

**A critical assessment of the legal effect of disbanding the Southern African
Development Community Tribunal**

By

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DECLARATION

I declare that the thesis "*A critical assessment of the legal effect of disbanding the Southern African Development Community Tribunal*" is my own work. It has not been submitted previously for any degree indicated and acknowledged as complete reference. I therefore cede copyright of the thesis in favour of the University of the Free State.

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ABSTRACT

This thesis presents a panoramic exploration of the legal effects of the suspension and subsequent dismantlement of the South African Development Communities (SADC) Tribunal after the regional court's watershed ruling against the Zimbabwean government land reform.

The classic case of *Mike Campbell (Pty) Ltd and Another v Minister of National Security Responsible*, the SADC Tribunal ruled that the government of Zimbabwe should stop continuing with the invasion of white farmers in Zimbabwe and those whose farms had been confiscated should be compensated. Zimbabwe contested the jurisdictional competence of the tribunal to preside over the expropriation of white farms. Their reason was based on Protocol under which the tribunal had been established, and the amendment of the SADC Treaty. The government of Zimbabwe argued that the Protocol was not binding upon them, in that it has not yet been ratified by the requisite two third of the total membership.

The primary argument concerns the government of Zimbabwe's denial to be bound by the rulings of the SADC Tribunal. Article 21 (b) of the SADC Protocol on Tribunal forms the basis of their ruling because this provision gives the tribunal the powers "to develop its own jurisprudence, having regard to applicable treaties, general principles and rules of public international law" which are the sources of law. Out of three presiding judges, two concur that the tribunal have jurisdiction to preside over human rights matters and they made reference of art.21 of the Protocol on SADC Tribunal. The other judge gave a dissenting view and he indicated that the tribunal could not legislate on behalf of SADC member states by developing its own jurisprudence.

The amendment of the Constitution of Zimbabwean to allow the government to effect changes by inserting Amendment 17, which allowed the expropriation of land without compensation, and these changes also, denied the property owners right to seek legal redress to local courts. These changes affected the fundamental clauses of the constitution and such changes are tantamount to constitutional dismemberments. The ramifications of the suspension of the tribunal is that individuals and legal persons within SADC region have no regional court to ventilate their complaints when they are denied a legal redress by local courts. This study dissects the legal implication of the dismantlement of the SADC tribunal and its negative impact towards protection of human rights, democratic values and the rule of law in the SADC region. The study provided significant recommendations to the SADC Heads of State and Government particularly the resuscitation of the SADC Tribunal.

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ABBREVIATIONS AND ACRONYMS

SADC	Southern African Development Community
SADCC	Southern African Development Coordinating Committee
ACHPR	African Commission on Human and People's Rights
ECOWAS	Economic Community of West Africa
ECOWAS CCJ	Economic Community of West Africa Community Court of Justice
FLS	Front Line States
REC	Regional Economic Communities
UNtHR	United Nations on Human Rights
ACHRPR	African Charter on Human and People Rights
ECJ	European Court of Justice
EACJ	East African Court of Justice
SABF	Southern African Business Forum
UDHR	Universal Declaration of Human Rights
ICCPR	International Convention on Civil and Political Rights
ICERD	International Convention on Elimination of Racial Discrimination
EU	European Union
COMESA	Common Market for Eastern and Southern Africa
CEMAC	Economic and Monetary Community of Central Africa
EAC	East African Community
SADCAT	SADC Administrative Tribunal
GDP	Gross Domestic Product
UDI	Unilateral Declaration of Independence
OAU	Organisation of African Unity
SACU	Southern African Custom Union
MDP	Mutual Defence Pact
UN	United Nations
NLC	National Land Committee
ZIMCORD	Conference on Reconstruction and Development
NGO	Non-Governmental Organisation
IACtHR	Inter-American Court on Human Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
PTA	Preferential Trade Area
ICJ	International Court of Justice
SCA	Supreme Court of Appeal

LSSA	Law Society of South Africa
SADC LA	SADC Lawyers Association
SADC-NGO	SADC Non-Governmental Organisation
CJEU	Court of Justice of the European Union
TFEU	Treaty on Function of European Union
IC	International Court
ICC	International Constitutional Court
EALA	East African Legislative Assembly
CAN	Andean Community
ECCAS	Economic Community of Central African States
ALBA	Union de Naciones de America
MERCOSUR	Mercado Comun Del Sur
IOC	Indian Ocean Commission
FTA	Free Trade Agreement
CJAC	Court of Justice of the Andean Community
ECtHR	European Court of Human Right
ICC	International Criminal Court
WTO	World Trade Organisation

Key concepts: suspension, colonialism, human rights, rule of law, democracy, economic integration, socio-economic rights, solidarity, sovereignty, jurisdiction, land reform, expropriation, compensation, constitutional dismemberment, amendments, Judicialisation and Dejudicialisation.

CHAPTER 1: GENERAL ORIENTATION TO THE THESIS

1.1. INTRODUCTION AND BACKGROUND

SADC Tribunal is constituted in terms of art.16 of the 2000 Protocol on SADC Tribunal with the main objective, which is to ensure adherence to and the proper interpretation of the SADC Treaty and its subsidiary instruments as well as adjudicating on dispute. Art.14¹ states that the Tribunal shall have exclusive jurisdiction over all disputes between the States and the Community. The provision further state that such dispute may be referred to the Tribunal by the State concerned of either by the competent institution or organ of the Community.² There is an outcry among communities, civic organisations and Human Rights Organisation against the disbandment of the SADC Tribunal.³ The decision to suspend the functioning of the tribunal was viewed by the affected parties as more political than legal.⁴ There is growing support for the reinstatement of the SADC Tribunal, which among others, a coalition of legal and human rights organisations has appealed to regional leaders during a SADC Heads of State and Government meeting held in Gaborone, Botswana to reinstate the Tribunal.⁵ The primary objective for the call to reinstate the SADC Tribunal was to ensure that southern African countries uphold the rule of law and the protection of human rights.⁶ The SADC Tribunal was established under the Treaty of the Southern African Development Community (SADC) in 1992, but the regional court was only inaugurated in November 2005.⁷ The tribunal was charged with ensuring that member states comply with the SADC Treaty and subsidiary instruments.⁸ It is imperative to indicate that the tribunal had competence to hear individual complaints of alleged human rights violations.⁹ The tribunal is currently suspended and the SADC Heads of State and Government took the decision to review its mandate and jurisdictional competence.¹⁰

The adoption of the 2014 SADC Protocol on Tribunal in the Southern African Community which removed access to the tribunal by individuals and legal persons, as well as the removal

¹ 2000 SADC Protocol on Tribunal

² 2000 SADC Protocol on Tribunal

³ Manyathi-Jele, SADC Stakeholder from a coalition to lobby for restoration of SADC Tribunal. De Rebus (2013)

⁴ Moyo 2016: 363 - 388

⁵ Independent Online "Calls for SADC to reinstate Tribunal" (17 August 2015)

⁶ Sedutla M, Whither the SADC Tribunal. De Rebus (May 2013)

⁷ Tino 2021: 141-172

⁸ Tino 2021: 141-172

⁹ Swart 2013:254-262

¹⁰ Shivamba 2019: 1-5

of its human rights jurisdiction in terms of Art.4(c) of the SADC Treaty.¹¹ This was viewed as a denial of access to justice to individuals and legal persons who will want to lodge complaints against SADC member states.¹² The framework of this SADC Protocol on Tribunal is in conflict with the wording of the SADC Treaty, which is the SADC constitutive legal instrument.¹³ It is imperative to highlight that the SADC Treaty protects the rights of member states, individuals, and legal persons who may be aggrieved by the actions of their member states.¹⁴ The primary objective of the SADC Tribunal was to ensure that SADC Institutions interpret and implement the SADC Treaty and other instruments as intended by member states.¹⁵

The role-played by the SADC Tribunal and its significance needs to be highlighted, for example, the reinstatement of the Tribunal will provide legal recourse against the member states. The principle of exhaustion of local legal remedies at the national level is of paramount importance but in the present case the victims were denied access to local courts, hence they approached the tribunal to pursue their case.¹⁶ On the contrary, the disbandment of this tribunal was perceived as the disregard for the independence of the judiciary, separation of powers, and the rule of law.¹⁷ Additionally, the infringement of human rights and disregards of the rule of law is an impediment to the attraction of foreign investment and business confidence across the region.¹⁸

It is concerning that since the disbandment of the SADC Tribunal to date, the SADC Heads of State and Government has not yet found it befitting to have a regional court that will settle disputes between member state and individual or legal persons seeking legal recourse.¹⁹ The exclusion of human rights from the SADC Tribunal is a discordance with other regional tribunals such as the Court of Justice of ECOWAS and the East African Court of Justice.²⁰ Although SADC Tribunal is suspended, the SADC Protocol provides mechanisms of dispute settlements such as those, which were in line with the World Trade Organisation (WTO) but the availability of these dispute mechanisms do not justifies the disbandment of the tribunal in Southern Africa.²¹

¹¹ Magwanda 2021: 17 -22

¹² Tino 2014: 103 - 127

¹³ Tino 2014: 103-127

¹⁴ Art.23

¹⁵ Art.16.(1)

¹⁶ Shumba 2022:287-309

¹⁷ Phooko 2018:1-19

¹⁸ Poku 2001: 99-101

¹⁹ Manyathi-Jele 2014: 5-6

²⁰ Moyo 2009: 590-614

²¹ Nyathi 2017: 167-178

The decision of the SADC Heads of State and Government to suspend the tribunal is not unique, for example, other countries such as the United States of America, Burundi, Gambia, and South Africa threatened to cancel their membership from their international criminal courts (ICC).²² Although there are countries that violated their obligation and comply with the rulings of international courts but the present case the government of Zimbabwe implemented a land reform program that contravenes the SADC Treaty, specifically Art.4 (c) which state that SADC member state must adhere to the principles such as rule of law, democracy and human rights.²³ The SADC Tribunal rulings found that the government of Zimbabwe discriminated against white farmers based on race and its failure to pay fair compensation for expropriated commercial farms amounts to an infringement of property rights.²⁴ The SADC member states were in solidarity with the government of Zimbabwe even though they failed to comply with the SADC Tribunal rulings on *Mike Campbell v Government of Zimbabwe* that justifies that member states protects their sovereignty.²⁵ It is imperative to mention that member states, instead of complying with the provisions of the SADC Treaty, specifically art.4 (c) that stipulate that member state must strives to adhere to the principles such as human rights, democracy and the rule of law.²⁶

It is argued that SADC Heads of State and Government did not follow the correct procedure when they signed the 2014 SADC Protocol on the Tribunal, instead of amending the 2000 Protocol on the Tribunal to have legal standing to develop a new Protocol on the Tribunal. It is therefore imperative to indicate that the latter Protocol on Tribunal is still in existence and operational.²⁷

It is against this background, that the thesis makes a determination to establish the negative impact of the decision of SADC Heads of State and Government of failing to reinstate SADC Tribunal.²⁸ Secondly, this thesis seeks to determine whether the limitation of the scope of jurisdiction of the SADC Tribunal of only providing the interpretation of the SADC Treaty and other instrument, as well as presiding over inter-state matters amount to infringement or denial of legal or natural person's access to justice.²⁹ Thirdly, the thesis will also determine whether the decision to suspend the SADC Tribunal infringed the principles of the rule of law, democracy, and human rights of the people in the SADC region.³⁰ Fourthly, the thesis will

²² Molano-Cruz & Kingah 2013: 100-127

²³ Nathan 2006: 606-622

²⁴ Nathan 2006: 606 - 622

²⁵ Mkhandawire 2010: 567-573

²⁶ Moyo 2018: 266-292

²⁷ Tino 2021: 103-127

²⁸ Phooko 2015:531-565

²⁹ Nkatha 2018: 1-32

³⁰ Nkatha 2018: 1-32

establish whether the SADC Tribunal was intended to resolve human rights disputes or economic integration disputes.³¹ It is noteworthy that economic integration cannot be separated from human rights, especially socio-economic rights.³²

This study seeks to determine whether the decision of the SADC Heads of State and Government to suspend the functioning of the SADC Tribunal, as well as the signing of the 2014 SADC Protocol on Tribunal by the SADC Member States, have a negative impact on the existing 2000 SADC Treaty which to date has not yet been amended.³³ The SADC Heads of State and Government were required to amend the SADC Treaty before they could replace the 2000 SADC Protocol on Tribunal with the 2014 SADC Protocol on Tribunal.³⁴ The SADC Treaty as the SADC constitutive instrument gives the SADC Tribunal a broader scope of jurisdiction to preside over matters brought by the SADC Member States and legal or natural persons against other member states or SADC employees against the SADC organisation.³⁵

1.2 RESEARCH PROBLEM

The decision was taken by fourteen SADC heads of state in May 2011 to disband the respected regional court of the SADC Tribunal following the court case of *Mike Campbell and Others (Pty) Ltd v The Republic of Zimbabwe*,³⁶ which the tribunal gave three judgments or rulings against the government of Zimbabwe. The tribunal made decisions or rulings against the government of Zimbabwe on three occasions (2008, 2009, and 2010) in which the government have refused to comply with them.³⁷ These decisions or rulings compel the government of Zimbabwe to halt the implementation of the Fast Track Land Reform Program (FTRP) and pay fair compensation to the landowners whose farms were expropriated.³⁸ The President of Zimbabwe, Robert MUGABE issued a statement that the rulings made against his government were absolutely nonsense, therefore his government will not comply with them.³⁹ It is noteworthy to indicate that the government of Zimbabwe disobeyed the court rulings; instead, they mobilized support from other SADC member states to disband the Tribunal.⁴⁰

³¹ Petrica 2020:61-67

³² Nkatha 2012: 1-32

³³ Nyathi 2017: 167 -178

³⁴ Magwanda 2021: 17-22

³⁵ Art.15

³⁶ SADC T 2/2007

³⁷ Tladi 2020: 129-153

³⁸ Nkatha 2019: 1-32

³⁹ Nathan 2013: 870-892

⁴⁰ Nkatha 2018:1-32

The decision of the government of Zimbabwe to dispossess the farmers of their land under the banner of the land reform initiative led to campaigns to reinstate the SADC Tribunal for the benefit of victims of injustice and the abuse of power throughout Southern Africa and for the restoration of the rule of law in Zimbabwe.⁴¹ The SADC Tribunal is one of the SADC institutions established in 1992, its headquarters situated in Windhoek city of Namibia.⁴² Its mission was to effectively and efficiently ensure compliance and resolve disputes related to the interpretation and application of the SADC treaty and subsidiary legal instruments.⁴³ A classic case of *Mike Campbell (Pty) Ltd and Others v Republic of Zimbabwe* which was about the Zimbabwe land-grabbing case.⁴⁴ The ramifications of the case resulted in the tribunal being disbanded because of political interference by the government of Zimbabwe in 2007-2008. The tribunal held on the basis that they were deprived of their land without the right of access to the courts and the right to a fair hearing, both of which are fundamental human rights.⁴⁵ The suspension of the SADC Tribunal affected its functions and the passing of a moratorium by SADC Heads of State and Government that the tribunal should not take new cases.⁴⁶ In addition, the decision not to renew the contracts of Tribunal judges had a negative impact on its operations.⁴⁷

1.3 HYPOTHESIS

This study is premised upon the presupposition of the significance of the SADC Tribunal in southern Africa. Based on the history of human rights violations in the regions, the presence of the regional court will redress the injustices and atrocities committed by SADC member states towards their citizens. The primary objectives of the SADC Tribunal was to ensure that SADC member States adheres to the principles of human rights and the rule of law.

Presently, there is no regional court to preside over the matters or complaints brought by individuals and/or legal persons regarding human rights violations committed by member states. It is also imperative to mention that SADC member states advocates the principle of sovereignty, which impedes them from interfering in the domestic affairs of another.⁴⁸ The government of Zimbabwe amended the Constitution of Zimbabwe in order to inset the Amendment 17, which gave the government the authority to expropriate farms without

⁴¹ Tino 2014: 103-127

⁴² Nkatha 2012: 1-24

⁴³ Article 21 of the Protocol on SADC Tribunal

⁴⁴ Swart 2018: 1-28

⁴⁵ Swart 2018: 1-28

⁴⁶ Nkatha 2019: 1-32

⁴⁷ Nyathi 2017: 167-178

⁴⁸ Merriam 2001:1-187

compensation and further prohibited the property owners from exercising their right to seek a legal recourse from local courts.⁴⁹ The amendment of the fundamental clauses of the Constitution of Zimbabwe is tantamount to constitutional dismemberment.⁵⁰

1.4 RESEARCH QUESTION

The key research question of this study is:

- Is the re-establishment of the SADC Tribunal necessary?

The following subsidiary question emanates from the key research question:

- Was the decision by the SADC heads of State and Government to disband the SADC tribunal in the best interest of the member states, legal, economic, and socio and political interests?

1.5 JUSTIFICATION OF THE STUDY

The study is significant for several reasons. Firstly, the thesis outlines the legal effects of the disbandment of the SADC Tribunal. Secondly, the negative impact of the principle of solidarity, which makes it difficult for member States to reprimand one another. Secondly, the principle of unrestrained sovereignty applied by member state to prevent the implementation of the rulings of regional juridical bodies undermines the promotion of human rights in the member states.

Thirdly, the study provides important insights into the legal nascent surrounding the dismantling of the SADC tribunal. Fourthly, this thesis will also outlines the ramification of the suspension of the SADC Tribunal and the justifications towards the reinstatement of this important legal infrastructure.

1.6 RESEARCH MOTIVATION

The primary objective of this study is to assess the legal effect of the suspension of the SADC Tribunal on communities and legal persons within the SADC region. The decision to suspend the SADC Tribunal was met with criticism by a group of legal and human rights organisations, which appealed to the regional leaders to reinstate the Tribunal.⁵¹ The findings of research

⁴⁹ Meckler 2016: 1007-1038

⁵⁰ Mota Makore, Osode & Lubisi 2021: 1-48

⁵¹ Moyo 2009: 590-614

conducted by Prof. Bartels revealed that the decision to limit the jurisdiction of the tribunal violate the human rights of individuals and legal persons, as well as negating the rule of law.⁵² The finding further highlighted that the tribunal is properly constituted.⁵³

The adoption of the 2014 SADC Protocol on Tribunal by SADC Head of States and Government was in contravention of the SADC Declaration and Treaty for the SADC Head of States and Government. This new SADC Protocol on Tribunal excluded individuals and legal person from seeking a legal recourse against member states.⁵⁴ The new Protocol further limited the jurisdiction of the Tribunal to preside only matters related to the interpretation of the SADC Treaty and its subsidiary instruments with exclusion of human rights complaints.⁵⁵

Secondly, the jurisdiction of the SADC Tribunal was also limited to presiding over inter-state matters.⁵⁶ It is noteworthy that by reducing the jurisdictional power of the SADC Tribunal was tantamount to an infringement of the rights of individuals or legal persons within the SADC region. It is acknowledged that the Tribunal's main objective was to ensure that the economic integration among member states becomes a reality and takes place through the SADC Declaration and Treaty and other SADC Protocols that guide the SADC Institutions.⁵⁷

The concerns raised by the business communities such, as the Southern African Business Forum (SABF) regarding the decision of the SADC Head of State and Government will harm the business investment in the region.⁵⁸ It is noteworthy that the business community and investors require legal certainty, therefore failure of SADC member states to ensure that the rule of law and protection of human rights, which are paramount pillars for sound regional economic integration, are adhered so that foreign investment can be attracted.⁵⁹ Lack of policy certainty will have serious implications for the attraction of foreign investments for the government of Zimbabwe and it will be an impediment to economic integration.⁶⁰

It is important to indicate that human rights cannot be separated from economic integration, especially socio-economic rights.⁶¹ Saurombe and Phooko agree that socio-economic rights cannot be separated from economic integration.⁶² This argument is contrary to the decision of

⁵² De Rebus "Whither the SADC Tribunal?" Sedutla (2013 Publication)

⁵³ Swanepoel 2020: 1-6

⁵⁴ De Rebus "Whither the SADC Tribunal?" Sedutla (2013 Publication)

⁵⁵ *Cape Times Newspaper "Legal challenge over SADC tribunal powers"*, Venter (2018 Publication)

⁵⁶ Nkatha 2019: 1-32

⁵⁷ Nyathi 2017: 167-178

⁵⁸ De Rebus "Whither the SADC Tribunal?", Sedutla (2013 Publication)

⁵⁹ Naldi & Magliveras 2016: 133-159

⁶⁰ De Rebus "Whither the SADC Tribunal?", Sedutla (2013 Publication)

⁶¹ Nkatha 2012: 1-32

⁶² Saurombe 2013: 467-569

the SADC Head of State and Government to limit the Tribunal's human rights jurisdiction, which will affect individuals and legal persons within the SADC.⁶³

The recommendations made by the panel of private experts who were approached by SADC Ministers of Justice that the SADC Tribunal is properly constituted and that the Tribunal was operating within their jurisdictional environment justified the argument of the tribunal, which emphasized their competence to preside over human rights matters. It was clear that the tribunal was operating within the parameters of the SADC Treaty and 2000 SADC Protocol on Tribunal, which are the constitutive documents of the SADC as an intergovernmental organisation.⁶⁴

1.7 RESEARCH METHODOLOGY

The study will adopt a comparative analytical approach. It mainly consists of desktop research. A detailed review, critical analysis, and interpretation of the relevant provisions, case law, and academic literature is conducted. Some of the most important sources that have been relied on in our legal journals by leading authors in the field, reports by international organisations, the SADC Treaty and SADC Protocol on Tribunal, other international organisations, as well as a comparative analysis of legislative or policies governing the functioning of other regional and international courts. There are mainly two types of research methodologies that may be employed in law. These include the quantitative and qualitative approaches. The qualitative approach may be used using several research methods, which have varying effectiveness and applicability depending on the nature of the subject matter. For this thesis, the qualitative approach was implemented using a limited number of research methods, specifically including historical studies, critical content analysis, and comparative sectional analysis. These research methods are more suitable for the subject of this thesis because of the following reasons. First, the historical studies methods employed in Chapter Two enables a credible discussion of the historical and factual background of the debate and contestation around the negative impact of colonial rule and the land dispossession by the colonialist in Southern Africa. Secondly, the critical and comparative approach is used in Chapters Three, Four, Five, and Six of this thesis to analyse the establishment of the SADC Tribunal and the assessment of its function in ensuring that there SADC objective of realising the economic integration and settlement of disputes among SADC member states in the SADC region is realised. The data

⁶³ Moyo 2018: 266-292

⁶⁴ Nkatha 2018: 1-32

gathered through desktop methodology can demonstrate the effectiveness of primary research, thus hypothesis can be formed and the research can be evaluated.

1.7 LITERATURE REVIEW

1.7.1 The formation of SADC Tribunal

The SADC Tribunal is a modern regional court that was established in August 2008 by the Council approval of its organisational. One of the challenges faced by the SADC Tribunal is the issue of enforcement or execution of its judgment.⁶⁵ Mkhawire states that judicial proceedings are pointless if a litigant cannot have a judgment enforced.⁶⁶ This predicament needs the Commonwealth family to play a role in addressing the impasse.⁶⁷ De Wet posits that the SADC Tribunal had the mandate to preside over human rights complaints; therefore, Zimbabwe was bound by its decision as a matter of international law.⁶⁸

It is imperative that from the SADC legal instruments, the primary responsibility to enforce and execute the SADC Tribunal decision and rulings lies with Member States, this is buttressed and well rooted in the principle of international law *pacta sunt servanda* which interpreted as obligation undertaken in international or regional treaties or conventions must be honoured in good faith.⁶⁹ What is vital with this principle is that the bulk of international law and its enforcement are based on consent and good faith among states.⁷⁰

The SADC Tribunal is established by Art.9 (g) read with Art.16 of the SADC Treaty establishing the Southern African Development Community (the SADC Treaty) which outlines the mandate of the tribunal as articulated in Art.16(1) of the Treaty.⁷¹ This provision stipulates that the Tribunal shall be constituted to ensure adherence to the proper interpretation of the provisions of the Treaty and subsidiary instruments, and to adjudicate upon such disputes as, may be referred to the Tribunal.⁷²

The jurisdiction of the Tribunal shall extend to disputes between the Member States, and disputes between employees of SADC or legal persons and member States; disputes between

⁶⁵ Johnson 2005: 1-28

⁶⁶ Zimbabwe's President signs Controversial Amendment into law, Voice of America News, September 12, 2005, available at <http://www.voanews.com/english/news/a-13-2005-09-12-voa36-66395147.html?CFTOKEN=35884117&CFID=18138884>.

⁶⁷ Mkhawire 2010: 567-573

⁶⁸ De Wet 2013: 45-63

⁶⁹ Murithi 2023: 24-28

⁷⁰ Mkhawire 2010: 567-573

⁷¹ SADC Treaty 1/2007

⁷² SADC Treaty 1/2007

employees of SADC and the Community (SADC).⁷³ The Tribunal may also render advisory opinions upon request by the Summit or Council of Ministers.⁷⁴ However, no natural or legal person shall bring an action against a member State unless they have exhausted all available remedies or are unable to proceed under domestic jurisdiction.⁷⁵

Saurombe highlighted the role and function of the Tribunal, which is to determine any dispute regarding the interpretation and application of the Treaty, and it, is Protocols that cannot be settled peacefully.⁷⁶ The Tribunal plays a critical role for the integration process for the SADC as it provides legal guidance to all SADC institutions and plays an oversight role during the implementation stages of the integration agenda⁷⁷. Peter-Berries concurs with Saurombe that SADC has noticed that tribunals must be established as a mechanism to settle disputes arising from the regional integration process, therefore, Art.16 of the SADC Treaty supports the assertions of these scholars.⁷⁸

Art.16⁷⁹ SADC Declaration and Treaty, 1992 of the SADC Treaty establish the SADC Tribunal, which is the subject matter of this thesis it states that the tribunal shall be constituted to ensure adherence to and the proper interpretation of the provision of this Treaty and subsidiary instruments and to adjudicate upon such dispute as may be referred to it. It is my considered view that the set provision gives the Tribunal the powers to interpret the provisions of this Treaty, which include the principles as articulated in the SADC Treaty.⁸⁰

SADC Member States are obliged to adhere to the provisions of the SADC Treaty, including its principles such as the human rights, democracy and human rights.⁸¹ This study analyses Art.16 of the SADC Declaration and Treaty, which regulates the establishment of the Tribunal and gives this institution the powers to interpret the provisions of the Treaty and its principles.⁸² It is against this background that the decisions of the Tribunal on cases presided over before it became final and binding against member states who were parties before it as stipulated in Art.16 (5).⁸³

⁷³ SADC Treaty 1/2007

⁷⁴ SADC Treaty /2007

⁷⁵ SADC was founded by Angola ,Botswana, Lesotho, Malawi, Mozambique, Namibia, Swaziland, Tanzania, Zambia and Zimbabwe

⁷⁶ Saurombe 2012: 468-569

⁷⁷ Oppong 2010:115-135

⁷⁸ Peter-Berries 2012: 99-102

⁷⁹ SADC Declaration and Treaty, 1992

⁸⁰ SADC Protocol on Tribunal,2000

⁸¹ Article 4 (c) of SADC Treaty

⁸² SADC Declaration and Treaty, 1992

⁸³ SADC Declaration and Treaty, 1992

1.7.2 Composition of SADC Member States and establishment of SADCC and SADC

The primary objective of the establishment of the Southern African Development Coordination Committee (SADCC) by African countries such as Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, Tanzania, Zambia and Zimbabwe was to end their financial dependency on South Africa.⁸⁴ The heads of government of these countries unanimously agreed to focus on the integration of economic development within the region.⁸⁵

The SADCC countries expected to transform this organisation by developing and signing the SADC Treaty to be their constitutive document.⁸⁶ A reference is made to Art.2 of the SADC Treaty, which articulates the objective of this SADC as the regional organisation established to spearhead economic integration.⁸⁷ Additionally, other objectives stated in this document are the following; to achieve development and economic growth; alleviate poverty; enhance the standard and equality of life of the people of Southern Africa; as well as to support the socially disadvantaged through regional integration.⁸⁸

These objectives will be attained through increased regional integration, built on democratic principles, and equitable and sustainable development.⁸⁹ Based on the objectives set in the SADC Treaty which are the driving force of this regional organisation, one could have expected the member states to adhere to these objectives, especially the enhancement of the standard and equality of life of the people in the region.⁹⁰ The assurance that member states would adhere to the democratic principle, which in essence includes the respect of human rights and the rule of law as, stipulated in the SADC Treaty.⁹¹

On the other hand, SADC was founded by Angola, Botswana, Lesotho, Malawi, Mozambique, Namibia, Swaziland, Tanzania, Zambia and Zimbabwe met in Windhoek, Namibia in 1992 to establish SADC by signing the SADC Treaty, which made it clear that human rights were part of the integration agenda.⁹² The disbandment of the SADC Tribunal by the SADC Head States and Government caused an outcry among legal and human rights experts, as well as Business communities in the SADC region.⁹³ The historical background of the SADC as the regional

⁸⁴ Chingono and Nakana 2009: 396-498

⁸⁵ De Wet 2013: 45-63

⁸⁶ SADC Declaration and Treaty, 1992

⁸⁷ SADC Declaration and Treaty, 1992

⁸⁸ SADC Declaration and Treaty, 1992

⁸⁹ Communiqué Text of the Extraordinary Summit of SADC Heads of State and Government, Lozitha Royal Palace, Swaziland, 30 March 2009, available at: www.sadc.int/> accessed 28 November 2012.

