacted the jurisprudence of the EACJ.³³ These judges played a critical role in resisting authoritarian governance and countering formidable forces that threatened the integrity of the rule of law.³⁴

²⁶ RACHEL L. ELLETT, *PATHWAYS TO JUDICIAL POWER IN TRANSITIONAL STATES: PERSPECTIVES FROM AFRICAN COURTS* (1st ed. 2013).

²⁷ JAMES THUO GATHII, *THE PERFORMANCE OF AFRICA'S INTERNATIONAL COURTS: USING LITIGATION FOR POLITICAL, LEGAL, AND SOCIAL CHANGE* 9 (2020).

²⁸ Samuel P. Huntington, *Democracy's Third Wave*, 2 J. DEMOCRACY 12, 12-13 (1991).

²⁹ Peter J. Schraeder, *Understanding the "Third Wave" of Democratization in Africa*, 57 THE J. OF POL. 1160, 1160-1161 (1995) (The first two waves began in the 1820s and the 1940s); Gabrielle Lynch & Gordon Crawford, *Democratization in Africa 1990-2010: An Assessment*, 18 DEMOCRATIZATION 275, 275 (2011).

³⁰ Lynch & Crawford, *supra* note 29, at 276, 284

³¹ Mihreteab Tsighe Taye, *The Role of the East African Court of Justice in the Advancement of Human Rights: Reflections on the Creation and Practice of the Court* 1-30 (Univ. of Copenhagen iCourts, Working Paper No. 145, 2018).

³² Taye, *supra* note 2, at 343.

³³ Taye, *supra* note 2, at 347; Gathii, *supra* note 2, at 259-262.

³⁴ Gathii, *supra* note 2, at 259-262; Taye, *supra* note 2 at 349-351.

In essence, the evolution of EACJ into a platform for human rights adjudication featured a dynamic shift in the region's legal and political landscape. The synergy between democratization, civil society activism, and judicious leadership has not only redefined the scope of the court's authority but also fortified the architecture for human rights protection.³⁵ To fully grasp this transformation, it is essential to investigate the origins of the EACJ, beginning with the drafting process of the EAC Treaty. This foundational phase set the stage for the EACJ and laid down the initial framework that would enable the court to evolve beyond its original mandate. During this period key provisions relating to the rule of law, good governance, and human rights were woven into the fabric of the EAC Treaty, influenced by the participation of civil society, particularly legal professionals and human rights advocates. This participatory approach ensured that the EACJ was equipped from its inception with the potential to adapt and respond to the changing needs and challenges of the EAC, paving the way for the EACJ's eventual transformation into a player in the protection of human rights in the region.

B. *The Drafting of the EAC Treaty*

Lawyers are instrumental in the initial phases of forming international courts. They help determine what can be realistically achieved and provide guidance on whether legal or political tactics would be more effective. As a result, lawyers contribute to the development of both transnational and supranational arenas.³⁶ Using legal discourse, lawyers contribute to raising "rights consciousness."³⁷ In East Africa, lawyers played a crucial role in the creation of the EACJ and in raising "rights consciousness" early in the formation of the EACJ.³⁸ The extent of the EACJ's jurisdiction was contentious from the beginning.³⁹ While law society organizations and legal practitioners pushed for the EACJ's mandate to include human rights matters explicitly, states wanted a court without human rights jurisdiction.⁴⁰

³⁵ Gathii, *supra* note 2, at 250-51.

³⁶ David M. Trubek et al., *Global Restructuring and the Law: Studies of the Internationalization of Legal Fields and the Creation of Transitional Arenas Symposium: The Future of the Legal Profession*, 44 CASE W. RES. L. REV. 407, 407-08 (1994).

³⁷ Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era before "Brown"*, 115 YALE L. J. 256, 346, 349 (2005).

³⁸ Taye, *supra* note 2, at 344.

³⁹ See Solomy Balungi Bossa, *A Critique Of The East African Court Of Justice As A Human Rights Court*, in PROTECTING HUMANITY 333 (Chile Eboe -Osuji ed. 2010).

⁴⁰ The Treaty for the Establishment of the East African Community (As amended on December 14, 2006 and August 20 2007), *supra* note 2, at art. 27(1).

During the negotiations that led to the establishment of the EACJ, lawyers from human rights non-governmental organizations (NGOs) and the EALS advocated for a final appellate jurisdiction encompassing all legal matters, including human rights.⁴¹ Their efforts successfully aimed to equip the EACJ, as an institution of regional integration, with the capacity to safeguard human rights and uphold the rule of law across East Africa.

Despite the Member States' decision to deny the EACJ final appellate jurisdiction over all legal matters, civil society groups and lawyers shaped the EAC Treaty's provisions. The initial rendition of the draft treaty failed to impose comparable obligations to respect the rule of law and good governance on the original partner states vis-à-vis aspiring Member States, which raised concerns among civil society groups, like the EALS, regarding the EAC Treaty's integrity.⁴² Lawyers representing civil society groups argued that all states participating in the treaty must commit to upholding the rule of law and good governance.⁴³ The EALS proposed a revision to address these concerns and strengthen the EAC Treaty's framework.⁴⁴ Recognizing the significance of this criterion, the revised EAC Treaty ensures that all participating states, whether original or aspiring, uphold the rule of law, safeguard human rights, and promote social justice.⁴⁵ Thus, the EALS proposed a new provision that Member States willingly bind themselves to the principles of good governance as prerequisites for community membership.⁴⁶ These principles include adherence to democratic values, the rule of law, social justice, and universally accepted human rights standards.⁴⁷

The revised EAC Treaty emphasizes a commitment to promote responsible governance and foster a unified regional community by including these specific provisions.⁴⁸ Expectedly, the criteria for admission, which encompass concepts like good governance, democracy, and human rights, raised queries regarding their exact interpretation. The recommendations fell short of offering explanations.⁴⁹ Indeed, the admirable notions of "good governance,"

⁴¹ Taye, *supra* note 2, at 342.

⁴² *Id.* at 343.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 346.

⁴⁶ *Id.* at 343.

⁴⁷ *See id.*

⁴⁸ The Treaty for the Establishment of the East African Community, *supra* note 3, at art. 5, 6.

⁴⁹ *See* Taye, *supra* note 2.

"democracy," and "universally accepted standards of human rights" lack clear and universally accepted definitions.

Furthermore, in the context of the EAC Treaty, it became evident that the founding states had full control over how closely they followed the fundamental goals of the EAC Treaty. This approach received criticism, especially in areas related to democracy and the protection of human rights.⁵⁰ Consequently, it was necessary to establish mechanisms for creating and, when possible, enforcing these standards. One potential way to move forward involved reconsidering the role of the EACJ. This meant taking a more rigorous approach to interpreting the EAC Treaty's provisions.⁵¹ According to this approach, the EACJ's focus would shift to directly interpreting the EAC Treaty itself and the laws and protocols established by the EAC. This approach has been reflected in the jurisprudence of the EACJ.⁵²

In sum, civil society organizations wanted the original Member States to commit to upholding the rule of law, good governance, and human rights. This push led to the inclusion of Articles 6(d) and 7(2) in the EAC Treaty.⁵³ Additionally, these groups suggested referencing the African Charter on Human and Peoples' Rights (African Charter) in Article 6(d).⁵⁴ As discussed in the following sections, interpreting these provisions clarified the EACJ's jurisdiction and established a basis for litigating human rights cases before the court despite the clear postponement of human rights jurisdiction in Article 27(2) of the EAC Treaty.⁵⁵ Consequently, cases based on these articles expanded the court's authority to indirectly address human rights matters.

⁵⁰ *See id.*

⁵¹ *See id.*

⁵² *See id.*

⁵³ Mihreteab Tsighe Taye, *The Role of the East African Court of Justice in the Advancement of Human Rights: Reflections on the Creation and Practice of the Court*, 27 AFR. J. OF INT'L & COMPAR. L. 359, 363-64 (2019); The Treaty for the Establishment of the East African Community, *supra* note 3, at art. 6(d), 7(2).

⁵⁴ *Id.* at art. 6(d).

⁵⁵ *Id.* at art. 27(2).

Article 27: Jurisdiction of the Court

1. The Court shall initially have jurisdiction over the interpretation and application of this Treaty, provided that the Court's jurisdiction to interpret under this paragraph shall not include the application of any such interpretation to jurisdiction conferred by the Treaty on organs of Partner States.

2. The Court shall have such other original, appellate, human rights and other jurisdiction as will be determined by the Council at a suitable subsequent date. To this end, the Partner States shall conclude a protocol to operationalize the extended jurisdiction.

C. *Human Rights and Environmental Cases in the EACJ*

The EACJ authority significantly shifted when it broadened its scope beyond economic matters to include human rights and environmental matters. Initially rooted in economic integration, the court gradually ventured into cases that indirectly touched on human rights concerns and environmental matters.⁵⁶ This section explores the defining cases and critical junctures that signify the EACJ's transition from its original economic emphasis to actively participating in and influencing discussions about human rights and environmental matters within East Africa.

i. The Evolution of Human Rights Case Law in the EACJ

The central narrative of the past two decades of the EACJ encompasses its initial struggle against state backlash and its subsequent transition into a human rights court through the systematic circumvention of jurisdictional limitations.⁵⁷ At the core of this story are two cases: the *Nyongo* case,⁵⁸ which symbolizes backlash against the EACJ, and the *Katabazi* case,⁵⁹ which represents the EACJ's resilience. The *Nyongo* and *Katabazi* cases are fundamental in the EACJ's history, characterized by opposition, progress, criticism, and admiration. The court's evolution into a human rights court was made possible by the foundation laid during the drafting process of the EAC Treaty, as discussed in the previous sections, where explicit references to human rights and the rule of law were incorporated.⁶⁰

In the case of *Anyang Nyong'o v. Attorney General of Kenya* (*Nyong'o* case), a dispute concerning Kenya's selection of candidates for the East African Legislative Assembly (EALA), the sub-regional parliament, and the EACJ issued an interim ruling that prevented the swearing-in of the candidates until the court made a final decision on the matter.⁶¹ The Kenyan government swiftly reacted to the *Nyong'o* ruling,

⁵⁶ See *Katabazi*, Ref. No. 1 of 2007 ; See also African Network for Animal Welfare (ANAW), Ref. No. 9 of 2010.

