4. EACJ Politics & Pressures

As the first two chapters highlight, African Regional Economic Community (REC) courts operate within a strategic space, and only by understanding the REC courts' *raison d'être* and position within the EAC infrastructure can we begin to comprehend why these courts must draw on judicial and extrajudicial agency to build and forge their power. This chapter makes the case for investigating strategies of empowerment by situating the East African Court of Justice (EACJ) within its historical, contextual, and structural constraints. It examines the EACJ from the inside out, starting with the formally transcribed rules of court composition, judicial tenure and leadership before providing a brief history of the formation of judicial institutions in the EAC. It historicises the developments that led to the creation of the EACJ courts by taking a bird's-eye view of the past and current developments of the EAC court. It then provides an overview of the broader constellation of factors and strategic space within which the EACJ operates. The chapter also illustrates how such factors limit the courts' authority and autonomy, emphasising the relevance of judicial resilience and the need for strategic empowerment. The goal of the chapter is to provide an illustrative depiction that delineates the boundaries, complexities, and dynamic nature of regional integration courts in Africa, as drawn from the experience of the EACJ.

4.1 East African Court of Justice

Rooted in regional integration processes, the EACJ[120] is the judicial arm of the East African Community (EAC).[121] The court became operational following its inauguration on November 30, 2001, by the Summit of EAC Heads of State.[122] The duty of the EACJ is specified as ensuring "adherence

120 Also simply referred to as "the court."

121 Established under Article 9 (1) (e) of the EAC Treaty.

122 Six judges, two from each of the three founding partner states (Kenya, Uganda, and Tanzania) were sworn in together with the pioneer Registrar. Among the first tasks undertaken by the new court was the drafting and adoption of its Rules of Procedure. See Art. 42 of the EAC Treaty.

to law in the interpretation and application of and compliance with" the EAC Treaty.[123] Thus, settling disputes that may arise as the EAC implements its core objectives is its primary duty. The court can be accessed by the EAC partner states, the Secretary-General of the Community, legal or natural persons and EAC employees in pursuit of dispute resolution pertaining to matters under the Treaty.[124] EACJ conducts its hearings and delivers rulings in public sessions.[125]

4.1.1 EACJ Mandate

International courts (ICs) generally have differently delegated powers and specific jurisdictions, which are, at times, not entirely clear-cut. The EACJ has a broad mandate, but it does not include the jurisdiction granted to partner state organs by the Treaty.[126] Moreover, the EACJ's broad jurisdiction[127] has been limited in its application since its inception. The Council of Ministers has not operationalised the court's mandate to confer appellate and human rights mandate over two decades later.[128] Even though the decision to extend this jurisdiction was made in November 2004 (Ruhangisa 2011, 26), its subsequent protocol remains unresolved.

Despite several efforts undertaken by the pioneer[129] and successive[130] benches to relevant bodies in the EAC seeking to expand the EACJ's jurisdiction, partner states remain unyielding in their refusal to grant it. Partner states have justified their reluctance to confer human rights jurisdiction by reasoning that human rights claims should be pursued through the African Court on Human and Peoples' Rights (Ebobrah and Lando 2020, 185). However, this reasoning might be unsubstantiated due to the withdrawal of

123 Art. 23 (1) EAC Treaty.
124 Art. 23 (1); 28; 29; 30; 31 EAC Treaty.
125 Art. 35 (1) EAC Treaty.
126 Art. 27 (1) EAC Treaty.
127 Broadly stated to involve all matters pertaining to the interpretation and application of the EAC Treaty (Art. 27 (1) EAC Treaty). The EACJ also has arbitration jurisdiction, under arbitration clauses and special agreements (Art. 32 EAC Treaty), to act as an arbitral tribunal upon request. It also has jurisdiction over matters of trade, investment, as well as the EAC Monetary Union, which was granted but is awaiting a Protocol to operationalise it (Otieno-Odek 2017, 468).
128 See Art. 27 (2) EAC Treaty.
129 Online interview, EACJ Pioneer Judge, Solomy Balungi Bossa, June 10, 2020.
130 Online interview, EACJ Appellate Judge, Geoffrey Kiryabwire, June 18, 2020.

some EAC partner states from the African Court.[131] Other overtly political motivations for the hesitation have been put forward, such as the partner states' fear of vesting another IC with human rights jurisdiction.[132] Another explanation is that partner states defer this issue until an EAC political federation is attained.[133] Nevertheless, despite these limitations, the EACJ has craftily built its human rights jurisprudence with the assistance of judicial allies (Alter, Gathii, and Helfer 2016; Taye 2019).[134]

4.1.2 Composition and Leadership

The EACJ has a First Instance Division (FID) and an Appellate Division (AD),[135] with a maximum of fifteen judges. Ten and five judges sit on the respective benches.[136] Only two judges should hail from the same partner state.[137] Judges are in office for a seven-year, non-renewable term and can serve their full terms until the age of 70.[138]

The court is headed by the president, who is the administrative head of the court[139] and the head of the Appellate Division.[140] The Vice-President assists the President, and both are appointed by the Summit of Heads of

131 Other observers perceive the "concurrent" jurisdiction with the African Court on Human and Peoples' Rights as misdirected (Ruhangisa 2011, 34).

