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Defining the Scope of Free Movement of Citizens in the East African Community: The East African Court of Justice and its Interpretive Approach

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Abstract

Free movement of persons is one of the core tenets of the East African Community (EAC) common market, making it seem like a purely economic project. However the EAC ultimately aims to constitute itself as a political federation. This article argues that the free movement of persons within the EAC should be interpreted in broad terms with the aim of asserting it as a fundamental right of EAC citizens. Such an interpretation should be championed by the East African Court of Justice, whose mandate is the interpretation and application of community law. The court, however, seems to prefer a narrow, textual and cautious interpretive approach that may not necessarily advance the EAC's broader objectives. A human rights-oriented interpretive approach might just be the key to realizing a progressive transformation in the rationalization of the right to free movement within the EAC.

Keywords

Free movement of persons, East African Community, fundamental rights, textual-formalism, regional integration, East African Court of Justice

INTRODUCTION

Free movement of persons within the East African Community (EAC) is grounded in the Treaty for the Establishment of the East African Community

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(EAC Treaty),[1] but elaborated in the EAC Common Market Protocol (CMP)[2] and its annexes. The EAC is primarily an economic integration scheme comprising the states of Kenya, Tanzania, Uganda, Burundi, Rwanda and, most recently, South Sudan.[3] Although its objectives may be said to be predominantly economic, a clear reading of the EAC Treaty reveals that the community's objectives traverse social, cultural, political, technological, legal and judicial, peace and security aspects. In fact, looking at the projected development of the EAC, the ultimate objective is to establish a political federation,[4] plans for which are underway. The free movement of persons within the EAC therefore ought to be looked at from this broader perspective, as a fundamental right that lies at the heart of EAC citizenship[5] and not as a mere tool for the consolidation of a common market.

From a regional integration perspective, the rationale for the free movement of persons is essentially economic. This proposition is best supported by the development and evolution of the free movement provisions within the European Community, now European Union, arguably one of the earliest and still surviving regional integration schemes, which serves as a prototype for other integration schemes. In the case of Europe, the free movement provisions were originally restricted to workers, one of the factors of production whose free movement within an economic community was necessary for the realization of a common market, one of the phases of regional integration.[6] It was later that the provisions were extended to members of their families and eventually morphed into one of the fundamental rights of citizens of the European Union.[7] This development and expansion of the scope of free movement in Europe has been largely attributed to the Court of Justice of the European Union (CJEU),[8] which was able

1 The treaty entered into force on 7 July 2000.

2 The Protocol for the Establishment of the EAC Common Market was signed by the then five partner states on 20 November 2009 and entered into force on 1 July 2010.

3 South Sudan was admitted into the EAC in March 2016.

4 EAC integration is to be achieved through four phases: a customs union, the protocol for which entered into force on 1 January 2005; a common market, which is still under implementation, although the protocol establishing it came into force on 1 July 2010; a monetary union, the protocol establishing which was signed on 30 November 2013; and a political federation.

5 Suffice to note that the status of an "EAC citizen" is not yet formally recognized, despite the availability of EAC passports for nationals of EAC partner states. Therefore, the use of the phrase "EAC citizen" in this article shall be understood as meaning "a national of a partner state recognized under the laws governing citizenship in the partner state", this being the interpretation provided in CMP, art 1. The issue of whether or not there can be said to be generic EAC citizenship merits further research and discussion. Part of this discussion has been laid out in the author's draft thesis; see C Nalule "Advancing regional integration", above at note * at 59–67.

6 Treaty of the European Economic Community, art 48.

7 W Maas "The genesis of European rights" (2005) 43/5 *Journal of Common Market Studies* 1009.

8 See A Reinisch *Essential Questions in EU Law* (2012, Cambridge University Press) at 68.

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to achieve this through an expansive and teleological interpretation of the relevant treaty provisions.[9]

In the case of the EAC, the free movement of persons is extensively detailed within the CMP. EAC partner states are obliged to ensure, without discrimination, the free entry and exit of each other's nationals into and from their respective territories, without a visa, and to ensure their free movement and stay within the state for a renewable period of up to six months.[10] Restrictions may only be applied on grounds of public policy, public security or public health.[11]

Despite being of general application (that is, not restricted to economically active persons), the positioning of this freedom within the CMP lends credence to a predominantly economic justification. Additionally it appears to imply that free movement of persons may lose its significance outside the common market or rather that, in the absence of the common market, there can be no alternative provision for it within the overall integration scheme. Such a conclusion, however, would have failed to take into account the EAC's overall objectives, which go beyond the economic aspects. How the provisions on free movement of persons within the EAC are interpreted will determine whether they are simply economic freedoms exercisable in a common market or whether they are in fact fundamental freedoms of EAC citizens. This is a task that would primarily lie with the East African Court of Justice (EACJ), the EAC's judicial organ, whose role as provided in the EAC Treaty is to interpret and apply the treaty, its protocols and annexes.[12]

Consequently, this article considers whether the EACJ's main interpretive approach favours a holistic definition of the scope of free movement of EAC citizens. It argues that the EACJ's interpretive approach is largely textual, and in some instances quite narrow, which tends to have a debilitating effect on the court's authority and ability progressively to shape the advancement of the right to free movement in the community. This is illustrated by an examination of the court's handling of the issue of free movement of persons. Regrettably, the EACJ has only dealt with three cases dealing with this issue, of which only one was decided on the merits.[13] Nevertheless this case,

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9 FG Jacobs "Citizenship of the European Union: A legal analysis" (2007) 13/5 *European Law Journal* 591 at 592; M Dougan "The bubble that burst: Exploring the legitimacy of the case law on the free movement of union citizens" in M Adams et al (eds) *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice* (2013, Hart Publishing) 127 at 145–46.

10 CMP, art 7.2.

11 Id, art 7.5.

12 EAC Treaty, arts 23 and 27.1. See also *The East African Law Society v The Secretary General of the East African Community*, EACJ ref no 1 of 2011.

13 *Samuel Mukira Mohochi v The Attorney General of Uganda*, EACJ ref no 5 of 2011. *Mbugua Mureithi wa Nyambura v The Attorney General of the Republic of Uganda and the Attorney General of the Republic of Kenya*, EACJ ref no 11 of 2011, a case that raised similar issues as those in *Mukira Mohochi*, but was dismissed on the grounds that it was filed outside the two month limitation period stipulated in art 30.2 of the EAC Treaty. In *East*

Samuel Mukira Mohochi v The Attorney General of Uganda (*Mohochi*),[14] is discussed in light of other court decisions on some significant issue areas, so as to present a more balanced and, hopefully, more persuasive argument. In some instances, in order to advance the proposition of this article, a comparison of similar issues is made with decisions of other regional courts, particularly the CJEU and the Caribbean Court of Justice (CCJ), to demonstrate how different interpretive approaches have led to different outcomes on similar issues. Needless to say, the operational context also needs to be taken into account in trying to understand why a court appears to favour one interpretive approach over another. Hence, the article also attempts to proffer an explanation as to why the EACJ might favour the textual-formalist approach.

The article is divided into six sections. The next section provides a general overview of the EACJ to ensure a clear understanding and appreciation of its structure and operational context. The article then examines the court's interpretive approach, both generally and particularly on the free movement of persons. The discussion demonstrates that the court's approach is largely textual and narrow (textual-formalism), which may have an effect on the court's authority, an argument that is expanded in the following section. Next the article discusses the advantages of the textual-formalism approach and how the EACJ may adapt it as the best strategy to achieve its purposes for the benefit of the community. The final section proposes a way forward for the EACJ, considering whether it should retain its approach or adopt another if it is progressively to influence and define the scope of free movement of EAC citizens in order to promote the EAC Treaty objectives holistically.