⁵⁷ Karen J. Alter, James Thuo Gathii, & Laurence R. Helfer, *Backlash against International Courts in West, East and Southern Africa: Causes and Consequences*, 27 THE EUR. J. OF INT'L L. 293 (2016).

⁵⁸ See Prof. Anyang' Nyong'o and 10 Others v. The Attorney General Of The Republic of Kenya and 5 others, Ref. No. 1 of 2006 (Nov. 27, 2006), available at <https://www.eacj.org/?cases=eacj-application-no-1-of-2006>.

⁵⁹ *Katabazi*, Ref. No. 1 of 2007, at 16.

⁶⁰ See Taye, *supra* note 2.

⁶¹ *Nyong'o*, Ref. No. 1 of 2006, at 7-8, 10.

expressing strong disapproval.⁶² Kenya pursued various strategies, ultimately amending the EAC Treaty to limit the authority of the EACJ, by dismantling the court surreptitiously.⁶³ Nevertheless, the remaining two Member States, Uganda, and Tanzania, were ardently devoted to invigorating the East African integration endeavor and deemed dismantling the court excessively radical.⁶⁴

Failing to abolish the EACJ entirely, Kenya threatened to remove the court's two Kenyan judges.⁶⁵ This tactic backfired as the EACJ stood firm, and the government eventually acknowledged the lack of grounds for the corruption allegations made against the judges.⁶⁶ Undeterred, Kenya pursued a third strategy—amending the EAC Treaty.⁶⁷ The amendments were hastily proposed, drafted, and approved by the heads of state during an extraordinary summit meeting that bypassed community consultation procedures.⁶⁸

These EAC Treaty revisions transformed the structure, jurisdiction, and access rules of the EACJ. The EACJ was divided into two divisions, and provisions were added to facilitate the removal or suspension of judges facing misconduct allegations at the national level.⁶⁹ The revisions clarified that the EACJ could not hear cases falling under the jurisdiction of domestic institutions as outlined in the EAC Treaty, and introduced a two-month limitations period for filing complaints challenging national actions contrary to the EAC Treaty.⁷⁰ The amendments sparked vehement opposition from civil society groups.⁷¹ The survival of the EACJ owed much to the tireless efforts of the EALS; the organization actively defended the court, utilizing avenues such as publishing editorials in the press, lobbying opposition politicians, filing lawsuits, and sending letters of protest to the presidents of the three Member States.⁷² particularly highlighted the exclusion of civil society

⁶² Alter, Gathii & Helfer, *supra* note 58, at 302.

⁶³ *Id.* at 12; James Gathii, *Mission Creep or a Search for Relevance: The East African Court of Justice's Human Rights Strategy*, 24 DUKE J. COMP. & INT'L L. 249, 268 (2013).

⁶⁴ Alter, Gathii & Helfer, *supra* note 58 at 11.

⁶⁵ Henry Onoria, *Botched-Up Elections, Treaty Amendments and Judicial Independence in the East African Community*, 54 J. OF AFRICAN L. 74, 81 (2010).

⁶⁶ Alter, Gathii & Helfer, *supra* note 57 at 12.

⁶⁷ Onoria, *supra* note 65 at 82.

⁶⁸ Alter, Gathii & Helfer, *supra* note 57 at 13.

⁶⁹ *Id.*; Onoria, *supra* note 65 at 83.

⁷⁰ *Id.*

⁷¹ Alter, Gathii & Helfer, *supra* note 58 at 13.

⁷² *Id.*

groups from the amendment process, voicing their concerns and objections.⁷³

Despite the attempts to discourage the court from asserting its authority in the *Nyong'o* case, the measures implemented proved ineffective in deterring its resolute determination. Hence, a significant milestone challenging the jurisdictional limitation concerning human rights was achieved through the *Katabazi* case.⁷⁴ In this notable legal development, the Ugandan Law Society applied to the EACJ, alleging that Uganda violated specific articles within the EAC Treaty, namely Articles 6, 7(2), and 8(1)(c).⁷⁵ The strategic approach of the application was carefully designed to avoid explicitly claiming substantive human rights violations, thereby preventing any potential advantage for the defendant, which argued the court lacked human rights jurisdiction. However, Uganda contended that the application pertained to matters concerning human rights, thereby asserting that the court's jurisdiction was not applicable in accordance with the provisions outlined in Article 27(2).⁷⁶ This provision stipulates that the court should possess an expanded mandate, encompassing human rights jurisdiction that would be established and put into effect at a later appropriate time, subject to the operationalization of a protocol associated with the EAC Treaty.⁷⁷

Concurring with Uganda's argument, the court acknowledged its lack of jurisdiction concerning human rights issues.⁷⁸ However, the court emphasized its competence in interpreting the EAC Treaty's provisions, even in the context of human rights violations.⁷⁹ As a result of this interpretative power, the court ultimately determined that Uganda transgressed the principle of the rule of law, a fundamental tenet within the EAC.⁸⁰ Surprisingly, despite the ruling against a partner state and bypassing the EACJ's jurisdictional boundaries, the *Katabazi* case did not provoke a negative reaction, leading to a restrained approach by the Ugandan government.⁸¹ The lack of negative reaction can be attributed, in part, to the cohesive unity displayed by the legal society and judges in

⁷³ *Id.*

⁷⁴ James Katabazi, *et al.* v. Secretary General of the East African Community and Attorney General of the Republic of Uganda, *supra* note 12.

⁷⁵ *Id.* at 3.

⁷⁶ *Id.* at 12.

⁷⁷ Treaty for the Establishment of East African Community (As amended on December 14, 2006 and August 20 2007), *supra* note 3 at 27.

⁷⁸ *Katabazi*, *supra* note 12 at 16.

⁷⁹ *Id.*

⁸⁰ *Id.* at 23.

⁸¹ Victor Lando, *The Domestic Impact of the Decisions of the East African Court of Justice*, 18 AFRICAN HUMAN RIGHTS LAW JOURNAL 463, 474 (2018).

steadfastly opposing the actions of the Ugandan government, beginning at the domestic level.⁸²

The *Katabazi* case marked a turning point in the EACJ's jurisdiction, clarifying that although the principle of the rule of law is not a human right in itself, it constitutes a prerequisite for safeguarding human rights.⁸³ Consequently, the EACJ recognized its competence in ensuring compliance with the law and acting as a check on the responsibility to uphold the rule of law.⁸⁴ While the court did not directly address the violation of the applicants' rights, it framed the issue as a breach of the principle of the rule of law, which is a fundamental principle of the community.⁸⁵ The court emphasized that adherence to the decisions of national courts forms the cornerstone of judicial independence and is a necessary element for upholding the rule of law.⁸⁶ The *Katabazi* case demonstrates that human rights litigation is feasible in the EACJ when an act violating the rights in question also amounts to a violation of the EAC Treaty.

The EACJ chose to assert jurisdiction in interpreting the provisions of the EAC Treaty instead of directly claiming human rights jurisdiction when invoking Articles 6(d) and 7(2).⁸⁷ The Court's jurisdiction includes interpreting principles like good governance and the rule of law.⁸⁸ While some criticized the EACJ's human rights jurisdictional expansion as judicial activism and its human rights jurisprudence “as an anomaly,” the need for a human rights claims forum within the EAC was evident.⁸⁹

Exploring alternative mechanisms for addressing human rights claims in East Africa exposed their limitations, thereby elevating the EACJ as a valuable forum for such matters. The African Court on Human and Peoples' Rights represents a potential alternative. However, the accessibility of this court to individuals is contingent upon the ratification of specific declarations by Member States, a condition not fulfilled by any state within the EAC.⁹⁰ It is noteworthy that Tanzania

⁸² Taye, *supra* note 18 at 365.

⁸³ *Katabazi*, *supra* note 12 at 23.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 16.

⁸⁸ Treaty for the Establishment of East African Community (As amended on December 14, 2006 and August 20 2007), *supra* note 3 at 15.

⁸⁹ Gathii, *supra* note 63 at 292.

