

# **Ethical Dilemma in Regional Courts: Ceding Sovereignty, Balancing Impartiality, and Regional Interests**

## **1. Introduction**

The establishment of regional courts has significantly impacted international law by promoting justice, economic integration, and human rights within their regions. For the purposes of our discussion, examples include the East African Court of Justice (EACJ), the COMESA Court of Justice, the ECOWAS Court of Justice, and the former SADC Tribunal. These courts enhance cooperation among member states and ensure adherence to regional treaties, despite each having its own legal framework. However, regional courts face dilemmas based on challenges in the environment in which they operate. They are constantly faced by challenges to their jurisdictions by member states who are often reluctant to cede sovereignty. Coming from member states which may have interests that may not always align with the regional interests may seemingly present challenges to their impartiality, but this is not the issue. The regional courts are bound by the treaties, laws and legal principles governing their regional economic community (REC) and their allegiance is to those laws and not any national interests. The challenge for the regional courts is the enforcement of their decisions by member states which may unethically prioritise national interests over regional interests, under the guise of protecting their sovereignty. It is therefore political challenges that surround the operation of the courts that present dilemmas which are crucial for panelists to address.

To reiterate, the dilemma, if at all ethical, before us, is not an ethical dilemma for the regional courts, but of the political environment surrounding their operation. Discussions of ethical dilemmas for courts typically involve examining judicial decision-making to ensure decisions are based on right and wrong. In regional courts, these decisions must resolve rights violations and ensure governance accountability fairly and justly, adhering strictly to impartiality principles guided by ethical frameworks. The exercise of sovereignty by member states raises ethical questions beyond court decisions and addresses the misuse of sovereignty to evade treaty obligations. Regional courts, bound by strict ethical guidelines, rarely face criticism for unethical decisions or lack of impartiality in their jurisdictional analyses. The balance that must be created is within the political space and it is the balance between sovereignty and international cooperation.

This paper shall discuss the sovereignty dilemma surrounding the operation of regional courts, using the the example of the SADC Tribunal in an effort to illustrate how the sovereignty versus the supranationalism dilemma can undermine the very raison d'être of the regional courts. The paper shall briefly highlight the challenges that the SADC Tribunal and then attempt to suggest some best practices to avoid recurrences of the SADC Tribunal's fate. The paper shall then briefly discuss challenges with balancing impartiality and regional interests very broadly with reference to the other existing courts to provide a basis for best practices to be developed so as to ensure that the regional courts are able to operate and fulfil the crucial roles they were created for. From the lessons that can be learned from the SADC Tribunal, it can be seen that the crux of the issue with regard to the ethical dilemma behind ceding sovereignty and balancing impartiality and regional interests doesn't arise from a lack of ethical grounding in our regional judges. Regional judges have internalised and produce jurisprudence that shows their adherence to the moral duty and intention of advancing human rights and the rule of law. Considering all the relevant factors such as fairness, justice and the well being of individuals. Indeed as we heard this morning in the keynote lecture with regard to the EALA election case adjudicated by the EACJ, it has become an established principle that justice must be done "even if the heaven must fall down".

Unfortunately, as the case of the SADC Tribunal demonstrates, the real dilemma arises from the substantial risk that significant negative consequences may ensue unless we actively endeavor to protect the space within which our regional courts operate from political interference. It is hoped that by discussing these issues, we can stimulate a conversation around practical measures aimed at avoiding any dilemmas. As Winston Churchill once said, "[T]hose that fail to learn from history are doomed to repeat it." This lesson serves as a cautionary note rather than a prediction of inevitable failure or a forewarning of impending disaster for any regional court that stands firm on ethical principles. Instead, it should be viewed as a clarion call to all stakeholders to continue supporting regional courts, thereby enhancing their legitimacy.