⁹⁰ SADC Declaration and Treaty, 1992

⁹¹ SADC Declaration and Treaty, 1992

⁹² Oosthuizen 2006: 72-108

⁹³ Meckler 2016: 1016-1034

organisation in Southern Africa is important in determining the reason for the establishment of the organisation, which is the political and economic integration.⁹⁴

Mkhandawire observed that the SADC was established in 1992 with the primary objective of ensuring economic growth and development.⁹⁵ Arts.4 and 6 of the SADC Treaty states that the SADC objective is to be achieved by adhering to equality, democracy, good governance, the rule of law, and human rights.⁹⁶ In pursuance of the set objectives, the SADC member States adopted a Protocol that established the Tribunal, which was inaugurated in November 2005.⁹⁷ The jurisdiction of the SADC Tribunal is that it presided over disputes between states as well as between natural or legal persons and states subject to exhaustion of local remedies.⁹⁸ It is noteworthy to mention the decisions of the Tribunal are binding on member States.⁹⁹ The lack of powers to enforce its judgments makes the SADC Tribunal a toothless institution that depends on Summit to enforce compliance with the defaulting member state.¹⁰⁰ However, in this situation, the SADC Tribunal made numerous judgments against the government of Zimbabwe in which the Head of State and Government or the Summit failed to enforce against the defaulted member state.

Integration is the process in which political actors in different national settings group themselves to transfer their loyalties, expectations, and political activities towards a new and larger organisation in which it possesses or demands jurisdiction over existing national states.¹⁰¹ Integration involves a partial transfer of authority over the predetermined subject matter, from the usual locus at the municipal level to different, central and international institutions jointly created by converging States.¹⁰² The distinction between political and economic integration is that the former envisages the political bonding leading to a central continental government while the economic integration relates to more economic and technical cooperation that should yield a limited result at the sub-regional level.¹⁰³

⁹⁴ Article 14 of 2000 SADC Protocol on Tribunals and its procedures available at: <http://www.sadc-tribunal.org/docs/Protocol> on Tribunal and Rules thereof.pdf> accessed 28 November 2012

⁹⁵ Meckler 2016- 1007-1037

⁹⁶ SADC Declaration and Treaty, 1999

⁹⁷ SADC Treaty 1/2007

⁹⁸ Ruppel 2011: 89-101

⁹⁹ Article 35 of SADC Protocol on Tribunal

¹⁰⁰ Ruppel & Banganwabo 2008:1-35

¹⁰¹ Naldi & Magliveras 2016: 133-159

¹⁰² Heywood 2010: 481-493

¹⁰³ Chingono & Nakana 2009: 396-408

1.7.3 Ratification of 1999 SADC Treaty by SADC Member States

It is vital to mention that by September 1993 all member states had ratified the SADC Treaty, which came into operation in October 1993.¹⁰⁴ The fundamental pillar of the SADC Treaty was to ensure harmonisation of political and socio-economic policies and plans of member states.¹⁰⁵ Secondly, the encouragement of economic, social, and cultural ties across the region, the development of policies aimed at the progressive elimination of obstacles to the free movement of capital, labour, goods, and services, and the promotion and harmonisation of international relations of member states.¹⁰⁶ It is noteworthy that all fourteen SADC countries inherited their legal systems from former colonial masters.¹⁰⁷ On independence, and without exception, the existing law was continued but isolated from any further legal development in the country of origin.¹⁰⁸ This included the development of the law by the courts in the former colonial powers.¹⁰⁹

SADC Declaration and Treaty, 1992 gave the Tribunal the powers to establish its jurisprudence, meaning the Tribunal judges were bestowed with powers to interpret the provision of this constitutive document to develop their precedent to be followed by member states and their national courts.¹¹⁰ SADC Member States could have supported the decisions taken by the SADC Tribunal against member states that transgressed the provisions of the SADC Treaty, specifically Art 4 (c) and (e)¹¹¹ which are more relevant to the discussion of the topic in this study. The following principles are referred to the following; human rights, democracy, and the rule of law; as well as peaceful settlement of disputes.

The Tribunal's interpretation and implementation of Art.4 (e) of the SADC Treaty against the government of Zimbabwe regarding the implementation of the Land Reform Policy that was found to be discriminatory against white farmers was correct¹¹².

¹⁰⁴ SADC Declaration and Treaty, 1999

¹⁰⁵ SADC Declaration and Treaty, 1999

¹⁰⁶ Nkatha 2019: 606-622

¹⁰⁷ Nathan 2008:1-23

¹⁰⁸ Chigara 2003:369-397

¹⁰⁹ Thomashausen 2002: 27-51

¹¹⁰ Article 21 of SADC Protocol on Tribunal

¹¹¹ SADC Declaration and Treaty, 1992

¹¹² SADC Declaration and Treaty, 1992

1.7.4 Interpretation of the provisions of SADC Treaty and 2000 SADC Protocol on Tribunal

Such analysis of the domestication of SADC Protocols into the national laws of member States will provide answers to questions regarding member states' willingness to abide by the provisions of the SADC Declaration and Treaty or whether they were just complying with the international conventions on human rights to enable them to receive donor funding from western countries.¹¹³ By inclusion of Art.6 (5) of the SADC Declaration and Treaty compels member States to take measures to ensure that they give the SADC Treaty the force of national law.¹¹⁴

This provision compels SADC Member states to incorporate them in their national constitutions so that they can bind them.¹¹⁵ Should the SADC member States be serious about the implementation of the Protocol, they could have given the Protocol the necessary force by legislating it into their national law.¹¹⁶ The delay in legislating the SADC Treaty by member States was done deliberately to develop the defence mechanism that the provision of the Treaty is not binding on them, as the government of Zimbabwe has raised it in the disputes placed before the SADC tribunal, the Northern Gauteng High Court and the Constitutional Court in South Africa.¹¹⁷ The defence put by the government of Zimbabwe that the provisions of the SADC Declaration and Treaty were not binding on the country because were not given the force of national law was rejected by these courts.¹¹⁸ Both the reasoning of the North Gauteng High Court and Constitutional Court was that it is incorrect for the government of Zimbabwe to raise the fact that the SADC Declaration and Treaty has not yet been legislated into national law, therefore they cannot be bound by this constitutive document.¹¹⁹ Even though Zimbabwe has not yet legislated the SADC Treaty into national law, the government has signed the SADC Declaration and Treaty, as well as has nominated a judge to sit in the SADC Tribunal that act is a clear proof that the country accepted to be bound by the Treaty provisions.¹²⁰

The suspension of the SADC Tribunal and the promulgation of the 2014 SADC Protocol on Tribunal by the Summit were in contravention of the SADC Declaration and Treaty, hence the civil society movements within SADC region formed a united front against the decision of the

¹¹³ Chingono & Nakana 2009: 396-408

¹¹⁴ SADC Declaration and Treaty, 1992

¹¹⁵ Phooko 2015:531- 565

¹¹⁶ Phooko 2019: 415-432

¹¹⁷ *Mike Campbell & 78 Others v The Republic of Zimbabwe SADC T 2/2007*

¹¹⁸ *Law Society of South Africa and Others v President of the Republic of South Africa and Others (CCT67/2018 [2018] ZAC 51; 2019 (3) BCLR 329 (CC)*

¹¹⁹ Cowell 2013: 153-165

¹²⁰ Nkatha 2018:1-32

Summit, therefore they are mobilising for the resuscitation of the Tribunal.¹²¹ The limitation of the jurisdiction of the Tribunal to handle interstate disputes by member states was a travesty of justice that impedes the rule of law and the protection of the human rights of the SADC people and legal persons.¹²² It is acknowledged that the SADC Tribunal was meant to be the regional court that will deal with economic integration matters but human rights issues cannot be separated from economic integration, taking into account the socio-economic rights.¹²³

1.7.5 Historical background of the Enforcement of foreign judgement

The relevance of the recognition and enforcement of foreign judgment arose in Europe during the 19th century in response to the demands of increased trade and freedom of movement of persons, goods, and capital.¹²⁴ A contrary view was that in Southern Africa, none of the several international agreements and conventions on recognition and enforcement apply.¹²⁵ In that regard, the matter is governed in the common law countries by the relevant common law principles and statutory provisions, and in the civil law countries.¹²⁶ SADC has been unable to draft and propose or even to conclude, any regional legal cooperation agreements.¹²⁷ A SADC Legal Sector Committee established in 1998 under the responsibility of Namibia, has thus far considered cooperation only in criminal law matters and internal issues such as the establishment of the SADC Tribunal.¹²⁸

The SADC objectives are the achievement of development and economic growth, the alleviation of poverty, the enhancement of the standard and quality of life, support of the socially disadvantaged through regional integration, the evolution of the common political values, systems, and institutions, the promotion and defence of peace and security, and achieving the sustainable utilisation of natural resources and effective protection of the environment.¹²⁹ The protection and upholding of human rights is a key responsibility of each member state, however on the other hand the role of Regional Economic Communities (RECs) in upholding human rights, democratic governance, and the rule of law need to be determined.¹³⁰

¹²¹ The Citizen Newspaper "Calls for SADC to reinstate tribunal" – Fabricus 18 August

¹²² Ebobrah 2011: 216-250

¹²³ Naldi & Magliveras 2016: 133-159

¹²⁴ Fitzmaurice 1957:203-293

¹²⁵ Mkhandawire 2010: 567-573

¹²⁶ Thomashausen 2002: 27-51

¹²⁷ Ebobrah 2009: 312-335

¹²⁸ Hulse & Van der Vleuten 2015: 84-103

¹²⁹ Declaration and Treaty of the Southern African Development Community

¹³⁰ Ruppel 2009: 173-186

1.7.6 Comparative Analysis of regional courts in Africa in presiding over human rights complaints

RECs must uphold human rights, principles of democratic governance, and the rule of law in order to ensure that member states accede to specific human rights treaties, conventions, or declarations on the international, regional, and sub-regional level.¹³¹ For example, the convention in which most of the African countries ascribes including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and Economic, Social and Cultural Right, the Convention on the Elimination of Racial Discrimination, or the African Charter on Human and People's Rights.¹³²

Ruppel has stated that the promotion of human rights plays a vital role in the process of regional integration as buttressed in the Abuja Treaty as well as by RECs constitutive legal instrument, specifically in the SADC Treaty principles, which articulates that member states must take observance of the human rights, democracy and the rule of law.¹³³ The SADC Tribunal was established in 1992 by Art.9 of the SADC Treaty as one of the SADC institutions.¹³⁴ The regulation of its composition, functioning, and jurisdiction was deferred to the adoption of specific protocols by the Summit in terms of Art.16 of the SADC Treaty.¹³⁵ The functions of the Tribunal were articulated in article 16 of the SADC Treaty, which stipulates that the Tribunal must ensure the adherence to, and proper interpretation of the provisions of the Treaty and subsidiary instruments.¹³⁶ The provision further gave the Tribunal the powers to adjudicate upon disputes as may be referred to it.¹³⁷ The protocol was clear that the Tribunal would hear the disputes between member states, natural/legal persons, as well as between States and natural/legal persons and their Organisation, and between the latter and its staff.¹³⁸ Other functions of the Tribunal are to provide a legal advisory opinion at the request of the Summit and the Council as well as preliminary rulings in proceedings of any kind before national courts or tribunals.¹³⁹

It is noteworthy that by separating human rights from economic integration, SADC will move a step backward as compared to other regional courts such as ECOWAS CCJ, the East

¹³¹ Mwinuka 2013: 108-142

¹³² Von Staden 2016: 1113-1131

¹³³ Ruppel 2009: 173-186

¹³⁴ SADC Declaration and Treaty, 1999

¹³⁵ SADC Declaration and Treaty, 1999

¹³⁶ SADC Declaration and Treaty, 1999

¹³⁷ SADC Declaration and Treaty, 1999

¹³⁸ Art.14

¹³⁹ Art.20

African Court of Justice (EACJ), and the European Court of Justice (ECJ), which have clauses that deal with the protection of human rights by member states.¹⁴⁰ Based on the development that is taking place in other regional economic communities, it is appropriate that SADC takes these fundamental principles, namely the rule of law, democratic principles, and human rights seriously.¹⁴¹ It is concerning to note that in some of the SADC member states, there are those still embarking on human rights abuse, atrocities and disregarding the rule of law whilst others are still ruling by iron fist (dictatorship).¹⁴² As a mechanism to end the despotic rule in some of the SADC member states, the civil rights movement and Southern African Law Societies need to embark on massive human rights awareness campaigns to challenge the status quo and end the disregard of human rights, rule of law and transgressions of democratic principles in the SADC region.¹⁴³

On the other hand, the ECOWAS Community Court of Justice, a constitutive instrument has provisions concerning the court's jurisdiction over human rights issues and it provides direct access for individuals instead, the competence granted to the court extended only to cases brought either by states or by the authority of Heads of State and Government.¹⁴⁴

These regional courts are fully presiding over the disputes or complaints lodged by individual members of their member states without hindrance or interference by the Head of State and Government.¹⁴⁵ The expectation was that SADC should have adhered to the provisions of the SADC Declaration and Treaty, specifically Art.4 (c) which highlights the principles that member states should adhere to, for example, human rights, democratic values, and the rule of law.¹⁴⁶ The Heads of State and Government in the SADC should abide by these principles and afford the SADC Tribunal its independence to interpret and implement the provisions of the SADC Treaty the same as other regional courts do.¹⁴⁷

In my view, the SADC Tribunal should have been allowed to exercise its independence to implement the provisions of Art.16 of the SADC Declaration and Treaty by providing proper interpretation of the provisions of this Treaty and subsidiary instruments and to adjudicate disputes as may be referred to it.¹⁴⁸ The interference of the Head of States and Government by suspending the Tribunal impeded this institution from executing its responsibility as stipulated by Art.16 of the SADC Treaty. By not adhering to Art.4 (c) of the SADC Treaty,

¹⁴⁰ Alter, Gathii & Helfer 2015: 1-39

¹⁴¹ Nkatha 2012: 984-1001

¹⁴² Achiume 2017: 1-36

¹⁴³ Shivamba 2019:1-5

¹⁴⁴ Adjolohoun 2020: 1-40

¹⁴⁵ Alter, Gathii & Helfer 2015: 1-39

¹⁴⁶ SADC Declaration and Treaty, 1999

¹⁴⁷ Klazen 2010: 147-155

¹⁴⁸ SADC Declaration and Treaty, 1999

SADC member states do not respect human rights, democratic principles, and the rule of law.¹⁴⁹ Lastly, if the SADC member states are serious about adherence to the rule of law, democratic principles, and human rights by this time the SADC Ministries of Justices should have been tasked to develop the SADC Protocol on Human Rights to ensure that member states are legally bound to protect the rights of their citizenry.¹⁵⁰

1.7.7 Expropriation of land without compensation and the rejection of SADC Tribunal judgement

The expropriation of agricultural land that belonged to white farmers without compensation infringed the rights of owners of the farms; hence, the Tribunal's decision was in their favour.¹⁵¹ Secondly, Amendment 17 of the Constitution of Zimbabwe prohibited the farmers from seeking legal recourse against the expropriation of their farms was also found to be unconstitutional in the sense that it infringed the rights to property of the affected farmers.¹⁵² Secondly, the amendment further prohibited the farmers from seeking a legal recourse by approaching local courts.¹⁵³ The provisions of Amendment 17 of the Constitution of Zimbabwe negated the principle that affected parties should exhaust local remedies before approaching the Tribunal; hence, the farmers approached the SADC Tribunal to preside over their claims against expropriation of their farms.¹⁵⁴

The Tribunal's decisions or judgments against the government of Zimbabwe on expropriation of farms led to the disbandment of the Tribunal by SADC Heads of State and Government ("the Summit").¹⁵⁵ The fundamental question is whether the decision of the SADC Summit to disband the tribunal was in the best interest of the member states. It is imperative to refer to Art 16 of the SADC Treaty that outlines the functions of the SADC Tribunal as discussed above but to bring clarity on the matter.¹⁵⁶ This provision stated that the Tribunal should provide a proper interpretation of the SADC Treaty and subsidiary instruments and to adjudicate upon such disputes as might be referred to it.¹⁵⁷ Art.4 (c) of the SADC Treaty provided that the SADC Member States should adhere to the principles of adherence to human rights, democracy, and the rule of law.¹⁵⁸

¹⁴⁹ *Mike Campbell (Pty) Ltd & Another v The Republic of Zimbabwe*, SADC (T) 1/2007

¹⁵⁰ Phooko 2015: 531-565

¹⁵¹ *Mike Campbell and Others (Pty) Ltd & Another v The Republic of Zimbabwe*, SADC (T) 1/2007

¹⁵² *Mike Campbell and Others (Pty) Ltd v The Republic of Zimbabwe*, SADC (T) 1/2007

¹⁵³ *Mike Campbell and Others (Pty) Ltd & Another v The Republic of Zimbabwe*, SADC (T) 1/2007

¹⁵⁴ *Mike Campbell and Others (Pty) Ltd & Another v The Republic of Zimbabwe*, SADC (T) 1/2007

¹⁵⁵ Shay 2012: 133-171

¹⁵⁶ SADC Declaration and Treaty, 1999

¹⁵⁷ SADC Declaration and Treaty, 1999

¹⁵⁸ SADC Declaration and Treaty, 1999

The SADC tribunal was correct in its interpretation that the provision allows it to preside over human rights transgression by the government of Zimbabwe against white farmers.¹⁵⁹ The infringement of human rights is based on the decision of the government to expropriate the farms without compensation.¹⁶⁰ The situation was aggravated by the fact that these agricultural farms were awarded to war veteran who played a part in the forceful removal of farm owners from their farms.¹⁶¹ In this regard, the Tribunal had found that much of the commercial land confiscated was distributed to the political elites.¹⁶² Further, even if all of the expropriated land had been distributed to the poor, the tribunal would have outlawed it by its impact on the rights of the owners, for example, property rights and other ancillary rights.¹⁶³

The government refused to comply with the Tribunal decision alleging the invalidity of the 2000 Protocol and the 2001 Amendment Treaty. The authorities in Zimbabwe cited that the Protocols lacked the two-third ratification votes in order to enable them to enter into force.¹⁶⁴ It is noteworthy that the loophole or lacuna found in the SADC Treaty whereby the Protocol is salient about the meaning of "appropriate action" which gave the Summit the discretionary powers in determining the action to be taken needs to be addressed to ensure that the SADC Tribunal is accorded its independence as the judicial court in the SADC region.¹⁶⁵ A worsening situation was noted in 2010 when the Summit resolved not to renew the terms of judges and not to appoint new ones thus suspending the activities of the Tribunal.¹⁶⁶ Lack of appointment of new judges and renewal of their terms have impedes the functioning of the Tribunal and has created the impression that member States are not committed to regional integration.¹⁶⁷

This decision created the impression that member States are strongly anchored to their sovereignty.¹⁶⁸ Failure to renew the contract of judges was tantamount to the disbandment of the SADC Tribunal because this institution could not function without judges.¹⁶⁹ Farmers in Zimbabwe after the government failed to comply with the SADC Tribunal, approached the African Commission on Human Rights and People's Rights (hereafter referred to as African Commission) seeking legal intervention from the African Court on Human and Peoples' Rights

¹⁵⁹ Phooko 2015: 531-565

¹⁶⁰ *Mike Campbell (Pty) Ltd & Others v The Republic of Zimbabwe*

¹⁶¹ Michell 2001: 587-593

¹⁶² Karimakwenda, White Commercial Farmer Shot and Killed in Chegutu, 27 October 2010 available at <http://www.swradioafrica.com/news271010/whitecom271010.htm>.

¹⁶³ *Mike Campbell (Pty) Ltd & Others v The Republic of Zimbabwe, SADC (T) 1/2007*

¹⁶⁴ Ruppel 2009: 173-186

¹⁶⁵ Moyo 2009: 590-614

¹⁶⁶ Burger 1982: 274-275

¹⁶⁷ Nkatha 2019:1-32

¹⁶⁸ SADC, Towards the Southern African Development Community: A Declaration by the Heads of State or Government of Southern African States (1992), available at http://www.sadc.int/documents-publications/show/Declaration_Treaty_SADC.pdf.

¹⁶⁹ Nkatha 2019: 1-32

(hereafter referred as African Court).¹⁷⁰ The African court rejected the case and cited that the court could not interfere with the independence, competence, and institutional integrity of the SADC Tribunal, trespassing on the doctrine of separation of powers.¹⁷¹

The development of the new Protocol on Tribunal adopted in August 2014 introduced changes in the SADC judicial system, which has a serious implication for the development of the regional integration process.¹⁷² It is imperative that a comparative analysis of the 2000 Protocol and the new Protocol on Tribunal to put in evidence of possible strong and weak points provision of the new Protocol regulating the composition and functioning of the Tribunal, its competence, and jurisdiction, the applicable law and enforcement of its judgments.¹⁷³ Art.29 of 2014 SADC Protocol on Tribunal states that the tribunal shall adopt its own rules by a two-thirds majority.¹⁷⁴

1.7.8 Reaction of SADC Member States against the Government of Zimbabwe

It is noteworthy that Botswana was the only country in the SADC region that was able to denounce Zimbabwe's non-compliance with the ruling of the SADC Tribunal.¹⁷⁵ SADC Member States made an undertaking that they will abide by the principles stipulated in the Art.4 of the SADC Treaty, therefore their decision to suspend the Tribunal entrusted with the enforcement of the SADC Protocols render this organisation (SADC) useless and without power.¹⁷⁶ The Summit underestimated the SADC Tribunal's judges that they could not exercise their judicial independence by interpreting the provisions of the SADC Treaty without fear or favour.¹⁷⁷

A primary example is the suspension of Madagascar from SADC by Heads of State and Government after a coup *d'état* against the Madagascan President Ravalomanana was correct and applauded by other regional communities.¹⁷⁸ Therefore, a similar approach was expected to take place against the Zimbabwean government after they were found to have infringed the property rights of the farmers.¹⁷⁹ The government of Zimbabwe contravened the

¹⁷⁰ *Mike Campbell (Pty) Ltd v Republic of Zimbabwe (2/2007) (2008) SADC T 2*

¹⁷¹ *Mike Campbell (Pty) Ltd v Republic of Zimbabwe (2/2007) (2008) SADC T 2*

¹⁷² Magwanda 2021: 17-22

¹⁷³ Naldi & Magliveras 2016: 133-159

¹⁷⁴ 2014 Protocol on Tribunal

¹⁷⁵ Nkatha 2019: 1-33

¹⁷⁶ Ndi-Zambo & Maloka 2001 et al 127

¹⁷⁷ Nathan 2006: 606-622

¹⁷⁸ Nathan 2006: 606-622

¹⁷⁹ S Christie, "Killed Off by Kings and Potentates" (Mail & Guardian 2011)

<https://mg.co.za/article/2011-08-19-killed-off-by-kings-and-potentates>. As intimated by the former President of the Tribunal, the decision of SADC member States showed that they only paid 'lip service to the principles of human rights, democracy and the rule of law and do not scrupulously adhere to them.' See Justice Ariranga Pillay, former President of the SADC Tribunal.

provisions of Art.4(c) of the SADC Declaration and Treaty, which are set to be fundamental, and in line with international conventions and treaties such as the United Nations on Human Rights (UNtHR) and African Charter on Human Rights and People Rights (ACHRPR).¹⁸⁰ The 2014 SADC Protocol on Tribunal reduced the powers and functions of the SADC Tribunal, which limited the tribunal's jurisdiction to interpretation of the SADC Treaty and subsidiary instruments and presiding only on inter-state disputes.¹⁸¹ The Protocol took away the right of individuals and legal persons from lodging human rights complaints against SADC member states before the Tribunal.¹⁸²

The decision of the Summit clearly showed that southern African countries are not ready for constitutional democracy in line with the principles of the rule of law, democratic values, and respect for human rights.¹⁸³ Phooko stated that SADC member states had to use the best practices in other jurisdictions, specifically the East African Court of Justice, European Union (AU), and the European Court of Justice (ECJ) when they established the SADC Tribunal.¹⁸⁴ Naldi and Magliveras posits that SADC member states used phrases such as the protection of the rule of law and human rights only to attract foreign investments in the region.¹⁸⁵ SADC member states were only concerned with the protection of their sovereignty as a mechanism for preventing interference in their countries.¹⁸⁶ It is pivotal to indicate that denying people and legal persons their right to legal recourse to the regional courts is tantamount human rights infringement and disregard of the rule of law.¹⁸⁷

It is noteworthy that the SADC Tribunal was given the powers to develop its jurisprudence; hence, the judge's interpretation was that Art.4 (c) of the SADC Treaty gave Tribunal powers to preside over human rights issues.¹⁸⁸ Based on the history of human rights violations in southern Africa, it will be prudent that the SADC Tribunal is accorded powers to preside over human rights complaints.¹⁸⁹ The Summit's failure to take action against the Government of Zimbabwe's non-compliance with the SADC Tribunal judgment accompanied by a call that it

¹⁸⁰ Ruppel 2009: 173-186 Ruppel 2009: 173-186

¹⁸¹ 2014 SADC Protocol on Tribunal

¹⁸² Naldi and Magliveras 2016: 133-159

¹⁸³ G Erasmus, "The New Protocol for the SADC Tribunal: Jurisdictional Changes and Implications for SADC Community Law' Tralac Working Paper No. US15WP01/2015, January 2015

¹⁸⁴ Phooko 2015: 531-565

¹⁸⁵ Nyathi 2017: 167-178

¹⁸⁶ Hulse 2016: 1-31 Hulse 2016: 1-31

¹⁸⁷ Phooko 2018: 1-27

¹⁸⁸ Mike Campbell & Others (Pty) Ltd v The Government of the Republic of Zimbabwe

¹⁸⁹ Van der Vleuten and Hulse 2013: 57-62

would adopt "appropriate measures" to enforce its compliance were clear signs of member state solidarity with Zimbabwe.¹⁹⁰

It was expected that Summit would take action against Zimbabwe either suspending it or applying any other sanctions.¹⁹¹ On the contrary, the Summit preferred to suspend the Tribunal, under the guise of a review process of its role, functions, and terms of reference coupled with the instruction that the Tribunal could not take other new cases.¹⁹² Additionally, the Summit failed to renew the contracts of Tribunal judges, by so doing the Summit denied the Tribunal a quorum to preside over disputes placed before it.¹⁹³

SADC should have used the same approach to suspend the government of Zimbabwe on the implementation of the Land Reform Policy, which was in contravention of the SADC Declaration and Treaty, specifically Art.4 (c) dealing with member states adherence to human rights, democratic values and the rule of law.¹⁹⁴ The Government of Zimbabwe's assertion that the SADC Tribunal should not use the principles of the SADC Treaty to grant itself a jurisdiction to preside over human rights issues whilst member states have not implemented a Protocol on Human Rights was a clear protectionist approach to deny individuals or legal person their right to ventilate their complaints with the Tribunal.¹⁹⁵ The Vice Chairperson of the African Commission stated that *"It we accept, as we should, that the judiciary is the custodian of the rule of law and justice in any country we should have no difficulty in asserting that the concept of the independence of the judiciary is an important facet of the doctrine of separation of powers of the three branches of government"*.¹⁹⁶

It is against this background that Zimbabwe failed to comply with the SADC Tribunal judgment. The reasoning of the Government of Zimbabwe is not correct because Art.4 (c) of the SADC Treaty must be read in totality with other provisions of this legal instrument so that the SADC Tribunal can be able to derive the correct meaning and the intention of the member state by inserting this clause in the SADC Treaty.¹⁹⁷

¹⁹⁰ Van der Vleuten and Hulse 2013: 57-62

¹⁹¹ Saurombe 2011 et al

¹⁹² Mkhandawire, "SADC Stakeholders form coalition to lobby for restoration of a SADC Tribunal", October 2014, De Rebus.

