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Supranationalism and Supremacy: The East Africa Court of Justice (EACJ) versus The Supreme Court of the Republic of Kenya (SCORK) SCORK Reference No.1. of 2022; In The Matter of an Advisory Opinion: Attorney General and Hon. Martha Karua, Sc

By: ***Dr. Wilfred Mutubwa*** *

Various angles to the debate surrounding the decision of the SCORK on the effect of the decisions of the EACJ in Kenya, and the extent of the latter's remit, have been offered in recent days by commentators and academics alike. The view I take of the matter is through the prism of the philosophies of the two courts on economic, and even political integration. In my considered view, the extent of the reach of the EACJ's jurisdictional tentacles can also be understood by interrogating whether the court engenders supranational jurisdiction or not.

Supranationalism and Supremacy of Regional and International Courts

A supranational union or institution is an entity whose authority transcends the sovereignty of the member states and their respective territorial boundaries.[1] Unlike states in a federal union, member states retain ultimate sovereignty, although some sovereignty is

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[1] Weiler, Joseph. "The community system: the dual character of supranationalism." *Yearbook of European law* 1, no. 1 (1981): 267-306, 267.

exercised by, shared with, or added to the supranational body.[1] Since it is an agreement between sovereign states, it is usually based on treaties or agreements.[2]

Joseph Weiler, a foremost supranationalism theorist, classifies supranationalism into two categories: the juridical/normative approach and the political/decisional approach.[3] A more contemporary view, in the context of the EU integration is, according to Weiler, characterised by different levels of supranationalisation and integration.[4] The 1958-1968 period is, for instance, distinguished from the current EU supranationalism model. The current period is characterised by the institutional domain, monetary domain and geographical extension of the common market.[5]

Normative supranationalism addresses three main principles: the doctrines of direct effect, supremacy and the pre-emption.[6] The doctrine of direct effect relates to the vesting of authority in main autonomous institutions, such as was done in the early days of

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[1]Karhu Kimmo, "The European Constitution Making" *Centre for European Policy Studies* (2004) http://aei.pitt.edu/32581/1/20._EU_Constitution.pdf. accessed on 10th June 2024, 21-26, 21.

[2] Ibid.

[3] See Weiler, Joseph (n) 1.

[4] Ibid. (See also generally Davey, William J. "PJG Kapteyn & P. VerLoren van Themaat, Introduction to the Law of the European Communities After the Coming into Force of the Single European Act." *Fordham International Law Journal* 13, no. 2 (1989): 257.)

[5] J Weiler Joseph, (n) 1.

[6] Leal-Arcas, Rafael. "Theories of Supranationalism in the EU." *Journal of Law in Society* 8, no. 1 (2007): 96.

European integration through the ECSC, in order to adopt self-executing member state law.[7] The doctrine of supremacy means that there is a hierarchy of norms with the integration organ law being superior to the member state law.[8] The pre-emption principle, on the other hand, means that the integration unit has policy making competence where state members are precluded from enacting legislation contradictory to the integration unit's law and are pre-empted from taking such action at all.[9]

The EU is often cited as the foremost example of supranationalism. This is primarily because its institutions exercise authority over member states and may supplant national organs. The EU parliament passes laws that apply to the entire membership overriding national laws or legislation.[10] The Court of Justice of the European Union

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[7] Ibid.

[8] Bruno De Witte. 'Direct Effect, Supremacy and the Nature of Legal Order', in P. Craig and G. De Burca (eds.), *The Evolution of EU Law, Oxford, Oxford University Press*, (1999). pp. 177-213.

[9] Fagbayibo B, "Common Problems Affecting Supranational Attempts in Africa: An Analytical Overview" (2013) 16(1) PER/PELJ 32, at 33.