This paper will discuss the sovereignty dilemma faced by regional courts, using the example of the SADC Tribunal to illustrate how the conflict between sovereignty and supranationalism can undermine the very purpose of regional courts. It will briefly highlight

the challenges faced by the SADC Tribunal and suggest best practices to avoid similar occurrences in the future and shall attempt to provide a basis for developing best practices. The goal is to ensure that regional courts can operate effectively and fulfill their crucial roles. The lessons from the SADC Tribunal show that the ethical dilemma of ceding sovereignty in the face of clashing national and regional interests does not stem from a lack of ethical grounding in regional judges. These judges have demonstrated their commitment to advancing human rights and the rule of law, considering fairness, justice, and the well-being of individuals. As highlighted in the keynote lecture regarding the EALA election case adjudicated by the EACJ, it is an established principle that justice must be done "even if the heavens fall." Unfortunately, as the SADC Tribunal case demonstrates, there is a real possibility that the heavens can fall unless deliberate efforts are made to protect the ethical spaces surrounding regional court decisions. By discussing these issues, we hope to catalyze discussions around practical measures to avoid these ethical dilemmas. As Winston Churchill once said, "[T]hose that fail to learn from history are doomed to repeat it."

## **2. Ceding Sovereignty: The Sovereignty vs. Supranationalism Dilemma**

Ceding sovereignty while is is often seen as a threat or a source of tension for the effective functioning of regional courts should really be an automatic attribute of regional integration. It is widely and well understood that sovereignty is a fundamental principle in international relations, granting states the authority to govern themselves without external interference. However, what is not so easily accepted, because I am sure it is understood, is that sovereignty is not absolute and can be limited or shared through international agreements.<sup>1</sup> By agreeing to be bound by the treaties that govern their RECs, member states consent to be bound by the rules of the RECs over and above their own and this consent demonstrates the state's willingness to accept the obligations outlined in the treaty, which may require it to alter its laws or policies in alignment with the treaty's provisions. By agreeing to these terms, member states effectively limit their sovereign powers in specific areas.

When signing treaties, member states frequently agree to limit their sovereignty in areas such as human rights and trade. Regarding human rights, this entails upholding the rights

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<sup>1</sup> The Geneva Convention on the Law of Treaties, particularly the Vienna Convention on the Law of Treaties (VCLT) adopted in 1969, provides a framework for how treaties are created, interpreted, and enforced. While it does not explicitly state that states must cede sovereignty when they join treaties, it implies that by entering into a treaty, states agree to be bound by its terms, which can involve limitations on their sovereignty.

enshrined in those treaties, sometimes necessitating modifications to domestic laws. Trade treaties might involve reducing tariffs or adhering to specific regulatory standards, thereby limiting the ability to impose unilateral trade policies.

Consequently, it should not be surprising that regional courts, established by these member states to ensure compliance and accountability, exercise their authority to hold states accountable. Critics, however, argue that regional courts may overstep their mandate, issuing decisions that undermine national sovereignty and democratic processes.<sup>2</sup> Some states argue that such rulings interfere with domestic affairs, highlighting the ongoing struggle between national sovereignty and regional judicial authority. The surprising aspect is that sovereignty arguments arise at this juncture, necessitating careful analysis and discussion. This understanding is crucial for fostering cooperation with regional courts and ensuring the enforcement of their decisions by member states.

## 2.1 The Case of the SADC Tribunal

*“The dissolution of the Tribunal reflects SADC’s hierarchy of values, in terms of which the organization’s formal commitment to human rights, the rule of law, and a regional legal order is subordinate to the political imperatives of regime solidarity and respect for sovereignty. The crux of the matter is that the SADC states will not relinquish sovereignty to regional institutions. Scholars who have described the Tribunal as a supranational entity are mistaken”<sup>3</sup>*

Laurie Nathan

One of the fundamental ethical dilemmas regional courts encounter is the reluctance of member states to cede sovereignty. States often perceive supranational courts as threats to their autonomy, especially when rulings contradict national policies or political interests. The Southern African Development Community Tribunal (‘SADC Tribunal’ or ‘Tribunal’) exemplifies the sovereignty dilemma. Established to enforce SADC treaties and adjudicate

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<sup>2</sup> For example, with reference to the SADC Tribunal, see International Commission of Jurists, Southern Africa Litigation Centre & SADC Lawyers’ Association, Resolutions of SADC Lawyers, Judges and Rule of Law Advocates Adopted at the 2nd Regional Legal Consultative Conference on The Review of The SADC Tribunal (2011).