¹⁹³ Van der Vleuten and Hulse 2013: 57-62

¹⁹⁴ Chigara 2012: 341-377

¹⁹⁵ Chigara 2012: 341-377

¹⁹⁶ M Mumba, "The Independence of the Judiciary through the eyes of the African Commission on Human and Peoples Rights, Paper presented at the Symposium on Strengthening the Independence, Impartiality and Accountability of the Judiciary in the context of Lesotho organized by the International Commission of Jurists in conjunction with the Judiciary of Lesotho 4-5 March, 2010, Maseru, Lesotho

¹⁹⁷ Chigara 2012: 341-377

The primary purpose of Art.4 (c) is to ensure that member states adhere to the principle of the rule of law, democratic values, and the protection of human rights.¹⁹⁸ Secondly, as a mechanism of developing its own jurisprudence SADC Tribunal found it correct to refer Art.4(c) to accord itself a jurisdiction to preside over the human rights dispute as referred to it in the case of *Mike Campbell and Other 77 complainants* when they sought a legal recourse to the Tribunal.¹⁹⁹ The Zimbabwean government used amendment 17 of the Constitution of Zimbabwe to deny the complainants a right to approach the local court against expropriation of their farms without compensation.²⁰⁰ The decision of the SADC Tribunal to use Art.4 (c) to hear the human rights dispute involving expropriation of land by Zimbabwe, this regional court followed the jurisprudence of the European Court of Justice (ECJ) when they developed a jurisprudence that the court or tribunal hearing the matter should read the entire constitutive legal document, including the preamble.²⁰¹

The negative impact of colonial rule also plays a role in the governing system of the southern African countries in particular.²⁰² Most of the countries became independent from colonial rule not so long ago; therefore, it became difficult for the member states to cede some of their sovereignty or powers to the regional organisations.²⁰³

The implication of that is that these member states would want to hold to power, hence they found it difficult to give away their sovereignty.²⁰⁴ On the contrary, with the inclusion of the principles of human rights, democratic values, and the rule of law, a reasonable person will expect that member states adhere to and abide by these principles.²⁰⁵ However, the determination of whether the southern African countries are incorporating the SADC Declaration and Treaty in their domestic law needs an analysis.²⁰⁶

1.7.9 Comparative Analysis of 2000 SADC Protocol on Tribunal And 2014 Protocol on Tribunal

It means that the existing rules of procedure which were annexed to the 2000 Protocol and form an integral part thereof (art.23) will also be repealed when the new Protocol comes into

¹⁹⁸ SADC Declaration and Treaty

¹⁹⁹ *Mike Campbell & Others (Pty) Ltd v The Republic of Zimbabwe*

²⁰⁰ Chigara 2012: 341-377

²⁰¹ *Al-Skeni v United Kingdom (2011)*, Application No.55721/07 Before the European Court of Human Rights, 7 July 2011 (2011) 53 E.H.R.R.18

²⁰² Scholtz 2011: 197-215

²⁰³ Nathan 2013: 870-892

²⁰⁴ Afadameh-adeyemi & Kalula 2010 et al

²⁰⁵ Saurombe 2012: 467-569

²⁰⁶ Mkhandawire 2010: 567-573

force.²⁰⁷ It is noteworthy to mention that the adoption of new rules will only happen after the appointment of new judges.²⁰⁸ The jurisdiction of the new Tribunal is that the body will only preside over matters between member states.²⁰⁹ It means that the Tribunal will no longer have jurisdiction to settle matters between legal persons/ natural persons and member States, as well as between Organisation and its staff.²¹⁰

Under the 2000 Protocol on Tribunal, controversies between individuals and member States, the applicant has to exhaust all available remedies under the domestic jurisdiction before referring the matter to the Tribunal.²¹¹ On the contrary, the new Protocol endows the Tribunal with the power to solve only interstate litigations concerning the interpretation of the SADC Treaty and Protocols²¹². A determination needs to be made to assess whether the limitation of the jurisdiction of the Tribunal has a legal effect on private individuals or legal persons' right to seek legal recourse from the regional court should they be denied such right by domestic courts.²¹³

Art.33 of the new Protocol stipulates that the Tribunal shall have the jurisdiction in the interpretation of the SADC Treaty and Protocols relating to disputes between member state functions, therefore it may not assess the validity or the correct application of SADC law anymore.²¹⁴ Secondly, the new Protocol takes away the powers of the tribunal to settle disputes between the Organisation and its staff.²¹⁵ Van der Vleuten and Hulse outline that the decision of the tribunal is binding for the parties involved²¹⁶. The member state's laws and rules of civil procedure for the enforcement of foreign judgments enforce these decisions.²¹⁷ In case when the member state refuses to abide by the decision of the tribunal, the affected party must revert to the tribunal again.²¹⁸ The tribunal should approach the Summit where the latter has a legal duty to take appropriate action against the hostile party.²¹⁹ The word phrase "appropriate action" is not explicit therefore; it creates a *lacuna* regarding the action to be taken to enforce the decision of the tribunal.²²⁰

²⁰⁷ Tino 2011: 140-173

²⁰⁸ Naldi & Magliveras 2016:133-159

²⁰⁹ 2014 SADC Protocol on Tribunal

²¹⁰ Naldi & Magliveras 2016:133-159

²¹¹ Art.15(2)

²¹² Ruppel 2009: 173-186

²¹³ Magwanda 2021:17-22

²¹⁴ 2014 New Protocol on SADC Tribunal

²¹⁵ Ruppel 2009: 173-186

²¹⁶ Van der Vleuten and Hulse 2013: 173-186

²¹⁷ Thomashausen 2002: 26-51

²¹⁸ Ruppel 2009b: 173-186

²¹⁹ Article 35 of 2000 SADC Protocol on Tribunal

²²⁰ Moyo 2009: 590-614

Under the new Protocol, the Tribunal's functions differ from the practice of their regional organisation such as the European Union (EU), COMESA, CEMAC, EAC, and ECOWAS whose courts have jurisdiction over disputes concerning the Organisation and its employees.²²¹ As a mechanism of addressing the difference of operations in terms of dealing with disputes between the Organisation and its employees, the SADC Head of States and Government decided to establish the SADC Administrative Tribunal (SADCAT), which is responsible for settling disputes between the Organisation and its employees.²²² The significant change with the establishment of the institution is that SADCAT is a distinct body from the Tribunal, which will only preside over employer, and employee matters.²²³ It is important to refer to the constitutional court decision regarding the decision of the SADC Head of States and Government of disbanding the Tribunal whereby the court affirmed the rulings made by the SADC Tribunal, which were in favour of white farmers.²²⁴ In the landmark decision that has far-reaching implications for South African constitutional law and South Africa's international relations, the South African Constitutional Court confirmed the North Gauteng High Court decision, that the constitutional prescription that the President must always act rationally and lawfully is not only valid in the domestic arena but follows the President even when conducting international relations.²²⁵ The case of *Law Society of South Africa and Others v President of the Republic of South Africa and Others*²²⁶, the constitutional court held that the disbanding of the SADC Tribunal and purporting to replace it with the weaker one and by so doing is contrary to the provisions of the SADC Treaty, and the Summit acted unlawfully and irrationally. Based on that judgment, the involvement of the President of the Republic of South Africa in the suspension of the SADC Tribunal by appending his signature on the 2014 Protocol on the Tribunal in the Southern African Development Community.²²⁷ The president involvement is nullified by section 7(1) and (2) and section 8 (1) of the South African Constitution, therefore his conduct is declared unconstitutional, unlawful and irrational.²²⁸ The court ordered the President to withdraw his signature from the 2014 Tribunal Protocol.²²⁹ Hulse states that the South African role in the suspension of the Tribunal after it had made damning

²²¹ Phooko 2018: 1-34.

²²² Phooko 2018: 1-34

²²³ Scholtz 2011: 197-201

²²⁴ Samtani 2020: 197-225

²²⁵ Phooko & Nyathi 2019: 415-432

²²⁶ *Law Society of South Africa v President of the Republic of South Africa and Others* 20382/2015 2018 ZAGPPHC 4; 2018 2 All SA 806 (GP); 2018 (6) BCLR 695 (GP)

²²⁷ *Law Society of South Africa and Others v President of the Republic of South Africa*

²²⁸ *Law Society of South Africa and Others v President of the Republic of South Africa and Others* 20382/2015 2018 ZAGPPHC 4; 2018 2 All SA 806 GP; 2018 6 BCLR 695 GP

²²⁹ *Law Society of South Africa and Others v President of the Republic of South Africa and Others* 20382/2015 2018 ZAGPPHC 4; 2018 2 All SA 806 GP; 2018 6 BCLR 695 GP

rulings against Zimbabwe's land reform program.²³⁰ The political influence of the then President of Zimbabwe, Robert Mugabe in the disbandment of the Tribunal despite two reviews confirming the legality of the Tribunal's establishment and the validity of the ruling against Zimbabwe has indicated the protectionist idea of African leaders on their country's sovereignty which deem to have superseded human rights, democracy and the rule of law.²³¹

However, it was expected that South Africa as the powerful state in Southern Africa could have played an influential role in ensuring that the rule of law and human rights as the cornerstone of democracy is protected, therefore used its position to rubberstamp the SADC Tribunal judgments against Zimbabwe.²³²

1.7.10 Interpretation of Express and Implied Powers

Phooko made a comparative analysis of the legal systems of both South Africa and Zimbabwe and this is informed by referral of SADC Tribunal rulings against the Government of Zimbabwe to Northern Gauteng High Court in the case between *Government of Zimbabwe v Fick*.²³³ In these cases, Phooko analysed the legal system of these countries, which is dualist since the two countries are former British colonies.²³⁴ In terms of the dualist theory, international law may be applied by national courts only if it has been incorporated into national law through legislation.²³⁵

It is noteworthy that the dualist theory views international law and national law as two separate legal systems.²³⁶ In this regard, the constitution of a particular country will determine which laws between international and national law will take precedence over the other.²³⁷ However, a country should not raise domestication of the international treaty as a defence to avoid the obligation to respect the international law as in the present case between *Mike Campbell and Others v the Republic of Zimbabwe*.²³⁸ Phooko stated that as a mechanism of establishing or

²³⁰ Hulse 2016: 3-30

²³¹ Chigara 2012: 341-377

²³² N Botha, 'Rewriting the Constitution: The "Strange alchemy of Justice Sachs, indeed'. (2009) 34 South African Yearbook of International Law 253. See also Ferreira, 'The Interpretation of Section 231 of the South African Constitution: a lost Ball in the High Weeds'. (2008) 41(2) Comparative and International Law Journal of Southern Africa 324-338.

²³³ Phooko 2015: 531-565

²³⁴ Ebobrah & Nkatha 2010: 85-100

²³⁵ Ferreira & Ferreira-Snyman 2014: 1471-1496

²³⁶ Erasmus G, "High Court of Botswana Steps into Void Left by SADC Tribunal available at <http://www.tralac.org/images/docs/5553/s14tb032014-erasmus-high-court-of-botswana-steps-into-void-sadc-tribunal-20140305-fin.pdf>

²³⁷ Mude 2014: 79-106

²³⁸ Johnson J, 'Enforcing Judgements in International Law: An Analysis of the Southern African Development Community ("SADC") Tribunal Decision in the case, Mike Campbell (Pty) Ltd & Others v The Republic of Zimbabwe, available at [http://www.jdsupra.com/legalnews/enforcing-judgements-in-international-law-69044/accessed 9 September 2014](http://www.jdsupra.com/legalnews/enforcing-judgements-in-international-law-69044/accessed%209%20September%202014).

making a fact-finding mission, he decided on the jurisdiction of an international organisation. He made a distinction between express and implied powers conferred upon an organisation by state parties.²³⁹

Express powers are those powers expressly articulated in the constitutive document; therefore, member states must accede to the provision of these documents²⁴⁰. On the other hand, implied powers are those powers that are not clearly articulated in the document.²⁴¹ These powers give room for the tribunal judges to apply their minds to provide the meaning of what the member states were seeking to achieve.²⁴² The implied power gives the Tribunal judges powers to develop the jurisprudence by giving meaning to the provisions of the constitutive documents where there is no express meaning provided by member states.²⁴³ Helfer stated that international human rights litigation in Africa is evolving and this development was noted when human rights attorneys and civil society groups focused much on advocacy efforts, not on the judicial and quasi-judicial bodies of the African Human Rights systems but on sub-regional courts linked economic integration communities in West, East, and Southern Africa.²⁴⁴

De Wet supported the assertion that the SADC Tribunal have a jurisdiction to preside over human rights cases based on the Tribunal judge's interpretation of Art.4 (c) of the SADC Treaty.²⁴⁵ Two of the three cases involving Zimbabwe were concerned with the violation of human rights. The case involving *Luke Tembo v Government of Zimbabwe* was about the government seizing of mortgage property while *Gondo and Others v the Republic of Zimbabwe* was about the government's refusal to give effect to court orders of Zimbabwean domestic courts that provided relief for victims of violence, thereby denying their right to a remedy. Of the remaining eight cases, five of them involve internal employment disputes between the SADC and its employees.²⁴⁶

Mwanawina submitted that the suspension of the Tribunal amounted to a dismissal or halting of the work of judicial officers.²⁴⁷ In principle, an independent judiciary will not be negatively affected by decisions of the executive bodies unless such decisions have been empowered by a provision of law²⁴⁸. In this circumstance, the SADC Head of States and Government

²³⁹ Phooko 2018: 1-34

²⁴⁰ Phooko 2018: 1-34

²⁴¹ Phooko 2018: 1-34

²⁴² Phooko 2018: 1-34

²⁴³ Phooko 2015: 531-565

²⁴⁴ African (Banjul) Charter on Human Rights and People's Rights 1981

²⁴⁵ SADC Declaration and Treaty, 1999

²⁴⁶ De Wet 2013:45-63

²⁴⁷ Scholtz and Ferreira 2011: 331-358

²⁴⁸ Mwanawina 2013: 321-335

decided not to renew the contract of judges and stated upfront that those judges whose contracts expire in December 2010 would also not be renewed.²⁴⁹ It was obvious that the Tribunal would not preside on cases if they were not forming a full bench.²⁵⁰ This decision indirectly disbanded the SADC Tribunal.²⁵¹ The question raised was "Was the decision of the SADC Head of States and Government in line with the SADC Declaration and Treaty as the constitutive document of the SADC? The answer was no, the reason being there is no provision in the SADC Treaty empowers the Summit to disband this judicial organs of the SADC.

Again, Art.36 of the SADC Treaty read in conjunction with Art.35 states that the amendment of this treaty shall be adopted by a decision of three-quarters of all members of the Summit.²⁵² The SADC Head of States and Government did not meet the required quorum of three-quarters of member states when they indorsed the 2014 SADC Protocol on Tribunal.²⁵³ The SADC Heads of States and Government primarily endorsed the 2014 SADC Protocol on Tribunal to limit the jurisdiction of the tribunal and to exclude individuals and legal persons from approaching the regional court to ventilate their human rights complaints. The 2014 SADC Protocol on Tribunal was only signed by three member states, which contravenes Art.35 of the SADC Treaty set a requirement of three-quarter member states who should unanimously agree to dissolve the SADC or its institutions.²⁵⁴

The above literature demonstrates that there is no specific provision in the SADC Treaty that may be used to deter member states from disobeying the protocols. Secondly, this assessment identified another gap within the SADC Treaty, for example, art.33 that states that the Summit may impose sanctions against a member state that persistently fails, without good reasons, to fulfil obligations assumed under this treaty.²⁵⁵ Sub-art 33 (b) further states that sanctions may be imposed against any member state that implements policy that undermine the principles and objectives of SADC.²⁵⁶ Art. 33(2) gives the Summit the power to determine the sanctions to be imposed on a case-by-case basis.²⁵⁷ It is known that SADC member states are concerned about the protection of their sovereignty, hence in most cases, they are in solidarity with one another.²⁵⁸ SADC member states adherence to principles such as human

²⁴⁹ Mzikamanda 2011: 1-22

²⁵⁰ Mwanawina 2013: 321-335

²⁵¹ Sachs 1998 et al

²⁵² SADC Treaty

²⁵³ Articles 35 and 36 of SADC Declaration and Treaty

²⁵⁴ SADC Declaration and Treaty, 1999

²⁵⁵ SADC Declaration and Treaty, 1999

²⁵⁶ SADC Declaration and Treaty, 1999

²⁵⁷ SADC Declaration and Treaty, 1999

²⁵⁸ Erasmus 2015: 2-5

rights, democratic values, and the rule of law would not be take place as long as there is no public participation by the people when their Presidents represented them internationally.²⁵⁹ This study considers that people should be given a voice when the President wants to commit their country by signing a protocols and ratifications of international treaties.²⁶⁰

The SADC Treaty was drafted in such a way it portrays member states as if they are adhering to the democratic principles but only a few member states such as South Africa and Botswana.²⁶¹ On the other hand, countries such as Zimbabwe, Tanzania, Swaziland, and Morocco are still using dictatorship and subjecting their citizens to human rights abuse and atrocities.²⁶² It is imperative to mention that dictatorship and human rights abuse contravene Art.4 (c) of the SADC Treaty, which compels member states to adhere to principles such as human rights, democratic principles, and the rule of law.²⁶³

Another gap is that the SADC Treaty is silent regarding the consequence of the SADC member state's failure to agree to the reappointment of judges.²⁶⁴

The study seeks to determine whether individuals and legal persons have a legal remedy that can be explored to counter the decision of the SADC Heads of States and Government of enacting the 2014 SADC Protocol on Tribunal.²⁶⁵ The new 2014 SADC Protocol on Tribunal limits the jurisdiction of the tribunal and prevents individuals and legal persons from approaching the regional court to seek legal recourse against their governments.²⁶⁶ Secondly, this thesis seeks to establish what should be done or what action should be taken against the member state who reneges from complying with the SADC Treaty.²⁶⁷ Thirdly, the study will determine which legal remedies are available for the citizens or legal persons against their countries in cases when their rights have been infringed by the action or conduct of their country's Heads of States.²⁶⁸

²⁵⁹ R Downrkins, 'Taking Rights Seriously', (1977) at 20 notes that principles, unlike rules, do not operate 'in an all or nothing fashion', noting rather that they are to be 'taken into account ... as a consideration inclining in one way or another.

²⁶⁰ A Pillay, 'Reflecting on the SADC Tribunal: A missed opportunity' (2003) SAFPI Policy Brief No.29 <http://osf.org.za/wp-content/upload/2015/08/Reflecting-on-the-SADC-Tribunal-a-missed-opportunity.pdf> accessed 8 August 2017.

²⁶¹ Nkatha 2018: 1-32

²⁶² M Evans, 'The Front-line State, South Africa and Southern Africa Security: Military prospects and perspectives' <http://pdfproc.lib.msu.edu/?file=/DMC/African%20Journals/pdfs/Journal%200f%20University%20Zimbabwe/vol12n1/juz012001002.pdf> accessed 6 August 2027

²⁶³ SADC Declaration and Treaty

²⁶⁴ Mike Campbell & Others (Pty) Ltd v The Republic of Zimbabwe

²⁶⁵ Nkatha 2018: 1-32

²⁶⁶ 2014 SADC Protocol on Tribunal

²⁶⁷ Mike Campbell & Others Others (Pty) Ltd v The Republic of Zimbabwe

²⁶⁸ Mike Campbell & Others Others (Pty) Ltd v The Republic of Zimbabwe

1.6.11 Comparative Analysis of Mandates of Regional and International Regional Economic Communities

It is noteworthy that the current state in which there is no regional court or tribunal in the SADC region harms natural and legal persons in the region.²⁶⁹ Comparative analysis of regional courts of other regional economic communities or international regional economic communities and their jurisdiction with the SADC need to be determined.²⁷⁰ At the international level, the European Union as a body established to ensure economic integration among European countries has the European Court of Justice (ECJ); which is authorised to review the acts of the national authorities adopted in the shadow of their international treaty obligations.²⁷¹ The adjudicatory competence of such courts to determine compliance with the relevant agreement generally overlaps with the national authorities' interpretation and application of these obligations in the course of the exercise of their domestic decision-making competence.²⁷² The similarity between the regional courts and international courts is the criteria for procedural instantiation of subsidiarity is the exhaustion of the domestic remedies rule which needs to be satisfied before the treaties supervisory bodies can deal with an individual complaint.²⁷³

A determination should be made on whether it was a mistake for SADC member states to copy what the European Union has developed by giving the European Court of Justice more powers than the national courts of member states and to develop its jurisprudence that is far exceeding the bounds of national courts of their member states.²⁷⁴ By taking into account the history of the SADC region whereby most of the member states were just recently emancipated from the colonial rule, these countries were expected to relinquish their independence too early; hence most countries such as Zimbabwe, Mozambique, and Swaziland were still finding it difficult to cede some of its independence.²⁷⁵ One of the challenges is that SADC comprises of the countries ascribing to constitutional democracy and protects the rule of law, democratic principles, and human rights whilst others are still using the autocratic rule type of government, which the protection of human rights is secondary and people are still subjected to atrocities and abuse of human rights by the government.²⁷⁶ Helfer

²⁶⁹ Nkatha 2018: 1-32

²⁷⁰ Johnson 2011: 1-28

²⁷¹ M Fleshman, 'Africa Ending Impunity for Rights Abuses, 20#4 Africa Renewal 7 (January 2007), available at <http://www.un.org/ecoscodev/geinfo/afrec/vol20no4/204-ending-impunity.html>

²⁷² Von Staden 2016:1113-1131

²⁷³ Von Staden 2016:1113-1131

²⁷⁴ Mike Campbell & Others (Pty) Ltd v The Republic of Zimbabwe

²⁷⁵ Hulse 2016: 1-30

²⁷⁶ Hulse 2016: 1-30

refers to *Cimexpan* case whereby the decision was viewed in light of weak legal protection of free movement in Southern Africa.²⁷⁷ He went further to identify a loophole in the 1992 SADC Treaty, which include a vague promise to “develop policies aimed at the progressive elimination of obstacles to the free movement of people of the region.”²⁷⁸ Although the statement made by Helfer is not relevant in this thesis but the manner in which the SADC Heads of States and Government drafted the SADC Protocols, they deliberately constructed the provisions of the protocols in such a way that they are not specific in order to protect themselves from being accountable. It is imperative to indicate that even though the member states adopt a Protocol on Free Movement to facilitate the movement of individuals, and even that unambitious legal instrument has not yet entered into force.²⁷⁹

1.8 OUTLINE OF CHAPTERS

This study is divided into seven Chapters. **Chapter One** - Introductory chapter. It contains the background to the study, and the research method employed. **Chapter Two** - outlines the impact of colonialism in Southern Africa and the resultant protection of sovereignty by African leaders. **Chapter Three** - outlines various historical backgrounds of the Southern African Development Coordinating Committee (SADCC), which evolved to Southern African Development Communities (SADC). **Chapter Four** – focuses on the discussion around the background why the SADC Tribunal was disbanded specifically focusing on Zimbabwe Land Reform as highlighted in *Mike Campbell v Zimbabwe Government*. **Chapter Five** – focuses on determining the provisions of the 2000 SADC Declaration and Treaty and its 2001 amended Treaty and 2014 SADC Protocol on Tribunal. Is the SADC Heads of State and Government decision encouraging the independence of the judiciary? **Chapter Six** – focuses on a comparative analysis of regional (ECOWAS CCJ, EACJ, and SADC Tribunal) and international courts (European Court of Justice) on their competency and jurisdiction to adjudicate on human rights, rule of law, and democracy issues. **Chapter Seven** – covers a summary of the findings and conclusion and recommendations on issues discussed in this thesis.

²⁷⁷ Art.5(2)(d) of the SADC Treaty

²⁷⁸ Helfer 2018: 235-253

²⁷⁹ SADC Protocol on Facilitation of Movement of Persons, August 18, 2005, not yet in force. Only five SADC member states have ratified the Protocol. Fewer than the nine required for its entry into force.

1.9 REFERENCING STYLE

The referencing style used in this study is the Journal for Judicial Science (JJS), an accredited journal that is published by the School of Law, University of the Free State. The research will not have intellectual Property implications in terms of copyright law, as all works used will be acknowledged.

1.10 ETHICAL IMPLICATION OF THE STUDY

This work is purely a desktop research in which all primary and secondary sources used will be referenced. As such, no individual or group interviews/questionnaires will be used as instrument of research with the objective of holding discussions concerning any topics or issues that might be sensitive, embarrassing or upsetting. No criminal or other disclosures requiring legal action and having potential adverse effects, risk for research participants will be made in the course of the study. Therefore, there is no need for arrangement to be made in respect of insurance and/or indemnity to meet the potential legal liability of the University of the Free State for harm to participants arising from the conduct of the research.