[10] The CJEU is established under by the Treaty of Lisbon which came into force enforces European Union Law including annulling the decisions, regulations and directives of EU and state member organs and ensuring compliance with EU obligations by states and even individuals. CJEU and the Treaty of Lisbon are available at <https://europa.eu/european-union/about-eu/institutions-bodies/court-justice_en.> accessed on 10th June 2024. The ECHR was established in 1959 and has jurisdiction to rule on state and individuals' allegations of violations of civil and political rights. Set out in the European Convention on Human Rights. The Courts' decisions are binding on state parties and have led governments to alter their legislation and administrative practices in a wide range of areas. See

(CJEU) and the European Court of Human Rights (ECHR) have original jurisdiction in matters regarding the interpretation of the constituting treaty, treaties entered into by the state parties, trade and investment claims and violations of human rights.[11] The Courts' jurisdiction applies across the entire EU membership.[12] State members cannot extricate themselves from the coercive force of the EU organs. EU treaties, decisions of the EU Commission, Parliament, Courts and other organs must be complied with by member states and their organs.[13]

The principles of direct effect of EU law, supremacy of the CJEU over national courts and the overriding effect of its decisions were first demonstrated in the 1963 case of *Van Gend en Loos v Nederlandse Administraitie der Belastingen*[14] in which the court held that provisions of the EC treaty have direct effect in the community bestowing enforceable rights as between individuals and the member states.[15]

Is the EACJ a Supranational Institution?

Unlike its predecessor, the pre-1977 EACA, before the collapse of the first post-independence EAC, the EACJ in its current form does not engender supranational jurisdiction. Its jurisdiction is limited to the

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<https://echr.coe.int/Pages/home.aspx?p=home.> accessed on 27th June 2024.

[11] Sweet, Alec Stone, and Thomas L. Brunell. "Constructing a supranational constitution: Dispute resolution and governance in the European Community." *American Political Science Review* 92, no. 1 (1998): 63-81.

[12] Ibid.

[13] Ibid.

[14] [1963] ECR1, 11-12.

[15] R Leal-Arcas, (n) 7.

interpretation of the EAC Treaty and other instruments, to issue advisory opinions, arbitration, as well as employment and labour disputes that may arise between the EAC and its staff.[16]

While there is no issue with the EACJ's jurisdiction in interpreting the EAC Treaty and regulating relationships between the Community's members and organs, it is not clear whether the Court exhibits the direct effect or supremacy principles of supranationalism. Article 33 of the Treaty provides that the decisions of the EACJ on the interpretation of the EAC Treaty have precedence over those of national courts on similar subject matter. Article 43 directs national courts and tribunals to refer a matter to the EACJ, if they consider that a ruling is necessary to enable the national court to give a judgement. This approach ensures harmony in the interpretation and application of the treaty by the partner states on the interpretation of the EAC Treaty.

Article 30 of the EAC Treaty permits the EACJ to admit cases brought by legal and natural persons who are resident in the partner states. Individuals can therefore challenge the legality of an act, regulation, directive, decision or act of a Partner State, or an institution of the Community on the grounds of its unlawfulness, or infraction of the treaty. Unlike other similar treaties, the EAC Treaty is silent on the requirement for a person to exhaust local remedies before moving the Court. The doctrine of subsidiarity is therefore not applicable, rendering the EACJ accessible as a court of first instance. To this extent, the doctrines of direct effect and access are underscored by the

[16]Articles 23, 36, 31 and 32 of the EAC Treaty.

Treaty.

Three decisions of the EACJ are useful in placing this discussion into context. In the case of *Anyang' Nyong'o v Attorney General of Kenya*[17], which involved the election of members of the EALA representing Kenya, the applicant contended that Kenya's representatives had been nominated in violation of Article 50 of the EAC Treaty.[18] The Court held that a country cannot invoke its domestic laws as a justification for failure to meet its treaty obligations. This decision seems to suggest an inclination of the court towards an interpretation that favours supremacy of the EAC laws over national laws of member states.

However, a subsequent decision of the same court seems to take an entirely different trajectory in respect of the supremacy principle. In its decision in the case of *East African Civil Society Organization Forum v The Attorney General of the Republic of Burundi &2 others*[19], the Court held that it lacked the requisite jurisdiction to interfere with decisions

[17] (Reference No. 1 of 2006 (Judgment)) [2007] EACJ 6 (30 March 2007) *https://www.eacj.org/?cases=prof-peter-anyang-nyongo-and-others-vs-attorney-general-of-kenya-and-others*. Accessed 10th June, 2024.