132 They point to the indictment of the former Kenyan president and his Deputy at the International Criminal Court (ICC) and Tanzania's withdrawal of its declaration permitting individual petitions to the African Court as some such discouraging scenarios.

133 Speech, Hon. Justice Nestor Kayobera, EACJ President, Judicial tripartite forum, June 7–29, 2022, Hotel Verde, Zanzibar. https://www.african-court.org/wpafc/east-african-court-of-justice-remarks-by-hon-justice-nestor-kayobera-president-of-east-african-court-of-justice-during-a-judicial-dialogue-between-regional-and-sub-regional-courts-in-africa/.

134 See *Chapter 6* for a detailed account of this.

135 Once single-tiered, the court was split following the 2007 amendments to the Treaty. At the time, the court comprised six judges from each of the original three partner states.

136 Art. 24 (2) EAC Treaty.

137 For a detailed account of all major structural elements and appointment criteria, see the relevant international regulations available online at: https://doi.org/10.15495/EPub_UBT_00007471.

138 Art. 25 (1) (2) EAC Treaty.

139 Responsible for the administration and supervision of the court pursuant to Art. 24 (7a) and Art. 24 (10) EAC Treaty.

140 Represents the AD, regulates the disposition of the matters brought before the court and presides over its sessions as stipulated in Art. 24 (7b) EAC Treaty.

State.[141] The office of the president is held in rotation among the partner states after the completion of any one term.[142] Likewise, the Principal Judge is the head of the First Instance Division (FID),[143] assisted by the Deputy Principal Judge, both of whom are appointed by the Summit.[144] Moreover, all four court leaders ought to hail from different partner states.[145]

The Registrar oversees court administration and performs other duties stipulated under the Treaty and court rules.[146] All three court leaders – President, Principal Judge and Registrar[147] – reside and work permanently in Arusha. Because the other judges continue to reside in their respective home countries and only assemble for scheduled hearings by sessions, the bulk of the empowerment activities to be explored in the following chapters has fallen on the shoulders of the court leadership.

4.2 EACJ within the Integration Project

Regional integration efforts in East Africa can be traced back to early British colonial times. At the time, the colonial agenda was to build an economic bloc in an effort to achieve greater political control over British East Africa. The first integration project was anchored in shared supranational institutions, infrastructure, and services. The Kenya-Uganda Railway was constructed between 1897 and 1901 to provide a gateway from the coast to the hinterland (Masinde and Omolo 2017, 15). On the economic front, a single regional currency,[148] the establishment of a Customs Collection Center for Uganda in Mombasa in 1900, a Currency Board, and a Postal Union (in 1905) were also created. These developments were followed by the creation of a justice system, the Court of Appeal of East Africa (EACA)[149], in 1909, to protect the advances in regionalisation and a Customs Union in 1919 (ibid., 15). A significant step in the early integration process was

141 Art. 24 (4) EAC Treaty.
142 Art. 24 (9) EAC Treaty.
143 The Principal Judge directs the work of the FID, represents it, regulates the disposition of the matters brought before the court and presides over its sessions, as spelt out under Art. 24 (8).
144 Art. 24 (5) EAC Treaty.
145 Art. 24 (6) EAC Treaty.
146 Art. 45 (4) EAC Treaty.
147 Upon the retirement of the second Registrar in January 2023, the Community hired a Deputy Registrar to take over the daily administration of the court.
148 The East African Shilling was used in the three countries by 1905.
149 EACA served as an appellate court for all the East African territories.

the establishment of the East African High Commission in 1948, aimed at establishing a "quasi-federation" between Uganda, Kenya, and Tanganyika (Kasaija 2010, 25). The High Commission comprised "the three territorial governors, with a Secretariat manned by technocrats with a region-wide outlook and expertise, coordinated the common services" (ibid., 25). Laws issued by its legislative organ, the East Africa Central Legislative Assembly, were enforceable in all three countries.

Following the independence of all three countries, an umbrella organisation to coordinate existing cooperation in terms of a regional trade agreement rather than a political federation took shape with the coming into force of the Treaty for East African Cooperation, establishing the East African Community (EAC) in 1967 (Kasaija 2010, 27). Although the EAC was already quite advanced, with a common market, common services, and a judicial arm and was considered "a model of regional integration and development" at the time, the EAC collapsed in 1977 (Masinde and Omolo 2017, 15).[150] The collapse of the defunct EAC followed the end of some of its institutions, including the EACA. After long contemplation and deliberation, the East African Community was revived on 30 November 1999, with the signing of the EAC Treaty.

The current EAC is a regional intergovernmental organisation comprising eight partner states.[151] As outlined in its *fundamental*[152] and *operational*[153] principles, the new EAC integration project is explicitly human development-oriented, aspiring for closer ties in social, cultural, political, and technological sectors to achieve sustainable development. The EAC seeks incremental economic integration, having established a Customs Union[154] and Common

150 The collapse is attributed to several reasons, including its "strong intergovernmental (interstate) structure" and the "ideological differences between the leaders of the Member States" (Masinde and Omolo 2017, 16).