OVERVIEW OF THE EACJ: STRUCTURAL AND OPERATIONAL CONTEXT

The EACJ is established as the judicial organ of the EAC, mandated, just like the other organs, to act within the limits of the powers conferred by the EAC Treaty.[15] The court was inaugurated in 2001 but only received its first case in 2005. Chapter 8 of the treaty clearly details the court's jurisdiction, powers and mandate, and the role, composition, appointment, tenure and removal of its judges.

The court is currently based temporarily in Arusha, Tanzania and comprises two divisions: the First Instance Division and the Appellate Division. Although

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African Law Society v The Attorney General of the Republic of Burundi, EACJ ref no 1 of 2014, the issue was whether Burundi's public prosecutor had followed due process in issuing a ban prohibiting a citizen travelling out of the country. Hence it was more a procedural than a substantive issue.

14 Ibid.

15 EAC Treaty, art 9.

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the treaty provides for a maximum of 15 judges, there are currently ten[16] serving in the court, five in each division. A quick look at the profile of the judges, though predominantly male, reveals a diversity in terms of age, and multiple specializations including law practice, academia and exposure to international law and politics.[17] This gives the impression of a bench that is not only highly competent, but also potentially dynamic in its interpretation and application of the law.[18]

The court is a permanent institution but the judges are currently serving on an ad hoc basis until the Council of Ministers decides that the court is fully operational.[19] Apart from the president and vice-president of the court who reside in Arusha, the other judges only convene there for business when the need arises. Moreover they continue to serve on a full-time basis in their respective national official capacities. Due to this divided commitment, it is quite challenging to select the panel of judges to hear cases. This ineluctably impacts on the court's ability to hear and dispose of cases efficiently.[20]

Despite this operational drawback, the EACJ has one of the broadest access provisions for a regional court. References before the court may be brought by: a partner state against another partner state or a community organ or institution;[21] the Secretary General against a partner state that has failed to fulfil its treaty obligations;[22] any legal or natural person who is a resident in a partner state against a partner state or community institution that has acted in breach of the treaty;[23] and EAC employees.[24] Additionally, national courts or tribunals, while adjudicating matters that may concern the interpretation or application of the treaty, may refer relevant issues or questions to the EACJ for a preliminary ruling.[25] The Summit of Heads of State, the Council of

16 Each of the five partner states (excluding South Sudan) has a judge representing it on both divisions.

17 Profiles of the current EACJ judges are available at: <http://eacj.org/?page_id=1135> (last accessed 15 November 2017).

18 On the relationship between the profiles of judges of an international court and the court's legitimization strategies, see MR Madsen "The legitimization strategies of international judges: The case of the European Court of Human Rights" in M Bobek (ed) *Selecting Europe's Judges: A Critical Review of the Appointment Procedures to the European Courts* (2015, Oxford University Press) 259 at 270–71.

19 EAC Treaty, art 140.4.

20 See JE Ruhangisa (former registrar of the EACJ) "The East African Court of Justice: Ten years of operation" (paper presented at the Sensitisation Workshop on the Role of the EACJ in the EAC Integration, Kampala 1–2 November 2011), available at: <http://eacj.org/wp-content/uploads/2013/09/EACJ-Ten-Years-of-Operation.pdf> (last accessed 2 December 2017) at 24. The court itself pointed out this limitation in *Sitenda Sebalu v The Secretary General of the East African Community; The Attorney General of the Republic of Uganda and Two Others*, EACJ ref no 1 of 2010 at 39.

21 EAC Treaty, art 28.

22 Id, art 29.

23 Id, art 30.

24 Id, art 31.

25 Id, art 34.

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Ministers or a partner state may also request an advisory opinion from the court regarding a question of law arising from the treaty.[26] Furthermore, the court may also act as arbiter in matters for which it has been expressly designated as such in an agreement between contracting parties.[27]

Of all these access avenues, the most utilized is that by natural or legal persons, while partner states and the Secretary General have never brought matters before the court.[28] The preliminary ruling procedure has rarely been effected by the national courts of the various partner states. More than ten years since its inauguration, the EACJ, despite having national courts as its subregistries, only received its first and, as yet, only preliminary reference in 2015. The EAC Council of Ministers has so far requested two advisory opinions,[29] a demonstration of deference by an executive organ to the court's authority.

As regards the EACJ's relationship with other community organs, the dynamics vary from organ to organ. The East African Legislative Assembly (EALA) has demonstrated strong support for and submission to the court's authority on numerous occasions. Not only did EALA members bring the first case before the court, they have continued to use this avenue for resolving disputes and have consistently supported the extension of the court's jurisdiction as well as an increase in its funding.[30] The Secretariat, on the other hand, seems to be more aligned to the executive organs, which might explain why it has been described as viewing its "mandate through the prism of member state interests".[31] Not only is it always a respondent in cases before the court, being accused, in some cases, of failure to monitor treaty compliance by the partner states effectively,[32] but it is also seen as not being sufficiently open and inclusive of civil society efforts in support of the court.[33] However, its inaction or the inadequacy of its action could be due to the executive

26 Id, art 36.

27 Id, art 32.

28 References to the EACJ by natural or legal persons, some of which are brought by civil society organizations, account for almost 90% of the cases before the court.

29 *In the Matter of a Request by the Council of Ministers of the East African Community for an Advisory Opinion*, EACJ appln no 1 of 2008 (Advisory Opinion no 1 of 2008); *In the Matter of a Request by the Council of Ministers of the East African Community for an Advisory Opinion Made Pursuant to Articles 14(4) and 36 of the Treaty for the Establishment of the East African Community and Rule 75(4) of the East African Court of Justice Rules of Procedure, 2013*, request for an advisory opinion no 1 of 2015.

30 See *Calist Mwatela and Others v East African Community*, EACJ ref no 1 of 2005, which raised the issue of separation of powers between the Council of Ministers and its sectoral committees on the one hand and the EALA over bills of the EAC. For further discussion of EALA's support to the EACJ, see KJ Alter, JT Gathii and LR Helfer "Backlash against international courts in west, east and southern Africa: Causes and consequences" (2016) 27/2 *European Journal of International Law* 293 at 325–26.

31 Alter et al, id at 320.

32 In *Sitenda Sebalu*, above at note 20, the Secretary General was found to have failed to fulfil his obligations in invoking the powers vested in him under art 29 to ensure that the protocol on the court's extended jurisdiction is concluded.