[18] Article 50 stipulates that *"The National Assembly of each partner state shall elect …nine members of the Assembly, who shall represent as much as is feasible, the various political parties represented in the National Assembly, shades of opinion, gender and other interest groups in that Partner State, in accordance with such procedure as the National Assembly of each Partner State shall determine."*.

[19] (Appeal 1 of 2020) [2021] EACJ 34 (25 November 2021) <*http://eacj.eac.int/?cases=application-no-5-of-2015-arising-from-reference-no-2-of-2015-east-african-civil-society-organisations-forum-eacsof-vs-attorney-general-of-burundi-2-others.*> accessed on 10th June, 2024.

of constitutional courts of member states or to sit on appeal on decisions of such courts.

Articles 33 and 34 of the EAC Treaty are clear that the EACJ is not an appellate court from decisions of member state courts. The Court's decision in the *East African Civil Aviation case* also seems to clarify this position. However, in its decision in the case of *Sitenda Sebalu v Secretary General of EAC and Attorney General of the Republic of Uganda*[20], the EACJ *seems to* suggest that an appeal from national courts could be entertained by the Court. In the said case, the Applicant had brought the case as an appeal from the decision of the Supreme Court of Uganda. He averred that the continuous delay in establishing the East African Court of Appeal as stipulated by Article 27 of the Treaty is a blatant violation of the rule of law and the Treaty. The Court agreed with the Applicant and directed a quick operationalisation of the relevant Protocol. The Council of Ministers instead amended the draft Protocol to exclude the appellate and human rights jurisdiction to the EACJ as had been proposed.

The Role of the EACJ in promoting Constitutionalism as a regional court

A closer look at the concept of constitutionalism with regards to the jurisdiction of the EACJ and the national courts, the same provides a distinct approach. Constitutionalism refers to the adherence to fundamental principles outlined in a constitution, including the

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[20]EACJ Ref. No. 1 of 2010. http://eacj.eac.int/?cases=honorable-sitenda-sebalu-vs-secretary-general-of-the-eac-attorney-general-of-the-republic-of-uganda-honorable-sam-k-njuba-and-the-electoral-commission-of-uganda. Accessed on 10th June, 2024.

protection of individual rights, separation of powers, and the rule of law. Regional courts, such as the East African Court of Justice (EACJ), play a pivotal role in promoting constitutionalism within the context of regional integration frameworks. Constitutionalism refers to the adherence to fundamental principles enshrined in a constitution, including the protection of individual rights, the separation of powers, and the rule of law. In the regional context, these principles transcend national borders and become essential pillars for the effective functioning and legitimacy of regional organizations.[21]

The EACJ's decision in the case of ***Katabazi and 21 Others v Secretary General of the East African Community and Another***[22] (the Katabazi case) is a landmark ruling that exemplifies the court's commitment to upholding constitutional values and promoting the rule of law and respect for human rights within the East African Community (EAC). In this case, the EACJ addressed allegations of human rights violations by Ugandan security agents who interfered with the execution of a lawful court order, thereby contravening the principles of the rule of law and good governance enshrined in the EAC Treaty. The court emphasized that the interference with the judicial process violated fundamental principles of the rule of law and undermined

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[21] Rosenfeld, Michel. "The rule of law and the legitimacy of constitutional democracy." *S. Cal. L. Rev.* 74 (2000): 1307. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=262350. Accessed 10th June, 2024.

[22] (Ref. No. 1 of 2007) [2007] EACJ 3 (1 November 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. Accessed 10th June, 2024.

the due administration of justice.