Chapter 2:

The effect of colonialism in Africa

2.1 Introduction

This chapter seeks to determine the effect of colonialism in southern Africa and Zimbabwe in particular has led to the leaders protecting their sovereignty, solidarity and independence gained through the shedding of blood.²⁸⁰ A forceful removal of Africans in their land has left them landless and they were pushed to a less fertile area, which is not suitable for agriculture.²⁸¹ The removal of Africans from their land is a primary reason as to why the government of Zimbabwe took a decision to amend its constitution to insert the provisions, which gave them the authority to expropriate private farms without compensation. These provisions further prohibited property owners from seeking a legal recourse from local courts.

The disbandment of the SADC Tribunal by the member states was a strategy to end the life of a regional court, which they seem not to have a control over it.²⁸² The SADC Tribunal rulings which found that the government of Zimbabwe have transgressed the provision of the SADC Treaty which obliges member states to adhere to the principle of human rights, democracy and the rule of law was a trigger factor for mobilisation to disband the court.²⁸³ In defence, the government of Zimbabwe cited that the tribunal do not have a jurisdiction to preside over human rights matters and further that the government of Zimbabwe could ratify the 2000 SADC Protocol on Tribunal.²⁸⁴ It is against this background that the government of Zimbabwe has pushed their land reform program to redress the land imbalance of the past by expropriation of land without compensation.²⁸⁵

The history of land dispossession in Zimbabwe depicts that land is contentious issue taking into the manner in which Zimbabweans were forcefully removed from areas suitable for agriculture and displaced into an infertile area.²⁸⁶ These areas were occupied by Zimbabweans prior colonialization but they were forced out of these areas by white's

²⁸⁰ Achiume 2017: 1-34

²⁸¹ Dube & Midgley 2008: 303-326

²⁸² Nathan 2011: 1-23

²⁸³ Treaty of the Southern African Development Community, 1992 available at <http://www.sadc.int/documents-publications/sadc-treaty/> [hereafter SADC Treaty 1992]

²⁸⁴ *Mike Campbell and Others (Pty) Ltd v Republic of Zimbabwe*

²⁸⁵ Ebobrah 2010: 81-92

²⁸⁶ Gibson 2009: 31-32

minorities.²⁸⁷ The issue of land dispossession is two sided, namely the dispossession of land occupied by black people taken during the colonial time and current discourse, which involves the implementation of the land reform program by African countries against white farmers as a mechanism to redress the land imbalances of the past.²⁸⁸

Colonialism is defined as the direct and overall domination of one country by another based on state power being in the hands of a foreign power.²⁸⁹ The primary objective of colonialism is political domination, and secondly to make possible the exploitation of the colonized country.²⁹⁰ This phenomenon took place during the 1800-1960s, which is part of another phenomenon called imperialism.²⁹¹

During post-independence, the African countries faced with challenges of disentangling from the colonial perfected role of the state because of the systematic disarticulation in the indigenous economy and intrinsic trying of it with the external economy of the colonizers.²⁹²

2.2 Historical background of the Rhodesians before and after 1890

The history of Zimbabwe indicates that land was at the centre of the people's lives before the arrival of white people and at the centre of controversy from the time that white people colonised the country in 1890.²⁹³ One of the scholars, Chinua Achebe has indicated, "*African people did not hear of culture for the first time from Europeans, that their societies were not mindless but frequently had a philosophy of great depth and value and beauty, that they had poetry and, above all, they had dignity*". *It is this dignity that many African People all but lost during the colonial period and it is this that they must now regain*²⁹⁴.

The pre-colonial history of Zimbabwe further emphasises that "African societies of the past, with their imperfections, were not consumers but producers of culture."²⁹⁵ This statement is supported by the fact that although Zimbabwe was not ruled by one ruler, there were different kingdoms that were under powerful political leaders with a recognisable base and

²⁸⁷ Mabasa Sasa, 'Zim Pulls out of SADC Tribunal', Herald [Zimbabwe], 2 September 2009] available at http://www.zimbabwesituation.com/sep3_2009.html.

²⁸⁸ Hartnack 2009: 363-364

²⁸⁹ Helderling & Robinson 2012: 1-38

²⁹⁰ Mitchell 2001:587-593

²⁹¹ Zimbabwe: 'White Farmers begin Returning Home', All Africa, July 16,2007 available at: <http://allafrica.com/stories/200707170532.html>.

²⁹² Platteau 1996: 129-145

²⁹³ Simukai Chigudu, 'Colonialism had never Really Ended': my life in the shadow of Cecil Rhodes, The Guardian, 14 June 2021

²⁹⁴ Achebe 1973: 8-17

²⁹⁵ Achiume 2017:142-143

superstructure.²⁹⁶ The land that became the British colony called Southern Rhodesia, named after Cecil John Rhodes.²⁹⁷

It is noteworthy that the Zimbabweans depended on good land for agriculture and they needed land for the extraction of minerals such as gold. Concisely, land in its various forms, was central to the people's survival.²⁹⁸

The economy of Zimbabwe prior to colonialism was driven by the salt industry thrived in the saline springs of the middle save valley called Mafungabusi plateau, and the sea in the eastern side of the country.²⁹⁹ The salt industry supported the small-scale salt industry and the people living nearby were able to trade for salt for livestock over a distance of up to fifty miles.³⁰⁰ Other commercial activities were carried out in iron ore, a commodity that was found in some areas though not everywhere.³⁰¹

Agriculture was the real basis of the Iron Age economy, but because occasionally drought and pestilence adversely affected it, the mining industry and ivory were the main drive for the economy, hence the efforts put into export production and trade.³⁰²

Chigara opines that Zimbabwe's soil and climate demonstrate a classification of the nation's land according to its agricultural potential and divided into two zones, namely privately owned white commercial farmland and black tribal trust land.³⁰³ It is important to distinguish that the people residing in zone 1 are white farmers and they were allocated fertile regions with the highest potential for agricultural production³⁰⁴. On the other hand, those residing in Zone 5 are black people and this area consists of semi-desert soils having the least potential for agricultural production³⁰⁵.

Sow has indicated that whiteness as the contract is an agreement among colonizers bargained for among themselves to perpetuate expropriation of real property, extraction of natural and human or other capital, and exclusive dominion over the socio-political franchise³⁰⁶.

²⁹⁶ Mieke 1993:1-81

²⁹⁷ Achiume 2017:1-37

²⁹⁸ Settle 1996:1-12

²⁹⁹ Adebayo 1900-1945: 111-135

³⁰⁰ Birnberg & Resnick et al

³⁰¹ Achiume 2017: 1-34

³⁰² Harlett et al

³⁰³ Chigara 2008: 531-548

³⁰⁴ Chigara 2008: 531 - 548

³⁰⁵ Chigara 2008: 531 - 548

³⁰⁶ Sow 2023:1-38

2.3. Zimbabwe's Post-Independence Land Reform

This sub-paragraph gives light on the effect of colonialism in African countries, particularly Zimbabwe that defaulted in implementing the decisions or rulings of the SADC Tribunal. These ruling were in favour of the white farmers who were forcefully removed from their commercial farms under the banner of Land Reform Program implemented by the government of Zimbabwe.³⁰⁷

Given the historical background of the politics of Zimbabwe, Robert Mugabe became the first President of the Independent Zimbabwe in 1980, during his State of the nation address, he pledged to undo the devastating effects of colonialism and improve the plight of oppressed Africans in Zimbabwe.³⁰⁸ It is important to mention that President Mugabe undertook that the government would not embark on compulsory land expropriation for ten years³⁰⁹. Prior to the land reform program the government of Zimbabwe used the willing buyer, willing seller" as a strategy to redistribute land³¹⁰. The voluntary land redistribution method allowed individuals to purchase land from private landowners with government loans³¹¹. What triggered the government to move away from voluntary redistribution of land was criticisms emanated from the critics who cited that the process moved too slowly³¹². Similar criticism was raised by the Namibian Prime Minister who indicated that a, "Willing buyer, Willing seller policy is cumbersome to reach the land reform program's ultimate goal."³¹³

Another development was the promulgation of the Land Acquisition Act of 1992, which allows the government to acquire land compulsorily from owners, accompanied by fair compensation for the property.³¹⁴ During the seven years of the implementation of the Land Acquisition Act of 1992, 71,000 black families had been resettled.³¹⁵ Shirley stated that this resettlement took place through the government purchases of 3.8 million hectares of land, however, this land redistribution was rattled with corruption because some of the recipients of the redistributed land were not those in need, but President Mugabe's political cronies³¹⁶. It is imperative to indicate that in 2000 the Zimbabwean voters rejected a constitutional referendum that would have allowed the government to implement its fast-track land reform program based on

³⁰⁷ Diop et al

³⁰⁸ Dancaescu 2003: 615-618

³⁰⁹ Agreement concluded at Lancaster Conference, UK-Zim.

³¹⁰ Shriver 2005: 419-433

³¹¹ Shay 2012: 133-171

³¹² Shriver 2005: 419-447

³¹³ Shriver 2005: 419-447

³¹⁴ Achiume 2017: 1-34

³¹⁵ Chilunjika and Uwizeyimana 2006: 1-15

³¹⁶ Shay 2012: 133-171

compulsory land acquisitions.³¹⁷ Instead of President Mugabe and parliament accepting the defeat, they passed constitutional Amendments 16A and 16B, which allows the government to acquire land without safeguards to prevent arbitrary application, and guarantees due process or compensation³¹⁸. It is imperative to indicate that President Mugabe's failure to win the constitutional referendum was a clear indication of diminishing power to have a grip to make the decisions he wants.³¹⁹ In addition, this rejection of the constitutional referendum was a signal that opposition parties are becoming stronger to oppose unconstitutional decisions made by the majority party in parliament.³²⁰ The Lancaster House agreement, which was signed on 21 December 1979 at Lancaster House brought to an end the illegal white-dominated regime that had ruled Southern Rhodesia since the Unilateral Declaration of Independence (UDI) in 1965, ushered the newly independent state of Zimbabwe.³²¹ The amendment 16A of the Constitution of Zimbabwe stipulates that Great Britain, instead of Zimbabwe must pay landowners compensation for their expropriated land³²². The government reiterated that Great Britain has the responsibility to pay because it colonized Zimbabwe and dispossessed legitimate owners by promulgating and enforcing racist laws.³²³ The provisions of the Amendment 16A (1) (a) – (c) highlighted the most important factors related to land redistribution³²⁴:

- (a) That the people in Zimbabwe were unjustifiably dispossessed of their land during colonial domination;
- (b) That Zimbabwe regained independence by taking up arms against the colonizers; and
- (c) To reassert their right and regain ownership to their land, Zimbabwe should be able to acquire land from current owners without paying them.

Amendment 16B removed a notice requirement for land redistribution and prevented landowners from challenging government acquisition in an independent court³²⁵. Shay stated that the negative impact of land reform was that the government allocated land to people with limited resources or insufficient funds to productively use the land they were given.³²⁶ Some

³¹⁷ Shay 2012: 133-171

³¹⁸ Constitution of Zimbabwe of 1979, as amended by Act No.5 of 2005

³¹⁹ Nieuwkerk 2007: 61-72

³²⁰ Burke, J 2016, Mugabe launches new currency in 'last gamble' for Zimbabwe. The Guardian, 28 November 2016, available at > <https://media.the-guardian.com/world/2016/nov/28/Mugabe-launches-new-currency-in-last-gamble-for-zimbabwe>> accessed 25 November 2019

³²¹ Shay 2012: 133-171

³²² Constitution of Zimbabwe of 1979 (as amended by Act No.5 of 2005)

³²³ Achiume 2017:1-34

³²⁴ Constitution of Zimbabwe of 1979 (as amended by Act No.5 of 2005)

³²⁵ Constitution of Zimbabwe of 1979 (as amended by Act No.5 of 2005)

³²⁶ Gutu, O. 2015, MDC vindicated over land issue, available at: <http://nehandaradio.com/2015/01/05/mdc-vindicated-land-issue/> (Accessed 09 September 2015)

of the beneficiaries of the land made decisions to return the land back to former owners citing a reason that they are unable to utilize the land for agricultural purposes³²⁷.

The effect of the land reform program was that investors became hesitant to invest money in Zimbabwe because there was no security of tenure and no promise of fair compensation for redistributed property.³²⁸ The land reform program contributed to the unemployment rate due to approximately 500,000 workers who were displaced after their employers were evicted from the land³²⁹. Since 2000, Zimbabwe embarked upon a controversial fast-track land reform program to redistribute large commercial farms mostly owned by white farmers to landless black Zimbabweans who were dispossessed during colonialism³³⁰.

The ramifications of this Land reform program is that it has created controversy and violence against white landowners.³³¹ Historically, an incident, which took place on 26 October 2010 a wife of a farm owner known as Kobus Jobert was assaulted and a gang murdered him in his home after his home, was identified for land redistribution³³². It is noteworthy that despite the violence resulting from the land reform program, individual blacks own no more land today than they did during the colonial period. The demands for the redistribution of land by the government of Zimbabwe led to the amendments 16A and 16B of the Zimbabwean constitution which authorise fast-track land reform that violate the minimum international standards regarding the right to property and due process³³³.

2.4 Campbell and Zimbabwe's successful backlash

The government of Zimbabwe's refusal to comply with the decisions or rulings of the SADC Tribunal stems from the historical past of colonialism.³³⁴ The British colonial rule in Zimbabwe embedded a deeply unequal, racialised land ownership structure that concentrated almost the country's arable land in the hands of the white minority³³⁵.

³²⁷ Chanakira (Jan. 4, 2011). White farmer takes farm back, NEW ZIMBABWE.COM, <http://www.newzimbabwe.com/news/printVersion.aspx?newsID=4197>

³²⁸ Bureau of Afr.Affairs, Background Note: Zimbabwe, US.DEP'T ST.(Nov. 3, 2010), <http://www.state.gov/r/pa/ei/bgn/5479.htm#econ>

³²⁹ Shay 2012: 133-171

³³⁰ Rutherford 2005:103-105

³³¹ Achiume 2017: 1-43

³³² Karimakwenda, T (Oct. 27, 2010). White Commercial Farmer Shot and Killed in Chegutu, SW Radio Africa, <http://www.swradioafrica.com/news271010/whitecom271010.htm>

³³³ Shay 2012:133-170

³³⁴ *Mike Campbell and Others (Pty) Ltd v Republic of Zimbabwe*

³³⁵ Achiume 2017: 1-37

As a mechanism of reclaiming the land, President Robert Mugabe in 2005 pushed through parliament an amendment to the national Constitution that would push his controversial "Fast Track Land Reform Program".³³⁶ Amendment 17 stipulates that the uncompensated, compulsory acquisition of agricultural land be identified for resettlement purposes³³⁷. Amendment 17 vests ownership of this land in the Zimbabwe government and strips the Zimbabwean courts of jurisdiction over any challenges to compulsory acquisition.³³⁸ In the classic case of *Mike Campbell v The Republic of Zimbabwe*, a commercial farmer Mike Campbell purchased his farm before Zimbabwe's independence and led a lawsuit challenging the Zimbabwean government's forced, uncompensated acquisition of farms before the SADC Tribunal.³³⁹ He was joined in the lawsuit by his son-in-law and 77 other farms.³⁴⁰ The heart of their claim was the argument that in effect Amendment 17 targeted only the land of white farmers in Zimbabwe and thus constituted unlawful racial discrimination.³⁴¹ The central argument in this case was that the plaintiffs argued that Amendment 17 was a breach of the SADC Treaty because the land acquired under it was not identified using reasonable and objective criteria.³⁴² They further argued that in practice, the government used race as the sole basis for targeting white farms, and this constituted unlawful racial discrimination contrary to international law.³⁴³ They went further to argue that they had been unlawfully denied access to courts to challenge the legality of Amendment 17 and denied compensation for the land seized from them.³⁴⁴ On merits, it was argued that the land seized under Amendment 17 was reasonably identified and it had acquired land not only from the white farmers but also from a few black Zimbabweans as well.³⁴⁵ It is noteworthy to indicate that those black Zimbabweans who were dispossessed of their farms were not the supporters of the ZANU PF.³⁴⁶

The government of Zimbabwe argued that to redress race-based structural inequity in land ownership due to colonial dispossession, its land reform process mainly targeted white-owned

³³⁶ Nicole Fritz, 'Up in Smoke: The SADC Tribunal and Rule of Law in the Region', 01 September 2012, No.11 South African Foreign Policy Initiative

³³⁷ Constitution of Zimbabwe, September 14, 2005, Amendment (no.17)

³³⁸ *Mike Campbell and Other (Pty) Ltd v Republic of Zimbabwe (2008) SADCT 2*, <http://www.saflii.org/sa/cases/SADCT/2008/2.pdf>

³³⁹ *Mike Campbell and Others (Pty) Ltd v Republic of Zimbabwe (2008) SADCT 2*

³⁴⁰ *Mike Campbell and Others (Pty) Ltd v Republic of Zimbabwe (2008) SADCT 2*

³⁴¹ *Mike Campbell and Others (Pty) Ltd v Republic of Zimbabwe (2008) SADCT 2*

³⁴² *Mike Campbell (Pty) Ltd v Republic of Zimbabwe (2008) SADCT 2*, <http://www.saflii.org/sa/cases/SADCT/2008/2.pdf>

³⁴³ *Mike Campbell (Pty) Ltd v Republic of Zimbabwe (2008) SADCT 2*, <http://www.saflii.org/sa/cases/SADCT/2008/2.pdf>

³⁴⁴ *Mike Campbell (Pty) Ltd v Republic of Zimbabwe (2008) SADCT 2*, <http://www.saflii.org/sa/cases/SADCT/2008/2.pdf>

³⁴⁵ *Mike Campbell (Pty) Ltd v Republic of Zimbabwe (2008) SADCT 2*, <http://www.saflii.org/sa/cases/SADCT/2008/2.pdf>

³⁴⁶ Achiume 2007: 1-34

land as the colonial project had vested arable land ownership in whites.³⁴⁷ The SADC Tribunal issued a decision on the merits in November 2008 and it emphasized that the bench unanimously decided that it had a jurisdiction "in respect of any dispute concerning human rights, democracy and the rule of law, and thus it had jurisdiction over Campbell's case."³⁴⁸ The judges further unanimously ruled that the applicants had been denied access to courts in Zimbabwe, in violation of their fundamental rights to access to justice and a fair hearing.³⁴⁹ Four judges found that the Zimbabwean government had unlawfully discriminated against the applicants based on race, because Amendment 17 had an "unjustifiable and disproportionate" impact on Zimbabwean white farmers only.³⁵⁰ One judge dissented from this finding of unlawful racial discrimination.³⁵¹ Finally, the tribunal unanimously found that the Zimbabwean government owed the applicants "fair compensation" for the lands it had compulsorily acquired.³⁵²

The plaintiffs were unsuccessful in enforcing their judgment in Zimbabwe through its national courts.³⁵³ The government of Zimbabwe dismissed these attempts and by June 2009, the applicants secured a second favourable ruling from the tribunal, which found that the government of Zimbabwe is in breach and contempt of its November 2008 decision.³⁵⁴ In retaliation the government of Zimbabwe began a campaign led by Minister of Justice Patrick Chinamasa against the tribunal drafting memorandums citing that the SADC Tribunal had never been properly established, therefore member states, including Zimbabwe were thus under no obligation to comply with its rulings.³⁵⁵

The government of Zimbabwe reneged from the SADC Treaty, they refused to appear before the tribunal, and further, they mentioned that they would not be bound by any of the tribunal decisions, past and future.³⁵⁶ In strengthening its mobilisation campaign against the tribunal, Zimbabwe's Minister of Justice visited SADC member states to lobby support for opposition

³⁴⁷ Achiume 2017: 1-37

³⁴⁸ *Mike Campbell (Pty) Ltd v Republic of Zimbabwe (2008) SADCT 2*, <http://www.saflii.org/sa/cases/SADCT/2008/2.pdf>

³⁴⁹ *Mike Campbell (Pty) Ltd v Republic of Zimbabwe (2008) SADCT 2*, <http://www.saflii.org/sa/cases/SADCT/2008/2.pdf>

³⁵⁰ *Mike Campbell and Others (Pty) Ltd v Republic of Zimbabwe (2008) SADCT 2*

³⁵¹ *Mike Campbell and Others (Pty) Ltd v Republic of Zimbabwe (2008) SADCT 2*

³⁵² *Mike Campbell and Others (Pty) Ltd v Republic of Zimbabwe (2008) SADCT 2*, <http://www.saflii.org/sa/cases/SADCT/2008/2.pdf>

³⁵³ Phooko 2015: 1-36

³⁵⁴ Karen, Alter Gathii and Helfer 2016: 17-18

³⁵⁵ *Fick and Another v Republic of Zimbabwe*, (SADC (T) 01/2010 [2010] SADC 8 (July 16, 2010) available at <http://www.saflii.org/sacases/SADCT/201/8.html>

³⁵⁶ Achiume 2017: 1-37

to the regional court.³⁵⁷ Prior SADC Summit scheduled for August 2010, the tribunal issued another contempt ruling against Zimbabwe, and again it was referred to the Summit.³⁵⁸ It was argued that there was no public record of the 2010 Summit proceedings. Based on the empirical work to determine whether the Summit deliberated on non-compliance with the tribunal rulings by the government of Zimbabwe, it was established that during the Summit, President Robert Mugabe had intended to block any discussion of Zimbabwe's human rights records at the meeting, but several member states opposed Zimbabwe's actions.³⁵⁹

In defence of the SADC Tribunal, non-government organisations, human rights attorneys and SADC judges rallied in opposition to the tribunal's suspension.³⁶⁰ Their strategy was that they embarked on a public campaign that included press releases, conferences, and legal briefs all making case for maintaining the tribunal's jurisdiction over human rights issues, and access for private litigants.³⁶¹ The positive outcomes of this public awareness by NGOs, Human Rights lawyers, and SADC judges were that the SADC Ministers of Justice and Attorney General proposed a revised Tribunal Protocol with some compromises.³⁶² For example, it preserved private access, narrowed the Tribunal's standing requirements, and stripped the Tribunal human rights jurisdiction in the absence of adoption of a separate human rights protocol.³⁶³ Despite the efforts taken by the SADC Ministers of Justice and Attorney Generals in revising the Tribunal Protocol, the government of Zimbabwe remained hostile, and President Mugabe denounced the proposal, maintaining that the SADC review process was nothing more than a ploy to undermine Zimbabwe's land reform process.³⁶⁴

The outcome of the SADC Summit in 2010 was a new SADC Protocol on Tribunal with a mandate confined to interpreting SADC member state disputes over the interpretation of SADC instruments and presiding over interstate matters only.³⁶⁵

2.5 Situating Campbell in its Socio-Political Context: The land issue

This study will make a comparative analysis of three cases of a backlash against African sub-regional tribunals. Alter, Gathii, and Helfer argued that two factors explains the successful backlash against the SADC Tribunal relative to the partially successful backlash against the

³⁵⁷ Achiume 2017: 1-37

³⁵⁸ Sirota 2004: 343-353

³⁵⁹ Moyo 2000: 5-6

³⁶⁰ Peter Fabricus 2011, 'Dissolution of SADC Tribunal dissect, Cape Times

³⁶¹ Achiume 2017: 1-37

³⁶² De Vos & Phore, 'The SADC Tribunal's Effectiveness is anyone's guess, August 2008, De Rebus

³⁶³ Achiume 2017: 1-37

³⁶⁴ Achiume 2017: 1-37

³⁶⁵ Final Communiqué of 32nd Summit of SADC Heads of State and Government (August. 18,2012)

East African Court of Justice, and the failed backlash against the ECOWAS Tribunal.³⁶⁶ The first factor relates to the SADC secretariat, which lacked the requisite political culture and professionalisation to exert independent influence over SADC member states to shield the tribunal from the Campbell backlash.³⁶⁷ The second factor was the failure of civil society to mobilise effectively against the backlash.³⁶⁸ It is noteworthy that these factors gave a context category and it may be useful for understanding the Mugabe regime's success at contracting the authority of the SADC Tribunal.³⁶⁹

It is important to highlight the historical, political, and social context in the subject matter and findings of Campbell's case whereby the tribunal deliberated on issues such as racial equality and postcolonial land reform.³⁷⁰ These issues are vital for understanding both the backlash and its success.³⁷¹ The tribunal dealt with the socio-politically charged subject matter of the case and its handling of the matter is central in explaining the success of Zimbabwe's backlash.³⁷²

Alter argues that in their comparison of the International Courts (ICs), among them the SADC Tribunal. Issues such as racial equality and postcolonial land reform triggered the backlash and did not explain divergent outcomes.³⁷³ It was argued that the devious politics were at the core of which was the regime's tenacity and its primary means of diminishing the tribunal's authority.³⁷⁴ Alter posits that the relevance of political context, namely the explosiveness of the land issue was at the heart of the Campbell case.³⁷⁵ Nathan argued that the demise of the SADC Tribunal was triggered primarily by three factors³⁷⁶, namely:

- (i) SADC countries have not surrendered their sovereignty from the national to the regional level;
- (ii) SADC countries have not evolved common political values, systems, and institutions; and
- (iii) SADC countries, solidarity trumps democracy.

³⁶⁶ Achiume 2017: 1-37

³⁶⁷ Voeten 2014: 1-39

³⁶⁸ Margaret 1999: 2-16

³⁶⁹ Madsen 2014: 123-134

³⁷⁰ Phooko 2016: 1-20

³⁷¹ Caron & Shirlow 2016: 1-45

³⁷² Canovan 1999: 2-16

³⁷³ Karen 2016: 2016b: 293-328

³⁷⁴ Project on International Courts and Tribunals, available at http://www.pict-pcti.org/Erik_Voeten_International_Courts_Data, available at http://www9.georgetown.edu/faculty/ev42/IC_data.htm

³⁷⁵ Boone 2009: 183-201

³⁷⁶ Nathan 2013: 1-35

Nathan concluded that lack of common value or shared commitment to postcolonial land reform does more to explain why SADC permitted the tribunal's demise.³⁷⁷ It was argued that the tribunal's indelicate handling of the land reform issue played a causal role in the success of the Mugabe-led backlash.³⁷⁸

To have a clear understanding of Campbell's subject matter and legal findings, it is necessary to postulate on postcolonial land reform in Zimbabwe, and in southern Africa to assess the effect of land dispossession in Zimbabwe.