33 Alter et al "Backlash", above at note 30.

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control that does not leave it with much autonomy to execute its mandate effectively. The EAC executive organs are the Summit of Heads of State, the Council of Ministers and their sectoral committees. The summit is responsible for the appointment and removal of the judges and for determining their salary and other terms and conditions.[34] Hence the executive can be said to have significant leverage over the court, proof of which was evidenced in the backlash the court suffered after its decision in *Peter Anyang' Nyong'o and Others v The Attorney General of Kenya and Others*.[35] In that case, the court declared null and void the process undertaken by the Kenyan Parliament in nominating its members to the EALA, holding that the process was a "fictitious election" in violation of the EAC Treaty. In retaliation, the Kenyan government led a disparaging campaign against the court, which resulted in amendments to the treaty. These included splitting the court into the two divisions (initially it had been a single court) and excluding the court's jurisdiction over matters upon which jurisdiction was conferred on organs or institutions of partner states.[36] The court has since declared that the latter amendment undermines its supremacy in interpreting and applying the treaty.[37] However, its call upon the relevant organs to revisit the amendments seems to have gone unheeded. A further effect of the court's trimmed jurisdiction may be seen in the Customs Union Protocol and CMP, where other institutions are granted jurisdiction over disputes arising under them.[38] The EACJ has however insisted that these are only alternative dispute resolution mechanisms that neither oust nor exclude its jurisdiction. It still remains the "final authoritative forum" with "jurisdiction over disputes arising out of the interpretation and application of the Treaty which … includes the Annexes and Protocols thereto".[39]

The EACJ's jurisdiction has been one of the frequently contested issues in several cases before it. In the first place, the court has jurisdiction to interpret and apply the treaty, but has "such other original, appellate, human rights and other jurisdiction as will be determined by the Council at a suitable subsequent date".[40] The main bone of contention in most cases has been the court's jurisdiction to hear matters relating to human rights. Although the protocol to extend the court's jurisdiction over such matters has not yet been

34 EAC Treaty, arts 24–26.

35 EACJ ref no 1 of 2006.

36 EAC Treaty, proviso to arts 27.1 and 30.3.

37 *The East African Centre for Trade Policy and Law v The Secretary General of the EAC*, EACJ ref no 9 of 2012, paras 58–59 and 68.

38 The Customs Union Protocol, art 24.1 establishes the East African Community Committee on Trade Remedies to settle disputes under the protocol, while the CMP, art 54.2 grants jurisdiction to redress violations of rights guaranteed under it to national judicial, administrative and legislative authority.

39 *The East African Law Society*, above at note 12 at 24; *The East African Centre for Trade Policy and Law*, above at note 37, paras 76 and 78.

40 EAC Treaty, art 27.

operationalized, the court has heard numerous cases that involve matters of human rights and the rule of law. While acknowledging that it indeed has no express jurisdiction to hear human rights matters, the court has applied the treaty's fundamental and operational principles, which include the promotion and protection of human rights and the rule of law to justify its jurisdiction. In the landmark case of *James Katabazi v The Attorney General of Uganda* (*Katabazi*) the court stated its position thus: "[w]hile the Court will not assume jurisdiction to adjudicate on human rights disputes, it will not abdicate from exercising its jurisdiction of interpretation under article 27(1) merely because the reference includes allegations of human rights violation".[41]

This decision set a precedent that has been followed and further defined in subsequent cases. As a consequence, and rather ironically, the court has entertained more cases alleging violations of human rights and the rule of law as fundamental principles of the EAC Treaty.[42] Being a court of a regional economic community, one would have thought that trade and economic disputes would constitute the majority of cases before it, but this is obviously not the case.

The free movement of persons being a "hybrid right",[43] having both an economic and human rights justification may thus present both a challenge and an opportunity for the EACJ: a challenge in the sense that there is uncertainty or even ambiguity in determining which justification should prevail in its interpretation; and an opportunity in the sense that the court could use it as a basis for adjudicating on a fundamental right even without the extended jurisdiction. This article now develops this argument further.

INTERPRETING THE EACJ'S INTERPRETIVE APPROACH ON FREEDOM OF MOVEMENT

Any court, in interpreting the law, may avail itself of a number of interpretive approaches or techniques. The EACJ often refers to article 31 of the Vienna Convention on the Law of Treaties (Vienna Convention), the codification of customary international law on treaty interpretation.[44] Article 31(1) provides

41 EACJ ref no 1 of 2007 at 16.

42 About 30% of the cases decided on their merits by the EACJ concern issues of fundamental and operational principles of the EAC Treaty, including human rights protection. This represents the majority of the court's case law. See also J Gathii "Variation in the use of sub-regional integration courts between business and human rights actors: The case of the East African Court of Justice" (2016) 79/1 *Law and Contemporary Problems* 37; J Gathii "Mission creep or a search for relevance: The East African Court of Justice's human rights strategy" (2013) 24/2 *Duke Journal of Comparative and International Law* 249.

43 LR Helfer "Sub-regional courts in Africa: Litigating the hybrid right to free movement" (2015, iCourts working paper series no 32), available at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2653124> (last accessed 15 November 2017).

44 See for instance *East African Centre for Trade Policy and Law*, above at note 37, paras 30–31;

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that treaties should be interpreted in "good faith in accordance to the ordinary meaning to be given to the terms of the treaty in their context and in the light of its objects and purpose". Treaty interpretation has thus often been broken down to encompass at least three approaches: actual text or textual; intention of the parties; and the object and purpose.[45] Within these approaches, judges may rely to varying degrees on formal reasons (based on authoritative sources of law such as constitutions, statutes, precedents on statutory interpretation, general principles of law etc) and substantive reasons (based on moral, economic, social and political content, and arguments).[46] This article argues that the EACJ's interpretive approach is predominantly textually based on formal reasons (textual-formalism). Moreover, the use of the term "formalism" has also been associated with judicial restraint or caution as opposed to judicial activism.[47] In a formalist model, courts tend to uphold the separation of powers strictly, viewing their role as "merely being to discern and apply - the 'intent' of the legislature".[48] Hence the courts tend to do less gap-filling in the exercise of restraint or caution. Therefore, the use of the term "textual-formalism" also connotes judicial restraint or caution.

As mentioned above, the EACJ usually refers to article 31(1) of the Vienna Convention to justify a strict textual interpretation, which it has adopted in a number of significant cases, as this article illustrates in the following paragraphs.[49] Yet, the EACJ has not always been set in the textual-formalism mould. It has occasionally embraced an expansive or liberal, purposive interpretive approach by which it has justified its adjudication upon matters that would not ordinarily fall within the purview of a regional economic court. This is particularly evident where it has had to assert its jurisdiction and

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Democratic Party v The Secretary General, EAC and Others, EACJ ref no 2 of 2012, paras 23–24; Advisory Opinion no 1 of 2008, above at note 29 at 28–29.

45 M Shaw *International Law* (6th ed, 2008, Cambridge University Press) at 932. Gerard Conway similarly identifies several approaches including: the textual or literal, based on the ordinary or technical meaning of the words; the teleological or purposive, which looks at the object and purpose of the legal instrument; the historical or originalist, which looks at the intention of the framers; the consequentialist reasoning; the evolutionary or innovative interpretation; and the first versus second order justification. See G Conway *The Limits of Legal Reasoning and the European Court of Justice* (2012, Cambridge University Press) at 19–21.

46 R Summers and M Taruffo "Interpretation and comparative analysis" in DN MacCormick and R Summers (eds) *Interpreting Statutes: A Comparative Study* (1991, Dartmouth Publishing) 461 at 498–99.

47 R Posner "Legal formalism, legal realism, and the interpretation of statutes and the constitution" (1986–87) 37 *Case Western Law Reserve Law Review* 179 at 180–81.