⁹⁰ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and People's Rights, (1998), <https://www.african-court.org/wpafc/wp-content/uploads/2020/04/Protocol-of-the->

and Rwanda, which previously made such declarations, subsequently rescinded them.⁹¹ Furthermore, the contraction of domestic avenues for the redress of human rights violations further emphasizes the suitability of the EACJ in this domain. This context coincided with a period in which the EACJ, after a pause exceeding five years, sought to assert its relevance by adjudicating cases presented to it.⁹²

The *Katabazi* case serves as a prime illustration of the EACJ's assertiveness, particularly in light of the Member States' hesitation to confer explicit human rights jurisdiction upon the court. This assertiveness became critical due to the EAC Treaty's lack of direct provisions for human rights jurisdiction and the delays in broadening the EACJ's mandate.⁹³ As a result, human rights considerations increasingly became embedded within the EACJ's jurisprudence.⁹⁴ This integration is primarily achieved through the invocation of good governance and rule of law principles, as encapsulated in Articles 6(d) and 7(2) of the EAC Treaty, thereby enabling the court to address human rights issues within its legal framework.⁹⁵

After the *Katabazi* decision, the EACJ issued a series of judgments that cited Articles 6(d) and 7(2) of the EAC Treaty. Particularly, in *Plaxenda Rugumba v. The Secretary General of the EAC and the Attorney General of the Republic of Rwanda (Plaxenda Rugumba case)*, the First Instance Division adopted a direct method in addressing the human rights violation claim.⁹⁶ This approach advanced without the necessity of establishing an explicit connection to the rule of law or the broader principles enshrined within the good governance clause of the

Establishment-of-the-African-Charter-on-Human-and-Peoples-Rights-.pdf. Article 34(6) of the Protocol requires state parties to make a separate declaration to allow individuals and non-governmental organizations (NGOs) to bring cases directly to the court. This declaration allows individuals and NGOs with observer status before the African Commission on Human and Peoples' Rights to file cases directly with the African Court

⁹¹ Tom Gerald Daly & Micha Wiebusch, *The African Court on Human and Peoples' Rights: Mapping Resistance against a Young Court*, 14 INTERNATIONAL JOURNAL OF LAW IN CONTEXT 294 (2018); Nicole De Silva & Misha Ariana Plagis, *NGOs, International Courts, and State Backlash against Human Rights Accountability: Evidence from NGO Mobilization against Tanzania at the African Court on Human and Peoples' Rights*, 57 LAW & SOCIETY REVIEW 36 (2023).

⁹² James Gathii, *supra* note 2 at 253.

⁹³ Treaty for the Establishment of East African Community (As amended on December 14, 2006 and August 20 2007), *supra* note 3 at 27(2).

⁹⁴ Gathii, *supra* note 2 at 253.

⁹⁵ Treaty for the Establishment of East African Community (As amended on December 14, 2006 and August 20 2007), *supra* note 3.

⁹⁶ *Plaxenda Rugumba vs The Secretary General of the EAC and the Attorney General of the Republic of Rwanda*, (2012), <http://eacj.org/?cases=plaxenda-rugumba-vs-the-secretary-general-of-the-eac> (last visited Apr 4, 2024).

EAC Treaty.⁹⁷ This signified a shift in the EACJ's jurisprudence, where it engaged with human rights issues directly, even in the absence of an explicit human rights jurisdiction.⁹⁸ The case involved the detention of a Rwandan citizen without trial for five months.⁹⁹ Despite Rwanda's objections to the jurisdiction, the EACJ maintained its responsibility to ensure that the Member States adhere to the principles of good governance and the rule of law, emphasizing that failure to do so would constitute neglect of the court's duties.¹⁰⁰

The First Instance Division of the EACJ asserted that the provisions of the African Charter, as referenced in Article 7(2) of the EAC Treaty, were binding on the Member States. The Division emphasized that these provisions were not merely symbolic or superficial elements of the EAC Treaty.¹⁰¹ It concluded that the court's established jurisdiction to interpret and apply the EAC Treaty inherently included the authority to assess whether a Member State adhered to its obligations to promote and protect human rights, in line with the African Charter. This assessment was to be conducted within the framework of the good governance clauses articulated in Articles 6(d) and 7(2) of the Treaty.¹⁰² Nevertheless, in the *Plaxenda Rugumba* case, the Appellate Division expressed disagreement with the First Instance Division's more straightforward approach. The Appellate Division insisted on a direct cause of action under the EAC Treaty before addressing human rights claims, limiting its reach into broader human rights issues.¹⁰³

In the case of the *Democratic Party and Mukasa Mbidde v. The Secretary General of the East African Community (EAC) and the Attorney General of Uganda* (Democratic Party case) the Appellate Division took a different perspective from its previous position, as seen in the *Rugumba* case, regarding the authority to interpret a human rights treaty.¹⁰⁴ In the *Democratic Party* case, the Appellate Division interpreted Articles 6(d) and 7(2) of the EAC Treaty as granting the EACJ authority to enforce the African Charter, the Vienna Convention, and other pertinent international instruments.¹⁰⁵ This aimed at ensuring

⁹⁷ Treaty for the Establishment of East African Community (As amended on December 14, 2006 and August 20 2007), *supra* note 11 at 6(d) and 7(2).

⁹⁸ *Plaxeda Rugumba*, *supra* note 96

⁹⁹ *Plaxeda Rugumba*, *supra* note 96

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *The Democratic Party and Mukasa Mbidde v The Secretary General of the EAC and the AG of Uganda*, (2011).

¹⁰⁵ *Democratic Party vs the Secretary General of the East African Community, the Attorney General of the Republic of Uganda, the Attorney General of the Republic of*

the Member States adhered to both the stipulations of the EAC Treaty and the provisions of other international agreements mentioned within the EAC Treaty. The court's task verified that the Member States complied with these requirements, whether referenced directly, as in Article 6(d), or indirectly, as in Article 7(2).¹⁰⁶ This decision in the *Democratic Party* case notably broadened the previously narrow jurisdictional scope the court held over human rights cases.¹⁰⁷

In the *MSETO and Halihalisi Publishers Ltd v the Attorney General of the Republic of Tanzania* (*MSETO* case), which involved the Tanzanian government's prohibition of a newspaper from reporting on a corruption scandal related to the presidential election campaign in Tanzania, a decisive moment unfolded.¹⁰⁸ The First Instance Division of the EACJ applied the African Charter in its evaluation of the ban to determine its justification in protecting the public interest.¹⁰⁹ The court found Tanzania in breach of the right to freedom of expression as stipulated in Article 18(1) of the Constitution of Tanzania, Articles 19(3) of the International Covenant on Civil and Political Rights (ICCPR), and Article 27(2) of the African Charter, which are internationally recognized human rights norms.¹¹⁰ The EACJ's handling of both the *Democratic Party* and *MSETO* cases has significantly contributed to clarifying the law, enhancing the predictability regarding the obligations of Member States. These cases together served to clearly delineate the extent and limitations of state responsibilities under the regional and international human rights frameworks within the EAC.

The evolution of human rights case law illustrates the EACJ's commitment to upholding human rights. The EACJ's transition towards acting as a human rights tribunal, as notably highlighted in the *Katabazi* case, set a foundational precedent for other human rights cases. The EACJ's journey did not halt expanding its jurisdiction over human rights matters; it has ventured into a new phase, focusing on environmental justice and employing a similar developmental trajectory to that of its

Kenya, the Attorney General of the Republic of Rwanda, and the Attorney General of the Republic of Burundi, (2015).

¹⁰⁶ Treaty for the Establishment of East African Community (As amended on December 14, 2006 and August 20 2007), *supra* note 11 at 6(d) 7(2).

¹⁰⁷ *Democratic Party vs the Secretary General of the East African Community*, the Attorney General of the Republic of Uganda, the Attorney General of the Republic of Kenya, the Attorney General of the Republic of Rwanda, and the Attorney General of the Republic of Burundi, *supra* note 105.

¹⁰⁸ *MSETO and Halihalisi Publishers Ltd v the Attorney General of the Republic of Tanzania*, (2018).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

human rights jurisprudence.¹¹¹ Environmental concerns are increasingly recognized as integral to the human rights discourse, acknowledging that a healthy environment is crucial for the full enjoyment of fundamental human rights. The EACJ seized the opportunity to integrate environmental issues into its jurisdiction, reflecting a broader understanding of human rights that includes environmental protection and sustainability. This expansion signifies the EACJ's adaptive approach in addressing the evolving legal and societal challenges in the EAC, emphasizing the interconnectedness of human rights and environmental well-being.¹¹²

ii. From Human Rights to Environmental Adjudication

Once the EACJ established human rights jurisdiction, the subsequent step involved extending its jurisdiction to encompass environmental matters. In June 2014, the EACJ's First Instance Division delivered a ruling in the *Serengeti* case, addressing for the first time environmental protection and obligations to safeguard the environment.¹¹³ This decision challenged the Tanzanian government's plan to construct a road across the Serengeti National Park.¹¹⁴ The court overturned the government's action, setting a significant legal precedent.¹¹⁵ The appellate court called it "the first environmental case of its kind" in the East African region.¹¹⁶

To understand the importance of this decision, it is essential to contextualize it. Like its neighboring states, Tanzania heavily depends on its natural resources.¹¹⁷ However, the widespread reliance on lumber as the primary energy source has resulted in alarming deforestation rates.¹¹⁸ Despite Tanzania's remarkable biodiversity, issues like wildlife

¹¹¹ James Thuo Gathii, *Saving the Serengeti: Africa's New International Judicial Environmentalism*, 16 CHI. J. INT'L L. 386, 433 (2015).

¹¹² *Id.* at 393.

¹¹³ Afr. Network for Animal Welfare v. The Att' Gen. of the United Republic of Tanzania., Reference No. 9/2010, ¶ 86 (E. Afr. Ct. of Just. June 20, 2014).

¹¹⁴ *Id.* at ¶ 5.

¹¹⁵ *Id.* at ¶ 86.

¹¹⁶ The Att' Gen. of the United Republic of Tanzania., Appeal No. 3 of 2014, ¶ 81 (E. Afr. Ct. of Just., July 29, 2014).

¹¹⁷ Ayron M. Strauch et al, *Influence of Forest Management Systems on Natural Resource Use and Provision of Ecosystem Services in Tanzania*, 180 JOURNAL OF ENVIRONMENTAL MANAGEMENT 35, 35, 42 (2016).