<sup>3</sup> Nathan, L. (2013). The disbanding of the SADC Tribunal: A cautionary tale. *Human Rights Quarterly*, 35(4), pp. 870-892.

disputes, it faced fierce resistance when it ruled against Zimbabwe in *Mike Campbell (Pvt) Ltd v. Republic of Zimbabwe (2008)*. In August 2012 the Summit of the Heads of State and Government of the Southern African Development Community (SADC) held in Maputo, Mozambique, decided to suspend from operation one of its key institutions the SADC Tribunal.<sup>4</sup> A new Protocol ('2014 Protocol') was adopted to reconstitute the Tribunal with limited jurisdiction at the 34th Summit of SADC Heads of State or Government ('Summit') held in Victoria Falls, Zimbabwe, from 17 to 18 August 2014.<sup>5</sup>

Before its suspension, the SADC Tribunal was a key sub-regional court in Southern Africa, established under Article 9 (1) of the SADC Treaty. Its primary role, as per Article 16 (1), was to ensure adherence to the SADC Treaty and adjudicate disputes. The Campbell decisions highlight the tensions regional courts face when dealing with sovereignty issues. Despite maintaining impartiality and balancing regional interests with human rights concerns, the tribunal still faced challenges. This case demonstrates that ethical decision-making by regional courts must be supported to have an impact. While human rights are crucial for regional integration, political interests can threaten the existence of such courts. Learning from history and innovating is essential to keep regional courts legitimate and operational.

### **2.1.1 Summary of Campbell 1 Case: *Mike Campbell (Pvt) Limited & William Michael Campbell v The Republic of Zimbabwe*, Case No. SADC T: 2/07**

The *Campbell 1 case* was the second filed before the SADC Tribunal and led to its first ruling. Initiated on October 11, 2007, Mike Campbell (Pvt) Limited and William Michael Campbell challenged Zimbabwe's compulsory acquisition of their land. Facing an imminent threat of seizure, they sought interim measures from the Tribunal to prevent removal from their property.<sup>6</sup> Zimbabwe did not oppose the interim measures but argued the Tribunal lacked jurisdiction since local remedies had not been exhausted under article 15(2) of the Tribunal's Protocol.<sup>7</sup>

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<sup>4</sup> Hansungule, M. (2013). Strategic review for Southern Africa, Vol. 35, No. 1, pp. 135-145. Available at: <http://hdl.handle.net/2263/40305> [Accessed 12 Feb. 2025].

<sup>5</sup> Asmelash, H.B. (2016). Southern African Development Community (SADC) Tribunal. Max Planck Institute Luxembourg, Department of International Law and Dispute Resolution. p. 2.

<sup>6</sup> Centre for Human Rights, Faculty of Law, University of Pretoria (November 2015 ). 'The role of the Southern African Development Community (SADC) Tribunal in promoting human rights and strengthening regional social, economic and political integration in SADC' Report commissioned by SADC Lawyers' Association [https://www.chr.up.ac.za/images/researchunits/litigation/cases/THE\\_ROLE\\_OF\\_THE\\_SADC\\_TRIBUNAL\\_IN\\_PROMOTING\\_HUMAN\\_RIGHT.pdf](https://www.chr.up.ac.za/images/researchunits/litigation/cases/THE_ROLE_OF_THE_SADC_TRIBUNAL_IN_PROMOTING_HUMAN_RIGHT.pdf) accessed 10 February 2024.

<sup>7</sup> Ibid.