151 The original three members – Kenya, Tanzania, and Uganda – signed the Treaty in 1999, and it entered into force in July 2000. Burundi and Rwanda became full members in July 2007. South Sudan became a full member in September 2016, whereas the Democratic Republic of Congo (DRC) and Somalia achieved the same in July 2022 and March 2024, respectively.

152 Art. 8 EAC Treaty.

153 Especially, the operational principle that "the Partner States undertake to abide by the principles of good governance, including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights" as stipulated in Article 7 (2) of the EAC Treaty.

154 In force since 2005, this established free trade for intra-EAC goods and services and agreed on a Common External Tariff amongst EAC states (Art. 75 EAC Treaty).

Market[155] and is in the process of establishing a Monetary Union.[156] Most strikingly, the EAC's ultimate objective is establishing a political federation, which is currently being fast-tracked as a confederation.[157] Scholars are not optimistic about the EAC states' realisation for the political federation as historical motivations for integration (Pan-Africanist agenda), and current realities (national sovereignty interests and enlargement of the EAC) outweigh the conscious efforts to federate (Makulilo, Stroh, and Henry 2018).

The revamped EAC aims at deeper integration than its predecessor envisioned while avoiding the mistakes that led to the latter's failure. It drew inspiration from the European Union (EU) for its institutional and legal frameworks (Ugirashebuja et al. 2017), establishing Organs and Institutions to accelerate the implementation of these objectives. Aside from its judicial arm, the EAC has six other governance structures, with the executive arm strongly represented in its organs (the Secretariat, Council and Summit) and one legislative arm. The Summit of Heads of Government of partner states is the overall executive head of the EAC. It "drives the integration agenda and provides the general direction" to achieve regional objectives (Khadiagala 2016, 177). The Council of Ministers (the Council) comprises Ministers responsible for regional cooperation and the Attorneys General of each partner state.[158] As the primary policy organ,[159] the Council serves as the central decision-making and governing body of the EAC.[160] The East African Legislative Assembly (EALA) is the legislative arm of the Community.[161] It comprises nine elected members from each partner state, seven ex-officio

155 In force since 2010, the Common Market allows for free movement of people, capital, labour, services, and the right of establishment and residence within the EAC (Protocol on the Establishment of the East African Community Common Market. Done at Arusha, November 20, 2009).

156 The East African Monetary Union Protocol was signed on November 30, 2013, and it "allows the EAC Partner States to progressively converge their currencies into a single currency in the Community" (East African Community. n.d. "Monetary Union." https://www.eac.int/monetary-union (Accessed May 28, 2023).

157 East African Community. n.d. "Political Federation." https://www.eac.int/political-federation (Accessed May 28, 2023).

158 Art. 13 EAC Treaty.

159 Art. 14 (1) EAC Treaty.

160 The Council initiates and submits Bills to the EALA and considers the budget, among others (Art. 14 (3) EAC Treaty). The third organ, the EAC Coordination Committee – which reports directly to the Council – is made up of the permanent secretaries responsible for regional cooperation in the partner states and coordinates the activities of various Sectoral Committees.

161 Art. 49 (1) EAC Treaty.

members, Ministers responsible for regional cooperation, the Secretary-General, and the Counsel to the Community.[162] EALA debates and approves the Community budget and recommends to the Council how to proceed with decision-making.[163] The Secretariat conducts EAC administration activities and manages the Community's finances, including submitting the budget to the Council for consideration.[164] Whenever the court (EACJ) has specific requirements – whether financial, staff-related, or jurisdictional – they must go through the Secretariat, as it is solely responsible for forwarding bills to EALA through the Coordination Committees, managing strategic planning and monitoring of EAC programmes[165] as well as staff recruitment. Hence, the court is institutionally dependent on the Secretariat and other organs. Scholars have critiqued this governance model of the EAC, arguing that it "does not sufficiently reflect the principles of separation of powers and judicial independence, thereby posing a threat to the democratic advancement of the Community" (Mwanawina 2018, 95).

In addition to institutional dependence, grievances in the executive arms of the EAC have adversely affected the court's performance and institutionalisation. In the past few years, several intra-EAC conflicts have cost the Community revenue,[166] led to border closures and stagnated regional trade,[167] and postponed the Summit.[168] The Council has also faced criticism for delaying the ratification of the regional protocols.[169] The postponement of the Summit and Council meetings affects the activities of the Communi-