2.5.1 Zimbabwe

Historically, the government of Zimbabwe gained independence from the colonial rule in 1980. At the time, approximately 6,000 white farmers owned 42 percent of the country, Zimbabwe's most favoured agro-ecological zones, secured under colonial legislation that dispossessed the black majority of all but the most resource-starved land in the country.³⁷⁹ Bangwayo-Skeete³⁸⁰ also stated that the colonial legacy left a disproportionate distribution of fertile lands in the hands of few white settlers showing the need to redistribute land.³⁸¹ Mangena posits that the liberation struggle that claimed the lives of thousands of Zimbabweans was waged to ensure that the historical dispossession was reversed and the land was returned to its rightful owners.³⁸²

Achiame argued that most of the farmers fought to prevent Rhodesia from becoming Zimbabwe, and taking into account the oppressive force of the racialised agrarian structure on millions of black Zimbabweans.³⁸³ The ramifications of the protectionist approach of the white farmers resulted in land reform was a fundamental concern that mobilised Zimbabwe's anticolonial liberation movement to forcefully expropriate the commercial farms.³⁸⁴ Another triggering factor for the expropriation of these farms was the collapse of the Lancaster House Agreement, which led to early prospects of meaningful land reform.³⁸⁵ One of the most important conditions of the Lancaster Agreement between Britain and Zimbabwe was that the latter had to guarantee that was rooted in the demands of landless, disenfranchised black

³⁷⁷ Richards C, 2018 'Bring back the SADC Tribunal, says judge' *Africantii*, available at <https://bit.ly/3iTUOvA>

³⁷⁸ Peter-Berries 2015: 1-23

³⁷⁹ Achiame 2017: 1-37

³⁸⁰ Kabonga 2020: 1-56

³⁸¹ Settle 1996: 1-12

³⁸² Shay 2012: 134-170

³⁸³ Achiame 2017: 1-37

³⁸⁴ Achiame 2017: 1-37

³⁸⁵ SADC Tribunal is daydreaming: Didymus Mutas, ZIMDI-ASPORA, Dec, 1, 2008, available at <http://www.zimdiaspora>.

Zimbabweans both in urban and rural, rather than the mechanisations of ruling elites within the Mugabe regime.³⁸⁶

It was argued that the Mugabe regime retaliated swiftly by preventing the members of his movement from invading the white farmers.³⁸⁷ Achiume argued that it was for the first time that President Mugabe faced a threat of strong political opposition as his popularity and relevance plummeted.³⁸⁸ As a mechanism of gaining support Mugabe regime-sponsored violence was a feature of Zimbabwe's landscape as he fought to stay in power.³⁸⁹ It was argued that Zimbabweans of all races were subjected to brutality and intimidation for supporting the political opposition.³⁹⁰ It was in this context that the Mugabe regime made a calculated move to regain his popular support and retain power by reinventing himself as the champion of landless Zimbabweans.³⁹¹

It is noteworthy that the Mugabe regime's land reform was politically motivated; therefore, it is no surprise that it found popular purchase in that it seemed finally to redress land grievances many have held since the colonial era.³⁹²

The Mugabe regime's political strategy leveraged social frustration at genuine race-based inequality in land ownership.³⁹³ Kabonga stated that the primary objective of the Fast Track Land Reform Programme (FTLRP) in Zimbabwe was the brainchild of President Mugabe and his political party.³⁹⁴ This program was established to push the narrative that President Mugabe and his political party remain in government.³⁹⁵ The FTLRP facilitated the transfer of land to nearly 170,000 households excluding the informal settlements that were largely excluded from the official "fast track" programme.³⁹⁶

It is imperative to mention that the idea of redistribution of land is not peculiar to Zimbabwe but it has been practiced in both the developed and developing world as a mechanism of addressing the historical inequalities in terms of access to land and the demanded changes in such inequalities.³⁹⁷

³⁸⁶ Sadomba 2013: 1-34

³⁸⁷ Platteau 1996: 129 -145

³⁸⁸ Chigara 2004: 1-34

³⁸⁹ Achiume 2017: 1-37

³⁹⁰ Palmer 1990: 164-165

³⁹¹ Achiume 2017: 1-37

³⁹² Moyo and Chambati 2013: 1-56

³⁹³ Chigara 2007: 126-131

³⁹⁴ Meckler 2016: 1-45

³⁹⁵ Bangwayo – Skeete, Bizabih and Zikhali 2010: 319-339

³⁹⁶ Deininger, Hoozevee and Kinsey 2004: 1697-1709

³⁹⁷ Kabonga 2020: 1-56

2.5.1.1 The Development of the Zimbabwean Land Reform Policy Paradigm Shifts: 1979-2015

The signing of the Lancaster House Agreement played a pivotal role in the commencement of the land reform programme in Zimbabwe.³⁹⁸ This agreement provided a legal framework for an equal distribution of land between the black majority who have been previously disenfranchised and the white minority who exercised an absolute control and total ruler ship over Southern Rhodesia from 1890 to 1980.³⁹⁹ Land reform was considered the vehicle that would foster socio-political and economic development in the country.⁴⁰⁰

It is imperative to indicate that politically, this scheme was viewed as a conduit through which peace and stability to be achieved in the country.⁴⁰¹ Socially, the scheme was sought to redress the historical imbalances and inequalities in landholding with a long term of eradicating poverty among rural citizenry.⁴⁰² Economically, the scheme was modelled to augment agricultural productivity among the families that have been resettled.⁴⁰³

The following periodical phases represent the distinct policy paradigms that were and still exist in the Zimbabwe land reform trajectory. The phases include the Lancaster House (willing buyer willing seller) 1980-1990, compulsory acquisition with fair compensation (1990-2000), fast track land reform (2000-2002 and beyond) and the phase of partnership between landholders and farmers (2014 to date).⁴⁰⁴

2.5.1.1.1 The Willing buyer willing seller phase (1980-1990)

This principle was the reigning paradigm from 1980 to 1992.⁴⁰⁵ The Lancaster House Conference culminated in the creating of Supreme Law of the country, which had carefully worded section on the land issue.⁴⁰⁶ Of concern was that the British government held out to

³⁹⁸ Africa All Party Parliamentary Group. 2009. Land in Zimbabwe: past mistakes, future prospects. A report by the Africa All Party Parliamentary Group. December 2009, available at: http://www.royalafricansociety.org/sites/default/files/reports/aappg_reports_land_in_zimbabwe.pdf (accessed 09 September 2016)

³⁹⁹ Dekker & Kinsey et al (2011)

⁴⁰⁰ Hall 1993: 275-276

⁴⁰¹ Africa Focus. 2013, Zimbabwe: New Narrative on Land Reform. Africa Focus Bulletin. 26 February 2013, available at: <http://www.africafocus.org/docs13/zim1302b.php> (accessed: 13 August 2015)

⁴⁰² Auriacombe, C.J. 2012. Methodology Class Notes. Honours Methodology Unit 4. Johannesburg: University of Johannesburg

⁴⁰³ Bratton et al (1990)

⁴⁰⁴ Temple and Hanstad et al (1990)

⁴⁰⁵ Capano 2009:7-31

⁴⁰⁶ Carson and Calvo et al (2009)

protect white farmers and the Patriotic Front accepted British demands only after the United States (US) and British government promised money to pay for land.⁴⁰⁷ The Lancaster Agreement required the Zimbabwe to wait a decade before they could commence with the implementation of land reform programme.⁴⁰⁸ This agreement further permitted government to purchase unoccupied land for resettlement purposes.⁴⁰⁹ Richardson posits that the draft constitution agreed upon at Lancaster House sets out a “Declaration Rights” which could be changed for 10 years and these rights included the “Freedom from Deprivation of Property”. Other principles included in the constitution that seeks to protect the white farm owners are the acquisition of land only on a willing buyer willing seller basis, payment of compensation remittable in a foreign currency and under-utilised land could be acquired for public purpose but at the market value.⁴¹⁰

The willing buyer willing seller principle entailed that there was no compulsory purchase and the government would only buy land for resettlement that was offered voluntarily.⁴¹¹ This principle further dictated that all land had to be offered to the government first, and if the government turn it down, a certificate of “no present interest” was issued allowing an alternative sale.⁴¹² The objective of the Lancaster House Constitutional scheme was to limit the scope of any land reform based on compulsory acquisition.⁴¹³ Other constitutional impediments in the phase of the land resettlement scheme was the exemption of productive farms from acquisition for resettlement as they fell outside the bracket of underutilised land.⁴¹⁴ Some of the weaknesses of the land reform programme during the first phase include that land redistribution and ownership were heavily skewed to the people with political connection with the ruling party rather than the farmers or communities.⁴¹⁵ A worse scenario was that the government did not have money to compensate the landowners and did not have finances to support the newly resettled African farmers so that they can establish the farming infrastructure needed to make land fertile and productive.⁴¹⁶ Although this scheme was found

⁴⁰⁷ Carson M and Calvo D, 2013. Paradigms in Public Policy: Theory and Practice of Paradigm Shifts in the EU, available at: <http://mahb.stanford.edu/wp-content/upload/2013/02/paradigm-in-public-policy.pdf> (accessed: 13 August 2015)

⁴⁰⁸ Chikozho 2008 et al (2008)

⁴⁰⁹ Chinamasa, P. 2002. MDC MPs Inhibited by Rhodes’ Spirit: Chinamasa. The Herald/All Africa Global Media via COMTEX. Africa News Services, May 23 2002.

⁴¹⁰ Dekker and Kinsey 2011: p2 -23

⁴¹¹ De Lisle 2013: 58-67

⁴¹² De Villiers et al (2003)

⁴¹³ Government of Zimbabwe. 1979. Southern Rhodesia: Constitutional Conference Held at Lancaster House, London September-December 1979, available at: <http://www.rhodesia.nl.lanc1.html> (accessed: 27 March 2025).

⁴¹⁴ Government of Zimbabwe. 1985. Land Acquisition Act 21 of 1985. Harare: Government Printers

⁴¹⁵ Gutu, O. 2015. MDC vindicated over land issue, available at: <http://nehandaradio.com/2015/01/05/mdc-vindicated-land-issue/> (accessed: 09 September 2015)

⁴¹⁶ Hall 1993: 275 - 296

to be rational and well planned but the willing buyer willing seller was sluggish and expensive.⁴¹⁷ Gutu posits that even though there was enough land for acquisition, the government was not in a position to target certain areas but it was guided by land being offered to it and to purchase land at market value.⁴¹⁸

2.5.1.1.2 The Compulsory Acquisition with fair compensation phase (1990-2000)

The precinct imposed by the Lancaster House Constitution expired on 18 April 1990 and this marked a new constitutional dispensation.⁴¹⁹ De Villiers posits that the expiry of the Lancaster House Constitution gave the post-independence government the first real opportunity to deal with the land issue and other constitutional matters in its own way.⁴²⁰ The coming into being of compulsory acquisition marked the emergence of a new policy paradigm shift.⁴²¹ The government of Zimbabwe legislated the introduction of its new land policy in two phases – first by amending the Constitution (Constitution of Zimbabwe Amendment Act 30 of 1990 and the Constitution of Zimbabwe Amendment Act 4 of 1993).⁴²²

The second phase was characterised by the introduction of new legislation such as the Land Acquisition Act, 3 of 1992, which allowed the government to compulsorily acquire land.⁴²³ These amendments allowed for land both commercial and unutilised to be compulsorily acquired for resettlement with fair compensation being paid in a reasonable time.⁴²⁴

The Land Acquisition Act of 1992 allowed government to compulsorily acquire land.⁴²⁵ This legislative prescript also empowered the president to acquire rural land compulsorily and set out the procedure in accordance with which that acquisition should take place.⁴²⁶ Section 19 of the Land Acquisition Act of 1992 stipulates that Parliament be also empowered to specify

⁴¹⁷ Hall et al (1989)

⁴¹⁸ Hanlon, Majengwa and Smart et al (2013)

⁴¹⁹ Hayes, M.2013. Encyclopaedia Britannica, available at: <http://global.britannica.com/EBchecked/topic/616563/United-States/77818/The-Rutherford-B-Hayes-administration> (Accessed: 26 March 2015)

⁴²⁰ Hill, R and Katarere, Y.2002. Colonialism and Inequity in Zimbabwe. Available at: https://www.iisd.org/pdf/2002/ensec_conserving_5.pdf (Accessed: 09 September 2015)

⁴²¹ Human Rights Watch/(HRW).2002. Fast Track Land Reform in Zimbabwe, available at <http://hrw.org/reports/2002/03/08/fast-track-land-reform-zimbabwe>. (Accessed: 27 March 2015)

⁴²² Human Rights Watch(HRW).2002. Land Reform in the Twenty Years After Independence, available at: <http://www.hrw.org/reports/2002/zimbabwe/ZimLand0302-02.html> (Accessed: 17 August 2015)

⁴²³ Indiana University.2005. Lancaster House Agreement. (Zimbabwe). Indiana Press Meridians: feminism,race, transnationalism, summer 2005, available at: http://en.wikipedia.org/wiki/Lancaster_House_Agreement (Accessed: 16 August 2015)

⁴²⁴ Jena, N.2015. Government in Land Policy U-Turn, Newsday, 05 January 2015, available at: <http://www.newsday.co.zw/2015/01/05/Zimbabwe-land-policy-u-turn/> (Accessed: 27 March 2015)

⁴²⁵ Jones, O.2015. Radical incrementalism in the opening (and closing) of makeshift utopias, available at: <https://ecologicalhumanities.files.wordpress.com/2015/05/radical-incrementalism-in-the-opening-of-utopias-final/pdf>. (Accessed: 14 August 2015)

⁴²⁶ Karumbidza, et al (2009)

through legislation certain principles upon which compensation could be calculated-thereby moving away from the market-value principle and the period, which the compensation had to be paid.⁴²⁷ This Act further established the Compensation Committee, which was mandated to determine a price tag for the acquired rural land.⁴²⁸ This was a sharp contrast to Lancaster House Constitution, which empowered the landholders to attach a price tag to the land.⁴²⁹

The implementation of the Land Acquisition Act, 3 of 1992 met with serious challenges since its inception.⁴³⁰ There was some antagonism between the land acquiring authority and the landowners which saw the landowners challenging the set prices in court.⁴³¹ In addition to the set challenges, another setback was lack of funding.⁴³² The absence of foreign support towards the implementation of the programme made the government digress from the Lancaster House constitutional guarantees.⁴³³

2.5.1.1.3 The Compulsory Acquisition Without Compensation Phase (2000-2002)

The compulsory acquisition of white owned land without compensation was known as the Fast Track Land Reform Programme (FTLRP).⁴³⁴ This project was carried out between 2000 and 2002, though allocation of farms and resettlement of people on the land acquired during the FTLRP period continued well beyond the 2000 to 2002 period.⁴³⁵

In order to implement the FTLRP, the government had to amend the laws governing the land reform and the constitution in order to legalise the FTLRP process.⁴³⁶ A draft Constitution which had proposal of clauses to compulsorily acquire land for redistribution without compensation was crafted and the government organised referendum on the new Constitution in February 2000.⁴³⁷ It is imperative to indicate that the new Constitution should have been approved was going to empower the government to acquire land compulsorily without compensation.⁴³⁸ A sad news was that even though the ruling party had adequate large majority in Parliament, the proposed draft Constitution by a ZANU-PF was defeated by 55%

⁴²⁷ Land Acquisition Act, 3 of 1992

⁴²⁸ Land Acquisition Amendment Act, 14 of 2001

⁴²⁹ Hanlon, Manjengwa and Smart et al (2013)

⁴³⁰ Hill, R and Katarere, Y. 2002. Colonialism and Inequity in Zimbabwe, available at: https://iisd.org/pdf/2002/envsec_conserving_5.pdf (accessed: 09 September 2015)

⁴³¹ Jena, N. 2015. Government in Land Policy U-Turn. Newsday. 5 January 2015, available at: <http://www.newsday.co.zw/2015/01/05/zimbabwe-and-policy-u-turn/> (accessed: 27 March 2015)

⁴³² Madhuku et al (2004)

⁴³³ Kinsey 1982: 92-113

⁴³⁴ Maphosa, Kujinga and Chingarande et al (2008)

⁴³⁵ Maphosa et al (1995)

⁴³⁶ Masiwa and Chigejo et al (2003)

⁴³⁷ Masunungure and Chimanikire et al (2007)

⁴³⁸ McCarthy-Jones and Turner 2011: 549-567

to 45%.⁴³⁹ Despite the rejection of the draft, Constitution by a ZANU-PF the government proceeded to amend the Constitution such that it was empowered to acquire white commercial farms without any obligation to compensate the landholders for the soil.⁴⁴⁰ Section 16A (1) of the new Constitution, government pledged to pay for the improvements that were made on the farms, but this did not happen because most farms acquired during (2000-2002) were acquired through violent land invasions.⁴⁴¹ The government of Zimbabwe was motivated by the political climate that prevailed in this period (2000-2002) rather than its genuine willingness to fast track land reforms.⁴⁴²

The Constitution of Zimbabwe Amendment Act, 5 of 2000 and the introduction of the Land Acquisition Act, 15 of 2000 were undertaken in a bid to authorise land acquisition without paying compensation.⁴⁴³ Madhuku asserts that this amendment constituted a fundamental departure from the previous approaches, which ensures that land reform proceeded on the assumption that compensation was mandatory, the difference being only over the proper measurement of the compensation.⁴⁴⁴

In contrast to the Land Acquisition Act, 3 of 1992, the amendment in the Land Acquisition Act, 15 of 2000 provided that 'should Britain not establish a compensation fund, compensation would only be payable for improvement to the land and not the value of the land itself.'⁴⁴⁵ It is noteworthy to indicate that Britain's failure to support the FTLRP since its implementation violated the Lancaster House Principles.⁴⁴⁶ The British failure to adhere to Lancaster Agreement angered the pro-Mugabe War Veterans Association and they organised and mobilised other war vets and landless villagers to go on a rampage marching on white owned farmlands.⁴⁴⁷ The land invasions through which "white farm owners were forced off the land violently without compensation marked the beginning of a complex crisis in Zimbabwe."⁴⁴⁸

⁴³⁹ Mitchell 2001: 587-601

⁴⁴⁰ Naldi 1993: 585-600

⁴⁴¹ Constitutional Amendment Act 5 of 2000

⁴⁴² Nyawo 2014:36-44

⁴⁴³ Constitution of Zimbabwe Amendment Act, 5 of 2000 and Land Acquisition Act 15 of 2000

⁴⁴⁴ Njaya and Mazuru 2010:164-185

⁴⁴⁵ Palmer 1990: 89-163

⁴⁴⁶ Rungusamy et al (2011)

⁴⁴⁷ Scoones, Marongwe, Mavedzenge, Murimbarimba, Mahenehene and Sakume 2011: 967-993

⁴⁴⁸ The Mike Campbell Foundation. 2008. Background to the Zimbabwean land crisis, available at: <https://www.mikecampbellfoundation.com/page/background-to-the-land-crisis> (Accessed: 16 August 2015)

2.5.1.1.4 Partnership between white commercial farmers and the indigenous black landholders (2014 to date)

There were no new significant policy shifts in the land reform trajectory between 2002 and 2014, since during this period government focused on the redistribution of the farms that have been compulsorily acquired or violently confiscated through FTLRP (2000-2002).⁴⁴⁹ Since 2014, the government of Zimbabwe has abandoned the chaotic and wanton violence, which characterised the FTLRP. Moreover, has adopted an incremental approach whereby, instead of encouraging land grabbing, the government allows the indigenous black landholders to venture into mutually beneficial partnerships and agricultural contracts with the once ejected white commercial farmers.⁴⁵⁰ The Minister of Lands and Rural Resettlement⁴⁵¹ said *“farmers were now free to choose who they wanted to engage in joint ventures and contract farming, thus emphasis was made on the preparation and production of a contract that protect both parties to encourage fair play and to prevent manipulation of one party by the other.”*

Despite the government efforts, there were some reports of indigenous people who complained of having been chased off by the resettled white farmers after pouring resources into the farms.⁴⁵² These incidents highlighted the need for improvement in the laws governing the new land reform approaches.⁴⁵³

2.5.2 Southern Africa

The sub-paragraph also clarifies the land dispossession experienced by Africans in southern Africa in the hands of the colonialists. It is important to indicate that the discussion of other southern African countries that were affected by colonialism is also important taking into account that these countries form part of the SADC organisation with its affected institution, namely the SADC tribunal that is the subject matter of this study.⁴⁵⁴

Achieme argued that access to land is a pressing social, economic and political issue across much of southern Africa and shared the history of colonial dispossession, which continues to

⁴⁴⁹ Masunungure and Chimanikire et al (2007)

⁴⁵⁰ Mitchell 2001: 587-601

⁴⁵¹ Douglas Mombeshora

⁴⁵² Nyawo 2014: 36-44

⁴⁵³ Richardson 2005: 541-565

⁴⁵⁴ De Wet, The Rise and Fall of the Tribunal of the Southern African Development Community: Implications of the Dispute Settlement in Southern Africa' www.repository.up.ac.za/dspace/bitsream/handle/2263/21831.DeWet_Rise_2013.pdf?sequence=1 accessed 7 August 2017

shape how SADC member states and their populations perceive land issues⁴⁵⁵. It is argued that it would be fair to state throughout the southern African region, that the land question is viewed through the lens of historic injustice.⁴⁵⁶ This study articulates that at the time of South Africa's transition from apartheid to democracy in 1994; whites owned eighty-seven percent of the country's land, even though they represented less than ten percent of the population.⁴⁵⁷ Achiume argued that the mismanagement of post-Apartheid land reform by South Africa's democratic government has exacerbated popular agitation on the land question and fuelled a popular political discourse on the need for South African politicians to emulate the Mugabe regime's approach to land reform.⁴⁵⁸ This study should provide guidance to other State Presidents of SADC countries to learn from the populist approach of the Mugabe regime that a land reform program must be implemented in accordance with the law, taking into account the property rights of landowners.⁴⁵⁹

Atuahene argued that the survey conducted in 2009 revealed that eighty-five percent of black respondents believed that white settlers took most of the land in South Africa unfairly; they therefore not have a right to the land.⁴⁶⁰ This survey further states that two-thirds of the black respondents were of the view that land must be returned to blacks in South Africa irrespective of the consequences for the current owners and for the political stability in the country.⁴⁶¹ Beyond South Africa, a 2001 review of the land redistribution in several southern Africa found redistribution defined as "repossession of land alienated by white settlers and its reallocation to blacks" is central to countries such as Swaziland, Namibia, and Malawi, in addition to Zimbabwe and South Africa.⁴⁶²

The land issue is viewed within the context of the post-colonial ideology under the former liberation movement, which now embraces a strategy of populist rhetoric to cover its policy failure.⁴⁶³ Achiume argued that the demands for access to land gain traction in the country due to its centrality to the welfare of many Namibians and persisting inequalities in land access.⁴⁶⁴ Even Botswana is also crippling with the colonial legacy of land expropriation although it is

⁴⁵⁵ Risse & Ropp 1999: 261-279

⁴⁵⁶ Sikkink 2013. 145 -163

⁴⁵⁷ Achiume 2017: 1-37

⁴⁵⁸ Moyo 2000: 1-54

⁴⁵⁹ Yonatan 2013: 437-454

⁴⁶⁰ Atuahene 2009: 31-32

⁴⁶¹ Ruppel 2008: 101-126

⁴⁶² Adams and Howell 2003: 1-65

⁴⁶³ Melber 2005: 135-136

⁴⁶⁴ Final Communiqué of 32nd Summit of SADC Heads of States and Government, par 24 (August 18, 2021)

primarily situated in the northern east of the country where colonial penetration was pronounced.⁴⁶⁵

Prior to Campbell case, the SADC member states lauded Mugabe's FTLRP and during the 2004 SADC Summit, Tanzania's President stated that *"Let the SADC speak with one voice and let the outside world understand, that to us Africans land is much more than a factor of production- we are spiritually anchored in the land of our ancestors....] Time has passed.⁴⁶⁶ We forgive those who did this to our ancestors but now we are in power, we cannot run away from our historical duty to set right these historical wrongs".⁴⁶⁷*

Achiume argued that in 2000 SADC repeatedly endorsed Mugabe's land reform project despite its violent and illegal dimension, trivialised gross human rights violations, and disparaged the international condemnation of Zimbabwe.⁴⁶⁸

2.6 Campbell's Socio-Political Dissonance and how it facilitated Zimbabwe's success

Achiume argued that the Tribunal's rejection of a race-conscious remedy to resolve an unquestionably racialised problem and its condemnation of Zimbabwe's post-colonial land reform program marked Campbell's as strikingly incongruent with fundamental concerns many southern Africans have about race-based inequality and land redistribution in the region.⁴⁶⁹

The socio-political dissonance is not the same as disagreeing with a given government about what law should be and it is different from failure to advance the political interest of a given government.⁴⁷⁰ It was argued that the socio-political dissonant decision is one that contradicts deeply held norms that a given society or community forms based on its social, political, and economic history.⁴⁷¹ Achiume argued that Campbell's case advanced a vision that differs markedly from a salient understanding among southern Africans of what substantive racial equality and just land reform should mean in the post-colonial era.⁴⁷² The ramifications of the socio-political dissonance in the context of the Zimbabwe land reform program was that it diminished the likelihood that key actors with the potential to protect or augment the authority

⁴⁶⁵ Manantsha and Maharjan 2010: 135-136

⁴⁶⁶ Moyo 2000: 5-6

⁴⁶⁷ Achiume 2017: 1-37

⁴⁶⁸ Nathan 2013: 66-67 Nathan 2013: 66-67

⁴⁶⁹ Nathan 2013: 66-67

⁴⁷⁰ Sadomba 2013: 1-56

⁴⁷¹ *Chinese Ship Endeavours to Get Weapons to Zimbabwe*, France24.com (April 22,2008) <http://observers.france24.com/en/20080422-chinese-ship-weapons-zimbabwe-angola>.

⁴⁷² Kleinbooi 2010: 1-32

of the Tribunal could or would do so.⁴⁷³ The decision that opposed Mugabe's interest was socio-politically resonant at the regional level and had more positive potential implications for the authority of the Tribunal.⁴⁷⁴ It was argued that the states short-circuit domestic compliance with international human rights norms by appealing to "countervailing national norms and value structures which emphasized sovereignty and domestic cohesion more than human rights principles."⁴⁷⁵ The difference is that the SADC backlash case was triggered by countervailing socio-political norms (race-conscious post-colonial reform to redress historical injustice and inequality) is both regional and consistent with international human rights principles.⁴⁷⁶

2.6.1 Dissonance at work: How Campbell affected the SADC Tribunal's Authority

Achiume argued that Mugabe's regime embarked on a protracted and proactive campaign not only to discredit but also to destroy the SADC Tribunal as a private access, human rights adjudicatory body.⁴⁷⁷ It is noteworthy that Campbell's case was either the first or the only adverse human rights ruling ever issued against Zimbabwe.⁴⁷⁸

It was argued that this case posed no meaningful direct threat to the FTLRP in that neither the litigant had any means of forcing Zimbabwe to comply with the decision taking into account the Amendment 17, which were operational constitutional provisions.⁴⁷⁹ Achiume stated that the challenging of FTLRP by applicants in Campbell's case played directly into the charged narrative of much consequence to the Mugabe regime.⁴⁸⁰ The support and solidarity of SADC member states towards the Mugabe regime destroyed the legitimacy of the applicant's claim.⁴⁸¹ Again, Campbell's litigation and decision were a direct affront to the ideological narrative at the core of this regime's campaign to stay in power.⁴⁸² They were the affronts in

⁴⁷³ Atuahene 2011: 120-121

⁴⁷⁴ *Celia W. Dugger and David Barboza, China May Give Up Attempt to Send Arms to Zimbabwe*, NY Times (April 23, 2008)

⁴⁷⁵ Risse and Ropp 1999: 145-163

⁴⁷⁶ Makau wa Mutua 1997: 92-95

⁴⁷⁷ Moyo 2009: 598-600

⁴⁷⁸ Achiume 2017: 1-37

⁴⁷⁹ Rene Vollgraaff, 'Piketty Says South Africa's Lack of Land Reforms fuels Inequality', Bloomberg Business, October 1, 2015 available at <http://www.bloomberg.com/news/articles/2015-10-01/piketty-says-south-africa-a-lack-of-land-reform-fuels-inequality>.