¹¹⁸ Caroline Kimeu, 'Means of Survival': Tanzania's Booming Charcoal Trade Drives Unchecked Deforestation, THE GUARDIAN, Dec. 13, 2022, <https://www.theguardian.com/global-development/2022/dec/13/tanzania-charcoal-trade-deforestation> (last visited Feb 23, 2024).

overexploitation and illegal utilization persist nationwide.¹¹⁹ Tanzania witnessed significant economic and political transformation in recent decades, marked by a departure from its socialist ideology towards an economic system that emphasizes market forces.¹²⁰ This shift raised environmental concerns, especially in the planning and execution of large-scale infrastructure projects.¹²¹ One such project that stirred controversy was the proposed road cutting through the Serengeti National Park.¹²²

The road project faced opposition from scientists, local communities, and international environmental organizations.¹²³ Critics viewed the project as a substantial threat to the unique ecology of the Serengeti, which sustains the world's largest mammal migration and houses diverse plant and animal species.¹²⁴ The resistance to the road project stemmed from concerns about its potential negative environmental impact on the Serengeti ecosystem and the potential harm it could inflict on the livelihoods of local communities heavily dependent on tourism and conservation.¹²⁵

In reaction to the road project, local communities and environmental groups contested the Tanzanian government's plan and sought a resolution from the EACJ.¹²⁶ The case underwent several phases, culminating in the EACJ First Instance Division ruling.¹²⁷ This initial ruling found that the Tanzanian government failed to comply with international environmental regulations to safeguard areas of special ecological significance.¹²⁸ Consequently, the court's definitive judgment

¹¹⁹ Emma Charlene Lubaale, *Judicial Enforcement of Environmental Human Rights in Africa*, in HUMAN RIGHTS AND THE ENVIRONMENT UNDER AFRICAN UNION LAW 155, 159 (Michael Addaney & Ademola Oluborode Jegede eds., 2020).

¹²⁰ MICHAEL F. LOFCHIE, *THE POLITICAL ECONOMY OF TANZANIA: DECLINE AND RECOVERY I* (UNIV. OF PA. PRESS ED. (2014).

¹²¹ Gathii, *supra* note 2 at 398.

¹²² ANAW v. Att'y Gen of the United Republic of Tanzania, *supra* note 15 at ¶ 5.

¹²³ Andrew P. Dobson et al., *Road Will Ruin Serengeti*, 467 NATURE 272 (2010); *Worldwide Opposition to Serengeti Road Has Yet to Sway Tanzanian Government*, AFRICAN WILDLIFE FOUNDATION (Mar. 15, 2011), <https://www.awf.org/news/worldwide-opposition-serengeti-road-has-yet-sway-tanzanian-government> (last visited Aug 10, 2023).

¹²⁴ Dobson, *supra* note 123, at 272.

¹²⁵ Support Our Legal Action to save the Serengeti, AFR. NETWORK FOR ANIMAL WELFARE, (Apr. 5, 2011), <https://africanetworkforanimalwelfare.wordpress.com/2011/04/05/support-our-legal-action-to-save-the-serengeti/> (last visited Aug 10, 2023).

¹²⁶ ANAW v. Att'y Gen of the United Republic of Tanzania, *supra* note 15, at ¶¶ 5, 17.

¹²⁷ *Id.* at ¶ 86(i).

¹²⁸ *Id.* at ¶ 86(ii).

effectively prohibited road construction through the Serengeti National Park.¹²⁹ Given this context, a more detailed analysis of the case is needed.

In 2010, the African Network for Animal Welfare (ANAW) sued the Tanzanian government before the EACJ¹³⁰ to secure a permanent injunction, effectively stopping the implementation of the government's proposed project.¹³¹ This project involved constructing and maintaining a 53-kilometer segment of the Natta-Mugumu - Tabora B-Kleins Gate - Loliondo Road, commonly called the “Road”, which would pass through the Serengeti National Park.¹³² ANAW's legal action aimed to secure an injunction that would effectively halt the Tanzanian government's plan to enhance, upgrade, or construct a road through the northern hinterlands of the park.¹³³ In its legal petition, ANAW requested two remedies from the court. Firstly, it sought a permanent injunction on the Tanzanian government to prevent any activities related to maintaining or establishing roads or highways within the Serengeti National Park area.¹³⁴ Secondly, ANAW sought a court declaration affirming that the construction of the road violated Tanzania's commitments outlined in the EAC Treaty for the Establishment of the East African Community and requested the court to hold the Tanzanian government accountable for this breach of obligations.¹³⁵

The Tanzanian government's original infrastructure project involved converting the 239-kilometer stretch of road into an asphalt highway.¹³⁶ Following concerns raised by domestic and international stakeholders, including the United Nations Educational, Scientific and Cultural Organization (UNESCO), and based on recommendations from a government-appointed consultant firm, Tanzania opted not to asphalt the road through the Serengeti National Park.¹³⁷ As an alternative to asphaltting the entire 239-kilometer road, the Tanzanian government opted to convert only the 53-kilometer segment traversing the Serengeti National Park to a gravel road.¹³⁸ In light of concerns articulated by ecological specialists regarding the potential for negative environmental

¹²⁹ *Id.*

¹³⁰ See generally, ANAW v. Att’y Gen of the United Republic of Tanzania *supra* note 14.

¹³¹ *Id.* at 7.

¹³² ANAW v. Att’y Gen of the United Republic of Tanzania, *supra* note 15, at ¶ 5.

¹³³ *Id.* at ¶ 17.

¹³⁴ ANAW v. Att’y Gen of the United Republic of Tanzania, *supra* note 15, at ¶ 17(iii).

¹³⁵ *Id.* at ¶ 17(i).

¹³⁶ *Id.* at ¶ 12.

¹³⁷ *Id.* at ¶¶ 19, 27–28.

¹³⁸ *Id.* at ¶ 27.

consequences and disruption to the annual animal migration cycle, a shift in policy direction was pursued.¹³⁹ During the EACJ First Instance Division hearing on ANAW's application, Tanzania raised procedural objections citing time limitations and the court's lack of jurisdiction.¹⁴⁰ However, the First Instance Division firmly asserted its jurisdiction over the challenged action and subsequently dismissed Tanzania's objections.¹⁴¹

Beyond procedural objections, Tanzania presented a multi-pronged defense before the First Instance Division. Firstly, it argued that the historical use of the contested road had not negatively impacted the Serengeti National Park's ecological integrity.¹⁴² Secondly, it cited the existence of similar roads within the region, suggesting the proposed road was not an isolated case.¹⁴³ Thirdly, Tanzania challenged the court's jurisdiction based on the absence of an operational Protocol on the Environment, as mandated by the EAC Treaty.¹⁴⁴ Fourthly, it contested the EACJ's authority to adjudicate breaches of non-EAC treaties, such as international environmental and natural resources conventions.¹⁴⁵ Despite these arguments, the First Instance Division ruled in favor of ANAW.¹⁴⁶

The court acknowledged Tanzania's plan for substantial alterations, including upgrading, paving, realigning, and establishing a trunk road through the Serengeti ecosystem's northern wilderness.¹⁴⁷ Contrary to Tanzania's claims, the court upheld the effectiveness of environmental provisions embedded in the EAC Treaty, despite the absence of a separate protocol on the environment.¹⁴⁸ The court's decision involved an assessment of the potential consequences tied to the original road development plan, which it deemed harmful to the park and its surroundings.¹⁴⁹ Consequently, the court ruled against the road's construction, emphasizing that the negative impacts outweighed the potential benefits.¹⁵⁰ While acknowledging Tanzania's perspective and legitimate interest in regional economic progress, the court prioritized

¹³⁹ ANAW v. Att'y Gen of the United Republic of Tanzania, *supra* note 15, at ¶¶ 21–22.

¹⁴⁰ *Id.* at ¶ 6.

¹⁴¹ *Id.*

¹⁴² ANAW v. Att'y Gen of the United Republic of Tanzania, *supra* note 15, at ¶ 19.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at ¶ 29(iii).

¹⁴⁵ *Id.* at ¶ 44.

¹⁴⁶ *Id.* at ¶ 86.

¹⁴⁷ Att'y Gen of the United Republic of Tanzania v ANAW, *supra* note 20 at ¶ 59.

¹⁴⁸ *Id.* at ¶¶ 24, 25, 28.

¹⁴⁹ ANAW v. Att'y Gen of the United Republic of Tanzania, *supra* note 15 at ¶ 82.

¹⁵⁰ *Id.* at ¶ 85.

maintaining ecological equilibrium and recognized the imperative of averting future ecological degradation.¹⁵¹ The court's carefully crafted decision exemplifies an attempt to harmonize the seemingly discordant objectives of environmental conservation and economic progress, acknowledging the inherent tension between these two domains and striving to achieve a measured equilibrium that fosters ecological sustainability and economic prosperity.¹⁵² This ruling represents a key jurisprudential milestone, resonating with broader implications for environmental conservation mechanisms within the legal structure of the East African Community. It established a precedent that reinforces the significance of environmental clauses within the EAC Treaty framework.

Tanzania appealed this decision to the EACJ's Appellate Division, reiterating its claim of the EACJ's lack of jurisdiction and challenging the legal interpretation and factual assessment employed by the First Instance Division concerning the proposed plan.¹⁵³ Tanzania specifically contested the lower court's interpretation and application of Articles 111-114 of the EAC Treaty, arguing that the EAC Treaty lacked legal efficacy due to the incomplete negotiation, agreement, signing, and ratification of an implementing protocol by all Member States.¹⁵⁴ Furthermore, the appeal contested the First Instance Division's subject-matter jurisdiction, arguing that the court lacked the legal authority to adjudicate disputes arising from international instruments beyond the purview of the EAC Treaty.¹⁵⁵ Additionally, Tanzania challenged the validity of the permanent injunction imposed upon it, asserting that the lower court exceeded its authority under the EAC Treaty by issuing such a measure.¹⁵⁶

The Appellate Division concluded that the provisions within the EAC Treaty, ranging from Articles 5(3)(c) to 114(1), are integral to the treaty framework and thus fall under the court's jurisdiction for interpretation and application as per Article 27(1), as well as for ensuring

¹⁵¹ *Id.* at ¶ 82.