By asserting its competence to interpret the EAC Treaty in a manner that promotes respect for human rights and the rule of law, the EACJ played a crucial role in shaping the regional legal landscape and fostering constitutionalism within the EAC framework. The court's decision underscored the importance of regional judicial bodies in safeguarding constitutional values and ensuring that member states adhere to their treaty obligations. The Katabazi case highlighted several key aspects of the EACJ's role in promoting constitutionalism. The EACJ's ruling affirmed the principle of the rule of law as a fundamental tenet of the EAC Treaty. By condemning the interference with the judicial process, the court sent a strong message about the importance of respecting the independence of the judiciary and the sanctity of court orders, both at the national and regional levels.[23]

While the EACJ does not have explicit jurisdiction over human rights disputes, its interpretation of the EAC Treaty in the Katabazi case demonstrated a willingness to address allegations of human rights violations within the context of treaty obligations. This broader interpretation of the court's mandate contributes to the protection of human rights within the regional integration framework. The EACJ's jurisprudence has the potential to shape regional norms and legal standards. By affirming the principles of the rule of law and respect for human rights, the court's decisions can influence the behavior of

[23] Lando, Victor. "The domestic impact of the decisions of the East African Court of Justice." *African Human Rights Law Journal* 18, no. 2 (2018): 464.

member states and promote the adoption of constitutional values throughout the region.

The EACJ's role in promoting constitutionalism and upholding treaty obligations can contribute to stronger regional cooperation and integration. When member states adhere to shared constitutional principles and respect the rule of law, it fosters trust and mutual respect, which are essential for effective regional cooperation. However, it is essential to recognize the limitations and challenges faced by regional courts like the EACJ in their efforts to promote constitutionalism. The court's jurisdiction is ultimately derived from the EAC Treaty, and its ability to enforce its decisions relies on the cooperation and compliance of member states.[24] Additionally, the EACJ's jurisprudence may sometimes conflict with domestic legal systems, leading to tensions between national sovereignty and regional integration objectives.

The EACJ's decision in the Katabazi case exemplifies the crucial role regional courts can play in promoting constitutionalism, the rule of law, and respect for human rights within regional integration frameworks. By interpreting and applying regional treaties in a manner that upholds constitutional values, regional courts contribute to the development of a robust regional legal order, foster regional cooperation, and ultimately strengthen the legitimacy and effectiveness of regional organizations.

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[24] Possi, Ally. "Striking a balance between community norms and human rights: The continuing struggle of the East African Court of Justice." *African Human Rights Law Journal* 15, no. 1 (2015): 213.

A Comparative Analysis of other Regional Courts in Africa

A comparative analysis of the jurisdictional remit and supranational character of regional courts in Africa, such as the ECOWAS Court of Justice and the SADC Tribunal, provides a broader perspective on the challenges faced by regional courts in asserting their authority over national courts.

For instance, the Community Court of Justice of the Economic Community of West African States (ECOWAS) plays a vital role in the West African region. Established under the provisions of the Revised Treaty of ECOWAS, this court consists of five independent judges appointed by the Authority of Heads of State and Government from member states. Its mandate includes ensuring the observance of law, equity, and the interpretation and application of the ECOWAS Treaty and subsidiary legal instruments.[25] Notably, the ECOWAS Court has jurisdiction to determine cases of human rights violations that occur within any member state.

The Southern African Development Community (SADC) Tribunal was created to address disputes within the SADC region. However, its journey has been marked by challenges. In 2008, the SADC Tribunal demonstrated its ability to adjudicate human rights cases when it ruled on a land rights dispute in Zimbabwe. Unfortunately, this decision led to its suspension in 2010. Member states disagreed over the Tribunal's competence to handle human rights matters,

[25] Nathan Laurie. 'The Disbanding of the SADC Tribunal: A Cautionary Tale' (2013) *35 Human Rights Quarterly* 870. https://www.researchgate.net/publication/265724911.TheDisbanding_of_the_SADC_Tribunal_A_Cautionary_Tale. Accessed 10th June, 2024.

revealing the delicate balance between national sovereignty and regional integration objectives. Although the Tribunal's suspension was later lifted, its power to adjudicate individual human rights cases was terminated in 2014, taking a step backward in regional justice access.[26]

The delicate interplay between national sovereignty and regional cooperation remains a central challenge for these courts. While they strive to uphold regional integration objectives, they must also respect the autonomy of individual member states. Finding this delicate balance is essential for ensuring effective justice delivery and promoting harmonious relations within the African continent.