The Tribunal affirmed its jurisdiction to hear individual cases against SADC member states. It interpreted article 4 of the SADC Treaty, emphasizing human rights, democracy, and the rule of law. The Tribunal ruled that the applicants' property rights claims fell within its mandate, giving substantive meaning to article 4.<sup>8</sup>

The ruling clarified that SADC member states have both individual and collective responsibilities to uphold democracy and human rights. The Tribunal also noted that non-state actors have rights and expectations for state compliance. Additionally, the Tribunal decided that the requirement for prior exhaustion of local remedies does not apply for urgent interim measures, which can assist non-state actors whose rights are at risk. Subsequently, the Tribunal issued an interim order against Zimbabwe concerning the applicants' land rights.<sup>9</sup> This was obviously a bold move in the face of the sovereign interests of a Member State, but consistently throughout this case, the Tribunal maintained impartiality and set on a course that protected the applicants land rights in very well reasoned and articulated decisions, confirming established human rights principle both under international law, and national laws of Member States. These positive achievements however did not save the Tribunal.

### **2.1.2 Summary of *Campbell 2 Case: Mike Campbell (Pvt) Ltd & 78 Others v The Republic of Zimbabwe***

In the **Campbell 2 case**, the Southern African Development Community (SADC) Tribunal examined the claims of 79 applicants, including Mike Campbell and others, who contested the Zimbabwean government's compulsory acquisition of their farmland under section 16B of the Zimbabwean Constitution, introduced by Amendment No. 17 of 2005. The applicants contended that this law was unlawful, racially discriminatory, and violated their rights under articles 4(c) and 6(1) of the SADC Treaty. They argued that the responsible Zimbabwean Minister had not applied reasonable criteria in the acquisition process and had denied them access to the courts and compensation.<sup>10</sup>

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<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

Zimbabwe contested the Tribunal's jurisdiction, claiming that without a human rights catalogue, the Tribunal could not reference standards from other treaties. Additionally, it defended its land policy as a necessary corrective measure for historical inequalities.<sup>11</sup>

The Tribunal ruled that it had the competence to determine the case, linking its jurisdiction to human rights principles and asserting its authority to apply international law within the SADC framework. Importantly, the Tribunal began the process of "constitutionalizing" the SADC Treaty, using its provisions to review national laws and policies for compliance with human rights standards.<sup>12</sup>

The Tribunal confirmed that the exhaustion of local remedies was required but noted exceptions when remedies were unavailable or unduly delayed. It emphasized that access to justice is a fundamental aspect of the rule of law, obligating member states to ensure this right.

In its judgment, the Tribunal found that Zimbabwe's actions violated the right to access justice and constituted indirect discrimination against white farmers. The Tribunal also underscored that the applicants had a right to compensation under international law, rejecting Zimbabwe's reliance on national law to evade its international obligations.<sup>13</sup>

Overall, the *Campbell 2 case* was significant as it reinforced the principles of human rights, democracy, and the rule of law within the SADC framework and established the Tribunal as a key player in the protection of these rights in Southern Africa.<sup>14</sup> The ethical space was therefore not what was under threat, but the surrounding environment. We therefore need to take this discussion to ensuring that we protect the spaces around the decision making so that gains we are registering in all our regional courts should not be lost political interests of sovereignty.<sup>15</sup>

### **2.1.3 Summary of *Campbell 3 Case: Mike Campbell (Pvt) Ltd & 78 Others v The Republic of Zimbabwe***

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<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

<sup>13</sup> Ibid.

<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

In the *Campbell 3* case, the original applicants from *Campbell 1* returned to the SADC Tribunal to seek a declaration that Zimbabwe was in contempt of the Tribunal's earlier ruling regarding interim measures. The Tribunal found substantial evidence indicating Zimbabwe's persistent disregard for its authority. This evidence included Zimbabwe's non-participation in proceedings, a letter from the Deputy Attorney General stating a policy to ignore the Tribunal's rulings, a speech by the Deputy Chief Justice questioning the Tribunal's jurisdiction, and public statements by President Mugabe expressing disdain for the Tribunal.<sup>16</sup>