162 Art. 48 (1) EAC Treaty.
163 Art. 49 (2) EAC Treaty.
164 Art. 66 (1); 71 (1) (i) (j) EAC Treaty.
165 Art. 71 (1) (c) EAC Treaty.
166 For example, Burundi and Tanzania stalling their contributions to the EAC. See Nantulya, Paul. 2017. "The Costs of Regional Paralysis in the Face of the Crisis in Burundi," *Africa Center for Strategic Studies*, Spotlight, August 24. https://africacenter.org/spotlight/costs-regional-paralysis-face-crisis-burundi/.
167 The closure of the Uganda-Rwanda border in early 2019 is a remarkable example. See Ashaba, Ivan and Gerald Bareebe. 2019. "Closed Borders and Fighting Words: Rwanda and Uganda's Deepening Rift," *African Arguments*, March 12. https://africanarguments.org/2019/03/closed-border-fighting-words-rwanda-uganda-rift/.
168 South Sudan and Burundi have been the biggest culprits in non-attendance. See East African Community. February 22, 2020. "21st Ordinary Meeting of the Summit of the EAC Heads of State postponed to a later date" and New Vision. November 30, 2018. "EAC Summit postponed due to absence of Burundi." https://www.newvision.co.ug/news/1490531/eac-summit-postponed-absence-burundi.
169 Sabiiti, Daniel. 2022. "EALA: Regional Council of Ministers blamed on integration setback." *Kigali Today*, October 31. https://www.ktpress.rw/2022/10/eala-regional-council-of-ministers-blamed-on-integration-setback/.

ty as a whole and the court in particular.[170] Case in point, court activity came to a standstill in November 2020 when seven of the judges' tenures expired, leaving the court without a quorum for over five months.[171] Even though the EAC had staggered the initial appointments, catering to institutional memory and continuation, this hiccup undid that superb arrangement. As a result, newer judges did not undergo the usual orientation to be socialised into the court's jurisdiction.[172] Other aspects of the court's staffing are also eroding. Since the retirement of the former Registrar, Yufnalis Okubo, over a year ago, there has not been a replacement; instead, a deputy Registrar has been installed.[173] Interestingly, while Okubo served, he did not have a deputy Registrar; now it is vice versa.

4.2.1 Meagre Budget Allocation

Financial resources to run the court are planned and approved as part of the annual EAC budget. For the last nine financial years,[174] the EAC budget average has been 102,346,275 US Dollars ($), with at least 55% of that amount being contributed equally by partner states (or solicited from other avenues). The rest is usually expected to be sourced from the bloc's Development Partners.[175] The EAC and EACJ budgets have gradually

170 Anami, Luke. 2020. "EAC Bills, budget waiting for quorum at summit." *The East African*. February 29. https://www.theeastafrican.co.ke/tea/news/east-africa/eac-bills-budget-waiting-for-quorum-at-summit-1437738.

171 Anami, Luke. 2021. "Long wait for justice draws to a close as Summit set to appoint judges." *The East African*. February 23. https://www.theeastafrican.co.ke/tea/news/east-africa/summit-set-to-appoint-judges-3300064.

172 Interview, Former EACJ Registrar, October 1, 2021, Kampala, Uganda.

173 Sabiiti, Daniel. 2022. "Christine Mutimura-Wekesa is new Deputy-Registrar of EAC Court of Justice." *Kigali Today*, May 7. https://www.ktpress.rw/2022/05/christine-mutimura-wekesa-is-new-deputy-registrar-of-eac-court-of-justice/.

174 In-depth research did not yield any reliable data from the first decade of the court's existence.

175 The leading and most consistent development partners of the EAC are the Federal Republic of Germany and its agencies – *Deutsche Gesellschaft für Internationale Zusammenarbeit* (GIZ) and the *Kreditanstalt für Wiederaufbau* (KfW), the Swedish International Development Agency (SIDA) and the People's Republic of China; the United States of America and its United States Agency for International Development (USAID), the European Union (EU), the African Development Bank (AfDB) and the World Bank (East African Community 2019, 56). Unfortunately, further research into all EAC Budget Speeches – and other relevant documents – does not

been reducing since 2016 and have only started to pick up in the last two financial years.

Table 3: EACJ vs EAC Budget

Financial Year	EAC Budget ($)	EACJ Budget ($)	% EAC budget
2015/2016	110,660,098	4,301,551	3.89
2016/2017	101,374,589	4,286,477	4.23
2017/2018	110,130,183	4,140,166	3.76
2018/2019	99,770,715	3,982,446	4.00
2019/2020	111,450,529	4,225,241	3.80
2020/2021	97,669,708	3,970,406	4.06
2021/2022	91,784,296	3,791,723	4.13
2022/2023	91,579,215	3,803,836	4.15
2023/2024	103,842,880	4,450,488	4.28
2024/2025	112,984,442	4,858,553	4.30
Average	102,346,275	4,185,636	

Source: Created by the author from publicly available EAC budget speeches.[176]