48 WN Eskridge "Dynamic statutory interpretation" (1987) 135 *University of Pennsylvania Law Review* 1479 at 1489–90.

49 In *Mbugua Mureithi*, above at note 13, the court reasoned that the EAC Treaty is an international treaty subject to Vienna Convention, art 31(1) and that the court is guided by that article in its interpretation. Moreover it applied its strict interpretation on time limitations and on this basis dismissed the case without hearing it on its merits.

powers in cases involving allegations of human rights violations,[50] environmental matters[51] and procedural anomalies in the election of EALA members.[52] The court's validation of its jurisdiction over such matters has been described as judicial activism.[53] It is noteworthy that, until now, the EACJ's activism is most strikingly noticeable on matters touching upon its substantive jurisdiction. However, when it comes to the interpretation of other substantive issue areas laid out in the various treaty provisions, activism appears to give way to textual-formalism. Specifically, the free movement of persons and the general human rights dimension can be seen as some of the issue areas where the court has fallen back to textual-formalism instead of carrying on with the liberal approach.

The EACJ has thus far dealt with three cases involving the free movement of persons. Of these only *Mohochi* is of relevance as it was dealt with on substantive issues.[54] The applicant in this case, a Kenyan lawyer, part of a delegation from Kenya scheduled to meet the Ugandan chief justice, was denied entry into Uganda for reasons not availed to him. He was instead handed a copy of a "notice to convey prohibited immigrant" and later made to board a flight back to Nairobi. He challenged the actions of the Ugandan immigration officers (for whom the Attorney General was sued in a representative capacity) as contravening various provisions of the EAC Treaty, the CMP and the African Charter on Human and Peoples' Rights (African Charter) (articles 2, 6, 7, 9, 10, 11 and 12).[55] The respondent contended that Uganda retained sovereignty over immigration matters and that the applicant's refusal was based on the limitation clause on free movement, that is for reasons of public interest, public security or public health. Broad and non-specific allegations were made as to the applicant having been a security threat, none of which the court found convincing. Consequently the court decided in favour of the applicant, declaring that the respondent had violated the EAC Treaty, the CMP and the applicant's rights as guaranteed in the African Charter.

50 *Katabazi*, above at note 41.

51 *The Attorney General of the United Republic of Tanzania v African Network for Animal Welfare (ANAW)*, EACJ appeal no 3 of 2011; and *The Attorney General of the United Republic of Tanzania v African Network for Animal Welfare*, EACJ appeal no 3 of 2014. These cases are popularly referred to as *Serengeti*.

52 In *Peter Anyang' Nyong'o*, above at note 35, the court overruled the contention that the determination of issues arising from the election of EALA members was reserved for appropriate institutions in the partner states, not the EACJ.

53 Gathii "Mission creep", above at note 42 at 254.

54 See above at note 13.

55 The relevant provisions were arts 6(d) and 7.2 of the EAC Treaty, which set out the fundamental and operational principles that include human rights observance. Art 7 of the CMP concerns the free movement of persons. The referenced articles of the African Charter provide for non-discrimination, freedom from arbitrary arrest and detention, the right to fair and just administrative action, the right to information, and the freedoms of assembly, association and movement.

Some of the commendable aspects in the judgment included the court's progressive and pro-integrationist standpoint in upholding the principles of the supremacy of community law and its direct effect once the partner states had domesticated it. Although Ugandan immigration law had not been amended to conform to the treaty, the court held that, as regards citizens of EAC partner states, section 52 on prohibited immigrants would have to be applied in conformity with the EAC Treaty.[56] Failure to do so would amount to an infringement of the treaty. On the issue of state sovereignty, the court was equally assertive in holding that, although the EAC Treaty did not remove a state's sovereignty to admit or deny entry to foreign nationals, such sovereignty could only be exercised in accordance with community law and not in violation of it.

However, the court was rather non-committal and circumspect on a number of key issues. For instance, it overlooked the correlation between free movement under the CMP (as an economic or market freedom) and free movement under the African Charter (as a fundamental or human right), leaving a wide gap. While making specific findings on the violation of the applicant's freedom of movement under the CMP, it entirely neglected the other limb on violation of free movement as a human right, even though the applicant had provided the necessary opening by alleging violation of free movement under both the CMP and the African Charter. The court offered no explanation for this omission, hence one can only speculate. The court might have assumed that its scrupulous evaluation of the facts under the CMP and finding of a violation of that protocol negated the need to evaluate the same facts under the African Charter. Furthermore, it did not deem itself the proper forum to decide upon alleged violations of the charter, as explained below.

In a more cursory manner, the court held that the applicant's rights under the African Charter, besides free movement, had been violated, without any justification grounded in the charter or in human rights discourse. For instance, after assessing the facts based on the lexical definition of "detention", and without any reference to the African Charter, the court found that the applicant's freedom from arbitrary arrest and detention had been violated.[57]

It is arguable that the court's avoidance of a sound human rights assessment was due to its limited jurisdiction over human rights matters, a position about which the court was explicit in a subsequent case where it held that "if there is a violation of the African Charter, then the EACJ is not the forum to challenge such violation".[58] The court thus opted to refer to the free movement of persons as a "Treaty-guaranteed right", a neutral phrase that favours neither a strictly economic nor human rights justification. Moreover, considering the hybrid nature of the right, the court could boldly have relied on the human

56 *Mukira Mohochi*, above at note 13, para 122.
57 Id, paras 104–08.
58 *Democratic Party*, above at note 44, para 63. The decision was overturned in *Democratic Party v The Secretary General, EAC and Others*, EACJ appeal no 1 of 2014, paras 73 and 79.

rights principles of the EAC Treaty and its *Katabazi* precedent to adopt a more human rights oriented interpretation. What this probably reveals about the EACJ is its uncertainty about adjudicating on human rights matters after setting the precedent in *Katabazi*. The court appears not to trust itself to read into the EAC Treaty what the treaty does not expressly provide, hence its failure to read the fundamental and operational principles expansively in order to resolve human rights related issues, including the right to free movement, satisfactorily.

When it came to the issue of limitations on free movement, the court similarly based its decision on the express provisions of the CMP. The CMP allows for limitations on free movement, but makes it obligatory for a partner state imposing a limitation to notify other partner states,[59] which the Ugandan officials did not do in *Mohochi*. On this basis, and in addition to the high-handed behaviour of the immigration officials, the court found no justification for restricting the applicant's right. What is of particular interest is the test the court laid down in evaluating any justification of imposed limitations. It stated that "a Partner State, before imposing a limitation on an individual would have to satisfy itself that the measure is merited in each particular case".[60] The court seems to have developed this test from an express reading of the treaty. Apart from the fact that the test is highly subjective, it is also at variance with the strict objective proportionality test applied by other regional courts. The CJEU has in numerous cases averred that limitations or restrictions should be based on objective considerations independent of the nationality of the persons concerned and be proportionate to the legitimate aim of the national measures undertaken.[61] This objective test was likewise upheld by the CCJ when deciding on limitations on the free movement of persons in a case very similar to *Mohochi*.[62] The objective test is more in accord with the human rights standard test for assessing the justification of limitations on fundamental rights. Had the EACJ not shied away from adopting a human rights approach, it could have prescribed a higher standard test

59 CMP, arts 7.5 and 7.6.

60 *Mukira Mohochi*, above at note 13, para 115.

61 See case C-224/98 *Marie-Nathalie D'Hoop v Office National de l'Emploi* [2002] ECR I-6191, para 36; case C-274/96 *Criminal Proceedings Against Horst Otto Bickel and Ulrich Franz* [1998] ECR I-7637, para 27; case C-303/12 *Guido Imfeld and Nathalie Garcet v État Belge* [2013], para 64.