With this evidence, the Tribunal invoked article 32(5) of its 2000 Protocol, which mandates reporting violations to the SADC Summit. The ruling raised significant concerns about Zimbabwe's conduct and its implications for human rights and the rule of law. The actions of Zimbabwe's national legal institutions, particularly the Attorney General's office and the Deputy Chief Justice, undermined the Tribunal's authority and signaled a troubling conflict with the SADC Treaty, which emphasizes shared values, democracy, and the rule of law. The Tribunal's findings highlighted the need for vigilance from other SADC Member States regarding Zimbabwe's behavior, as it threatened the integrity of the SADC compliance and sanctions regime and the overall commitment to the SADC agenda within the region.<sup>17</sup>

## 2.2 Analysis

The *Campbell case* exemplifies the dilemma of ceding sovereignty. Zimbabwe's refusal to comply with the Tribunal's decision led to the suspension of the Tribunal's functions in 2010, demonstrating the risks associated with national interests clashing with regional legal obligations. The reluctance to cede sovereignty was not unique to Zimbabwe. As Asmelash has noted, and the Tribunal's woes with regard to sovereignty date back to its inception. Although the SADC Tribunal was formally established when the SADC Treaty came into force on 30 September 1993, it took another 12 years before it became operational. This was due to delays in adopting the Protocol establishing the Tribunal that stipulated the composition, powers, functions, procedures and other matters governing its activities as envisaged in Article 16 (2) SADC Treaty. The sole reason for the delay in adopting the Protocol according to Asmelash, was the reluctance of the SADC Member States to set up a

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<sup>16</sup> Ibid.

<sup>17</sup> Ibid.



supranational court that would compromise their national sovereignty.<sup>18</sup> This confirms Nathan's view that the SADC member states never intended to create a body which was to hold them accountable for the limited cessation of towards aligning to the treaty goals.<sup>19</sup>

The unique manner in which the SADC Tribunal operated (as distinct from other such courts) also presented ample threats to the sovereignty of its members. Asmelash notes that one of the glaring feature of the Tribunal's jurisdiction over disputes involving natural or legal persons was the absence of nationality - or residency-related requirements. The comprehensive individual access to the Tribunal meant that even natural or legal persons that were neither nationals nor residents of SADC Member States could bring a case before the Tribunal. The differences with other sub-regional courts such as the COMESA Court of Justice and the East African Court of Justice (EACJ), was that in the latter, individual access to the Courts is limited to residents of their respective territories. Thus limiting the chances for individuals instituting a claim against a State if they are not residents, which the SADC Tribunal was not bound by. The SADC Tribunal was therefore a victim of its own progressiveness. We therefore need to move towards a culture in which progressiveness is rewarded not punished.<sup>20</sup>

Further, equally as progressive is that there was no requirement for natural or legal persons to have a legal interest in the subject matter of the dispute as a prerequisite for initiating a dispute before the Tribunal against the Member States of the SADC. As far as individual access to the Tribunal was concerned, the only requirement was related to the exhaustion of local remedies. In this regard, Article 15 (2) 2000 of the Protocol provided that *'[n]o natural or legal person shall bring an action against a State unless he or she has exhausted all available remedies or is unable to proceed under the domestic jurisdiction'*. This very provision enabled Member States to challenge decisions in a manner that was protective of

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<sup>18</sup> Asmelash op.cit supra foot note 2, p.2 "Several Member States were rather keen on less formal means such as arbitration and mediation. Yet they went on to establish a tribunal with comprehensive jurisdiction over the adjudication of virtually all disputes arising from SADC legal instruments in an attempt to gain credibility in the eyes of foreign investors and in particular of European donors who insisted on the importance of a strong dispute settlement mechanism in creating a rules-based integration process."

<sup>19</sup> Nathan, op.cit. supra foot note 3.