Interaction with the Doctrine of Subsidiarity

The doctrine of subsidiarity is a crucial principle in the context of regional integration and the relationship between regional courts and domestic legal systems. It holds that matters should be addressed at the lowest possible level of governance, and higher-level authorities should intervene only if the objectives cannot be adequately achieved at the lower level.

In the case of the East African Court of Justice (EACJ), the interaction with the doctrine of subsidiarity is particularly relevant when it comes to the requirement of exhausting local remedies before accessing the regional court. The EAC Treaty itself is silent on this issue, allowing individuals to directly petition the EACJ without

[26] Ibid.

necessarily exhausting domestic remedies first.[27]

This approach deviates from the strict application of the subsidiarity principle, which would typically mandate that individuals exhaust all available legal avenues within their national jurisdictions before escalating a matter to the regional level. By granting direct access, the EACJ effectively positions itself as a court of first instance in certain cases, potentially bypassing domestic judicial systems. However, it is essential to note that the EACJ's jurisprudence on this matter has been somewhat inconsistent.[28]

For instance, as discussed earlier, in the Anyang' Nyong'o v Attorney General of Kenya case, the EACJ asserted its authority to adjudicate matters without requiring the exhaustion of local remedies, implying a departure from the subsidiarity principle. On the other hand, in the *East African Civil Society Organization Forum v The Attorney General of the Republic of Burundi* case, the EACJ held that it lacked jurisdiction to interfere with decisions of constitutional courts of member states or to sit on appeal over such courts.[29] This decision aligns more closely with the subsidiarity doctrine, acknowledging the primary role of national legal systems in adjudicating constitutional matters. The *Sitenda Sebalu v Secretary General of EAC and Attorney General of the Republic of Uganda* case further muddied the waters, with the EACJ suggesting that it could entertain appeals from national courts,

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[27] Aloo A, 'Exhaustion of Local Remedies and the East African Court of Justice: Circumventing a Territoriality Trap' (2020) 20 African Human Rights Law Journal 383.

[28] Ibid.

[29] See (note 20).

potentially undermining the principle of subsidiarity.[30]

The interaction between the EACJ's jurisdiction and the doctrine of subsidiarity raises complex questions about the appropriate balance between regional integration, harmonization of laws, and respect for national sovereignty. On the one hand, allowing direct access to the EACJ without exhausting local remedies can facilitate efficient adjudication of regional matters and promote the uniform interpretation and application of the EAC Treaty. It also provides an avenue for individuals to seek redress when domestic legal systems fail to adequately address their grievances.

On the other hand, bypassing domestic judicial systems could undermine the principle of subsidiarity and potentially lead to conflicts between regional and national jurisprudence. It could also be perceived as encroaching upon the sovereignty of member states and their ability to adjudicate matters within their own legal frameworks. Ultimately, the resolution of this tension may lie in striking a careful balance and clearly delineating the respective jurisdictions of the EACJ and national courts. The EACJ could potentially play a complementary role to domestic legal systems, intervening only when there are clear violations of the EAC Treaty or when national remedies have been exhausted or proven ineffective.[31]

Alternatively, a more structured approach could be adopted, where certain categories of cases are designated as falling within the

[30] See (note 21).

[31] Nathan Laurie (See note 26)

exclusive jurisdiction of the EACJ, while others are required to follow the subsidiarity principle and exhaust local remedies first. Regardless of the approach taken, ongoing dialogue and cooperation between the EACJ and national judicial systems will be crucial to ensuring coherence, respect for national sovereignty, and the effective implementation of the principles of direct effect and supremacy within the framework of regional integration.

Concluding Reflections

In sum, two points accrue from the discussion forgoing.

Firstly, most regional integration efforts in Africa were originally conceived as economic integration blocs. Their dispute resolution organs were primarily meant to resolve trade disputes, mainly between states, states organs, the international body and its organs, and in some cases, investment disputes. Regional and sub-regional courts have since metamorphosed, by default, design or adaptation to current affairs, into tribunals with wide and far reaching jurisdictional mandates. For example, the EACJ, ECOWAS, and SADC Tribunals have, through judicial craft and creativity, pushed the limits of their treaty jurisdiction to include human rights and political questions. They have also admitted quite regularly and freely, claims by individuals, NGOs and civil society organisations. This has largely been achieved through liberal and flexible interpretation of their treaty mandates. Their jurisdictions are no longer circumspect by treaty provisions. It is this creeping expansionist mission through decisions/case law that has begotten the current “crises” in jurisdictional remit of regional courts such as the EACJ.