62 *Shanique Myrie v The State of Barbados* [2013] CCJ 3 (OJ), para 70. The applicant in this case was a Jamaican citizen who was denied entry into Barbados and deported back to her home country on the alleged ground that she had been untruthful about her host in Barbados. She claimed before the CCJ that the respondent state had violated her right to free movement under the Caribbean Community Law. Regarding limitations on a community citizen's free movement, the court's holding was "that no restrictions in the interests of public morals, national security and safety, and national health should be placed on the right of free entry of a national of any Member State unless that national presents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society".

than the watered-down version it set by adhering to a narrow textual interpretation.

Generally speaking, most of the EACJ's decisions are characterized by rather tautological and discursive arguments on the meanings of words and, as in *Mohochi*, issues (such as whether or not the applicant was detained) are decided based on the ordinary or technical meaning of a key word. Although other non-textual approaches may be considered, in the final analysis it is the textual or literal approach that is usually decisive. By adopting this approach, the EACJ is obviously guided by article 31(1) of the Vienna Convention and is probably justified in doing so when the literal interpretation of the text does no harm to the context and purpose of the treaty. The problem, however, arises where the court limits itself to the textual interpretation, neglecting the context and objects and purposes approach. A proper reading of article 31(1) does not seem to encourage a dissected application of these guidelines to interpretation,[63] but rather seems to emphasize that the text is the starting point of treaty interpretation and that the context and purpose of the treaty should be considered.[64] With regard to *Mohochi* therefore, the argument is that, while the court interpreted the free movement of persons in light of the CMP provisions, based mainly on an interpretation of the text, it might have come to a more robust decision by applying the treaty's objects. By adopting an interpretation to the free movement of persons that accommodates the human rights dimension, the court would definitely have reached a more expansive and purposive decision that resonates more with the wide-ranging objectives of the treaty, including strengthening cooperation in the political, economic, social and cultural fields.[65]

Indeed, a careful examination of those EACJ decisions that have been considered activist buttresses the contention that it favours textual-formalism. It is highly doubtful whether the court might have reached those decisions in the absence of express treaty provisions that could support the court's entertainment of those cases. With regard to cases involving human rights claims, the court relied on the fundamental principles expressly provided for in articles 6(d) and 7.2 of the EAC Treaty to override the jurisdictional limitations imposed in article 27.2. Similarly in *Serengeti*, the court's decision to deal with environmental matters was based on the express text of specific subject-related treaty provisions.[66] Accordingly, in the absence of explicit treaty provisions that favour an expansive interpretation, the EACJ has opted

63 Shaw *International Law*, above at note 45 at 933.

64 I Van Damme "Treaty interpretation by the WTO appellate body" (2010) 21/3 *European Journal of International Law* 605 at 620.

65 EAC Treaty, arts 5.1–5.3.

66 Above at note 51. The court relied on the EAC Treaty, arts 5.2 and 5.3, which comprise part of the community's objectives, and arts 111–14, which generally provide for co-operation in environment and natural resources management.

for a narrow and rigid textual interpretation, expressly rejecting any alternative interpretations. This is further illustrated by its position on three issues.

The first issue is time limits. Before the 2006–07 EAC Treaty amendments, there was no time limit within which natural or legal persons could file cases before the EACJ. This changed with the introduction of article 30.2, which provides a two month window within which natural and legal persons should file cases before the court. The court has adhered strictly to this time limit, arguing that legal certainty requires a "strict application of the time limit".[67] Hence, it has even rejected the argument on "continuing violation", commonly acceptable in human rights matters,[68] conclusively stating that "there was nothing in the *express language*" (emphasis added) of the article that suggests that continuing violations were exempted from the two month limit. In a statement more telling of its rather cautious and restrained approach, the court held that "nowhere does the Treaty provide any power to the court to extend, to condone, to waive, or to modify the prescribed time limit for any reason".[69] The court seems to have effectively rejected any other argument that would allow for any flexibility or even expansive reading of this particular provision, despite arguments that the two month limit is unfair and unreasonable for individual litigants in a region with comparatively low levels of transparency and access to information.[70] The Appellate Division thereby reversed the more expansive and purposive reading by the First Instance Division that had allowed for continuing violations under article 30.2, thus setting a precedent that has been followed in subsequent cases. This has led to several cases not being heard on their merits, including one, very similar to *Mohochi*, which touched on the free movement of persons.[71]

The second issue relates to the principle of horizontal direct effect. The case of *Modern Holdings (EA) Limited v Kenya Ports Authority* (*Modern Holdings*)[72] presented an opportunity for the EACJ to extend its authority to national public bodies and private companies. The court, however, held that it had no jurisdiction over matters brought by natural or legal persons, where the respondent was neither a partner state nor an EAC institution. The court was not at all convinced with the contention that the respondent was a public body in a partner state, carrying out services that come within the auspices of community law. It thus rejected the invitation to read the treaty purposively

67 *The Attorney General of Uganda and Another v Omar Awadh and Others*, EACJ appeal no 2 of 2012, para 59.

68 Id, paras 48–49.

69 Id, paras 49 and 59.

70 A Possi "The East African Court of Justice: Towards effective protection of human rights in the East African Community" (2013) 17 *Max Planck Yearbook of United Nations Law* 1 at 19.

71 *Mbugua Mureithi*, above at note 13. Other cases include *Hilaire Ndayizamba v Attorney General of Burundi and the Secretary General, EAC*, EACJ ref no 3 of 2012; and *Georges Ruhara v The Attorney General of Burundi*, EACJ ref no 4 of 2014.

72 EACJ ref no 1 of 2008. The court emphasized this position further in *Alcon International Limited v Standard Chartered Bank of Uganda and Two Others*, EACJ ref no 6 of 2010.

and thus apply the principle of horizontal effect. This shows a clear divergence in approach from that of the CJEU in particular. Whereas the CJEU was unrestrained in laying down the principle of horizontal direct effect, extending it even to private bodies that would be obliged under community law,[73] the EACJ refrained from applying it to public bodies that carry out services regulated by community law.

Thirdly, the EAC Treaty does not specifically set out the remedies that the EACJ may offer. The court has interpreted its remedial powers as being restricted to making "declarations of illegality of the impugned acts"[74] and orders as to costs. The court has deemed making any other orders to be beyond its jurisdiction.[75] The court has particularly declined to award damages of any kind, arguing that the cases before it are not grounded in tort or contract.[76] According to the EACJ, its jurisdiction to grant such remedies is excluded by the joint effect of articles 23, 27 and 30 of the EAC Treaty. However, a close reading of these articles (which respectively provide for the role of the court, its jurisdiction, and references by legal and natural persons) cannot, prima facie, be seen as restricting the court's array of remedies. The court seemed inclined to this position in *Serengeti*. Faced with the issue of whether the court had powers to grant a permanent injunction against a sovereign state party, the court adopted the teleological approach. In what appears to be a complete reversal of its earlier position, it stated that, as a judicial body, it "must necessarily be clothed with all the attributes, powers, authority and stature ordinarily vested in similar judicial bodies. Such is necessary for the achievement of its fundamental objective, namely: *to ensure adherence to the* [*law*]*… and compliance with th*[*e*] *Treaty*".[77] This change in position might have been due to the fact that the remedy in question was an equitable remedy, not a remedy at law. The Appellate Division justified this by re-affirming the applicant's contention that the court's power to grant an equitable remedy cannot be found in the EAC Treaty.[78]

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73 C-36/74, *BNO Walrave and LJN Koch v Association Union Cycliste Internationale, Koninklijke Nederlandsche Wielren Unie et Federación Española Ciclismo*. In this case, the court had to determine whether the treaty articles in question could be applied to legal acts of persons or associations who do not come under public law. In a teleological manner, the court reiterated that the principle of non-discrimination on grounds of nationality as articulated in the EEC Treaty applies in all spheres of gainful employment and provision of services. It thus reasoned (para 18) that the objectives of the community "would be compromised if the abolition of barriers of national origin could be neutralized by obstacles imposed by organizations which do not come under public law".