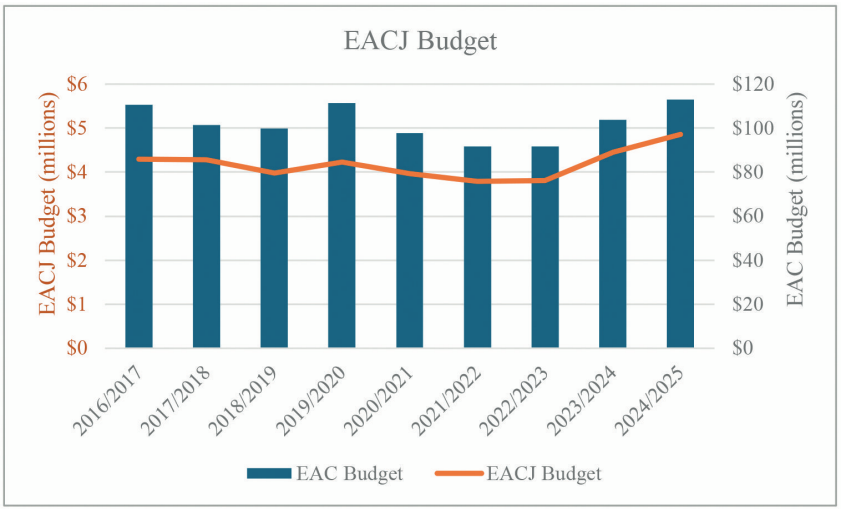
The reduction in the overall EAC budget is due to several factors. Firstly, reliance on development partners has led to a steady decline in budget allocation due to the phasing out of funds for some projects (East African Community 2015, 87). Secondly, as donor support for the budget dwindled, partner states' contributions did not increase. Instead, some partner states derailed the budget-making process, whereas others have not met their contributions since joining the REC bloc.[177] Moreover, even those countries that meet their contributions struggle with irregular remittances and financial instability.[178]

yield much in terms of relative donor contributions. It appears that the EAC does not avail this information.

176 See EACJ Budget Speeches (East African Community 2015; 2016; 2017; 2018; 2019; 2020; 2021; 2022; 2023; 2024).

177 Kamurungi, Elizabeth. 2023. "EAC budget crisis: TZ, Congo reject $103m supplementary." *The Daily Monitor*, August 16. https://www.monitor.co.ug/uganda/news/national/eac-budget-crisis-tz-congo-reject-103m-supplementary--4337416.

178 Starting off with a positive trend, the Republic of Somalia – which only joined recently – has already paid its full budgetary contribution for the financial year 2024/25. See Anami Luke. 2024. "Somalia pays $7.8m towards EAC budget." *The*



Given the funding challenges in the REC bloc, the EACJ, which does not have financial autonomy, has explicitly expressed dissatisfaction with the funding it receives. The court reports a "systematic annual reduction of budgetary allocation" and cites a lack of appreciation for its role within the Community (East African Community 2022, 31). However, focusing on the reduction of EAC the budget in isolation could be misleading. For instance, the EACJ received 4%, 4.13% and 4.28% of the EAC budget in the 2018/2019, 2021/2022 and 2023/2024 financial years, respectively (East African Community 2018; 2021; 2023). And yet, the EAC Secretariat received 47%, 47.78%, and 49% of the EAC budget. In contrast, the East African Legislative Assembly (EALA) received 13.4%, 16.8% and 17% of the EAC budget for the same financial year (East African Community 2018; 2021; 2023). Indeed, the court has been allocated a lower budget than other EAC organs and institutions[179] despite its growing caseload and consequent backlog (East African Community 2023). While there has been no notable increase in its budget, there has also been no reduction. On average, the EACJ has been allocated only 4% of the EAC budget across time.

East African, July 06. https://www.theeastafrican.co.ke/tea/news/east-africa/somalia-pays-7-8m-towards-eac-budget-4681534.

179 The Inter-University Council for East Africa and the Lake Victoria Basin Commission also receive more budgetary allocation than the EACJ – 12 and 9 percent of the EAC budget, respectively (East African Community 2021, 38).

Unlike the EALA and the Secretariat, the EACJ seems to be systematically financially disenfranchised. While the other two organs have seen a steady and gradual increase in their budget allocation, the court has not been as privileged. It is important to note that the East African Community and all its organs are largely financed by contributions from member states, although some of their projects are funded through resource mobilisation from external development partners.[180] However, due to the financial and administrative dependence on the Secretariat, the court has missed out on opportunities for support from development partners, whose funding rules did not allow them to channel monies in a joint EAC account (East African Court of Justice 2023, 46-48).

The graph above shows that the EACJ budget mirrors the overall state of funds available to the EAC. As the general budget decreases, so does the EACJ budget allocation. It is worth noting that financial constraints, as experienced by the EACJ, are not unique to the court but reflect the financial deficit faced by the REC body. Thus, it is essential to consider the EACJ budget, not in isolation, but in relation to funds availed to other REC organs and institutions. Likewise, the court has grown in caseload, in number of staff and judges, and as such, would like to receive a budget that is befitting of its stature. Hence, the court operates in a financial strategic space, and as the rest of the study will show, judges have had to mobilise for funding.

4.2.2 Ad hoc Service and Double Agency

Tied to the financial burden is the ad-hoc nature of judicial service, which heavily impacts the court's performance.[181] As mentioned in the court's 2018–2023 Strategic Plan, despite its existence for two decades, it still faces difficulties with institutionalisation (East African Court of Justice 2018, 16). EACJ judges continue to work on an *ad-hoc* basis,[182] with only the court leadership residing and working permanently in Arusha.[183] This setup, where judges continue residing in their respective home countries, proved to be a challenge in the composition of judicial panels required for the

180 Art. 71 (1) (h) EAC Treaty.
181 Ibid.
182 Ibid., 6.
183 Arusha is the temporary seat of the court until the EAC Summit of the Heads of States determines its permanence.