Unlike the EU, African integration efforts did not consciously or deliberately choose supranationalism; in fact, most are styled as intergovernmental bodies. Yet, in the execution of their functions, African regional courts such as the EACJ have developed jurisprudence that is inspired by the CJEU and EHRC to reflect or project supranationalism. This has had the effect of some member states of RECs questioning the propriety and continued existence of the regional courts. [32] This debate has not only been had in Africa but also in solid supranational jurisdictions like the EU. The UK for example, questioned the extent of the "over reach" of the CJEU and EHRC into the realm of domestic and political matters.[33] One will recall that this was a central theme in the Brexit discourse in the UK.[34]

Secondly, is the sort of chicken and egg situation we find ourselves caught in. In essence, which one comes first, international or national law; and which one should prevail over the other in case of conflict. This is a conundrum that is at the centre of the jurisdictional quagmire of international courts such as the EACJ. There are two diametrically opposed propositions. The first one is aptly exemplified by the writings of Sir Hersch Lauterpacht, a pre-eminent international law scholar, practitioner and jurist of the 20th century, who posed that

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[32] PJ Ngandwe, "The Predicament of African Regional Courts: lessons from the Southern African Development Community Tribunal" 2012 (1) *The Pan African Yearbook of Law* 47-66; L Nathan, "The Disbanding of the SADC Tribunal: A Cautionary Tale" 2013 (35*) Human Rights Quarterly* 870-892.

[33] See for example, Raphael Hogarth. IfG analysis, Brexit and the European Court of Justice. *Institute of Government.* (2017). https://www.instituteforgovernment.org.uk/sites/default/files/publications/IfG_Brexit_Euro_Court_JusticeWEB.pdf.Accessed 10th June, 2024

[34] *Ibid*

"National Sovereignty ends where international obligations begin."[35]

Lauterpacht was of the firm conviction that international law takes precedence over domestic law. According to him, states are creatures of international law, and that statehood is a concept borne out of recognition by international law. In other words, there is no state or domestic law without international recognition. States and their domestic law exist only because there is an international legal system that acknowledges the sovereignty of the state as against peer states. Sir Lauterpacht, himself a one-time judge of the ICJ, expressed himself on the relationship between international and domestic law thus: "The self-evident principle of international law is that a state cannot invoke its municipal law as a reason for non fulfilment of its international obligations." [36] In this vein, it appears that international law, on matters regarding international customary obligations, treaty rights and obligations, trumps domestic laws, including national constitutions.

Yet, there is an opposite view, too, with equal force of persuasion. There are those who view international law as a creature of the exercise of sovereignty by states. That states willingly cede some of their sovereign authority to a centre, for common good. And, therefore, that states are free to recall this authority at any point This thinking is founded on the principle that it is the mandate or duty of

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[35] See Lauterpacht, Eli. "Sovereignty-myth or reality?." *International Affairs (Royal Institute of International Affairs 1944-)* (1997): 149.

[36] H Lauterpatch, *The Development of International Law by the International Court* (Cambridge University Press Cambridge 1982) 262.

executive arms of states to enter into international agreements. It is also anchored on the view that the inherent sovereign authority of a state cannot be taken away, not even by international law. It is for this reason that dualist states prefer the *incorporation* of international law into domestic law through legislative processes rather than dualist transformational acceptance of international laws and agreements as part and parcel of nation; laws upon ratification thereof.

In the upshot, the approach taken largely depends on the philosophical anchorage and persuasion one takes with regard to the place of international law in the domestic sphere. The real challenge, however, identified by the decision under review is the ever-expanding elasticity of international law through case law, as international courts and tribunals flex their jurisdictional muscles in an effort to remain relevant and address emerging issues in the international plane.

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