74 *Sitenda Sebalu*, above at note 20 at 41.

75 In *Hilaire Ndiyazamba*, above at note 71, the court declined to make orders that the applicant be allowed to enjoy his freedom and should be released immediately, on the basis that it lacked the jurisdiction to grant such prayers. See also *Venant Masenge v The Attorney General of the Republic of Burundi*, EACJ ref no 9 of 2012.

76 *Timothy Alvin Kahoho v The Secretary General of the EAC*, EACJ appeal no 2 of 2013, para 83.

77 *Serengeti*, EACJ appeal no 3 of 2014, above at note 51, paras 52–53 (emphasis original).

78 Id, para 51.

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Arguably, the EACJ's decision in *Serengeti* may not affect its earlier position on non-equitable remedies, such as damages, as these are available at law. Hence they may need to be expressly provided for in legislation. Accordingly, the court's interpretation of its remedial powers regarding non-equitable remedies may be seen as a clear example of its textual-formalism, which can be contrasted with the CJEU's expansive and teleological reading of its powers on the same issue. Even though it could not find an express provision on extensive remedial powers, the CJEU established the principle of state liability, in which a member state of the European Community could be liable to pay damages. In *Francovich and Others v Italy*, the CJEU held that "the principle whereby a State must be liable for loss and damage caused to individuals as a result of breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty".[79] One might argue that the CJEU, unlike the EACJ, was addressing a national court that could then see to the application and enforcement of the principle. From this perspective, the situations of the EACJ and CJEU may not be comparable, but this would be missing the key point, which is the principle that was established for the purposes of enhancing community law. The CCJ may present a more appropriate comparison to further the argument. Upon making a finding of violation of the free movement of a community citizen by a member state, the CCJ awarded damages to the applicant, despite the absence of an express treaty provision to that effect.[80] The court was able to award compensatory damages to the applicant, having endorsed the principle of state liability in one of its earlier decisions.[81] The CCJ's interpretive approach, which, like the CJEU's, has tended to be more teleological, serves to illustrate the contrasting textual-formalism approach of the EACJ. The EACJ's limited remedial powers might proffer a probable explanation for why business persons or individual litigants are reluctant to take matters before the court.[82]

The EAC objectives and principles, contained in articles 5–7 of the EAC Treaty, span a variety of issue areas including regional trade and economics, rule of law, human rights, environmental matters, peace and security,

79 Joined *Cases C-6/90 and 9/90, Andrea Francovich and Others v Italy* [1991] ECR I-5357, para 35.

80 *Shanique Myrie*, above at note 62. The CCJ awarded the applicant damages for breach of the right to travel within the community without harassment or the imposition of impediments. The harassment to which she was subjected included a humiliating cavity search and overnight detention in a cell prior to her expulsion from Barbados.

81 Id, para 94. The court relied on its earlier decision in *TCL v Guyana* [2009] CCJ 5 (OJ), in which it acknowledged the lack of express treaty provisions on sanctions for breach of the treaty, but applied the principle of state liability as enunciated in *Francovich v Italy*. The CCJ reasoned (para 24) that "the new Single Market based on the rule of law implies the remedy of compensation where rights which enure to individuals and private entities under the Treaty are infringed by a Member State". In awarding damages in *Shanique Myrie*, the court went on to specify and apply the conditions under which compensation may be granted.

82 Gathii "Variation", above at note 42 at 45 and 51–54.

political, and cultural and other social aspects of integration. Being integral and express provisions of the treaty, the court is mandated to interpret and apply them.[83] Consequently one can comfortably conclude that the court's substantive jurisdiction should reflect the treaty's broad issue areas encapsulated in the objectives and principles of the EAC. Owing to its reliance on these provisions, the court has dealt with matters that it may not ordinarily have been expected to handle, and accordingly delivered decisions for which it is considered activist. However, as the discussion above has highlighted, the court has not followed through with a liberal and purposive interpretation on some significant issues. In particular, its handling of human rights issues may be seen as oscillatory. After *Katabazi*, one might have expected more human rights oriented decisions but, in a number of cases, including *Mohochi*, the court hesitates to take that further step on important human rights issues. It fails to consider them with the depth that they deserve. In one of its decisions, the First Instance Division actually held that it lacked the jurisdiction to interpret provisions of the African Charter, yet the EAC Treaty sets it as a standard.[84] In an interesting turn of events, this decision was later overturned by the Appellate Division stating that the EACJ did have jurisdiction to ensure adherence to the provisions of the African Charter and its protocol.[85] The implication of this decision, particularly on the free movement of persons, is that the EACJ can actually consider, in a more profound manner, the human rights dimension of the right, thus adopting a comparatively more expansive interpretation. Such an interpretation would be more consonant with the EAC's overall objectives, the ultimate of which is establishing a political federation. At that stage, it is expected that the human rights rationale might prevail over the economic rationale for the free movement of community citizens.

Yet the court appears to be hesitant to embrace fully its role in promoting and protecting human rights, so it may take some time before it can even view the free movement of persons within the EAC from a human rights perspective. The reason for this is that, despite dealing with a number of cases involving rule of law, human rights, environmental and other non-trade related issues, the court in *Omar Awadh* insisted that it is a trade-related court and not a human rights court, in justifying its rejection of a liberal or purposive interpretation on time limitations.[86] This can be said to be a rather restrictive and somewhat misleading interpretation of the court's broad substantive jurisdiction.

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83 See for instance, the court's decision on arts 5–7 in *Attorney General of Kenya v Independent Medical Legal Unit*, EACJ appeal no 1 of 2011 at 12.

84 EAC Treaty, art 6(d). See *Democratic Party*, above at note 44, para 63.

85 *Democratic Party* appeal no 1, above at note 58, paras 73 and 79.

86 *Omar Awadh*, above at note 67, para 48. This part of the court's decision is later alluded to and perhaps re-stated in *Mukira Mohochi*, above at note 13, para 28.