Court to hear a matter.[184] To remedy the issue, the court resorted to hearings by sessions instead of continuous sittings.

> "The EACJ sessions are held quarterly a year due to the ad hoc nature of service of the Judges. With the exception of the President and the Principal Judge who serve full time, the rest of the Judges service on a *temporary* basis."[185]

As such, the EACJ has at least three sessions per annum, depending on funding availability.[186] The infrequent assembly delays the "disposal of cases and hinders efficiency" (Otieno-Odek 2017, 485). While the temporary nature of the court was sensible in its early years due to a lack of workload and visibility, this arrangement seems inappropriate given the increasing caseload. Judicial interviews and participant observation at relevant court events epitomised the urgent need for full-time judges, which heavily impacts court performance.[187] Usually explained away in terms of scarcity of EAC funding, EACJ administrators interviewed in the study insisted that it is indicative of the lack of prioritisation of the court by the regional judicial body.

Furthermore, because EACJ judges only work part-time, they retain their positions in public service or the national judiciaries. This bifurcation of responsibility has been referred to as "double agency" (Taye 2020, 352), as judges become regional judicial actors who still maintain ties to their governments. The pressures of being a double agent for the REC body and one's appointing government and employer are heightened. The EACJ perceives this setup as challenging its perceived independence and political legitimacy (East African Court of Justice 2018, 16). As explored in the empirical chapters, the question of who ends up on the bench bears implications for judicial decision-making.

4.2.3 Opaque Judicial Appointments

Conventional wisdom suggests that IC judges are already at risk of interference from their appointers, who may use recontracting politics to influ-

184 The bench is considered to have quorum with three or five judges (Rule 69 of EACJ Rules of Procedure 2019).
185 Speech by Hon. Justice Nestor Kayobera, *supra* note 62.
186 Online Interview with Former EACJ Registrar, March 9, 2021.
187 See *Chapter 3*.

ence the court (Alter 2008) or subtler signalling techniques to curb their activism (Helfer and Slaughter 2005). The fact that EACJ judges serve concurrently on the REC bench and in their home countries poses an even greater risk of influence. Assumptions that member states may control the appointments by drawing on personal connections, affiliations, and other personal relationships to heavily influence and steer these appointments abound.[188]

Judicial selection to ICs worldwide remains "shrouded in mystery" (Terris, Romano, and Swigart 2007, 15). With a few notable contributions emerging from the European Court of Human Rights (Voeten 2007), the International Criminal Court, the International Court of Justice (Mackenzie et al. 2010) and the Appellate Body of the World Trade Organization (Elsig and Pollack 2014), we hardly know how and why judges arrive on international benches. In our investigation of appointments to African REC courts, we found that selecting judges for African courts at the regional level is even harder to grasp (Stroh and Kisakye 2024). The formal rules on the selection of judges are thin, stating that the Summit appoints judges from persons recommended by the partner states.[189] The Treaty remains silent on the processes of picking the candidates at the national level. Moreover, there are no written rules of selection at the national level, no specifications on the duration of appointments, and, at times, even the responsible nominating body is unknown.

As such, informality emerges in the form of relational informality (Dressel, Sanchez-Urribarri, and Stroh 2017) to complement regulatory gaps.[190] Thus, regional selection processes do not follow national procedures for judicial appointments, usually occurring under the guidance of the Judicial Service Commission (JSC) in East African Community (EAC) common-law countries. Instead, the process for EACJ judicial appointments is opaque, informal and in the hands of a few selectors who have much leeway in the selection process (Kisakye and Stroh 2024). We argue that because African sub-regional courts are relatively new entities, judicial appointments have been rare opportunities undertaken by various governments, which has hindered institutionalisation. Nevertheless, the opacity in

188 Interviews by author, September 2021- July 2022, Eastern Africa.

189 Art. 24 (1) EAC Treaty.

190 The idea that formally codified rules guarantee professionalism or, at least, the fair representation of diverse points of view on the bench is prominently included in assessments of de jure judicial independence (Melton and Ginsburg 2014). However, formal appointment rules never tell the entire story.

regulations leaves much room for the states to make political appointments that threaten the court's legitimacy (Ruhangisa 2011).[191]

4.2.4 Not an Appellate Court!

The EACJ is also still haunted by ghosts from its past. During interviews for this study, judges occasionally reflected on their role in integration, often differentiating their approach, mandate, and intervention from those of their predecessors. Unlike the East African Court of Appeal (EACA), which was the judicial organ of the defunct EAC (1967 to 1977), the EACJ has not been granted appellate jurisdiction.[192] EACA had its roots in the first integration project, which was anchored in shared supranational institutions, infrastructure and services and functioned as an appellate court of all British East African territories.[193] With the independence of Tanganyika, Uganda, and Kenya, the newly independent states decided to "keep and maintain" EACA, but its powers and jurisdiction were to be determined by the Parliament of each partner state (Katende and Kanyeihamba 1973, 44). Essentially, this development stripped powers from EACA and placed them in the hands of municipal courts in the new states. As explored in the rest of the thesis, judicial decision-making in the EACJ aligns with REC initiatives due to a fear of the collapse of the REC body.