¹⁵² *Id.* at ¶ 85.

¹⁵³ Att'y Gen of the United Republic of Tanzania v ANAW, *supra* note 20, at ¶ 3.

¹⁵⁴ Att'y Gen of the United Republic of Tanzania v. ANAW, *supra* note 20, at ¶ 9; *See also* Treaty for the Establishment of East Afr. Cmty. *supra* note 11, arts. 111–14. (At the core of Tanzania's appeal was the question of whether Articles 111-114 of the East African Community (EAC) Treaty possess independent legal force in the absence of a complementary protocol. These articles delineate the environmental responsibilities, obligations, and commitments incumbent upon EAC partner States for collaborative action.).

¹⁵⁵ ANAW v. Att'y Gen of the United Republic of Tanzania, *supra* note 15 at ¶ 33.

¹⁵⁶ Att'y Gen of the United Republic of Tanzania v ANAW, *supra* note 20, at ¶ 4.

compliance under Article 23(1).¹⁵⁷ Additionally, the Appellate Division clarified that the absence of an Environment and Natural Resources Protocol's ratification by EAC Member States does not negate the binding nature of these provisions.¹⁵⁸ According to the Appellate Division, the proposition that Articles 111-114 of the EAC Treaty are self-executing was substantially supported.¹⁵⁹ These articles derive their legal force solely from their inclusion within a duly ratified treaty that has entered into effect without any reservations or qualifications.¹⁶⁰ Particularly, Articles 111 through 114 of the EAC Treaty stand out as provisions that establish specific causes of action, serving as a compelling indicator of their immediate enforceability due to this inherent characteristic.¹⁶¹ The Appellate Division's other determination underlines the dual nature of these provisions: not only as obligations imposed on Member States, but also as grounds for legal action, enabling redress against a state's violation without the necessity of demonstrating "a personal tort, right, infringement, injury, or damage."¹⁶²

The Appellate Division's judgment further bolstered ANAW's position by highlighting a legal error made by the First Instance Division in its assessment of Tanzania's compliance with non-EAC international environmental instruments.¹⁶³ The Appellate Division definitively asserted that the First Instance Court's findings of violation were not based upon these non-EAC international instruments.¹⁶⁴ Furthermore, the Appellate Division acknowledged that even if the lower court considered aspects of these international agreements, such consideration would not have constituted a legal error.¹⁶⁵ This rationale is grounded in the general expectation that EAC Member States adhere to the norms and principles enshrined within these Conventions. Similar to its previous judgments on human rights, the Appellate Division underscored its authority to refer to relevant provisions of non-EAC treaties for interpreting the EAC Treaty, a principle applicable when the EAC Treaty explicitly acknowledges such references, effectively making them *de facto* obligations of the EAC Member States.¹⁶⁶ The Appellate Division relied

¹⁵⁷ *Id.* at ¶ 23.

¹⁵⁸ *Id.* at ¶ 24.

¹⁵⁹ *Id.* at ¶ 25.

¹⁶⁰ *Id.* at ¶¶ 29–31.

¹⁶¹ *Id.* at ¶ 25.

¹⁶² *Att'y Gen of the United Republic of Tanzania v ANAW, supra* note 20, at ¶ 25.

¹⁶³ *Id.* at ¶ 40. (including the African Convention on the Conservation of Nature and Natural Resources (2003), the Rio Declaration (1992), the Stockholm Declaration, the UN Convention on Migratory Species (1979), the UN Convention on Biodiversity (1992), and the UN Declaration on Environment and Development (1992)).

¹⁶⁴ *Id.* at ¶ 47.

¹⁶⁵ *Id.* at ¶ 48.

¹⁶⁶ *Id.* at ¶ 49.

on the interpretation it gave in the *Democratic Party* case, where it contended that the EACJ possessed inherent jurisdiction to interpret the African Commission on Human and Peoples’ Rights (ACHPR) within the context of the EAC Treaty.¹⁶⁷ This authority stems from the principle of treaty interpretation, which encourages courts to consider relevant international instruments, particularly when such instruments are explicitly referenced within the treaty itself.¹⁶⁸ Additionally, the Vienna Convention on the Law of Treaties, a universally recognized framework for treaty interpretation, stresses the importance of the context, object, and purpose of a treaty in determining its meaning.¹⁶⁹ Given the explicit recognition of international instruments within the EAC Treaty, interpreting the latter in light of the former aligns with established principles of international law.¹⁷⁰

Next, the Appellate Division addressed whether the EACJ had the authority to issue permanent injunctions against sovereign Member States under the EAC Treaty. Despite the Appellant Division's argument that the EAC Treaty lacked such explicit power, limiting the EACJ to temporary orders, it ultimately upheld the First Instance Division's ruling.¹⁷¹ The Appellate Division's argument focused on the EAC Treaty's outlined sanctions for non-compliance.¹⁷² It distinguished between EAC Treaty-specified sanctions imposed by political organs and the court's inherent judicial power to grant equitable remedies.¹⁷³

This decision hinged on the court's inherent power as a judicial body, as the Appellate Division argued that its very existence as such mandated it to be equipped with the necessary tools to fulfill its core function of ensuring adherence to the EAC Treaty.¹⁷⁴ This inherent power, the court reasoned, encompassed the ability to grant equitable remedies like permanent injunctions, crucial for preventing irreparable harm and upholding the law.¹⁷⁵

While not explicitly mentioning permanent injunctions, the EAC Treaty implicitly supported this inherent power through key

¹⁶⁷ *Democratic Party and Mukasa Mbidde v The Sec’y Gen. of the EAC and the AG of Uganda*, *supra* note 104 at ¶ 55; *Att’y Gen of the United Republic of Tanzania v ANAW*, *supra* note 20 at ¶ 49.

¹⁶⁸ *Att’y Gen of the United Republic of Tanzania v ANAW*, *supra* note 20 at ¶ 49.

¹⁶⁹ Vienna Convention on the Law of Treaties, art. 31(1), May 23, 1969, 1155 U.N.T.S. 331.

¹⁷⁰ *Att’y Gen of the United Republic of Tanzania v ANAW*, *supra* note 20 at ¶ 49.

¹⁷¹ *Id.* at ¶ 50.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.* at ¶ 53.

¹⁷⁵ *Id.* at ¶¶ 51, 53-4.

provisions such as Article 23(1), which established the court as a judicial body responsible for ensuring EAC Treaty compliance, implying the possession of necessary powers like issuing injunctions.¹⁷⁶ Additionally, Rule 1(2) of the court's rules of procedure, derived from the EAC Treaty, granted the court "inherent power to make such orders as may be necessary for the ends of justice."¹⁷⁷

The Appellate Division's decision affirmed EACJ's authority to issue permanent injunctions against sovereign Member States. This decision rested on the EACJ's inherent power as a judicial body, bolstered by supporting provisions within the EAC Treaty and its rules.¹⁷⁸ While the lack of explicit mention in the EAC Treaty might raise concerns, the court's reasoning highlights the importance of inherent judicial power in ensuring effective functioning and upholding the rule of law.¹⁷⁹

The question of whether a government's mere proposal to undertake a project can be challenged in court was another issue addressed by the Appellate Division.¹⁸⁰ Tanzania argued that the First Instance Division lacked jurisdiction since the government had not yet taken any concrete action, merely expressing an intention to improve the road infrastructure.¹⁸¹ The First Instance Division, however, acknowledged the lack of definitive government action but nonetheless found the reference admissible.¹⁸² This decision rested on several key arguments, particularly on the existence of a potential for future harm, in which the court emphasized the potential for irreversible damage to the Serengeti ecosystem if the initial plan, which envisaged constructing a bitumen road through the National Park, was implemented.¹⁸³ This potential violation of the EAC Treaty's environmental protection provisions, particularly Articles 5(3) (c), 8(1) (c), 111(1), and 114(1), justified entertaining the reference despite the absence of concrete action.¹⁸⁴ The court implicitly acknowledged the precautionary principle, a widely recognized principle in international environmental

¹⁷⁶ Att'y Gen of the United Republic of Tanzania v ANAW, *supra* note 20 at ¶ 51-2. Treaty for the Establishment of East African Cmty. (As amended on December 14, 2006 and August 20 2007), *supra* note 11 at 23(1).

¹⁷⁷ Tanzania v ANAW, *supra* note 20 at ¶ 54.

¹⁷⁸ *Id.* at ¶ 55.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at ¶ 21.

¹⁸¹ *Id.* at ¶ 63.

¹⁸² Att'y Gen of the United Republic of Tanzania v ANAW, *supra* note 20, at ¶ 60.

¹⁸³ ANAW v. Att'y Gen of the United Republic of Tanzania, *supra* note 15, at ¶ 11.

¹⁸⁴ *Id.* at 78.

law, which suggests taking preventive measures against potential environmental harm, even in the absence of scientific certainty.¹⁸⁵

While upholding the First Instance Division's decision, the Appellate Division provided crucial clarification on what constitutes an actionable "act" under the EAC Treaty, establishing a clear distinction between "acts" and mere omissions or inactions by governments.¹⁸⁶ Article 30, the court clarified, applied only to challenges against completed "acts," not hypothetical plans or intentions.¹⁸⁷ This distinction ensures that the court's resources are directed toward addressing concrete instances of harm rather than engaging in speculative assessments of future possibilities.