⁴⁸⁰ Adams & Howell 2001: 113-123

⁴⁸¹ Achiume 2017: 1-37

⁴⁸² De Villiers 2003: 120-134

the sense that they challenged the legality and morality of Mugabe's land reform program, emphasizing the brutality and corruption that riddled this project.⁴⁸³

Campbell's case presented two conflicting issues before the Tribunal, namely the applicant's concern about the expropriation of their farms without payment of fair compensation and citing that the FTLRP discriminated against them based on their race.⁴⁸⁴ On the other hand, Mugabe's regime mobilises support from SADC member states under the pretext of redressing the land dispossession, which took place during the colonial era.⁴⁸⁵ It is noteworthy that the arguments presented before the Tribunal had human rights transgressions.⁴⁸⁶ On a lighter note, the Tribunal judges were preoccupied by the fact that the government of Zimbabwe reneged from the SADC Treaty due to failure to adhere to the principles of human rights, democratic values, and the rule of law.⁴⁸⁷ Secondly, the judges found that the government of Zimbabwe expropriated white farms and that made the scale tilt in favour of the applicants and they made a ruling that the white farmers were racially discriminated.⁴⁸⁸ On the contrary, the tribunal judges during their assessment of the case have failed to consider the effects of colonialism and apartheid, which were also classified as crimes against humanity.⁴⁸⁹

On the same coin, the government of Zimbabwe was of the view that the implementation of FTLRP was justifiable in the sense that it sought to redress the land dispossession committed by white minorities during the colonial era.⁴⁹⁰ The plight of the African communities caused by displacement by the colonialists gave Mugabe's regime leeway and support from SADC member states because colonialists also dispossessed African people their land.⁴⁹¹ Legally speaking, the decisions and rulings made by the SADC Tribunal against the government of Zimbabwe were sound and legal in principle.⁴⁹² The SADC member states were in support of Zimbabwe, the SADC Head of States and Government could not impose sanctions for non-compliance against Zimbabwe because some of the member states were also faced with implementation of land reform in their respective countries.⁴⁹³

⁴⁸³ Melber 2005: 135-136

⁴⁸⁴ *Mike Campbell and Others (Pty) Ltd v Republic of Zimbabwe*

⁴⁸⁵ Meckler 2016: 1007-1038

⁴⁸⁶ *Mike Campbell and Others (Pty) Ltd v Republic of Zimbabwe*

⁴⁸⁷ *Mike Campbell and Others (Pty) Ltd v Republic of Zimbabwe*

⁴⁸⁸ *Mike Campbell and Others (Pty) Ltd v Republic of Zimbabwe*

⁴⁸⁹ Manantsha & Maharjan 2010: 128-130

⁴⁹⁰ *Mike Campbell and Others (Pty) Ltd v Republic of Zimbabwe*

⁴⁹¹ Chris Chanaka, 'SADC shows Approval for Mugabe', News Africa (August 17, 2004) available at <http://www.iol.co.za/news/africa/sadc-shows-approval-for-mugabe-219728>.

⁴⁹² *Mike Campbell and Others (Pty) Ltd v Republic of Zimbabwe*

⁴⁹³ Nkatha 2018: 1-32

The backlash against Campbell's case was politically profitable given Zimbabwe's socio-political landscape.⁴⁹⁴ The Mugabe regime decidedly seized this opportunity and eviscerated the SADC Tribunal's private access and human rights jurisdiction in the process.⁴⁹⁵ It was argued that the salience of regime solidarity in SADC and a commitment to anti-imperialism among member states contributed to the Tribunal's demise.⁴⁹⁶ Achiume states that beyond a general commitment to regime solidarity and anti-imperialism among SADC member states, the common challenge of unequal land ownership was inherited from the colonial era.⁴⁹⁷ The reason why SADC leaders showed solidarity towards Mugabe's regime was that they feared future scrutiny of their land reform efforts.⁴⁹⁸ It was argued that the Mugabe regime FTLRP that was viewed as a populist talisman was applauded in South Africa; however, the ruling party the African National Congress (ANC) distanced itself from the violent land seizures of the Mugabe regime.⁴⁹⁹ President Jacob Zuma has already pronounced a need to revise the country's willing buyer/willing seller approach to land reform.⁵⁰⁰ The African National Congress Youth League (ANCYL) vociferously applauded Mugabe's boldness and remained critical of the South African government for failing to pursue the radical reforms, which is viewed as necessary to address persisting apartheid-era land ownership.⁵⁰¹

It was argued that in South Africa land reform remains an issue at the centre of the dramatically shifting political landscape.⁵⁰² The emergence or rise of a populist leader Julius Malema, formerly the President of the African National Congress Youth League.⁵⁰³ In August 2013 he formed the Economic Freedom Fighters (EFF), which after months of its existence won over one million electoral votes in the 2014 General elections.⁵⁰⁴ The rapid rise of the EFF is in part

⁴⁹⁴ Atuahene, *Property Rights*, supra note 55, at 774. She defines 'property theft' as a community systematic deprivation of property with no just compensation leading to a generalized belief in the community that most owners would not own their property today but for these uncompensated takings.

⁴⁹⁵ Achiume 2017: 1-37

⁴⁹⁶ Nathan 2013: 1-35

⁴⁹⁷ Risse & Ropp 1999:261-270

⁴⁹⁸ Achiume 2017: 1-37

⁴⁹⁹ Nyathi 2017: 167-178

⁵⁰⁰ See, e.g. ANCYL Wants "Radical" Land Reform, News24 (April.30, 2010) <http://www.news24.com/SouthAfrica/News/ANCYL-wants-radical-land-reform-20100430>.

⁵⁰¹ See, e.g. ANC Youth League Statement on the visit to and Lessons from Zimbabwe, (April.8, 2010) <http://www.politicsweb.co.za/opinion/we-must-follow-zimbabwe-model-ancyl>

⁵⁰² Nicole Fietz, 'Up in Smoke: The SADC Tribunal and the Rule of Law in the Region, SAFPI Policy Brief No.11 (2012)

⁵⁰³ See, e.g. ANCYL Wants "Radical" Land Reform, News24 (April.30, 2010) <http://www.news24.com/SouthAfrica/News/ANCYL-wants-radical-land-reform-20100430>.

⁵⁰⁴ Economic Freedom Fighters, Taking back Our Stolen Land, (October.28, 2014) <http://www.politicsweb.co.za/documents/taking-back-our-stolen-land-eff>

attributable to its radical, populist platform and the foundational pillar of this platform was the "expropriation of South African land without compensation, for equal distribution."⁵⁰⁵

2.6.2 Situating Civil Society Mobilisation

Alter pointed out that a weak SADC secretariat and ineffective civil society mobilisation contributed to the demise of the SADC Tribunal.⁵⁰⁶ It was argued that the socio-political context is relevant, specifically the socio-political dissonance of Campbell's case.⁵⁰⁷ In tracing the interaction between the constituency context and the socio-political context as mediated in Campbell's case, both afford a richer account of why civil society actors failed to dissipate the Mugabe regime backlash.⁵⁰⁸ It was argued that civil society actors were required to influence SADC leadership by lobbying it through media and other channels, specifically targeting domestic, regional, and international audiences that might then put pressure on SADC member states to protect the Tribunal and seek enforcement on Campbell.⁵⁰⁹ It is noteworthy that the socio-political dissonance of Campbell's case limited the regional traction of civil society organisation and even shaped what type of civil society actors would invest in pro-Tribunal advocacy.⁵¹⁰ It was determined that most active civil society supporters of Campbell and their bid to save the Tribunal were mostly foreign-funded and were identified as elite civil society actors rather than popular civil society actors.⁵¹¹ Alter states that these civil society actors were norm-driven comprising several professional staff pursuing human rights mandates and their profiles depicted that they thinly disguised fronts for Western nations seeking to interfere with the internal politics of African nations.⁵¹²

It was argued that these elite civil society actors were doomed to failure given the findings of Campbell's case.⁵¹³ It was determined that a strategy to name and shame the backlash against the Tribunal overturning a post-colonial land reform program for targeting white farmers could not have mobilised regional popular or governmental support for the Tribunal.⁵¹⁴

⁵⁰⁵ Achiume 2017: 1-37

⁵⁰⁶ Alter 2015: 1-40

⁵⁰⁷ Achiume 2017: 1-37

⁵⁰⁸ Nathan 2013: 870 - 881

⁵⁰⁹ Fritz 2012: 5-50

⁵¹⁰ Chigara 2009: 530-538

⁵¹¹ Achiume 2017: 1-37

⁵¹² Achiume 2017: 1-37

⁵¹³ Sean Christie, Killed off by Kings and Pontates, Mail & Guardian (August 19, 2011), <http://mg.co.za/article/2011-08-19-killed-off-by-kings-pontates>.

⁵¹⁴ ANC wants Radical Land Reform, News24 (April 30,2010) <http://www.news24.com/SouthAfrica/News/ANCYL-wants-radical-land-reform-20100430>

Achiume reiterated that although many in the region were agitated by the violent implementation of land reform, few contested the validity of race-conscious land reform measures.⁵¹⁵ The absence of popular civil society actors from pro-tribunal advocacy hampered the campaigns and they could have persuaded SADC leaders and put pressure to support the Tribunal findings in Campbell's case or to resist President Mugabe's attack on the Tribunal.⁵¹⁶ Popular civil society refers to trade unions and religious and community-based organisations and these groups are politically relevant to SADC member state government because of their potential electoral influence.⁵¹⁷ A practical example of a popular civil society movement that mobilised the same year Campbell's case was decided, following the March 2008 presidential and parliamentary elections in Zimbabwe, the Mugabe regime organised a massive arms shipment from China that many believed they were intended for political repression on Zimbabwean civilians.⁵¹⁸

It was argued that because Zimbabwe is landlocked, the shipment had to transit through one of the coastal neighbours, then the southern African civil society in solidarity with Zimbabweans mobilised to prevent the docking of this arms shipment first in South Africa, then also in Mozambique and Angola.⁵¹⁹ When the shipment arrived in South Africa, the South African Transport and Allied Workers (SATAWU) refused to handle the cargo.⁵²⁰ They openly oppose calls from the South African government to comply with that country's trade obligations.⁵²¹

In addition, SATAWU collaborated with other unions working at docks in other SADC countries to curtail the weapons docking.⁵²² It was argued that SATAWU mobilisation had gained momentum whereby other trade unions, churches, and other civil society organisations staged protest actions against the shipment.⁵²³ Even the President of Zambia, Levy Mwanawasa called on fellow SADC member states to prevent the docking.⁵²⁴ Solidarity among trade unions, churches, and civil society movements curtailed Mugabe's regime's plans to

⁵¹⁵ Peterson 2012: 21-32

⁵¹⁶ Zongwe 2009: 20-25

⁵¹⁷ Achiume 2017: 1-37

⁵¹⁸ Chinese Shipment Endeavours to Get Weapons to Zimbabwe, France24.com, (April.22, 2008) <http://observers.france24.com/en/20080422-chinese-shi-weapons-zimbabwe-angola>

⁵¹⁹ Dugger and Barboza, China May Give Up Attempts to Send Arms to Zimbabwe, NY. Times (April 23, 2008), <http://www.nytimes.com/2008/04/23/world/africa/23zimbabwe.html?>

⁵²⁰ Chinese Shipment Endeavours to Get Weapons to Zimbabwe, France24.com, (April.22, 2008) <http://observers.france24.com/en/20080422-chinese-shi-weapons-zimbabwe-angola>

⁵²¹ Achiume 2017: 1-37

⁵²² Atuahene 2010: 765-774

⁵²³ Rene Vollgraaff, Piketty Says South Africa's Lack of Land Reform Fuels Inequality, Bloomberg Business, October 1, 2015, available at <http://www.bloomberg.com/news/articles/2015-10-01/piketty-says-south-africa-lack-land-reform-fuels-inequality>

⁵²⁴ Nkatha 2018: 1-32

smuggle ammunition to Zimbabwe, however, a similar approach should have been effected against the SADC member states decision to suspend the tribunal on account of the government of Zimbabwe's failure to comply with the decisions or rulings of the tribunal.⁵²⁵ Chiume reiterated that powerful transnational civil society mobilisation was possible under the right circumstances, including the suspension of the SADC Tribunal by the Summit.⁵²⁶ However, socio-political dissonance in Campbell's case alienated the civil society actors that might more effectively have dissipated the Mugabe backlash.⁵²⁷ Alter concurs that civil society triumph seems to have successfully pressured the SADC Justice Ministers to insist on the enforcement of Campbell's case and to propose of compromise tribunal that maintained private access.⁵²⁸

2.7 Conclusion

The implementation of land reform by the government of Zimbabwe whereby the farms were expropriated without payment of compensation was a human rights issue. The property rights of white farmers were infringed. Secondly, the expropriation of commercial farms belonging to the white community was viewed as racial discrimination. Judges in *Mike Campbell and Others (Pty) Ltd v the Republic of Zimbabwe* supported these views. The SADC Tribunal judges had to preside over a contentious issue in its early stage and that led to its demise by Mugabe's regime backlash, which enjoyed the support of SADC member states.

The question remains "Does the removal of Africans in their native land amounted to infringement of property rights? If that is the case, why is it difficult for whites to pay reparations to Africans? On the other hand, the land dispossession spearheaded by African governments against whites is tantamount to infringement of property rights. The land dispossession has to be distinguished, for example, property owners who inherited the land that was taken during the colonial era and the land purchased by the landowner for agricultural purposes. It is my submission that whites who purchased land for agricultural purposes should be paid compensation. Before the government can decide to expropriate this land, they should assess whether the land in question is used for agricultural purposes or not. If the landowner is using the land for producing food, then such land should not be considered for land reform.

⁵²⁵ A Pillay, 'Reflecting on the SADC Tribunal: A missed opportunity' (2013) SAFPI Policy Brief No.29 < <http://osf.org.za/wp-content/uploads/2015/08/Reflecting-on-the-SADC-Tribunal-a-missed-opportunity.pdf>>accessed 8 August 2017.

⁵²⁶ Article 23 of SADC Treaty provides that SADC 'shall seek to involve fully the people of the Region and key stakeholder in the process of regional integration'.

⁵²⁷ Achiume 2017: 1-37

⁵²⁸ Adams & Howell 2001: 1-45

CHAPTER 3:

The Institutional structure of the Southern African Development Coordinating Committee (SADCC) and Southern African Development Committee (SADC)

3.1 Introduction

This chapter will discuss the institutional structure of one of Regional Economic Community (REC) located in southern Africa, namely Southern African Development Community (SADC). The previous chapter posited the effects of colonialism in southern Africa and particularly Zimbabwe as one of the southern African countries experienced land dispossession by colonialists, which affected the livelihood of Zimbabweans? The establishment of the Southern African Development Coordinating Communities (SADCC) by southern African leaders was a mechanism of ending their economic dependency on apartheid South Africa and western countries. In *Mike Campbell and Others (Pty) Ltd v The Republic of Zimbabwe*, the SADC member states showed their solidarity by failing to reprimand the government of Zimbabwe to comply with SADC Tribunal rulings. These member states do not want to act as heroes because some of them are still yet to implement by land reform program to redress the land imbalance of the past in their respective countries. The member states that form part of the SADCC did not want to establish a regional court that would settle the disputes but they only wanted to form an intergovernmental organisation that would respect the sovereignty of their countries.

Subsequently, the Front Line States (FLS) met to establish a regional organisation commonly known as the Southern African Development Community. The primary purpose of the establishment of SADC was to ensure that there is economic integration and to allow the unrestricted movement of goods and persons in the SADC region.

3.2 Sovereignty Theory

This sub-heading explains the sovereignty theory as it is relevant in this thesis since it forms the basis of the SADC member states protection of their independence under the pretext of sovereignty. Most of the African states subscribes to the sovereignty principle in their countries as a mechanism of protecting their independence from interference from other member state or Western countries.

Bodin has developed the concept of sovereignty as a real contribution to political discourse or philosophy.⁵²⁹ Sovereignty is defined as supreme power over citizens and subjects, unrestrained by law.⁵³⁰ Bodin define this concept as a perpetual power as distinguished from any power that is limited to a specific period. In his discussion, Bodin stated that the sovereign must exercise the right to make peace, war and to appoint magistrates, to decide all causes in the last resort, and to grant pardons.⁵³¹ The attributes of the sovereign are to give laws to citizens collectively and severally without consent of a superior, an equal or an inferior.⁵³² Sovereignty is viewed as being established or appropriated by force but this concept is either inherent or necessary is not created by force event though an actual sovereign may be.⁵³³ Bodin went further to expand this theory as being conferred. The transference of legal sovereignty from one hand to another and this is done when people that confer it must have possessed it.

Bodin posits the characteristics of sovereignty, which are the following:

1. **Perpetual:** meaning sovereignty is not meant for a specific period;
2. **Inalienable:** the sovereign cannot delegate this authority or power to authority either without or within the state;
3. **Unrestrained:** sovereignty is the source of law and as such sovereignty is unrestrained by law. The laws of the land are under the control of the sovereign. The sovereign is competent to impose and collect taxes.
4. **Supreme Authority:** sovereign is the head of the state and as such the head of all corporate associations because these corporate bodies exist only at the will of the state.
5. **Limitations of the sovereignty:** the sovereign authority was unlimited and unrestrained. Under the following restrictions, it was limited:

⁵²⁹ Andrew 2011: 1-10

⁵³⁰ Austin 1962: 4-7

⁵³¹ Crawford 1979: 26-35

⁵³² Hume 1982: 85-86

⁵³³ Hotman 1972: 172 - 205

6. **Laws of God and Nature:** the sovereign, though being the head of state and foundation of law was not above all kinds of laws. He must obey the laws of God and Nature.
7. **No penalty for violation by a sovereign:** Bodin has not suggested any penalty for a sovereign who violated the laws of nature. The reason for such was that he felt that the sovereign was only accountable to God alone and did to his subjects.
8. **Honour the Commitment:** the sovereign is supposed to make certain promises at the time of his coronation. It is not legally challengeable in the court of law, yet morally bound to honour those commitments.
9. **Respect for Property:** the sovereign must respect the institution of private property. He must not confiscate it without a very valid reason. Bodin is of the view that property is a social institution. Sovereignty is political rather than social; therefore, both should not be intermingled.
10. **Constitution:** certain laws called the constitution of the state bind the state. These are the basis for the very existence of the state. Once the sovereign has agreed and has proven royal assent to the constitution he is bound to respect the constitution.

3.2.1 Rights of the Sovereignty

Bodin demonstrates the rights of the sovereignty as follows:

1. **Dictation:** the sovereign has the most right which is to dictate and to expect obedience from the subjects;
2. **Imposition of taxes:** the sovereign has the right to impose taxes individually as well as collectively and make arrangements for their collection;
3. **Coining currency:** the sovereign has a right to coin money for proper regulation of state transactions; and
4. **Appointments:** the state has the right to make appointments. A sovereign must appoint officers in the state both for his interest and in the interest of the state and the individuals.

Bodin's sovereignty theory primarily focused on absolute sovereignty whereby the sovereign is bestowed with all the powers to make laws and appoint officials within government.⁵³⁴ A concern is that no one can question the decisions of a rule or sovereign and the issues that may be raised by the people are considered as advice.⁵³⁵ In giving the theory of sovereignty a context to the discussion of this study, especially regarding the government of Zimbabwe,

⁵³⁴ Bilder 1994: 10-11

⁵³⁵ Henkin 1989: 216 -233

which expropriated private property without compensation, fits in this theory.⁵³⁶ In *Mike Campbell and Others (Pty) Ltd v the Republic of Zimbabwe*⁵³⁷ case, the government of Zimbabwe led by then President Robert Mugabe made a referendum to amend the Zimbabwean Constitution to insert Amendment 17 which allowed the government to expropriate private property (farms) without compensation. The amendments further prohibited the farm owners from seeking legal recourse to challenge the infringement of their property rights.⁵³⁸

It is imperative to indicate that the government of Zimbabwe subscribes to constitutional democracy whilst protects its sovereignty with jealousy.⁵³⁹ How the government was run under the administration of then President Robert Mugabe showed an element of absolute sovereignty, for example, the decision to amend fundamental provisions of the Zimbabwean Constitution such as the protection of private property and access to justice.⁵⁴⁰ Changing the fundamental provisions of the Constitution of a country to suit a particular narrative, such action is tantamount to constitutional dismemberment.⁵⁴¹ This assertion is based on the legal effect of the fundamental changes made in the Constitution of Zimbabwe, which lead to the infringement of the property rights of the white farmers.⁵⁴²

Additionally, the decision to recall the Zimbabwean judges who were seconded to form the panel of judges of the SADC Tribunal also demonstrated how the sovereign operates by taking sole decision and he cannot be questioned.⁵⁴³ On the other hand, the government of Zimbabwe is a constitutional country; its government comprises three legs, namely the executive, legislature, and the judiciary.⁵⁴⁴ It is important to mention that each leg or sphere is independent of one another.

Locke⁵⁴⁵ commenced with a state of nature, which is not the same as Hobbes, state of war but his theory focuses on the condition where individual rights are imperfectly secured.⁵⁴⁶ To ensure that individual rights are protected, a guarantee may be obtained, there is established

⁵³⁶ *Mike Campbell and Others (Pty) Ltd v The Republic of Zimbabwe*

⁵³⁷ (2008) SADCT 2

⁵³⁸ (2008) SADCT 2

⁵³⁹ Nyathi 2017: 167-178

⁵⁴⁰ Constitution of Zimbabwe (as amended in 2005)

⁵⁴¹ Mota Makore & Lubisi 2021:246-257

⁵⁴² *Mike Campbell and Others (Pty) Ltd v The Republic of Zimbabwe*

⁵⁴³ *Mike Campbell and Others (Pty) Ltd v The Republic of Zimbabwe*

⁵⁴⁴ Constitution of Zimbabwe (as amended in 2005)

⁵⁴⁵ Hooker 1689: 1593 - 1598

⁵⁴⁶ Letter de la Montagne, 1764, Du Contrat Social, 1762, Government de Pologne, 1772

a civil or political society and then government.⁵⁴⁷ The establishment of the civil or political society and government lead to every man to surrender irrevocably to the community his natural rights in as far as necessary for the common good.⁵⁴⁸ The political society is established by a fundamental law, the legislature, which is the supreme governmental power.⁵⁴⁹ This body is called the source of law⁵⁵⁰, the representative of the will of the society. The legislature is the highest governmental representative of the political society, which has given it life.⁵⁵¹ Locke posits that legislature is a power to protect and preserve, not to destroy; hence, it is not arbitrary over the lives and fortune of the people.⁵⁵² In case when the legislature is not in session and the Executive power is vested in a single person who has also share in the legislature.⁵⁵³ Locke stated that a single person might also be called supreme as long as his action is by the law and he may be looked upon as the image, phantom, or representative of the Commonwealth.⁵⁵⁴ Locke concurs with Bodin that the sovereign or ruler who stands as a king or legal sovereign is supreme while within the limits of the law.⁵⁵⁵ The only differences is that Locke's theory focuses on the three tiers of government which are expected to function independently from each other whilst Bodin's theory focus on absolute sovereignty.⁵⁵⁶ The limitation of power vested to a sovereign according to Bodin is that he or she must obey the laws of God or Nature.⁵⁵⁷ On the other hand, Locke buttresses that the executive has the powers to govern or lead the government but laws also limit these powers.⁵⁵⁸ Locke's theory demonstrates that the executive as the supreme should act within the legal parameters while the legislature is the sovereign governmental organ so long as the government endures; and that the political society is⁵⁵⁹ latent, and on the dissolution of the government, becomes the active sovereign. In context to the discussion of this study on the legal effects of the disbandment of the SADC Tribunal by SADC member states after they have failed to reprimand the government of Zimbabwe for a failure to implement the rulings of the SADC Tribunal in *Mike Campbell and Others case*.⁵⁶⁰ The government of Zimbabwe as a constitutional democratic country and a member of the African Union (AU) and of the United

⁵⁴⁷ History of Civil Society, 1764, Principle of Moral and Political Science, 1792

⁵⁴⁸ Palmer 1969: 12-23

⁵⁴⁹ Ricoeur 1976: 22-34

⁵⁵⁰ Merriam 2001: 1 -187

⁵⁵¹ Pocock 1972: 1-34

⁵⁵² Rorty 1984: 49-53

⁵⁵³ Skinner 1969: 48-49

⁵⁵⁴ Merriam 2001: 1 - 187

⁵⁵⁵ Maritain 1969: 41-43

⁵⁵⁶ Van der Vyver 1991: 321-324

⁵⁵⁷ Bodin et al

⁵⁵⁸ McRae 1962: 23-34

⁵⁵⁹ Ritchie 2019: 8- 249

⁵⁶⁰ *Mike Campbell and Others (Pty) Ltd v The Republic of Zimbabwe*

Nations has human rights obligations at both the regional and international level.⁵⁶¹ The government of Zimbabwe ratified the following regional and international legal instruments⁵⁶², namely the African Charter on Human and People's Rights (African Charter); African Charter on the Rights and Welfare of the Child; AU Convention Governing Specific Aspects of Refugee Problems in Africa; Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa; and AU Convention for the Protection and Assistance of Internally Displaced Persons in Africa.

International legal instruments ratified by the government of Zimbabwe are as follows⁵⁶³, International Covenants on Civil and Political Rights (ICCPR); International Covenants on Economic, Social and Cultural Rights (ICESR); Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); Convention on the Rights of Persons with Disabilities (CRPD); Convention on the Rights of the Child; and International Convention on the Elimination of All Forms of Racial Discrimination (CERD).