In light of the EACJ's broad substantive jurisdiction, comparing it with other international tribunals or courts such as the World Trade Organization Appellate Body (WTO AB), the CJEU or most other regional tribunals that serve a more or less singular objective, presents its own challenges in some aspects. For instance, it may be argued that the EACJ's approach is not so different from that of the WTO AB, which scholars have pointed out to be overly textual.[87] However, the EACJ is dealing with the interpretation of a constitutional treaty while the WTO AB specializes in trade-related issues that are essentially contractual matters. Hence, the textual approach may well serve its purpose. Even then the WTO AB's approach has been defended as being more contextual than purely textual in a grammatical sense.[88] Further, it has been noted that the WTO AB recently seems to be moving away from textualism and embracing a more evolutionary hermeneutic.[89]

In contrast, the EACJ can be seen as a cross between the WTO AB, the CJEU, the European Court of Human Rights and the International Court of Justice all rolled into one. Being in such a position, textual-formalism may not always be the best approach to breathe life into the provisions of the treaty. For instance, for such a hybrid right as the free movement of persons and as illustrated in *Mohochi*, it is extremely hard in some circumstances to separate purely economic/trade-related claims from human rights claims. In this case, it might be more befitting for the court to lean towards a more expansive interpretive approach, bearing in mind the wide-ranging objects of the treaty that it is mandated to interpret and apply. Additionally, the EAC Treaty, by virtue of the scope of its subject matter, would be better categorized as a legislative and constitutional treaty rather than a contractual treaty. For this reason, favouring a broad or expansive hermeneutic would be more appropriate.[90]

EFFECTS OF THE EACJ'S TEXTUAL-FORMALISM ON ITS AUTHORITY

Karen Alter et al have developed a typology on the authority of international courts, in which they assess a court's de facto authority based on the practices

87 Van Damme "Treaty interpretation", above at note 64 at 622–23.

88 Ibid.

89 Id at 624. This transition is quite evident in the statement of the WTO AB in the case of *European Communities: Measures Affecting Asbestos and Asbestos-Containing Products* WT/DS135/AB/R, where it decided (para 88) that the term "like products" "must be interpreted in light of the context, and of the object and purpose, of the provision at issue, and of the object and purpose of the covered agreement in which the provision appears". The same approach was reiterated in *European Communities: Customs Classification of Frozen Boneless Chicken Cuts* WT/DS269/AB/R, WT/DS286/AB/R, paras 175–76.

90 J Pauwelyn and M Elsig "The politics of treaty interpretation: Variations and explanations across international tribunals" in JL Dunoff and MA Pollack (eds) *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (2013, Cambridge University Press) 445 at 461.

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of key audiences.[91] They create a tier of authority ranging from "no authority" to "extensive authority", with the intermediary stages being "narrow" and "intermediate" authority. "No authority" refers to a situation where "litigants do not file cases at the court, and cases that the court decides are generally ignored".[92] A court will have "extensive" authority when its audience broadens to include civil society groups, bar associations, industries and legal academics. Consequently, the EACJ has been rated as having "no authority" over business actors, while having an emerging "extensive" authority in human rights cases.[93] Holding a slightly different view, Gathii considers the EACJ's authority over human rights cases to be "intermediate", a rank below "extensive".[94]

Despite the relatively high ranking of the court's authority regarding human rights and rule of law, it is doubtful whether this extends to its free movement jurisprudence. At most, the EACJ's authority on the free movement of persons is narrow on the lower scale. This is so because the impact of the *Mohochi* judgment seems not to have extended beyond the parties to the suit, when compared to, for example, the domino effect of *Katabazi*. Also, when compared to the CCJ, whose decision in *Shanique Myrie v The State of Barbados* (a case with facts similar to *Mohochi*) received wide attention from a diverse audience,[95] the *Mohochi* decision seems to be largely unnoticed except within elite legal circles. One of the reasons for this could be that no remedial action was ordered against the errant state, except perhaps that it was shamed.[96] The court's interpretation of its remedial powers may have partly contributed to its eschewal.

The EACJ's apparent lack of authority over business actors, who should in reality be one of its key audiences, has been attributed to the availability of alternative, more effective avenues and mechanisms. However, the court's ruling in *Modern Holdings*[97] coupled with its limited range of remedies deemed inadequate for business issues, have played a role in alienating economic actors.[98] Consequently the court rarely receives cases relating to the CMP and other economic integration issues. It may be argued that the free movement of persons is not really about the business community and that its

91 K Alter, L Helfer and M Madsen "How context shapes the authority of international courts" (2016) 79/1 *Law and Contemporary Problems* 1.

92 Id at 9.

93 Id at 16.

94 Gathii "Variation", above at note 42 at 37 and 54.

95 S Caserta and M Madsen "Between community law and common law: The rise of the Caribbean Court of Justice at the intersection of regional integration and post-colonial legacies" (2016) 79/1 *Law and Contemporary Problems* 89 at 111–12.

96 Gathii argues that most human rights cases brought before the EACJ are largely aimed at "naming and shaming" errant governments, which in itself may be satisfactory for the largely civil society litigants: Gathii "Variation", above at note 42 at 61.

97 Above at note 72.

98 Ruhangisa "The East African Court of Justice", above at note 20 at 29–30. Gathii "Variation", above at note 42.

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eschewal of the court may thus have no influence on other EAC citizens. This argument would however ignore at least two things: the business community is one of the key drivers for integration within the EAC and thus frequently invokes the free movement provisions; and for non-economically active citizens, the two month time limit is rather prohibitive, especially in a region where access to justice remains a huge challenge. Perhaps the court's seemingly inflexible interpretive approach regarding some significant issue areas has had a constricting effect on some of its key audience. This in turn might have curtailed its de facto authority.

Needless to say, the court's interpretive approach is not the only factor in assessing its authority. The EACJ's structural and operational context as well as the region's geo-political and socio-economic environment also have a significant role to play, and it would be preposterous for the court to be out of touch with this reality. The EACJ may therefore be justified, and possibly is being strategic, in favouring the textual-formalist hermeneutic. The next section develops this line of argument further, but also considers the opportunities that the EACJ enjoys from which it can adopt a more expansive interpretive choice in order to boost its efficacy and perhaps authority.

MAKING CAPITAL OUT OF TEXTUAL-FORMALISM?

Textual interpretation is considered largely justified where the text to be interpreted is more detailed or specific.[99] Pauwelyn and Elsig claim that, the more incomplete a treaty, the more an international court will be inclined to engage in a gap-filling exercise; the reverse then is true for treaties that may be regarded as more complete or comprehensive in scope.[100] This may prove a persuasive justification for the EACJ's preference for textualism. The EAC Treaty is quite comprehensive, with broad objectives, while the provisions on the free movement of persons are relatively elaborate, leaving probably less room for gap-filling. For instance, it was through the treaty's explicit principles espousing human rights that the EACJ was able to circumvent the restrictions on its jurisdiction. Furthermore, and by way of comparison, key areas in which the CJEU is accredited for shaping European law, such as developing the principles behind the direct effect and supremacy of community law as well as expanding the scope of persons covered by free movement provisions, are in the case of the EAC explicitly incorporated and codified into law. Consequently, the EACJ may have less of a gap-filling role to play when compared to other regional courts, in which case the textual approach may be more appropriate.

In yet another dimension, the court's textual-formalism might be considered to be a strategy or judicial tactic. The argument on judicial strategy has been propounded as a means by which a court builds its reputation and

99 Eskridge "Dynamic statutory interpretation", above at note 48 at 1496.

100 Pauwelyn and Elsig "The politics of treaty interpretation", above at note 90 at 462.

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enhances its legitimacy. This strategic model proposes that judges will tactfully adapt their behaviour and decisions to suit their interests under different circumstances.[101] Madsen refers to this as courts' "legitimization strategies", arguing that a court's legitimacy is based on how courts are reflexive of society: how a court's practices might reflect society and be justifiable to it.[102] He as well as Olsen claim that the narrow textual approach is usually adopted by an international court as a form of legal diplomacy to gain the confidence of partner states.[103] Dothan expands this argument further, averring that international courts have to take into account political considerations and make compromises to suit them all the time.[104] Consequently, an international court will favour a more restrictive as opposed to an expansive or even teleological hermeneutic when it needs to gain support and confidence from the very states that established it.