Furthermore, the court emphasized the concept of ripeness, requiring the challenged action to be beyond a mere intention or initial conception and must be concrete and full-fledged to be actionable, signifying a definitive step towards its realization.¹⁸⁸ This requirement prevents the court from becoming entangled in the preliminary stages of government decision-making, allowing space for internal deliberations and adjustments before judicial intervention. The court provided illustrative examples of what constitutes an actionable "act" in the context of the Serengeti Road project.¹⁸⁹ These include obtaining architectural plans, securing budgetary approval, commencing procurement processes, and initiating physical construction work.¹⁹⁰ These steps demonstrate a clear commitment to the project's implementation, exceeding mere ideas or proposals. Building on the First Instance Division's note that all parties agreed the benefits of linking Mugumu-Loliondo residents to Dar es Salaam outweighed the adverse impacts of the initial plan, the Appellate Division argued that Tanzania had effectively withdrawn its proposal to pave the Serengeti Road.¹⁹¹

This distinction between permissible and impermissible challenges is crucial. It ensures that the court's resources are focused on addressing concrete disputes with real-world consequences. Entertaining

¹⁸⁵ See James Cameron & Juli Abouchar, *The Precautionary Principle: A Fundamental Principle of Law and Policy for the Protection of the Global Environment*, 14 B. C. INT'L & COMP. L. REV. 1, 437 (1991); Giulia Claudia Leonelli, *Judicial Review of Compliance with the Precautionary Principle from Paraquat to Blaise: "Quantitative Thresholds," Risk Assessment, and the Gap Between Regulation and Regulatory Implementation*, 22 GERMAN LAW JOURNAL 184, 189 (2021).

¹⁸⁶ Att'y Gen of the United Republic of Tanzania v ANAW, *supra* note 20, at ¶ 75.

¹⁸⁷ *Id.* at ¶ 76.

¹⁸⁸ *Id.* at ¶ 75.

¹⁸⁹ *Id.* at ¶ 76.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at ¶ 74.

hypothetical or speculative cases based on mere proposals could lead to an overburdened court and potentially hinder legitimate development initiatives.¹⁹² However, the court acknowledged the limitations of this distinction and upheld the injunction granted by the First Instance Division.¹⁹³ This apparent contradictory approach can be understood by recognizing the potential for irreversible harm.¹⁹⁴ The court reasoned that any attempt to implement the initial plan, even if not fully formed, would violate the EAC Treaty's provisions on the rule of law, good governance, and environmental protection provisions.¹⁹⁵ This revealed the court's commitment to upholding the EAC Treaty's objectives, even in the absence of a fully formed action.

The court's final statement vividly depicted the arduous legal battle over the proposed Serengeti Road, highlighting the challenges faced by the applicants and underscoring the case's significance and motivations.¹⁹⁶ The applicants' journey, described as "long and arduous," "twists and turns," and "trials and tribulations," highlights the numerous challenges faced in pursuing environmental protection through legal means.¹⁹⁷ This characterization acknowledges the difficulties often encountered by those seeking to challenge powerful interests through the legal system.

The court presented the applicants' motivations as rooted in "public-spirited interest," specifically the "conservation, preservation and protection of a natural resource."¹⁹⁸ This focus on and description of the Serengeti as a "gem of a heritage" positions the legal action as a battle for the greater good, prioritizing the well-being of the environment over potential gains for any singular entity.¹⁹⁹ The case exemplifies the frequently recurring tension between conservation efforts and development initiatives. The court's statement that the *Serengeti* case is the "first [e]nvironmental [c]ase of its kind to be brought before this Court" emphasizes its novelty and potential impact.²⁰⁰

The court acknowledged the exceptional nature of the case, driven by genuine concerns for environmental protection rather than

¹⁹² See Att'y Gen of the United Republic of Tanzania v ANAW, *supra* note 20, at ¶ 67–73. The court addressed the doctrine of mootness, which suggests that courts should not waste resources on cases that are no longer relevant or have become academic.

¹⁹³ *Id.* at ¶ 82.

¹⁹⁴ *Id.* at ¶ 73.

¹⁹⁵ *Id.* at ¶ 74.

¹⁹⁶ *Id.* at ¶ 81.

¹⁹⁷ *Id.*

¹⁹⁸ See Att'y Gen Tanzania v ANAW, *supra* note 20, at ¶ 81.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

private interests, and by not awarding costs, and it aimed to avoid further burdening both the conservation proponents and the defendants, potentially facilitating future public interest litigation.²⁰¹ The *Serengeti* case established a precedent, indicating the court's readiness to address environmental protection matters, and its judgment is poised to be influential in shaping the outcomes of future cases concerning similar issues. However, the Appellate Division's decision left the status of the permanent injunction issued by the First Instance Division ambiguous, not directly terminating it but merely affirming the court's power to grant such injunctions, suggesting a strategic approach to balance its expanded authority in environmental disputes with the consideration of potential political repercussions.²⁰²

The Appellate Division's decision maintained a careful balance by neither affirming nor dissolving the injunction against Tanzania, signaling its dedication to environmental protection while avoiding direct confrontation with the Tanzanian government.²⁰³ This ambiguity leaves room for the injunction's future enforcement as a deterrent against actions threatening the Serengeti, reflecting the court's evolving role in enforcing the EAC Treaty's environmental provisions without overstepping political boundaries

III. EXPANDING THE HORIZON TO CLIMATE CHANGE LITIGATION

Pioneering cases often serve as catalysts, shaping the trajectory of subsequent litigations and policy developments. The *Serengeti* case stands as one such precedent, heralding a new era of environmental litigation at the EACJ.²⁰⁴ The case was a catalyst for subsequent environmental and climate change litigation, exemplified prominently by the *Center for Food and Adequate Living Rights et al. v. Tanzania and Uganda (CEFROHT case)*.²⁰⁵ Like the *Serengeti* case, the *CEFROHT* case highlights the importance of environmental impact assessments and the violation of international obligations in the context of the

²⁰¹ *Id.*

²⁰² *Id.* at ¶ 82.

²⁰³ *Id.*

²⁰⁴ Tanzania v ANAW, *supra* note 20, at 82.

²⁰⁵ Centre for Food and Adequate Living Rights (CEFROHT) & 3 Others v. The Att’y Gen of the Republic of Uganda, the Att’y Gen of the United Republic of Tanzania and the Sec’y Gen. of the East African Community, 39/2020, East African Court of Justice (Nov. 29, 2023), <https://www.eacj.org/?cases=centre-for-food-and-adequate-living-rights-cefroht-3-others-v-the-attorney-general-of-the-republic-of-uganda-the-attorney-general-of-united-republic-of-tanzania-and-the-secretary-general-of-the>.

construction of the East African Crude Oil Pipeline.²⁰⁶ Specifically, in the *CEFROHT* case, four civil society organizations sued the governments of Uganda and Tanzania before the EACJ, seeking an injunction to stop the construction of the East African Crude Oil Pipeline (EACOP) project.²⁰⁷ The applicants alleged that the project lacked proper environmental and social impact assessments (ESIAs) and contravened the EAC Treaty and the Protocol for Sustainable Development of the Lake Victoria Basin.²⁰⁸ In particular, they argued that the necessary approvals, including a certificate of approval from the National Environmental Management Authority (NEMA) and a comprehensive ESIA, were not obtained.²⁰⁹ Consequently, the project contravenes human rights obligations and poses potential risks to communities, ecological areas, wildlife, and food security.²¹⁰ These concerns highlight the need for thorough scrutiny and potentially a reassessment of the project's feasibility and potential consequences. This case's environmental and legal dimensions are rooted in the precedent of the *Serengeti* case, demonstrating that the *Tanzania* case catalyzed subsequent legal actions that address the complex interface between development, environmental protection, and legal accountability.

The *CEFROHT* case, like the *Serengeti* case, marks a critical point in the EAC, highlighting the interplay between development, environmental protection, and human rights advocacy.²¹¹ Regrettably, the court did not reach a decision on the *CEFROHT* case's merits due to preliminary objections that stalled proceedings, including challenges to the court's jurisdiction, claims that the filing exceeded time limits, questions about the court's authority to adjudicate the issues, and concerns over the adequacy of the applicants' submissions, with the time limitation objection requiring careful examination due to its significant implications for the case's adjudication.²¹²

The respondents' call for the case's dismissal on procedural grounds underlines the necessity of scrutinizing the law against the backdrop of evolving human rights and environmental jurisprudence,

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.* at ¶ 2.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ Centre for Food and Adequate Living Rights (CEFROHT) & 3 Others v. The Att'y Gen. of the Republic of Uganda, the Att'y Gen. of the United Republic of Tanzania and the Sec'y Gen. of the East African Community, *supra* note 205.

²¹² *Id.* at ¶ 64.

particularly focusing on the strict two-month filing deadline.²¹³ This requirement has historically imposed constraints, with the First Instance Division showing leniency in its interpretation, unlike the Appellate Division, which has adhered to a strict interpretation, notably rejecting the concept of "continuing violations."²¹⁴

The Appellate Division addressed the extendibility of the two-month filing deadline in ongoing human rights violation cases, confirming its lack of authority to extend this period.²¹⁵ It previously narrowed its human rights jurisdiction to conform with Article 6(d) of the EAC Treaty, contrasting with the First Instance Division's broader interpretation.²¹⁶ The Division also clarified that for continuous violations, the filing deadline starts from the violation's onset, not its end.²¹⁷

In the case of *Omar Awadi v. Attorney General of Uganda and Attorney General of Kenya*, the Appellate Division's stringent interpretation of the two-month rule, highlighting the Treaty's lack of exceptions, set a precedent that significantly influenced the First Instance Division.²¹⁸ This influence was evident in the *Prof. Nyamoya Francois v. The Attorney General of the Republic of Burundi* case, where the claim was dismissed for not adhering to the two-month rule, despite being filed during the applicant's detention and involving recent events.²¹⁹ The court

²¹³ Gathii, *supra* note 4; James Gathii, *Saving the Serengeti: Africa's New International Judicial Environmentalism*, 16 CHI. J. OF INT'L L. (2016), <http://chicagounbound.uchicago.edu/cjil/vol16/iss2/3>; James Gathii, *supra* note 17; Taye, *supra* note 52; Taye, *supra* note 32.