The government of Zimbabwe's decision to amend its constitution falls squarely into the domain of the legislature which has the powers to formulate laws, including amendment of the laws, which are in use by the people.⁵⁶⁴ The present issue whereby the Zimbabwean Constitution was amended by inserting Amendment 17, which permitted the government to expropriate private property (farms) without compensation, was the action of the legislature.⁵⁶⁵

The action infringed the property rights of the farm owners, therefore Bodin's theory of sovereignty states that the sovereign is prohibited from infringing social rights which is considered private.⁵⁶⁶ In line with Bodin's theory the decision of the executive (sovereign), the then President Robert Mugabe to allow the amendment of the Zimbabwean Constitution to allow expropriation of private farms without compensation was unlawful and invalid.⁵⁶⁷ This theory emphasized that the infringement of private property by the government is illegal.⁵⁶⁸ On the other hand, Locke encourages that there should be checks and balances on the functioning of the executive, legislature, and judiciary.⁵⁶⁹ In *Mike Campbell and Others' case*, the legislature went deeper to make the amendments in the Zimbabwean Constitution which

⁵⁶¹ Nkatha 2018: 1-32

⁵⁶² Laursen 2010: 3-4

⁵⁶³ Held 1984: 3-4

⁵⁶⁴ Constitution of Zimbabwe (As amended in 2005)

⁵⁶⁵ *Mike Campbell and Others (Pty) Ltd v The Republic of Zimbabwe*

⁵⁶⁶ Kleffens 1953:52-64

⁵⁶⁷ Chigara 2012: 344-356

⁵⁶⁸ Bodin et al

⁵⁶⁹ Bodin 1951: 71-83

trampled the social rights of the private property owners (white farmers) when they allowed the government to expropriate these farms without payment of compensation.⁵⁷⁰ The denial of the property owners to seek legal recourse against the infringement of their property rights is another concern.⁵⁷¹ The denial of access to justice is another human rights issue, which must be ventilated so that the victim's demand for justice can be heard in a court of law.⁵⁷² According to Locke's theory, the conduct of the executive must be within the parameters of the law.⁵⁷³ However, in *Mike Campbell and Others*, the decision of the executive to expropriate the private property of white farmers without compensation followed the amendment of the Zimbabwean Constitution which created an opportunities to allow government of Zimbabwe to change the fundamental provisions.⁵⁷⁴ Prior to the amendment of the constitution, the Zimbabwean Constitution protected private properties against the expropriation without compensation.⁵⁷⁵

3.3 The Front Line States (FLS) as a Stepping Stone to SADCC

The establishment of the Southern African Development Coordinating Committee (SADCC) by FLS was a political response to both apartheid South Africa and colonial rule in Southern Africa came into operation in 1974.⁵⁷⁶ The original members of the FLS were Angola, Botswana, Mozambique, Nigeria, Tanzania, and Zambia, whilst Zimbabwe joined later in 1980.⁵⁷⁷ The primary objective of the FLS was to focus on decolonization and termination of white minority regimes in the former Rhodesia, South West, and South Africa.⁵⁷⁸ Decolonization was a major theme of African political consciousness and was a crucial impetus in the formation of the Organisation of African Unity (OAU).⁵⁷⁹ The political ideology of the FLS was based on Pan-Africanism and their solidarity was based on three factors, namely it operated within an ad hoc fashion of decision-making with presidential summitry, secondly, the FLS self-imposed restriction on membership generated a simplified management structure and reduction of intra-FLS conflicts, thirdly, the informal nature of the FLS afforded the members the flexibility to pursue independent policies.⁵⁸⁰ It is noteworthy that the FLS expressed its role in economic cooperation outside the region as well as inside; the key objective of the organisation was the politico-security oriented strategy as a response

⁵⁷⁰ De Wet 2013: 1-34

⁵⁷¹ Hulse 2016: 1-30

⁵⁷² *Mike Campbell and Others (Pty) Ltd v The Republic of Zimbabwe*

⁵⁷³ Adjolohoun 2020: 1-40

⁵⁷⁴ Samtani 2018: 197-225

⁵⁷⁵ Botha 2009:41-52

⁵⁷⁶ Hwang 2007:55-72

⁵⁷⁷ Nils 1977: 1-15

⁵⁷⁸ Smith & Hogan 1990: 490-530

⁵⁷⁹ Atkinson 1999: 524-526

⁵⁸⁰ Whiteman 2000: 41-47

to destabilisation of an apartheid South Africa policy.⁵⁸¹ The objective of destabilisation policy was developed by PW Botha, former President of the Republic of South Africa, which enforced against neighbouring countries by dictating his terms and preserving access to regional resources without compromising its political system.⁵⁸²

Under the asymmetrical environment between the white minority in domination and the black majority in subordination and/or resistance, national sovereignty, which was centrally placed into the realist security thinking in the region, was compromised by any cooperative initiative rather than strengthened in order not to preserve newly acquired independence.⁵⁸³ Sovereignty was also used to enhance the cohesion of African nationalism in line with Pan-Africanism of liberation.

3.3.1 Southern African Development Co-ordinating Conference (SADCC)

The SADCC was established in April 1980 in Lusaka, Zambia with the primary objective of reducing their economic dependency on South Africa, thus supporting the struggle against apartheid.⁵⁸⁴ The founding members were nine southern African countries, namely Angola, Botswana, Mozambique, Swaziland, Tanzania, Zambia and Zimbabwe, including Malawi.⁵⁸⁵ This conference was not driven by legal instruments but by solidarity among former liberation movements that now led governments in most of the nine founding members.⁵⁸⁶ It is noteworthy to mention that Zimbabwe attained its independence the same year the SADCC was established.⁵⁸⁷ The abolition of bureaucracy through the establishment of this conference gave responsibility to the independent state to implement its common aims to promote inter-state economic and infrastructure projects, mobilise resources for development, secure international understanding of, and support for, the group's goals.⁵⁸⁸ Even though SADCC was established in 1980, the idea of regional economic cooperation encompassing both southern and eastern Africa dates back to 1974 when the Zambian President, Kenneth Kaunda proposed the establishment of a trans-continental belt of independent and economically powerful nations from Dar-es-Salaam and Maputo on the Indian Ocean to Luanda on the Atlantic.⁵⁸⁹

⁵⁸¹ Herberle 2002: 257-264

⁵⁸² Poku 2001: 99-110

⁵⁸³ Chigara 2001: 36-65

⁵⁸⁴ SADC's Vision, available at <http://sadc.int/>.

⁵⁸⁵ Richard & Elaine 2009:1-4

⁵⁸⁶ Viljoen 1999: 208-229

⁵⁸⁷ Nagar & Paterson 2013: 9-12

⁵⁸⁸ Nagar & Paterson 2013: 9-12

⁵⁸⁹ Nagar & Paterson 2013: 9-12

As a precursor to the establishment of SADCC, several meetings took place among leaders of the Front Line State the important one was held in Arusha, Tanzania between 3 and 4 July 1979.⁵⁹⁰ Subsequently, the Arusha meeting was followed by the Lusaka Economic Summit, which produced the declaration leading up to the formation of SADCC.⁵⁹¹ It is imperative to indicate that the Front Line State was a diplomatic coalition of independent southern African States, which initially formed to counter apartheid South Africa and support the region's liberation movements.⁵⁹² The FLS raised a concern regarding the economic dominance of South Africa in the region and such control required a counter strategy that was the collective economic strategy for lessening their dependence on South Africa.⁵⁹³ The primary objective of a grouping of FLS was the coordination of activities of the national governments in the region.⁵⁹⁴ The SADCC summit of 1981 reached an agreement on the institutional framework for the organisation and sought to reduce the bureaucratic level at the regional level.⁵⁹⁵ It is noteworthy that the national governments were responsible for implementing the SADCC programs, therefore lay primarily with the governments of the member states.⁵⁹⁶

The SADCC did not place the realisation of human rights attainment of democratic governance or even the entrenchment of the rule of law, including judicial organs.⁵⁹⁷ The primary goal of the conference was the reduction of economic dependency on South Africa by southern African countries was beneficial for Botswana, Lesotho, and Swaziland due to their proximity. Again, these countries had signed a customs union pact with South Africa since 1910 and had belonged to the Southern Africa Customs Union since 1969.⁵⁹⁸

Namibia joined the conference in 1992 and it freed itself from South African rule and claimed independence in 1988.⁵⁹⁹ The SADCC changed its name in 1992 and called the Southern African Development Community (SADC). This newly established regional organisation entered into a treaty-based organisation that adopted a range of values including the pursuit of integrated development in the sub-region. One of the fundamental objectives of the SADC was recognising a need for peace and stability, good governance, and the building of regional institutions to support these goals.⁶⁰⁰ South Africa joined the SADC two years later after its

⁵⁹⁰ Onwuka & Sesay 1985: 190-191

⁵⁹¹ Ruppel 2008: 101-110

⁵⁹² Nkatha 2018: 1-32

⁵⁹³ Nkatha 2018: 1-32

⁵⁹⁴ Visser 2008: 157-168

⁵⁹⁵ Onwuka & Sesay 1985: 205-219

⁵⁹⁶ Nkatha 2018: 1-32

⁵⁹⁷ Nkatha 2018: 1-32

⁵⁹⁸ Nagar & Paterson 2013: 9-12

⁵⁹⁹ SADC Website <http://www.sadc.int/index/browse/page/120> (accessed 12 May 2012)

⁶⁰⁰ Mbuende, presentation at CCR Policy advisory group seminar, "South Africa in Southern Africa", Cape Town, 19-20 November 2012

first democratic elections in 1994, which brought to an end the apartheid era and led to the official dissolution of the Front Line States.⁶⁰¹ The establishment of SADC brought many contradicting changes such as promoting the pooling of regional resources to address development problems that some countries could not resolve on their own, an approach that subsequently became a development paradigm in Africa and beyond.⁶⁰² Other countries inherited models of integrated infrastructure and services created by the previous system or relatively ad-hoc bi- or multi-national sectoral coordination.⁶⁰³

The SADCC's only achievement was the establishment of a firm foundation for regional integration in Southern Africa.⁶⁰⁴ For SADC member states to achieve macroeconomic stability and development, they require institutional capacity and sufficient resources for southern Africa's integrated development agenda.⁶⁰⁵ One of its weaknesses is that it lacks bureaucratic capacity, therefore its institutional capacity⁶⁰⁶. As a mechanism of attaining the goal of economic liberation in the region, the SADCC member states prioritised the pursuit of collective self-reliance to achieve political emancipation in the region.⁶⁰⁷ The SADCC emerged out of the interaction of regional, continental, and global forces and this evolution should not be limited to Southern African efforts alone, both the influence of Western actors and African states were responsible for creating and evolving the conference.⁶⁰⁸ The establishment of SADCC is a mixed product of African initiatives and European influences.⁶⁰⁹

There was enormous support that SADCC received from Western donors in the northern hemisphere and the conference evolved not only through the voices of African leaders such as Nyerere, Kaunda, and Khama in the 1960s but also from its unique approach to regional cooperation.⁶¹⁰ It is noteworthy to mention that the leaders of SADCC chose a different way of the project or sectoral responsibility, which differs from those of other organisations like the Economic Community for West African States (ECOWAS) and Southern African Customs Union (SACU) that pursue economic integration.⁶¹¹

⁶⁰¹ Chigara 2012: 341-377

⁶⁰² Nagar & Paterson 2013: 9-12

⁶⁰³ Nagar & Paterson 2013: 9-12

⁶⁰⁴ Venter & Neuland 2007: 173-175

⁶⁰⁵ Krygier 2000: 59-60

⁶⁰⁶ Nagar & Paterson 2013: 9-12

⁶⁰⁷ Hwang 2007: 54-72

⁶⁰⁸ Tamanaha 2000: 52-60

⁶⁰⁹ Settles 1996: 1-10

⁶¹⁰ Chigara 2012: 341-377

⁶¹¹ De Wet 2013: 45-63

3.3.2 The Institutional Development on peace and security

The era of apartheid ended in 1992 and the Cold War ended, the SADCC was dissolved and states concluded a treaty establishing SADC as an institutional body with a legal persona.⁶¹² The SADC differs from SADCC in three major respects, it includes South Africa, its primary goal goes beyond economic co-ordination to encompass regional integration, and its mandate extends to the political and security spheres.⁶¹³ The decision to replace SADCC was based on broadening the scope of the organisation's mandate and goals.⁶¹⁴ Secondly, the concern was a deep marginalisation of sub-Saharan Africa.⁶¹⁵ Thirdly, the establishment of SADC was to strengthen the region's international trade and political affairs, fourthly, a host of socio-economic problems that transcended borders and could be addressed at the national level struck southern Africa⁶¹⁶. Fifthly, the end of the Cold War led to widespread acceptance of multi-party political systems and the ending of ideological tension between states.⁶¹⁷

3.2.3 The emergence of SADC

SADC was established in January 1992 during the meeting of the SADCC Council of Ministers that approved a proposal to transform SADCC into a fully integrated economic community, followed by the signing of SADC Treaty in October 1992.⁶¹⁸ The SADC Treaty makes a binding obligation on member states to promote economic integration towards a fully developed common market.⁶¹⁹ It is noteworthy that all member states ratified the Treaty in September 1993, which came into operation in October 1993.⁶²⁰ Some of the SADC Treaty objectives are harmonisation of political and socio-economic policies and plans of member states, encouragement of economic, social, and cultural ties across the region, development of policies aimed at the progressive elimination of obstacles to the free movement of capital, labour, goods, and services; and promotion and harmonisation of international relations of member states.⁶²¹

Art.5 (1) (b) of the SADC Treaty highlighted the objectives of SADC including the promotion of common political values, systems, and other shared values that are transmitted through

⁶¹² SADC Treaty, 1992

⁶¹³ Nathan 2006: 605-622

⁶¹⁴ Burger 1982: 274-275

⁶¹⁵ Chigara 2012:341-377

⁶¹⁶ Malan 1998: 112-123

⁶¹⁷ Nathan 2006: 605-622

⁶¹⁸ Saurombe 2012: 467-472

⁶¹⁹ Ruppel 2009: 173

⁶²⁰ Nkatha 2018: 1-32

⁶²¹ SADC Declaration and Treaty, 1992

institutions that are democratic, legitimate, and effective.⁶²² This objective entails the achievement of self-sustaining development, economic growth, and poverty alleviation through regional integration, the achievement of complementarity between national and regional strategies and programs, the evolution of common political values and institutions, and the promotion and defence of peace and security.⁶²³ It is important to indicate that under the TROICA system, the leadership is performed collectively and the system vests authority in the incumbent, chairperson, the incoming chairperson, and the immediate previous chairperson.⁶²⁴

Art.4 stipulates that SADC and its members must act by the principles of sovereign equality of states, solidarity, peace and security, human rights, democracy and the rule of law, equity, balance and mutual benefit, and peaceful settlement of disputes⁶²⁵. Art.22 requires states to conclude and ratify protocols spelling out the goals, scope, and manner of cooperation and integration in seven sectors.⁶²⁶ The SADC's highest decision-making body is the Summit, which consists of Heads of State or Government and chaired by one of them on a rotating basis.⁶²⁷ The Treaty also provides for a Council of Ministers to oversee the functioning of the organisation, a Tribunal to adjudicate disputes, an Executive Secretary appointed by the Summit, and a Secretariat that is based in Botswana.⁶²⁸ SADC experienced several challenges, which affected this regional organisation from attaining its objectives.⁶²⁹

3.3.4 The Absence of Common Values

The development of common political values in the interest of stability, integration, and community building is one of the SADC's primary goals and it was part of the rationale of its establishment.⁶³⁰ It is sad to indicate that SADC has failed to meet this challenge, for example in the domestic sphere its member states have failed to reach consensus on the basic principles of governance.⁶³¹ A practical example is Swaziland and the Democratic Republic of Congo (DRC), which are not democratic, in addition, there are de jure democracies whose executives are intolerant of dissent, hardly accountable to parliament, and insufficiently committed to respect for human rights and the rule of law.⁶³² It is noticed that politicians in the

⁶²² SADC Declaration and Treaty, 1992

⁶²³ Art.5 of SADC Declaration and Treaty

⁶²⁴ Odhiambo & Chitiga 2016: 105

⁶²⁵ SADC Declaration and Treaty, 1992

⁶²⁶ SADC Declaration and Treaty, 1992

⁶²⁷ SADC Declaration and Treaty, 1992

⁶²⁸ Nathan 2006: 605-622

⁶²⁹ Chigara 2012:341-356

⁶³⁰ Art.2(2)(b) of the Protocol on Politics, Defence and Security Co-operation

⁶³¹ Jervis 1983: 173-194

⁶³² Nathan 2006: 605-622

region 'talk democracy but use undemocratic means to stay in power'⁶³³. The 2004 Freedom House survey of political rights and civil liberties revealed that countries such as Botswana, Lesotho, Mauritius, Namibia, Seychelles, and South Africa are free.⁶³⁴ On the other hand, Malawi, Mozambique, Tanzania, and Zambia are partly free, whilst Angola, the DRC, Swaziland, and Zimbabwe as 'not free'.⁶³⁵

It is noteworthy that in the absence of common political values, SADC has been unable to address crises that arise when states deviate totally from their official norms.⁶³⁶ A practical example is the position of Zimbabwe and other countries such as Angola and Swaziland where democracy and respect for human rights play a second fiddle to the comfort and power cravings of leaders.⁶³⁷ Disunity among member state on mechanisms they use in dealing with conflicts is worrisome, for example, countries such as Angola, Namibia, and Zimbabwe prefers defence cooperation and collective security through a mutual defence pact that would lead in time to a Nato-type organisation.⁶³⁸ On the other hand, Botswana, Mozambique, South Africa, and Tanzania preferred political cooperation and diplomatic means of peace making through a common security regime.⁶³⁹ The opposing views between South Africa and Zimbabwe regarding the use of armed forces and the use of diplomatic and peaceful methods have created these camps to work on cross-purposes resulting in divergent actions or no action at all in the face of an increasing number of crises.⁶⁴⁰

Another example that signalled the absence of common values was the signing of a mutual defence treaty between DRC, Namibia, and Zimbabwe without official notice to SADC.⁶⁴¹ This treaty provides that an armed attack against one of the signatories will be considered an attack against others and that each other will assist a signatory under attack through such action as it deemed necessary, including the use of armed forces, to repel the attack and to restore

⁶³³ Qouted in "Leaders Should Practice Democracy", South African Press Association, 15 October 2000.

⁶³⁴ Piano & Puddington (eds), *Freedom in the World 2004: the Annual Survey of Politcal Rights and Civil Liberties*

⁶³⁵ Piano & Puddington (eds), *Freedom in the World 2004: the Annual Survey of Political Rights and Civil Liberties*.

⁶³⁶ Nathan 2006: 605-622

⁶³⁷ 'Mugabe Will Not Be Swayed by the Polite Coaxing of Despotic Peers', Sunday Times (South Africa), 20 January 2022.

⁶³⁸ Lambrechts 2001: 22-27

⁶³⁹ Nathan 2006: 605-622

⁶⁴⁰ Nathan 2006: 605-622 Nathan 2006: 605-622

⁶⁴¹ See *Towards the Southern African Development Community; and SADCC, Theme Document (Maputo, January 1992)*

peace and security.⁶⁴² The ramifications of SADC member states lack of affinity and unity deferred and watered down its regional defence pact.⁶⁴³

The principles of solidarity and anti-imperialism, welded the history and ideology cut across the divisions, for example in the case of Zimbabwe, and leaders who break ranks are vilified.⁶⁴⁴

3.3.5 Weak States

African countries are weak in many ways and their weakness contributes significantly to insecurity and violence at national and regional levels.⁶⁴⁵ These weakness and insecurity leads to weak multilateral bodies.⁶⁴⁶ States do not surrender sovereign decision-making lightly in any circumstances.⁶⁴⁷ Some factors distinguish southern African states as cautious and sensitive.⁶⁴⁸ Firstly, these state guards their sovereignty jealousy because many attained it recently and at great cost through liberation wars.⁶⁴⁹ Secondly, most of them enjoy full sovereignty in any event, and they do not have a monopoly of violence over their territories, they do not have adequate control of movement across their borders, ability to mobilise resources and collect taxes is limited.⁶⁵⁰ The economic and financial dimensions of globalisation and other prescriptive policies of international financial organisations and foreign donors undermine their national security.⁶⁵¹ It is noteworthy that states with weak sovereignty are resistant to regional mechanisms that would dilute it further through binding rules and decisions that limit their discretion and heighten the possibility of interference in their domestic affairs.⁶⁵²

Sirota highlighted that the problem inherent to the SADC itself is the constant ravages of war and poverty, which impeded the organisation from reaching its goals.⁶⁵³ In strengthening their sovereignty, SADC member states signed a Mutual Defence Pact ("MDP") that gives each member nation the right to intervene in armed attacks of other member nations.⁶⁵⁴ Although

⁶⁴² Cilliers 1995: 30-47

⁶⁴³ Zacarias 1995: 37-45

⁶⁴⁴ Brammer 1999: 21-23

⁶⁴⁵ Jackson & Roseberg 1982: 1-24

⁶⁴⁶ Human Rights Watch, 'Fast Track Land Reform in Zimbabwe', Human Rights Watch Report, 14, (March 2002)

⁶⁴⁷ See 'SADC Heads Read Riot Act to Mugabe', Cape Times, 11 September 2001

⁶⁴⁸ ISDSC, 'Final Communique. 23rd Session of the Inter State Defence and Security Committee (ISDSC) of the Southern African Development Community (SADC) Organ on Politics, Defence and Security Co-operation' (Luanda, 9 August 2002)

⁶⁴⁹ SADC Welcomes Mugabe as an African Hero', Mercury, 26 August 2003

⁶⁵⁰ Nathan 2006: 605-622

⁶⁵¹ Malan 1998: 7-8

⁶⁵² Nathan 2006: 605-622

⁶⁵³ Beauregard Tromp, SADC Welcomes Mugabe as an African Hero, Mercury (S Africa), 8 (August 26, 2003) available online at http://iol.co.za/index.php?set_id=1&click_id=68cart_id=vn20030826061020725C162985

⁶⁵⁴ Security Pact Limits Sovereignty in Southern Africa, SABC News (S Africa)

this agreement is not relevant to this study, it articulates how SADC member states are so serious in protecting their sovereignty.⁶⁵⁵ The objective of this pact is to give SADC the ability to quell the endless stream of invasions, civil wars, and turf battles that have become a fact in Southern Africa.⁶⁵⁶ The analogy made by the SADC Chairperson and President of Tanzania, Benjamin Mkapa on possible conflicts in the region is that *"If your neighbour is unstable, you will not be stable yourself"*.⁶⁵⁷

This agreement does not only represent the divergence from economic-focused policies of the SADC past, but it is also an important shift away from the region's traditional respect for sovereignty.⁶⁵⁸ It is noteworthy to mention that the member state obtained their independence from colonial rule not so long; hence, they maintain fierce pride in their independence.⁶⁵⁹ Their commitment to sovereignty has developed in the context of immense political solidarity, commonly known as Pan-Africanism, which was generated and reinforced by the struggle against white settler colonialism and apartheid.⁶⁶⁰ Even though member states aligned to Pan Africanism, the SADC objective evolved common political values.⁶⁶¹ Systems and institutions resulted in the region's desire to preserve sovereignty as a fixed component of the political climate and an intractable barrier to substantive regional integration.⁶⁶² It is known that the SADC country's economy is in poor shape but there is no single country in the region is willing to contemplate loss of sovereignty.⁶⁶³

SADC Treaty envisaged a process of integration that entails a shift in the locus of exercising sovereignty from the national to the regional level.⁶⁶⁴ Based on the complexity of the matter, states are reluctant to confront its implications and the matter has been deferred since 1992.⁶⁶⁵

The SADC Secretariat proposed that the Organ be mandated to monitor the performance of member states in the field of human rights, democracy, and the rule of law.⁶⁶⁶ On the contrary, the Ministers responsible for preparing the Organ's terms of reference rejected this

⁶⁵⁵ Tapfumaneyi 1998: 25-34

⁶⁵⁶ Sirota 2004: 344-353

⁶⁵⁷ *Security Pact Limits Sovereignty in Southern Africa*, SABC News (S Africa)

⁶⁵⁸ Makoa 1999: 66-87

⁶⁵⁹ Sirota 2004: 344 -353

⁶⁶⁰ Evans, Holmes & Mandaza 1999:1-69

⁶⁶¹ See, 'Stalemate in Peace Process Led to SADC Intervention', Sunday Independent (South Africa), 27 September 1998

⁶⁶² Williams 2000: 84-104

⁶⁶³ Swastuk & Vale 1999: 361-389

⁶⁶⁴ SADC Declaration and Treaty, 1992

⁶⁶⁵ Nathan 2006: 605-622

⁶⁶⁶ Nathan 2006: 604-622

proposal.⁶⁶⁷ Instead, these Ministers were willing to permit the Organ to monitor the ratification by states of the United Nations (UN), Organisation for African Unity (OAU), and other international conventions and treaties on human rights, arms control, and disarmament.⁶⁶⁸ It was determined that the Summit did not ever discuss the independent human rights commission proposed by the ministerial workshop in Windhoek in 1994.⁶⁶⁹ This body further delayed the establishment of a supranational Tribunal that might pose a significant challenge to sovereignty.⁶⁷⁰

The provision of the SADC Treaty of 1992 states that the Tribunal will not only adjudicate upon disputes between states but will also ensure adherence to the provisions of the Treaty.⁶⁷¹ The Summit's delay in approving a Protocol on the Tribunal indicated the member states reluctance to cede their sovereign powers to the regional court.⁶⁷²

Another factor that contributes to the weak state is that southern Africa is characterised by underdevelopment and small economies with low productivity and these problems can be addressed through synergies generated by integration.⁶⁷³ Additionally, a limited capacity of states to undertake development and integration.⁶⁷⁴ South Africa as a member state of SADC, has not driven the integration process as could have been expected in light of its comparative strength in the region.⁶⁷⁵ Other SADC member states raised complaints that the South African government devoted less attention to its relations in southern Africa than elsewhere.⁶⁷⁶ Scholars such as Buzan and Waver were of the view that South Africa has neglected its responsibility of driving integration in the region.⁶⁷⁷ There were growing concerns and questions on whether South Africa is a SADC team player or is driven by self-interest.⁶⁷⁸ Several factors contributed to South Africa's neglect of the region. Among others, the government was preoccupied with the formidable challenges of national reconciliation,

⁶⁶⁷ SADC Secretariat, 'The SADC Organ of Politics, Defence and Security: Meeting of SADC Ministers Responsible for Foreign Affairs, Defence and SADC Affairs (Ministerial meeting held in Gaborone on 11 January 1996)

⁶⁶⁸ SADC Secretariat, 'The SADC Organ of Politics, Defence and Security: Meeting of SADC Ministers Responsible for Foreign Affairs, Defence and SADC Affairs (Ministerial meeting held in Gaborone on 11 January 1996)

⁶⁶⁹ See, Towards the Southern Development Community; Article 5(1)(b) of the SADC Treaty, and Article 2(2)(b) of the Protocol on Politics, Defence and Security Co-operation.