<sup>20</sup> Asmelash, op. cit. supra footnote 5.

their sovereignty as was seen in the *Campbell case*, where the Tribunal rejected Zimbabwe's objection of failure to exhaust local remedies.<sup>21</sup>

Similar sovereignty concerns affect the COMESA Court of Justice and the EACJ. While these courts have jurisdiction over trade and economic disputes, member states often resist judicial decisions that appear to limit their national policies. The EACJ, for instance, faced resistance when it ruled against Kenya in a case involving the violation of the East African Community Treaty's principles on human rights and good governance.

One of the safest way to avoid entanglement with the tensions surrounding sovereignty is to avoid human rights issues. According to Gathii, the COMESA Court of Justice has managed to avoid the complexities of the sovereignty issue by restricting itself primarily to resolving employment disputes, in stark contrast to the East African Court of Justice, which has expanded its jurisdiction to include human rights cases despite lacking explicit treaty authority. This cautious approach has however been described as limiting the COMESA Court's role in promoting the rule of law and human rights.<sup>22</sup> It all starts however with the original treaty provisions. If the treaty establishes an oversight judicial body with jurisdiction over human rights, then careful attention should be made in the drafting of those treaty provisions to enable the regional courts to enjoy the freedom to promote the rule of law and human rights and avoid any appearance that they might be shrinking themselves in self preservation against the backlash from perceived threats to the sovereignty of Member States.

In the three decisions in *the Campbell case*, the Tribunal found Zimbabwe's land reform program discriminatory and in violation of SADC treaties. Instead of complying, Zimbabwe, with the support of other SADC leaders, pressured the bloc to suspend the Tribunal in 2010 and later reconstituted it with limited jurisdiction in 2014. The requirement of the exhaustion of local remedies under Article 15 (2) 2000 of the Protocol was required only in relation to cases against the Member States but the personal jurisdiction of the Tribunal has now significantly been restricted under the 2014 Protocol.<sup>23</sup> Article 33 of the 2014 Protocol, which is the only jurisdiction-related article of the Protocol, limits the jurisdiction of the Tribunal to

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<sup>21</sup> Ibid p.7 "Article 15 (2) 2000 of the SADC Protocol was also invoked in *Republic of Tanzania v Cimexpan (Mauritius) LTD and Others* (where the SADC Tribunal denied jurisdiction due to failure to exhaust local remedies)."

<sup>22</sup> Gathii, J.T. (2018) 'The COMESA Court of Justice', in R. Howse et al. (eds.) *The Legitimacy of International Trade Courts and Tribunals*. Cambridge: Cambridge University Press (Studies on International Courts and Tribunals), pp. 314–348. Available at: <https://ssrn.com/abstract=3314213> [Accessed 12 Feb. 2025].

<sup>23</sup> Ibid.

disputes between Member States, thereby banning individuals' access to the Tribunal.<sup>24</sup> Asmelash is of the view that this is likely to have significant adverse effects for enforcement of SADC law and access to justice in the region. The nature of cases brought before the Tribunal prior to its suspension indicates that individual access to the Tribunal allows SADC nationals to hold their governments accountable and, in so doing, ensure the enforcement of SADC law. It is worth noting that no inter-State complaint has been filed before the Tribunal.<sup>25</sup> This case illustrates how political pressure can undermine the effectiveness of regional courts when states refuse to cede sovereignty.

### 3. Political Influence

The failure of SADC leaders to defend the Tribunal's independence highlights the ethical challenge of maintaining impartiality in the face of political opposition. According to, the COMESA Court of Justice, although designed to provide legal oversight over economic matters, has historically struggled with enforcement of its rulings due to political reluctance.<sup>26</sup> The COMESA Court of Justice plays a crucial role in resolving trade disputes, but even in relation to trade issues, its decisions often face resistance when they challenge national economic policies. For instance, some member states have ignored rulings that threaten their national trade policies, arguing that strict legal interpretations could hinder regional economic growth. Unlike the European Court of Justice (ECJ), which has robust mechanisms to enforce compliance, the COMESA Court lacks effective means to ensure that states uphold its decisions. This causes Gathii to question whether that court can truly function as an independent judicial body or if it is merely symbolic.<sup>27</sup> These are questions that must be discussed against the mandate of the court and by all necessary stakeholders.