Moreover, litigants sometimes confuse the jurisdiction of the EACJ, believing it to be an appellate court. The EACJ neither oversees decisions of the highest courts in the EAC partner states nor does it assume that role.[194] Noteworthy, though, is that domestic courts in partner states are not excluded from hearing disputes involving the Community unless jurisdiction is expressly conferred on the EACJ with respect to that matter.[195]

191 Studies on African national courts also hold appointments responsible for their legitimacy and performance deficits mainly due to the informal role of politicians in the selection process (Fombad 2014).

192 Art. 27 (2) EAC Treaty.

193 Even though it started out tending to the British Central African Protectorate (Malawi) as well, it was reconstituted in 1910 to include Tanganyika and Zanzibar within its jurisdiction and terminated its jurisdiction over Malawi (Katende and Kanyeihamba 1973, 43).

194 "There is a need for much sensitisation about community law and practice at the EACJ as some still confuse it with being an appellate court" (Interview, EACJ Judge, June 18, 2020).

195 Art. 33 (1) EAC Treaty.

Nonetheless, decisions of the EACJ on the interpretation and application of this Treaty have precedence over decisions of national courts on similar matters.[196] The EACJ falls under Alter's "New-Style ICs,"[197] whose experience is largely modelled on the Court of Justice of the European Union (CJEU).[198]

However, unlike the CJEU, which was built on preliminary reference procedures initiated by member states (Cuyvers 2017), the EAC has not had the same success with national courts. National courts are mandated to request a preliminary ruling on any question of law related to the interpretation, application, or validity of treaty provisions and other Community texts from the EACJ to aid them in determining cases before them.[199] Member states' municipal courts – both higher and lower – have hardly sought their counsel in this regard, with only one *preliminary reference procedure*[200] to date.[201] The apparent lack of engagement by national courts is somewhat puzzling, given that most EACJ judges continue to serve actively in their national judiciaries. Interviews hint at a level of interest from national judges, albeit a mostly an informal one:

> "The colleagues from the civil and commercial division of the High Court are especially interested in what we do. Of course, not all, but there'll be colleagues I continually chat with when we go back. Occasionally, our decisions come out in the media because some come from the local courts. So, they get interested and sit down and engage in professional conversation. But there's no formal or day-in-day-out or regular engagement on, you know, our discussion. But informally, you get people who are interested in what you're doing. The principal judge, specifically.

196 Art. 33 (2) EAC Treaty.

197 These ICs cropped up after the end of the Cold War, with special characteristics: compulsory jurisdiction and allowing for direct access by non-state actors to initiate litigation (Alter 2014, 5). Such actors include international commissions, institutional actors, and private litigants.

198 Albeit "with a local flavour" as its Rules draw heavily on the old Rules of the EACA (Online interview with the EACJ Appellate Judge, June 18, 2020).

199 Art. 34 EAC Treaty.

200 Case Stated No. 1 of 2014. *Attorney General of Uganda vs Tom Kyahurwenda.* Appellate Division, July 31, 2015. https://www.eacj.org/wp-content/uploads/2015/08/PRELIMINARY-REFERENCE-CASE-STATED-ON-01-OF-2014-FINAL.pdf.

201 Likewise, EAC organs are also barely requesting the court's Advisory Opinion. An advisory opinion, determined by the appellate chamber, can be requested by The Summit, Council of Ministers and or partner states regarding questions of law arising from the Treaty (Art. 36 EAC Treaty).

> We chat with him every now and every time we come back; he knows. The Chief Justice, too, will know when I am coming here, and he will occasionally ask how things are going."[202]

A few vital points emerge from this interview excerpt: the leaders of the top courts – such as the Principal Judge and Chief Justice – tend to show an interest in the judges, but perhaps mostly at an administrative level. Because these judges must leave their chambers at the domestic courts, court leaders ought to plan and reallocate cases to other judges promptly before REC judges set off for Arusha. As such, court leaders tend to ask about the court at an informal level to aid in planning or personal curiosity rather than formally. Were they to wish to support the EACJ, they would opt for feedback sessions with EACJ judges, judicial training on EAC law that elucidates the preliminary reference procedures and enforcement of EACJ rulings, both of which are the most direct avenues that domestic courts can lease with regional courts. While international courts (ICs) speak law to power and can influence governments to alter their behaviour, they cannot force governments to comply with their rulings. Relatedly, the EACJ does not have the power to implement its decisions on its own. It must work hand in hand with the national courts as it relies on national legal systems to enforce its decisions.[203] In contrast, the Council of Ministers or the partner states implement non-pecuniary commitments.[204] As such, the conditions for enforcement of its rulings leave the compliance question at the mercy of the partner states and policy organs of the Community.[205]