²¹⁴ Att'y Gen. of Kenya v. Indep. Medical Legal Unit, Appeal 1/2011, East African Court of Justice (March 15, 2012), <https://www.eacj.org/?cases=independent-medical-legal-unit-vs-the-attorney-general-of-the-republic-of-kenya-and-4-others>.

²¹⁵ Indep. Medico Legal Unit v. Att'y Gen. of Kenya, (2011).

²¹⁶ Indep.t Medico Legal Unit v. Att'y Gen. of Kenya, Decision on Application No. 2 to Review Appellate Division's Judgment (East African Court of Justice 2012). Article 30(2) of the EAC Treaty requires references to be filed with the EACJ within two months of the alleged violation. This time limit is narrow and can be difficult to comply with. The rule was introduced via an amendment of the EAC Treaty as a reaction to the Nyong'o Case involving Kenya. See generally, Karen J. Alter, et al., *Backlash against International Courts in West, East and Southern Africa: Causes and Consequences*, 27 EUR. J. OF INT'L L. 293 (2016).

²¹⁷ Att'y Gen. of Kenya v. Indep. Medical Legal Unit, Decision on Application No. 2 to Review Appellate Division's Judgment (East African Court of Justice 2012).

²¹⁸ Att'y Gen. of Uganda and Att'y Gen of Kenya v. Omar Awadh et al., Decision on Application No. 2 of 2012 (East African Court of Justice 2013).

²¹⁹ Professor Nyamoya Francois v. The Att'y Gen. of the Republic of Burundi, Reference No. 8 of 2011 (East African Court of Justice 2014).

dismissed the concept of a continuous violation, aligning with the Appellate Division's earlier decisions.²²⁰

Despite debates over the two-month rule's restrictiveness and its potential to hinder access to justice, a challenge to its legality and impact failed to convince the EACJ that it contravenes the relevant articles of the EAC Treaty.²²¹ The EACJ instead interpreted the rule as a procedural mechanism designed to accelerate the achievement of the community's goals as stipulated in the EAC Treaty.²²² While emphasizing the importance of equal access to justice, the court stopped short of labeling the rule as a violation.²²³

The second objection in the *CEFROHT* case pertains to the court's competence in addressing human rights violations within its jurisdiction.²²⁴ This issue further complicates the narrative, prompting a critical review of the court's role in safeguarding human rights within the purview of regional treaties and international conventions.²²⁵ In past cases, despite its stance as a non-human rights court, the EACJ often addressed human rights issues under the guise of rule violations within Articles 6(d) and 7(2).²²⁶ While the EACJ asserts its role in interpreting the EAC Treaty, it distinguishes itself from dedicated human rights institutions whose primary aim is safeguarding human rights.²²⁷

An illustration of this nuanced approach is evident in the case of *Samuel Mukira Mohochi v. Attorney-General of Uganda (Mohochi case)* where the EACJ declined the applicant's claim based on the violation of the African Charter, but acknowledged Uganda's failure to provide due process, constituting a breach of the rule of law under Article

²²⁰ *Id.*

²²¹ Steven Deniss v. The Att'y Gen. of the Republic of Burundi et al., Reference No. 3 of 2015 (East African Court of Justice 2017).

²²² *Id.*

²²³ *Id.*

²²⁴ Centre for Food and Adequate Living Rights (CEFROHT) et al. v. The Att'y Gen. of the Republic of Uganda, the Att'y Gen. of the United Republic of Tanzania and the Sec'y Gen. of the East African Cmnty, Reference No. 39 of 2020, ¶ 2, 17 (East African Court of Justice 2017); Center for Food and Adequate Living Rights et al. v. Tanzania and Uganda, Climate Change Litigation, <https://climatecasechart.com/non-us-case/center-for-food-and-adequate-living-rights-et-al-v-tanzania-and-uganda/> (last visited Feb 29, 2024).

²²⁵ Mihreteab T. Taye, *The Role of the East African Court of Justice in the Advancement of Human Rights: Reflections on the Creation and Practice of the Court*, 27 AFRICAN J. INTL. & COMPARATIVE L 359 (2019).

²²⁶ Mihreteab T. Taye, *Human Rights, the Rule of Law, and the East African Court of Justice: Lawyers and the Emergence of a Weak Regional Field*, 34 Temple Intl. & Comparative L.J. 339 (2020).

²²⁷ James Katabazi, *supra* note 12.

6(d) of the EAC Treaty.²²⁸ This decision confirmed the EACJ as a platform for individuals to hold a Member State accountable for disregarding the rule of law and human rights.²²⁹ However, this avenue came with the stringent time constraint of the two-month rule. The EACJ emphasized the gravity of obligations outlined in Article 6(d) as substantial governance responsibilities that it is willing to address.²³⁰ Nonetheless, the court's jurisdiction in such matters relies heavily on cases being filed within the specified timeframe, as demonstrated by its ability to entertain the *Mohochi* case due to its timely submission.²³¹

Thus, in the *CEFROHT* case, the rebuttals highlighted crucial points warranting attention.²³² The applicants' focus on procedural intricacies, especially their argument that the objections required an in-depth analysis of facts that surpasses what a preliminary hearing allows, reveals the complexities inherent in adjudicating the case.²³³ Furthermore, their defense concerning the adequacy of their submissions, rooted in the absence of prescribed formats within court rules, challenges the conventional procedural norms, emphasizing the need for flexibility in legal procedures while ensuring substantive justice.²³⁴

The First Instance Division, while applying established legal principles regarding preliminary objections, invoked several critical considerations concerning the relationship between procedural technicalities and substantive justice.²³⁵ Firstly, the court in *Secretary General EAC v. Margaret Zziwa*, established a robust framework for addressing preliminary objections.²³⁶ However, this reliance also raises questions about the rigidity of legal precedents in accommodating

²²⁸ Samuel Mukira Mohochi v. Att’y Gen. of Uganda, Reference No. 5 of 2011 (East African Court of Justice (2013)).

²²⁹ *See id.*

²³⁰ *See id.*

²³¹ *See generally, id.*

²³² *CEFROHT, supra* note 205.

²³³ Center for Food and Adequate Living Rights et al. v. Attorney General of the Republic of Uganda et al., Climate Change Litigation, (East African Court of Justice 2020), <https://climatecasechart.com/non-us-case/center-for-food-and-adequate-living-rights-et-al-v-tanzania-and-uganda/> (last visited Feb 29, 2024).

²³⁴ Reference No. 39 of 2020 Center for Food and Adequate Living Rights et al. v. Attorney General of the Republic of Uganda et al., East African Court of Justice, <https://www.eacj.org/?cases=reference-no-39-of-2020-center-for-food-and-adequate-living-rights-cefroht-3-others-v-the-attorney-general-of-the-republic-of-uganda-2-others> (last visited Dec 29, 2023); Centre for Food and Adequate Living Rights et al. v. Attorney General of the Republic of Uganda et. Al., Reference No. 39 of 2020, (East African Court of Justice 2017).

²³⁵ *CEFROHT, supra* note 205.

²³⁶ *Id.* at ¶ 46.

evolving legal contexts. The strict application of precedents, while ensuring consistency, limits the court's flexibility in adapting to unique circumstances that transcend the envisaged scenarios of past rulings.

The court's analysis crucially differentiated between legal issues and factual disputes, stating that a preliminary objection is valid only when it can be resolved without examining evidence to address factual disagreements, reinforcing the principle that factual matters necessitate a full trial.²³⁷ However, this distinction can sometimes obfuscate the inherently intertwined nature of law and fact, where legal interpretations can significantly influence the perception and relevance of facts. This rigid separation leads to the dismissal of claims on preliminary grounds, potentially overlooking substantive injustices that merit a full hearing.

The court's scrutiny of the reference, particularly in Paragraphs 18, 22, and 38, alongside the affidavits and documents submitted, demonstrates a commendable dedication to thorough judicial examination.²³⁸ The court prioritized procedural formalities over substantive justice. The focus on material dates and the timeliness of the reference, while procedurally critical, highlights a judicial inclination towards form over substance. By following this approach, the court marginalized the substantive merits of legal claims, which were overshadowed by procedural lapses.

The application of Article 30(2) of the EAC Treaty, prescribing a two-month limitation period for filing references, serves as a poignant example of the potential pitfalls of strict procedural adherence.²³⁹ While time limits are essential for legal certainty and the prevention of stale claims, their rigid enforcement, especially in environmental cases, such as *CEFROHT* cases involving multiple legal instruments and agreements, forecloses the avenues for redress.²⁴⁰ This raises critical questions about the balance between procedural efficiency and the need for flexibility in addressing substantive legal grievances.

Furthermore, the court's assertion of lacking jurisdiction *ratione temporis* (tribunal powers pursuant to a treaty) to entertain the matter, based on the time-barred nature of the reference, brings to the fore the critical role of jurisdictional thresholds in the administration of justice.²⁴¹ While jurisdictional rules are foundational to the legal process, their

²³⁷ *Id.* at ¶ 48.

²³⁸ *Id.* at ¶ 54.

²³⁹ *Id.* at ¶ 58.

²⁴⁰ *CEFROHT*, *supra* note 205.

²⁴¹ *Id.* at ¶ 64.

strict application should not serve as an insurmountable barrier to accessing justice, particularly in cases where procedural lapses do not undermine the integrity of the judicial process.