The EACJ has made efforts to assert its independence, ruling on cases concerning human rights and governance. However, it faces significant obstacles, including attempts by Member States to limit its jurisdiction. In 2007, according to Possi, the real test of the EACJ's resilience came in *Anyang' Nyong'o v Attorney General of Kenya* Ref No 1/2006 (29 March 2007), when the applicants successfully challenged the election of nine EALA

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<sup>24</sup> Ibid.

<sup>25</sup> Ibid.

<sup>26</sup> See Gathii, J., op. cit supra footnote 22.

<sup>27</sup> Ibid.

Members from the Kenyan National Assembly. The decision of the EACJ in this case led to a significant transformation of the nature of the EACJ thereafter. Possi states that shortly after the Court found Kenya to be in breach of article 50 of the EAC Treaty, Member States went on to amend the EAC Treaty. The main outcome of the *Anyang' Nyong'o case* was the disputed EAC Treaty amendments.<sup>28</sup> The amendments undermined the authority of the Court by establishing a two-layer court structure, establishing a time limit for the institution of cases, and attacking the security of tenure of the judges. The effects of having a time limit and an appellate chamber can easily be seen in the current functioning of the EACJ. Comments suggest that the 2007 EAC Treaty amendments which according to Alter, Gathii and Helfer, "have significantly affected the Court's subsequent trajectory".<sup>29</sup> The case was not the only one to be brought to the EACJ challenging article 50 of the EAC Treaty. Thus Possi concludes that EAC leaders attempted to curtail its jurisdiction, demonstrating how political pressures threaten judicial impartiality.<sup>30</sup>

Thus, the EACJ has taken a more activist approach in addressing human rights violations, even though its primary role is economic dispute resolution. Notwithstanding that such rulings enhance judicial legitimacy, as has been discussed above, its rulings sometimes conflict with regional leaders' political interests. This raises ethical questions about whether regional courts should focus solely on economic disputes or expand their mandates to include governance and human rights issues. Further, an audit of the EACJ by Possi has shown that based on shortfalls in the prevailing provisions affecting the EACJ, the court itself falls short of its authority in matters directly linked to EAC integration, such as trade. The shortcomings are caused by the existence of gaps in the EAC Treaty and the narrow interpretation of the role of the EACJ.<sup>31</sup> Consequently, more can be done to support the EACJ to support the development goals of EAC by strengthening its legal frameworks.

This ongoing discussion should focus on strengthening regional alliances, enabling member states to better adhere to treaty provisions and avoid reverting to sovereignty when decisions conflict with national goals. We need mechanisms to support judicial independence and the rule of law, reinforce regional court legitimacy, and enforce their decisions. One idea for

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<sup>28</sup> Possi, A. (2018). An appraisal of the functioning and effectiveness of the East African Court of Justice. *Potchefstroom Electronic Law Journal*, 21, pp. 1–42.

<sup>29</sup> Alter, K.J., et al. (2016). Backlash against international courts in West, East and Southern Africa: Causes and consequences. *European Journal of International Law*, 27(2), pp. 293-328 at 294.

<sup>30</sup> Possi, A., op. cit. supra foot note 27.

<sup>31</sup> Possi., supra op.cit. foot note 27.

continued dialogue is to hold joint intentional and systematic sessions for executives and law officers to understand regional legal frameworks and the importance of upholding judicial independence, regardless of national interests, in pursuit of regional integration goals. This should be part of the obligations of the treaty since it is important that all those who sign up are fully aware at the outset and continually what their consent to being bound to the treaty entails.

#### **4.1 Suggestions for continued engagement**

The examples of the regional courts that were discussed (SADC Tribunal, COMESA Court of Justice, and East African Court of Justice (EACJ)), exemplify in one way or another the complex ethical dilemmas faced by regional courts amidst tensions over sovereignty, national political, and regional interests. The suspension of the SADC Tribunal serves as a poignant reminder of the risks posed by political interference, while the limited enforcement powers of the COMESA Court highlight the significant challenges inherent in maintaining judicial authority. Additionally, the EACJ's ongoing struggles reveal the persistent tension between treaty aspirations and the political dynamics of member states. These cases illustrate that, for regional courts to function effectively, it is imperative that member states commit to protecting judicial independence by complying with or enforcing court rulings.