Other than hosting EACJ sub-registries, my research did not find other direct avenues of cooperation with the REC court. Additionally, the excerpt hints at national judges being hardly interested in the EACJ, except for when the REC court reviewed their decisions or if they raised media attention. Moreover, High Court judges at the civil and commercial divisions – those interested in being appointed at the EACJ – tended to engage the REC judges more. This is unsurprising. However, the fact that there does not seem to be much dialogue with national judiciaries indicates the lone

202 Interview, EACJ judge, Justice Wabwire Wejuli Richard, November 11, 2021, Bujumbura, Burundi.

203 Art. 44 EAC Treaty.

204 Art. 38 (3) EAC Treaty.

205 This is not unique to the EAC, as judgements of regional courts are not readily or easily enforceable, posing a challenge to the legitimacy and authority of ICs everywhere (Garrett and Weingast 1993; Gibson and Caldeira 1995; Howse and Teitel 2010; De Silva 2016).

journey that REC judges must tread, and it emphasises the urgent need for mobilising judicial allies as a regional court.

4.3 Resistance in a Strategic Space

In addition to the institutional constraints above, the most pressing limitation on the operation of the regional court is executive resistance to its decision-making. Scholars have noted that the relatively small size of RECs, coupled with the "tradition of strong executive branches, weak judiciaries, and citizens who share a deep post-colonial distrust of external interference and, relatedly, a reluctance on the part of political leaders to openly challenge the actions of other African governments" (Alter, Gathii, and Helfer 2016, 296) places REC courts in a predicament. Similarly, there is a lack of political willingness of those in power to abide by decisions, as the former EACJ Registrar points out:

> "It appears that Partner States still wish to remain sovereign while they subscribe to the integration objectives that require them to cede a certain amount of their sovereignty. This state of uncertainty being expressed by the Partner States is not healthy for the integration agenda. Partner States cannot eat their cake and at the same time demand to have it" (Ruhangisa 2011, 33).

Strong executives sanctioned the judges upon issuing regime-defying judicial interventions in its first major case, *Anyang' Nyong'o vs Attorney General of Kenya*.[206] As detailed in Chapter 5, the partner states responded to the impugned ruling by hastily amending the Treaty. The Treaty amendments significantly tampered with the court's structure, jurisdiction, and access rules. Structurally, the unitary court was split into two, creating an Appellate Division with the power to review the decisions of the First Instance.[207] Moreover, new grounds were added to ease the procedure for removing judges from office. The Treaty was heavily revised to include conditions such as misconduct, bankruptcy, dishonesty or fraud as reasonable grounds

206 *Anyang' Nyong'o, supra* note 5.

207 Report of the 4th Extraordinary Summit of Heads of State (Ref EAC/SH/EX/4/2006). December 14, 2006. Nairobi, Kenya (available with author), pages 3–4.

for judicial dismissal.[208] New grounds also allowed partner states to appoint temporary judges in the place of suspended judges.

As already clarified, EAC judges typically hold judicial or public office in their home countries, and the new provisions aimed at making any judicial allegations of misconduct in the partner state count at the sub-regional level.[209] This provision takes on more weight, considering that the Kenyan government had already started blatant attacks on the two judges. Unlike in their national counterparts, where political interference over the judiciary has been abundant (Ellett 2013), in the EACJ, *Anyang' Nyong'o* was the first and remains the only major backlash on the EACJ judges. It certainly set the groundwork for the succeeding benches, which were now aware of the fragile nature of the sub-regional level judiciaries.

Unlike the SADC Tribunal, the EACJ has faced a different fate: constantly threatened but still going strong. It presents an exciting puzzle: How do African ICs survive looming threats to their independence and grow their political relevance in the region? We do not know much about the threats and *strategic calculations* that judges in other *surviving* African RECs face. We do not know how they manoeuvre these looming threats, and much less is known about how they approach decision-making to build, negotiate, and maintain their power, relevance, and political standing. Drawing on the EACJ experience and splitting the bench into three distinct phases, the study investigates how individual and collective judicial agency operates with the historical and structural forces at play in Africa's ICs. The SADC Tribunal's demise is a case of the vulnerability of African ICs, but it is not the only story to tell.

The study differentiates judicial leadership in the first two decades across three benches, with a six-year time difference, to assess the context and developments over time. The demarcation into three benches is not only because of the seven-year judicial tenure that EACJ judges serve but also because of the significant critical junctures that brought about changes to the court. As such, the *pioneer bench* sat from the court's establishment in 2001 until 2007, when all the pioneer judges left the bench. The *second bench* was appointed after the contentious *Anyang' Nyong'o* case was decided. A watershed in the history of the EACJ, this case highlighted the potential political muscle of the new judicial organ; consequently, the first appellate bench was created to oversee the activist judgements of the trial

208 Art. 26 (1) (a) (c) (d) EAC Treaty.
209 Report of the 4th Extraordinary Summit (*supra* note 207, 7).

court. This bench served seven years until the appointment of the current *third bench*.[210] The following chapters will elaborate on the changes that occurred and explain the institutionalisation of the court across these three benches.

210 A visualisation of key actors in judicial empowerment in the EACJ, foregrounding the judges, registrars and court leaders across the three benches, is presented in a table (See Table 14) in the Appendix.