In adjudicating costs against the applicants, the court adhered to the principle that costs follow the event thus imposing the financial burden of the litigation on the party that does not prevail.²⁴² This decision, while consistent with legal norms, warrants a critical reflection on the implications of such cost orders on access to justice, especially for litigants who may be deterred from pursuing legitimate claims due to the risk of adverse cost implications that may be associated with environmental or human rights litigation.

Thus, the court's decision to bypass the merits of the case presents a critical juncture for the judicial system, exposing the need to reconcile procedural adherence with the imperatives of substantive justice. This situation highlights the necessity for a judicial paradigm that is adept at navigating the intricacies of legal disputes, ensuring that procedural formalities do not obstruct the quest for justice. The failure to address the core issues of the case represents a missed opportunity to influence environmental and climate change litigation. It calls for a judicious blend of legal principles that align procedural norms with the core principles of justice, maintaining the legal framework as a viable and fair mechanism for grievance redressal. As a case advances to the Appellate Division, it is crucial to monitor whether there will be a shift in perspective that aligns more closely with these ideals.²⁴³ Moreover, the forthcoming verdict by the Appellate Division could have far-reaching implications, potentially serving as a pivotal moment in regional legal history.²⁴⁴ It offers a unique chance to define the boundaries of justice in an area where economic activities, environmental sustainability, and human rights are increasingly intertwined. This moment could pave the way for a jurisprudence that harmonizes development with ecological stewardship, where justice extends beyond the confines of statutes to embody the hopes and entitlements of communities impacted by large-scale initiatives.

²⁴² *Id.* at ¶ 65.

²⁴³ Julius Barigaba, *EACJ to Rule on Lower Chamber Hearing Oil Pipeline Project Case*, THE EAST AFRICAN, Feb. 21, 2024, <https://www.theeastafrican.co.ke/tea/news/east-africa/eacj-to-hear-case-challenging-construction-of-eacop-4532322> (last visited Feb 29, 2024).

²⁴⁴ *Id.*

IV. The EACJ Declaratory Judgments and State Compliance

The efficacy of international judicial bodies is contingent upon a constellation of interrelated elements, including the extent to which their verdicts are respected, the frequency with which they are engaged, and the substantive outcomes they produce.²⁴⁵ Scholars posit that the most accurate measure of a court's influence and effectiveness lies in the degree to which national governments comply with its decisions.²⁴⁶ This evaluation adopts a quantitative perspective, encapsulated by the ratio of judgments that are upheld relative to the aggregate number of judgments issued.²⁴⁷ Thus, a tribunal is considered effective when Member States adhere to and comply with decisions.²⁴⁸ In contrast, a tribunal's ineffectiveness is inferred when its decisions are predominantly ignored, indicative of scant compliance.²⁴⁹ However, this approach is not devoid of inherent limitations. Particularly, monitoring compliance is intricate, as states may defer adherence to a judgment or execute it after considerable delays.²⁵⁰

In light of these limitations, certain scholars propose an alternative methodology for assessing the efficacy of international courts, wherein the focus shifts from quantitative metrics to qualitative, normative outcomes engendered by judicial decisions.²⁵¹ Under this paradigm, a court's effectiveness is predicated on the tangible and desired changes in state behavior that align with the normative directives of the court's rulings.²⁵² This perspective acknowledges the multifaceted roles and objectives of international courts, thereby highlighting the insufficiency of a purely quantitative approach to comprehensively evaluate their impact.²⁵³ Moreover, this approach prompts the question of determining the definitive objectives that should constitute the

²⁴⁵ James Thuo Gathii, *Introduction: The Performance of Africa's International Courts*, in THE PERFORMANCE OF AFRICA'S INTERNATIONAL COURTS: USING LITIGATION FOR POLITICAL, LEGAL, AND SOCIAL CHANGE 1, 2 (James Thuo Gathii ed., 2020).

²⁴⁶ Eric Posner & John Yoo, *Judicial Independence in International Tribunals*, 93 CALIFORNIA LAW REVIEW 1, 28 (2005).

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.* at ¶ 20.

²⁵⁰ *Id.* at ¶ 28.

²⁵¹ Gathii, *supra* note 245 at 2-4.

²⁵² Laurence R. Helfer, *The Effectiveness of International Adjudicators*, in OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION, 464, 467 (Karen Alter, Cesare Romano, & Yuval Shany eds., 2014).

²⁵³ Gathii, *supra* note 245 at 2-4; Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CALIFORNIA LAW REVIEW 899, 917-918 (2005).

benchmark for assessing effectiveness.²⁵⁴ Consequently, while adherence to judgments is indicative of effectiveness, exclusive reliance on quantitative measures does not fully encapsulate the broader ramifications of such decisions.²⁵⁵

In the specific context of the EACJ and its jurisdiction over human rights, the court's approach is primarily interpretative, precluding the direct adjudication of human rights claims.²⁵⁶ The judgments issued by the EACJ typically possess a declaratory nature, lacking immediate and enforceable consequences for Member States.²⁵⁷ However, the declaratory nature of these judgments does not negate their potential impact. A declaratory judgment does not release the state from its obligations; rather, it necessitates that the state, of its own choice, act appropriately to align its behavior with the dictates of the judgment.²⁵⁸ Consistent with the principle that sovereign states are obligated to honor their international commitments in good faith, as reiterated by Article 38(3) of the EAC Treaty, states are compelled to expediently implement the court's judgments.²⁵⁹ Despite this obligation, it is observed that partner states within the EAC routinely fall short of implementing EACJ judgments, thereby generating challenges concerning non-compliance within the East African Community.²⁶⁰ Nonetheless, instances such as Tanzania's adherence to the EACJ's ruling in the *Serengeti* case, where it abandoned the construction of a road through the Serengeti National Park, demonstrate compliance with the court's decisions.²⁶¹

²⁵⁴ Yuval Shany, *Assessing the Effectiveness of International Courts: A Goal-Based Approach*, 106 AMERICAN JOURNAL OF INTERNATIONAL LAW, 233 (2012).

²⁵⁵ Gathii, *supra* note 245 at 2-4.

²⁵⁶ Gathii, *supra* note 3.

²⁵⁷ John Eudes Ruhangisa, *The Scope, Nature and Effect of EAC Law, in EAST AFRICAN COMMUNITY LAW: INSTITUTIONAL, SUBSTANTIVE AND COMPARATIVE EU ASPECTS* 139, 141-42, 152 (Emmanuel Ugirashebuja et al. eds., 2017).

²⁵⁸ Cornell Law School, Legal Information Institute, Declaratory Judgment, https://www.law.cornell.edu/wex/declaratory_judgment.

²⁵⁹ Treaty for the Establishment of East African Community (As amended on December 14, 2006 and August 20 2007), *supra* note 11 at Art. 38(3). The EAC Treaty States that “A Partner State or the Council shall take, without delay, the measures required to implement a judgment of the Court.”

²⁶⁰ Solomon T. Ebobrah & Victor Lando, *Africa's Sub-Regional Courts as Back-Up Custodians of Constitutional Justice: Beyond the Compliance Question, in THE PERFORMANCE OF AFRICA'S INTERNATIONAL COURTS: USING LITIGATION FOR POLITICAL, LEGAL, AND SOCIAL CHANGE* 1, 192 (James Thuo Gathii ed., 2020), <https://doi.org/10.1093/os0/9780198868477.003.0006> (last visited Aug 12, 2023).

²⁶¹ Win for conservationists as East African Court stops Serengeti road, THE EAST AFRICAN, Aug. 2, 2020, <https://www.theeastafrican.co.ke/tea/news/east-africa/win-for-conservationists-as-east-african-court-stops-serengeti-road--1325590> (last visited Mar 1, 2024).

V. CONCLUSION

The EACJ's remarkable transition from its initial economic focus to a broader mandate encompassing human rights and environmental protection marks a pivotal moment in the region's legal development. This transformative journey illuminates the court's adaptability and its proactive stance in addressing pressing issues such as climate change, thus unlocking a previously untapped dimension of its jurisdiction. However, this expansion does not come without challenges. The court may face hurdles in effectively balancing its newfound roles and ensuring compliance from Member States. Nevertheless, these challenges present unique opportunities for the EACJ to pioneer innovative approaches and contribute to regional integration while safeguarding fundamental rights and ecological interests.

Looking ahead, the EACJ stands at a crucial juncture where its jurisprudential trajectory holds the potential to influence sub-regional and continental legal frameworks. As the court continues to refine its approach, it would be prudent to monitor its endeavors. Regional actors could consider reinforcing legal mechanisms and resources to bolster the court's capacity to address evolving challenges related to human rights, environmental protection, and the intricacies of climate change. In a broader context, the EACJ's evolution mirrors global trends in the convergence of human rights and environmental law. By setting a precedent for comprehensive oversight, the EACJ contributes to the advancement of a legal framework capable of addressing human rights and environmental problems.

The EACJ's recalibration signifies a turning point, paving the way for a new era in judicial oversight that harmonizes human rights and ecological preservation. The court's continued commitment to this trajectory underscores its pioneering role in the region and holds promise for inspiring similar transformations in other regional courts and international bodies. However, it is imperative that the court exercises caution in its pursuit of expanding jurisdiction, as this ambition could potentially trigger a backlash from Member States. The EACJ could employ resilient and strategic tactics to mitigate any potential backlash. This necessitates a delicate balance, where the court champions its expanded mandate and engages in active diplomacy and collaboration with Member States. Through fostering open communication and building consensus, the EACJ can ensure that its broader jurisdiction is seen not as an overreach, but as a vital step towards addressing the complex, intertwined issues of our time. As such, supporting and further

nurturing the EACJ’s expanded mandate can serve as a beacon for a more holistic approach to adjudication, one that embraces the nuanced realities of the region.