The strategic model seems to correspond with the EACJ to a large extent and could be the explanation for why it has opted for textual-formalism. There are a number of circumstances to support this argument. First, the court is relatively nascent, with judges appointed by the Summit of Heads of States and serving on an ad hoc basis. The court's funding is inadequate and the post-*Anyang' Nyong'o* backlash showed that individual governments might not attach much significance to the court as they were advocating for its abolition.[105] The court, therefore, need not only assert its legitimacy but also prove its relevance, particularly to the political organs and governments that established it. It is not yet as independent as it should be and, in the circumstances, textual-formalism, in as far as it is useful as a tool in legal diplomacy, would best serve its purposes. The court may thus be seen to be deferential to, and to uphold the intentions of, the treaty framers,[106] with decisions that are more difficult to challenge from a political perspective.

Secondly, the prevailing political environment within the EAC needs a court that can be seen to balance multiple interests: community versus partner states; partner state versus partner state; community versus community citizens; and partner states versus community citizens. Additionally, EAC states still cling to their sovereignty; the EAC secretariat is notably weak and far from being a supranational institution; the democratic credentials of most EAC countries are rather low, including aspects of rule of law and good governance; and the region is potentially volatile and prone to conflict, which places peace and security issues rather high on the EAC's agenda. These and other

101 S Dothan *Reputation and Judicial Tactics: A Theory of National and International Courts* (2015, Cambridge University Press) at 52–54.

102 Madsen "The legitimization strategies", above at note 18 at 264.

103 Id at 270–71; H Olsen "International courts and the doctrinal channels of legal diplomacy" (2015) 6/3–4 *Transnational Legal Theory* 661.

104 S Dothan "In defence of expansive interpretation in the European Court of Human Rights" (2014) 3 *Cambridge Journal of International and Comparative Law* 508 at 524.

105 Alter et al "Backlash", above at note 30 at 302.

106 Pauwelyn and Elsig "The politics of treaty interpretation", above at note 90 at 463.

exogenous factors portray the EACJ's operational environment as rather delicate, hence justifying the caution exercised by the EACJ judges in interpreting the EAC Treaty.

Thirdly, the EACJ follows the common law legal tradition even though two of the partner states, Burundi and Rwanda, were historically civil law countries. Prior research claims that adherents to the common law tradition usually favour textual rather than teleological interpretations.[107] For this reason, the EACJ's textual-formalism approach may be intrinsic to, and to an extent explainable by, its predominant legal tradition.

With all these multifarious dynamics at play, textual-formalism might be the EACJ's most rational choice, a reflection of the court's ability to interpret the times and respond accordingly.

Nevertheless, there are some factors, both inherent in and extrinsic to the EACJ, that would favour its adoption of a more expansive and proactive interpretive approach. Research has established that courts that are permanent with an open docket tend to have greater scope for interpretation, adopting evolutionary interpretative techniques and tending to set precedents, as opposed to ad hoc or retrospective tribunals with a fixed docket.[108] Accordingly, the fact that the EACJ is a permanent court with an open and rather wide docket should favour greater dynamism in the court's interpretive approach.

Furthermore, EACJ judges can have dissenting opinions,[109] which allow for alternative reasoning and arguments that might eventually lead to progressive interpretation and application of the law. The fact that the EACJ has not exploited this provision could be an indicator of its strategy or legal diplomacy, rather than the adoption of a hard and fast approach to treaty interpretation.

Probably the highest advantage that the EACJ enjoys, that should necessarily have an impact on its interpretive approach and even its authority, is its audience or stakeholders. Pauwelyn and Elsig postulate that, where a tribunal's audience goes beyond the constituent governments to include private actors and interests, the tribunal tends to adopt a more liberal and teleological interpretive approach.[110] Examples mentioned include the CJEU, the European Court of Human Rights and the Andean Court of Justice.[111] Indeed, the EACJ has some of the widest access provisions that an international court could possibly have, hence having a wide constituency or audience. No wonder that the court is largely patronized by private actors, including non-

107 Id at 468, citing A Arnull *The European Union and its Court of Justice* (2006, Oxford University Press) at 612 and M Lasser *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy* (2004, Oxford University Press).

108 Pauwelyn and Elsig, id at 462 and 465.

109 EAC Treaty, art 35.2.

110 Pauwelyn and Elsig "The politics of treaty interpretation", above at note 90 at 465–66.

111 Ibid.

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governmental organizations and civil society organizations. In fact, it is mainly due to the intervention of this audience, which appears to have a great stake in the court, that the EACJ was able to survive the extremes of the *Anyang'Nyong'o* backlash.[112] It is argued that private actors drive the court to be more activist in its interpretation.[113] This is most probably the case with the EACJ on those issues where its interpretation has been teleological.

However, in light of the present structural challenges and geo-political environment, it may not be in the court's best interests invariably or predominately to adopt the teleological approach. However, in consideration of all its vantage points, the court can still favour textualism, yet be expansive in its interpretation. It has already demonstrated its ability to do so on the issue of jurisdiction and should extend this to other issue areas. The free movement of persons is a satisfactory issue area to start from due to its hybrid nature, and *Mohochi* provided that opportunity. It should be recalled that Mohochi was a private individual seeking to enforce his right to free movement as an EAC citizen, a right protected under both the CMP and the African Charter to which the EAC Treaty explicitly makes reference. Hence, depending on the circumstances of each case, free movement can be interpreted in a purely economic sense or as a fundamental right, or even a human right of EAC citizens within the political federation context, in light of the EAC Treaty's objectives and principles.

The EACJ can and should influence this evolution in the rationalization of the free movement of EAC citizens. However, in order to do this, it needs to adopt a more expansive interpretive approach. It need not completely change tack by always opting for a teleological interpretation but, even within its textual approach, there is room for a more expansive interpretation: by becoming more human rights-oriented. In other words, the expansive interpretation advocated for in this article is not a strictly teleological interpretation, but rather one that offers greater flexibility within the textual approach, which, as argued above, can be comfortably supported by the provisions of the EAC Treaty.

CONCLUSION

This article has argued that the EACJ's interpretive approach may be described as textual-formalism, denoting a preference for textual interpretations coupled with relative caution or judicial self-restraint. By applying this approach to the free movement of persons, the EACJ has not been able to make a significant impact in this regard. In fact it is an area in which adjudication before the EACJ is not exactly forthcoming. The EACJ's authority in free movement cases contrasts sharply with that of other regional courts, namely

112 Alter et al "Backlash", above at note 30 at 322–23.

113 Pauwelyn and Elsig "The politics of treaty interpretation", above at note 90 at 466.

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the CJEU and CCJ, whose purposive hermeneutic has not only given much substance to the free movement provisions, but has also greatly expanded the scope of the right to the free movement of persons. However, the EACJ's textual-formalism may be justified in its current circumstances and may be a strategy that is best suited for its operational context. While appreciating the court's challenging operational environment, this article recommends that the court may still adhere to the textual approach, but with a more expansive interpretation of the EAC Treaty text. This may be effected by its adoption of a human rights-oriented interpretive approach for free movement provisions specifically, the seeds of which lie in its human rights related case law and the principles and objects of the EAC Treaty. Then may the EACJ be seen to be significantly defining the application and scope of the right to the free movement for EAC citizens.

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