To alleviate the tensions and conflicts associated with the operation of regional courts, several best practices can be implemented. While many of these practices are straightforward and already in place, they warrant reiteration to foster a discussion on these matters. By implementing the following best practices, regional courts can actively contribute to addressing the complexities related to ceding sovereignty by the executive, while maintaining their credibility, legitimacy, impartiality, promoting justice and human rights, and facilitating trade and regional integration among member states. This ultimately contributes to a more integrated and just regional framework. Some suggestions include:

##### **4.1.1 Clear communication of benefits**

Member States should be educated about the advantages of regional integration and the role of regional courts in enhancing justice and human rights. This includes demonstrating how cooperation can lead to economic benefits, stability, and improved international standing.

#### **4.1.2 Gradual integration approach**

States can be encouraged to adopt a phased approach to ceding sovereignty. This involves gradually increasing their commitment to regional courts and treaties, allowing Member States to adjust to changes in governance structures without feeling overwhelmed.

#### **4.1.3 Pre-litigation consultation processes**

Establishing a mandatory consultation process before disputes escalate to regional courts can help address sovereignty concerns. This allows States to negotiate and resolve issues amicably, potentially avoiding conflicts arising from court rulings.

#### **4.1.4 Strengthened national legal frameworks**

Member States should ensure that their national laws align with regional standards. By harmonizing domestic legislation with regional treaties, States can reduce conflicts resulting from conflicting legal interpretations.

#### **4.1.5 Enhanced participation in court procedures**

Member States should actively participate in the development of the regional court's procedures and rules. This participation fosters a sense of ownership and can help alleviate concerns regarding external interference.

#### **4.1.6 Judicial independence and protection:**

Safeguards must be in place to protect the independence of regional courts from political pressures. This includes mechanisms for judicial appointments free from political influence and ensuring the security of judges' positions.

#### **4.1.7 Transparent and inclusive decision-making**

Regional courts should adopt transparent processes that include input from member states and civil society. Ensuring that all stakeholders have a voice in decision-making can help build trust and reduce perceptions of overreach.

#### **4.1.8 Regular review of regional treaties**

Member States should periodically review and update regional treaties to address evolving political, social, and economic contexts. This ensures that treaties remain relevant and reflective of the interests of all member states.

#### **4.1.9 Building trust among member states**

Initiatives aimed at fostering cooperation, dialogue, and trust among member states can reduce resistance to ceding sovereignty. This could include joint training programs, workshops, and collaborative projects that highlight the benefits of regional integration.

#### **4.1.10 Monitoring and evaluation mechanisms**

Establishing mechanisms to monitor the implementation of regional court rulings and evaluate their impact can demonstrate the courts' effectiveness in promoting justice without undermining sovereignty.

#### **4.1.11 Public awareness campaigns**

Engaging the public through awareness campaigns about the role and importance of regional courts can help garner support for these institutions, reducing the perception of them as threats to sovereignty.

### **4.2 Conclusion**

Regional courts face complex dilemmas in adjudication and subsequently in enforcement of their decisions due to sovereignty tensions and regional interests. They must balance legal principles with economic and political factors. While expected to uphold the rule of law, their decisions can conflict with regional integration goals. Addressing these challenges requires considering sovereignty, justice, and human rights. Regional courts are vital for promoting legal standards and protecting rights, but their operations depend on the political environment. As international law evolves, ongoing dialogue and reform are necessary.

In conclusion, regional integration needs effective legal mechanisms for dispute resolution. The success of regional courts relies on member states' political will to respect judicial authority and uphold the rule of law. Challenges offer opportunities for innovation. Regional courts play a role, but solutions require a multisectoral approach to reduce tensions and address root causes.