⁶⁷⁰ Nathan 2006: 605- 622

⁶⁷¹ SADC Declaration and Treaty, 1992

⁶⁷² Nathan 2006: 605- 622

⁶⁷³ Hammerstad 2005: 69-87

⁶⁷⁴ Nathan 2006: 605- 622

⁶⁷⁵ Jackson & Roseberg 1982: 1-24

⁶⁷⁶ African Tension against SA on the Rise', Southern African Report, (15 August 1997) p3-4

⁶⁷⁷ Buzan & Waeber 2003: 235-238

⁶⁷⁸ See, 'African Tension against SA on the Rise', Southern African Report, 15,33 (15 August 1997)

transforming state departments, and addressing the socio-economic legacy of apartheid.⁶⁷⁹ Additionally, the government of South Africa was wary of adopting a prominent political posture because of regional fears of domination that were heightened by the South Africa Policy of destabilisation of 1980. On the contrary, South Africa is also inhibited by the absence of democracy in many SADC states.⁶⁸⁰

It is noteworthy that the bulk of South Africa's trade was with countries or nations outside the southern African region, hence little of wealth seeped into the SADC countries.⁶⁸¹ The southern African country's reliance on external funding restricted the SADC's ability to control its agenda, therefore resulting in the organisation having few enforcement mechanisms to ensure that its members respected the trade, drug smuggling, and water sharing agreements they have signed.⁶⁸²

3.3.6 The Contest for Labels in the Southern African Development Community (SADC) Land Issue

This sub-paragraph discuss the labelling of land disputes in the SADC region whereby there is a contestation among stakeholders for the status of 'ultimate victim'.⁶⁸³ Whenever there is a dispute, stakeholders immediately begin campaigning for the status of 'ultimate victim'.⁶⁸⁴ Chigara states that those who achieve that status always appear to gain public sympathy, more so they gain moral, economic, emotional, and other forms of desirable support from significant others.⁶⁸⁵

It is noteworthy that a state whose citizen's finite energy and resources are arrested in social conflict significantly reduces its opportunity to engage in other welfare-enhancing projects.⁶⁸⁶ The absence in most of these disputes of a deliberate constructive government engagement with the dynamics of the problem, the outcome, and to varying degrees, is often that everyone is weakened by the conflict.⁶⁸⁷ In the end, only a few could claim to have benefited from these conflicts.⁶⁸⁸ For example, the land crisis, the average Zimbabwean now faces hyper-inflation resulting in a spiralling cost of living, shortage of essentials basic commodities like paraffin

⁶⁷⁹ Nathan 2006: 605-622

⁶⁸⁰ Nathan 2006: 605-622

⁶⁸¹ Sirota 2004: 344-353

⁶⁸² *Mr Mugabe, Please Be Nice*, Economist 40 (Jan 19, 2002)

⁶⁸³ Chigara 2003:369-397

⁶⁸⁴ 'Mugabe Swears in War Cabinet', http://www.news24.com/News/Zimbabwe/0,1113,2-259_124773200.html (visited 20 November 2002)

⁶⁸⁵ 'What Mugabe does, Nujoma Can do better'. The Financial Gazette (Harare) at <http://allafrica.com/stories/2002/10110464.html> (visited 20 November 2002)

⁶⁸⁶ McShane & Williams 1992: 258-271

⁶⁸⁷ Chigara 2003: 369-397

⁶⁸⁸ See, 'What the Average Zimbabwean Faces: The Land Issue in Zimbabwe, May 2000 available at <http://scholars.nus.edu.sg/landlow/post/zimbabwe/politics/tumpkin/4.html> (visited 20 November 2002)

and medicines, transport disruptions due to fuel shortages which were crippling businesses at all levels.⁶⁸⁹ The interference with human rights such as freedom of speech, the right to strike, and freedom of association, the absence of effective law enforcement, chronic lack of foreign currency attributable to economic mismanagement, destruction of personal property, the daily fear of violence, intimidation and actual death.⁶⁹⁰ The ramifications of conflicts in Zimbabwe triggered by the implementation of the Land Reform program resulted in this country's economy being the world's fastest shrinking economy for some time, which now is said to be free for all.⁶⁹¹

Chigara states that criminology has developed a whole new era of study that focuses on victims' concerns and rights – victimology. Radical victimology refers to the victims of police force action, war, the correctional system, state violence, and oppression of any kind.⁶⁹² The system asks what the victim represents and symbolizes in the criminal justice system.⁶⁹³ It is also the mechanism used to evaluate the risk and effect of crime on citizens.⁶⁹⁴ For example, the land redistribution-based crises unfolding in affected SADC states are of significant interest to radical victimology not least because both President Mugabe of Zimbabwe and President Nujoma of Namibia regard the land issue as a matter of war against colonial vestiges in their respective countries.⁶⁹⁵ In comparison, the Namibian President sacked his Prime Minister for 10 years and threatened white farmers with stringent land reform proposals.⁶⁹⁶

About 4,000 mostly, white farmers in Namibia own just under half of arable land.⁶⁹⁷ Positivist victimology specialises in interpersonal crimes of violence, particularly concerned with the identification of factors that contribute to a non-random pattern of victimization and to the identification of victims that may have contributed to their victimization.⁶⁹⁸ The affected SADC

⁶⁸⁹ See, 'Zimbabwe Economy in Freefall', available at <http://www.channel4.com/news/home/z/stories/20021120/zim.html> (visited 21 November 2002)

⁶⁹⁰ "What the Average Zimbabwean Faces: The land Issue in Zimbabwe, May 2000, <http://www.scholars.nus.edu.sg/landow/post/zimbabwe/politics/tumpkin/4.html> (visited 20 November 2002)

⁶⁹¹ "Zimbabwe Economy in Freefall", at <http://www.channel4.com/news/home/z/stories/20021120/zim.html> (visited 21 November 2002)

⁶⁹² Friedrichs 1983: 283-294

⁶⁹³ Herberle 2002: 257-264

⁶⁹⁴ Elias 1986: 123-145

⁶⁹⁵ See, 'Mugabe Swears in War Cabinet', http://www.news24.com/News24/Zimbabwe/0,1113,2-259_1247733200.html (visited 20 November 2002)

⁶⁹⁶ "What Mugabe Does, Nujoma Can Do Better", The Financial Gazette (Harare) at <http://allafrica.com/stories/200210110464.html> (visited 20 November 2002)

⁶⁹⁷ Chigara 2003: 369-397

⁶⁹⁸ See, 'What Mugabe Does, Nujoma Can Do Better', The Financial Gazette (Harare), available at <http://allafrica.com/stories/200210110464.html> (visited 20 November 2002)

states have victims that are of interest to positivist victimology because there is a sense in which stakeholders in the land issue are agents to their victimhood.⁶⁹⁹

3.3.7 Agency and Passivity in the Construction of Labels

The public arena provides that theatre in which disputes are fought out; logically it is a place where the pursuit of the coveted label of 'ultimate victim' is evidenced.⁷⁰⁰ The technological gains of the last century have removed national monopoly on public issues of an international character and extended their reach to an international audience that is ever ready to engage in one way or another those directly involved or affected in dispute.⁷⁰¹ One of the technologies that makes nations meet is the internet, which is regarded as the world's most common meeting place.⁷⁰² It becomes a potent tool for those keen to mobilize local and international shame against whatever is opposed.⁷⁰³ For example, throughout Zimbabwe's land crisis, the Commercial Farmers Union of Zimbabwe has used its website to publicize judicial decisions of Zimbabwean Courts in which it was a party.⁷⁰⁴ This was a mechanism, which had a positive effect of alerting the world about the plight of Zimbabwe's commercial farming community and the apparent human rights abuse of the Zimbabwe government.⁷⁰⁵

Chigara is of the view that this system had the effect of persuading both the local and international liberals that Zimbabwe's commercial farmers were the indisputable victims of an autocratic and racist regime.⁷⁰⁶ The commercial farmers appeared as victims that had no government to enforce their legally recognised rights even as reaffirmed by their national courts.⁷⁰⁷ The National Land Committee (NLC) noted a similar mechanism of using the website to mobilise shame,⁷⁰⁸ a South African-based organisation publicised a shame against the landlessness of the majority of the land-starved peasant against the backdrop of an abundance of unused land confined in the hands of a few commercial farmers.⁷⁰⁹ This website

⁶⁹⁹ Chigara 2003: 369-397

⁷⁰⁰ Atkinson 1999: 524-526

⁷⁰¹ Chigara 2001: 36-65

⁷⁰² Smith & Hogan 1990: 490-530

⁷⁰³ Chigara 2003: 369-397

⁷⁰⁴ Heberle 2002: 257-264

⁷⁰⁵ Chigara 2003: 369-397

⁷⁰⁶ See, *The Commercial Farmers Union v Comrade Border Gezi and Others*, Case No.H.C 3544/2000, available at <http://www.samara.co.zw/cfu/courtorder.html> (visited 10 November 2002)

⁷⁰⁷ *The Commercial Farmers Union v Comrade Border Gezi and Others*, Case No. H.C. 3544/2000, <http://www.samara.co.zw/cfu/courtorder.htm> (visited 10 November 2002)
<http://www.nlc.co.za> (visited 10 November 2002)

⁷⁰⁸ <http://www.nlc.co.za> (visited 10 November 2002)

⁷⁰⁹ Chigara 2003: 369-397

appears to portray the landless black peasant community as the ultimate victim of South Africa's entrenched policies on prime farmland.⁷¹⁰

It is noteworthy that media play a significant role in broadcasting events that they select as news items, those in control of the liberal international media are very much involved in how people arrive at the determination of victim/aggressor or agent/victim in every situation that is of interest to us individually and collectively.⁷¹¹

Chigara states that the majority of those involved in the contest for the status of 'ultimate victim' in the SADC land issue are peasants.⁷¹² Their articulation of their concerns is beyond or beneath the machine of middle-class symbolism and the liberal press' interest.⁷¹³ The concerns of the parties must match those of the liberal press that present particularly to the universal public, the issue underlying the conflict with the liberal press agenda risks being ignored.⁷¹⁴ It is noteworthy that Zimbabwe's land issue was reported as a dangerous experiment with food security in the region, suggesting that access to land should remain the way it was because it ensured food security in both the country and the region.⁷¹⁵ This sentiment ignored the power dynamic associated with land ownership and the previous and continuing humiliation of the native population, which was alienated from their land and turned into squatters during colonial rule.⁷¹⁶

3.3.8 Access to Land as the Basis of Human Dignity in Agrarian Economies

Cecil John Rhodes's colonisation of Southern Rhodesia, later Rhodesia, and now Zimbabwe was motivated by the need to replicate the diamond and gold success at Kimberly further northwards.⁷¹⁷ The prospectors had reported that the whole country between Khama's dominion, the Zambezi in the north and Gaza land in the East, was enormously fertile.⁷¹⁸ It is noteworthy that the⁷¹⁹ Mashonaland moreover contained some of the richest deposits of alluvial gold in the world but credible enough in the light of explorers' reports which were reaching the Administrator.⁷²⁰ The pioneers soon found that the territory's diverse mineral resources though not to be compared with its southern neighbour were not a match for its fine

⁷¹⁰ McShane & Williams 1992: 258-261

⁷¹¹ Chigara 2003: 369-397

⁷¹² McShane & Williams 1992: 258-261

⁷¹³ Chigara 2003: 369-397

⁷¹⁴ Chigara 2001: 36-65

⁷¹⁵ Gann 1965: 68-78

⁷¹⁶ Chigara 2003: 369-397

⁷¹⁷ Deininger, Hoogeveen & Kinsey 2004: 1697-1709

⁷¹⁸ Godwin 2003: 100-114

⁷¹⁹ Gann 1965: 68-79

⁷²⁰ Goebel 2005:154-172

climate, fertile soil, and good rainfall.⁷²¹ Chigara is of the view that Southern Rhodesia's agricultural potential became an immediate issue and remains so to this day.⁷²² The land has remained the most important political and economic issue in Zimbabwe.⁷²³ Successive colonial legislation served to expropriate the most fertile territories with the most agricultural potential from native blacks that had lived off them from time immemorial and confine them in the hands of white commercial farmers.⁷²⁴

Murithi opines that European colonialism and apartheid rule was brutal, extractive, and dehumanising for Africans.⁷²⁵ The legacies of these systems are still felt across the continent.⁷²⁶ A practical example is the unresolved land reform intended to address the land imbalance caused by land dispossession by white minority.⁷²⁷ It is troublesome that despite the pain that was inflicted on Africans by the West, those who caused the pain and agony were quick to demand that Africa "get over" these injustices and stop harping on the past.⁷²⁸ On the contrary, Murithi is of the view that solidarity among African states and societies plays an important role in sustaining the campaigns against colonialism and apartheid in the twentieth century.⁷²⁹ In my view, the utilisation of solidarity among African states to fight colonial rule and apartheid yielded results at that time. What is concerning is that the African states are still holding to the same strategies or mechanisms that were used in the past to hold on to power by autocratic means, including trampling the rule of law and human rights.⁷³⁰ A classic example is *Mike Campbell and Others (Pty) Ltd and Another v The Republic of Zimbabwe*.⁷³¹

3.3.9 Conclusion

This Chapter demonstrated the establishment of the Southern African Development Coordinating Committee (SADCC) with the primary aim of ending the dependency on apartheid South Africa and Western countries. The founders of the SADCC were countries known as the Front Line States, which was later 1980 joined by Zimbabwe after it attained independence from the British government. The collapse of the Lancaster agreement between

⁷²¹ Chigara 2003: 369-397

⁷²² See <http://www.gta.gov.zw/Land%20Issue/factsheet.html> (visited 15 November 2002)

⁷²³ See <http://www.eisa.org.za/WEP/zimbq2.html> (visited 15 November 2002)

⁷²⁴ Chigara 2003: 369-397

⁷²⁵ Murithi 2023: 24-28

⁷²⁶ See, 'How Mugabe Abused Backing from Britain', The Times, 19 April 2000

⁷²⁷ McKendrick 2000: 383-393

⁷²⁸ Murithi 2023: 24-28

⁷²⁹ Murithi 2023: 24-28

⁷³⁰ Amaan & Singh 2023: 1-18

⁷³¹ SADCT 2

the government of Zimbabwe and Britain resulted in the former implementing land reform program, which paved the way for expropriation of land without compensation. White farmers in *Mike Campbell and Others v The Republic of Zimbabwe* felt the ramifications of the land reform program.

The implementation of land reform program by the government of Zimbabwe was a political strategy of the then President Robert Mugabe and his cronies to portray them as victims of land dispossession by colonialist. On the other hand, the Britain's failure to fund the land reform program in Zimbabwe in accordance with the Lancaster Agreement, they also cited that the government of Zimbabwe misappropriate their funds; hence, they took the decision to withhold them. In this scenario, the Britain also portray them as victims of corruption and maladministration.

CHAPTER 4:

Jurisdiction and the Functioning of the SADC Tribunal

4.1 Introduction

Part A of this chapter discusses the provisions of the SADC Treaty and SADC Tribunal that regulate the functioning of the SADC organization and one of its institution known as the SADC Tribunal.⁷³² The provisions SADC Declaration and Treaty mandates the member states to observe and adhere to the principles of human rights, democracy, and the rule of law.⁷³³ This proviso is central to the demise of the SADC Tribunal whereby the government of Zimbabwe in their defence in the case of *Mike Campbell and Others (Pty) Ltd v The Republic of Zimbabwe* stated that the tribunal does not have jurisdiction to preside over human rights issues.⁷³⁴ Another important provision of the SADC Treaty, Art.21 gives the SADC Tribunal to develop its jurisprudence by referring to the constitutive document of the regional courts and international law.⁷³⁵ The SADC Tribunal has developed its jurisprudence by giving the principles outlined in Art.4(c) the force of law so that it can binds all SADC member states.⁷³⁶

Part B deliberates more on the classic case of *Mike Campbell and Others (Pty) Ltd v The Republic of Zimbabwe* that dealt extensively with the infringement of property rights of white farmers by the government of Zimbabwe's implementation of land reform policy.⁷³⁷ The decision of the government of Zimbabwe to amend its constitution to insert Amendment 17 which allowed the government to expropriate the land without compensation and also prevented the farm owners from approaching local courts to seek a legal recourse against the infringements of their property rights.⁷³⁸ Before the amendment, the Zimbabwe Constitution had a provision that permits the government to expropriate the land if there are reasonable grounds to do that and also subject to payment of reasonable compensation.⁷³⁹

Scholars have demonstrated their concerns regarding the Zimbabwe Supreme Court of Appeal's missed opportunity to interpret the law correctly to ensure the independence of the judiciary against the pressure from the legislature, which is the other arm of government.⁷⁴⁰ It

⁷³² SADC Declaration and Treaty, 1992 and 2000 SADC Protocol on Tribunal

⁷³³ Article 4 (c) of SADC Declaration and Treaty, 1992

⁷³⁴ SADC(T) 2/2007

⁷³⁵ SADC Declaration and Treaty, 1992

⁷³⁶ Mkhandawire 2010: 567-573

⁷³⁷ SADC (T) 2/2007

⁷³⁸ Nathan 2006: 606 -622

⁷³⁹ Constitution of Zimbabwe (As amended in 2005)

⁷⁴⁰ Chigara 2012: 341-377

is imperative to indicate that there are three arms of government, namely the Legislature, the Executive, and the Judiciary.⁷⁴¹ According to the Constitutional theory, these arms should be independent from one another.⁷⁴² A contradicting point to the constitutional theory is that the government of Zimbabwe ascribed to constitutional democracy which propagates the independence of the judiciary and the protection of human rights but still pushes for the protection of their sovereignty which is another philosophy contracting the Constitutional theory.⁷⁴³ Additionally, the government of Zimbabwe ratified most of the international law Treaties, which demonstrates that the country takes human rights issues seriously.⁷⁴⁴ The concept of sovereignty is defined as the “supreme power over citizens and subjects unrestrained by law.”⁷⁴⁵ The definition states that sovereignty provides the government with unlimited power to make law for itself.⁷⁴⁶ To provide context on the discussion on these two schools of thought (theories), namely the Constitutional and Sovereignty theories which apply to the government of Zimbabwe. It is imperative to provide the discussions of these theories so that this study can provide an understanding of what informed the government of Zimbabwe to use the dual school of thought in its state establishment by ascribing to both constitutional and sovereignty, which contradict each other and create confusion.

4.1.1 Brief history and establishment of the SADC Tribunal

The South African Development Community (SADC) Tribunal was one of the institutions established in terms of the South African Development Community (SADC) Treaty (the Treaty) as the only regional court within the region⁷⁴⁷. The SADC Tribunal is established in terms of Art.9 (g) of the SADC Declaration and Treaty⁷⁴⁸. The wording of the SADC treaty as the constitutive instrument shows that the member states are committed to the ideals of human rights, rule of law, and democracy⁷⁴⁹. The establishment of the SADC was a culmination of efforts at deeper regional integration among member states.⁷⁵⁰ The Tribunal was one of the institutions established to facilitate and ensures that member state adheres to the constitutive document (SADC Treaty) with specific reference to Art.16 (1).⁷⁵¹ This provision stipulates that the Tribunal shall be constituted to ensure adherence to and the proper interpretation of the

⁷⁴¹ Constitution of Zimbabwe (As amended in 2005)

⁷⁴² Alexy 2000: 14-39

⁷⁴³ Kahn-Freund 1974: 5-10

⁷⁴⁴ Ruppel 2009: 173

⁷⁴⁵ Richard & Elaine 2009:1-5

⁷⁴⁶ Ocheni & Nwankwo 2012: 46-54

⁷⁴⁷ Stoppard: 1-27

⁷⁴⁸ SADC Declaration and Treaty,1992

⁷⁴⁹ Art.4 (c)

⁷⁵⁰ Tapfumaneyi 1999: 23-26

⁷⁵¹ 2000 SADC Protocol on Tribunal

provisions of this Treaty and subsidiary instrument and to adjudicate upon such disputes as may be referred to it.⁷⁵² Additionally, the provision of Art.16 (4) states that the Tribunal is empowered to provide advisory opinions to the Summit or Council of Ministers⁷⁵³.

Art.16 (2) state that the composition, powers, functions, procedures, and other related matters governing the Tribunal shall be prescribed in a Protocol adopted by the summit.⁷⁵⁴ The Protocol on Tribunal and its Rules and Procedures were adopted only in 2000. The Tribunal was inaugurated in 2001 and the first judges were appointed in 2005 whilst in 2006, the Tribunal's registry was established and in 2007, the Tribunal became functional.⁷⁵⁵

The provision of the Art.12 of the Protocol on Tribunal makes way for the establishment of the office of the Registrar who works closely with the Tribunal President for the day-to-day operations of this court.⁷⁵⁶ The establishment of the SADC Tribunal as the judicial arm of the organisation was a step in the right direction as compared to the architecture of the Southern African Development Coordinating Committee (SADCC) considering that the SADCC arrangement made no provision for a judicial body.⁷⁵⁷ SADC Protocol on Tribunal made provision for a tribunal jurisdiction that extends to disputes between States and to disputes between States and natural persons or legal persons.⁷⁵⁸ In a similar vein, the Tribunal like other international tribunals, the court was also directed to follow the rule on exhaustion of domestic remedies in considering the admissibility of cases.⁷⁵⁹

In discharging its responsibilities, Art.21 (a) of the SADC Protocol on Tribunal directs this court to apply the SADC Treaty, protocols forming part of the SADC Treaty, subsidiary instruments adopted by the Summit, the Council, or other SADC institution.⁷⁶⁰ The Tribunal is also empowered to develop its own jurisprudence, having regard to applicable treaties, general principles, and rules of public international law and any other rules and principles of the law of States.⁷⁶¹

⁷⁵² Article 16 (1) of the SADC Declaration and Treaty, 1992

⁷⁵³ SADC Declaration and Treaty,1992

⁷⁵⁴ SADC Declaration and Treaty

⁷⁵⁵ A Stoppard: 1-27

⁷⁵⁶ SADC Protocol on Tribunal

⁷⁵⁷ A Stoppard: 1-27

⁷⁵⁸ Art.15 of SADC Protocol on Tribunal

⁷⁵⁹ A Stoppard: 1-27

⁷⁶⁰ SADC Protocol on Tribunal

⁷⁶¹ Art.21 (b) of SADC Protocol on Tribunal

The SADC member states took considerable time before activating the Tribunal.⁷⁶² In spite of the express provision of the SADC Treaty, thirteen years lapsed between the adoption of the Treaty and the inauguration of the Tribunal.⁷⁶³ Some of the SADC member states are ascribed to the democratic type of government whilst others prefer the autocratic government; therefore, the establishment of the SADC Tribunal may not sit well with those who are not subscribing to the rule of law.⁷⁶⁴ In addition, the SADC member states avoid accounting for their human rights transgression caused by rampant atrocities in their countries.⁷⁶⁵

The definition of regional integration according to Mkhandawire is known as market integration and a process by which the economic barriers against the exchange of goods, services, capital, and people between two or more countries are eliminated or reduced.⁷⁶⁶ The process of integration involves the establishment of common legal rules and legal systems for citizens.⁷⁶⁷

4.1.1 Deconstructing the jurisdiction to adjudicate human rights

The integration of human rights into the structure of Regional Economic Communities (RECs) is twofold; firstly, states have committed themselves to respect human rights by acceding to specific human rights treaties, conventions, or declarations on the international, regional, and sub-regional level.⁷⁶⁸ Among others, some of the international instruments include the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and on Economic, Social and Cultural Rights, the Convention on the Elimination of Racial Discrimination, or the African Charter on Human and Peoples' Rights.⁷⁶⁹

It is noteworthy that the obligations and commitments resulting from this international instrument are also conceptualised in the REC's constitutive documents.⁷⁷⁰ There is a relationship between human rights and economic development because the latter contributes to economic development by guaranteeing a protected space where the elites cannot monopolise development processes, policies, and programs.⁷⁷¹ There is an interrelationship

⁷⁶² Chigara 2012: 341-377

⁷⁶³ PN Ndlovu 2011: 63-80

⁷⁶⁴ 'Killing the Monster', Africa News website: www.newsafrika.net/en/news/1565/killing-the-monster.html (accessed 12 May 2012)

⁷⁶⁵ Chigara 2009: 530-531

⁷⁶⁶ Chingono 2008: 396-408

⁷⁶⁷ Chingono 2008:396-408

⁷⁶⁸ Nye 2009: 4-13

⁷⁶⁹ Ruppel 2009: 173-186

⁷⁷⁰ Bosl, Breytenbach, Hartzenberg, MacCathy & Shade 2006: 7-10

⁷⁷¹ H Heinonen, 'Regional Integration and the State: The Changing Nature of Sovereignty in Southern Africa and Europe<> accessed 6 August 2017

between human rights and economic development and this has prompted the discussions in the world community.⁷⁷² Therefore, it is against this background that human rights are given more effect through economic growth, as the ultimate result of economic growth is the increasing availability of resources, resulting in a reduction of poverty and a higher standard of living.⁷⁷³

The promotion of human rights plays a significant role in the process of regional integration as articulated in the Abuja Treaty as well as the REC constitutive legal instruments.⁷⁷⁴ It is important to highlight that the integration process faced many challenges, which also touched on human rights, for example, a fear of states losing their autonomy, the fear of losing identity, socio-economic disparity among member states, historical disagreements, lack of vision and unwillingness to share resources are some of the challenges facing integration.⁷⁷⁵ The promotion and protection of human rights is part of SADC's priority as a regional organisation that furthers socio-economic cooperation and integration, as well as political and security cooperation among its member states.⁷⁷⁶ SADC took the initiative to draft a SADC Human Rights Charter as proposed by NGOs of several SADC member states but this legal document has never been signed and ratified.⁷⁷⁷ In the course of the establishment of the SADC Tribunal, panel experts considered the possibility of separating human rights instruments such as the Protocol of Human Rights or separate Southern African Convention on Human Rights; therefore, none of these has been attained.⁷⁷⁸

Nevertheless, SADC legal frameworks contained human rights provisions, for example, in its Preamble; the SADC Treaty determines the progress and well-being of the people of southern Africa and recognize the need to involve the people of the SADC region in the process of development and integration through guaranteeing democratic rights and observing human rights and the rule of law.⁷⁷⁹ In terms of Art.4, (c) member states should ensure that they observe the principle of the rule of law, democracy, and human rights.⁷⁸⁰

Based on this provision, a question remains "Does the SADC Tribunal have the jurisdiction to preside over human rights complaints?" Secondly, the crucial question is whether express

⁷⁷² Haas 1958: 16-34

⁷⁷³ Kouassi 2007: 2-12

⁷⁷⁴ Naldi & Magliveras 2016: 133-159

⁷⁷⁵ Bosl 2008: 116-123

⁷⁷⁶ Ruppel 2009:173-186

⁷⁷⁷ Ruppel 2009: 173-186

⁷⁷⁸ Ruppel 2009:173-186

⁷⁷⁹ Ruppel 2009: 173-186

⁷⁸⁰ SADC Declaration and Treaty

provision should have been added in the SADC Declaration and Treaty to give the Tribunal an express human rights jurisdiction. It is imperative to make a determination under the existing provisions of the SADC Declaration, Treaty, and SADC Protocol on the Tribunal that there is sufficient basis to support the Tribunal's assumption of human rights jurisdiction.⁷⁸¹ It is noteworthy to refer to the Articles 4, 5, and 6 of the Consolidated SADC Treaty read in conjunction with Articles 14 and 15 of the Protocol on the Tribunal.⁷⁸² Article 4 of the SADC Treaty deals with the principles in accordance with the SADC and its member states are expected to act in pursuit of integration, expressly including human rights, democracy, and rule of law.⁷⁸³ Article 5 sets out the objectives of SADC with reference to the promotion of common values transmitted through institutions which democratic, legitimate, and effective, as well as the objective to consolidate, defend, and maintain democracy, peace, security, and stability.⁷⁸⁴ Art. 6 (1) states that the SADC member state undertakes to adopt measures to promote the achievement of the objectives of SADC and refrain from taking any measures likely to jeopardise the sustenance of its principles.⁷⁸⁵ Art.33 (1) (b) threatens sanctions to member states, which undermines the principles of the SADC.⁷⁸⁶

The above-highlighted provisions, which give express powers to the SADC Tribunal to preside over human rights matters.⁷⁸⁷ Ebobrah posits that Arts.4,5,6 and 33 of the SADC Treaty on their own do not give express powers to the SADC Tribunal to have human rights jurisdiction, therefore there is no way the tribunal can claim human rights jurisdiction under the prevailing Treaty regime.⁷⁸⁸ Based on uncertain provisions of Arts, 4, 5, 6, and 33 of the SADC Treaty, the government of Zimbabwe in its defence stated that these principles as articulated in Art.4 (c) are not an end to themselves.⁷⁸⁹ The government further stated this provision is a means to an end and consequently that they cannot create legally enforceable obligations in themselves in the absence or explicit language to that effect.⁷⁹⁰ The lack of explicit wording of the provision of the SADC Treaty has created a lacuna concerning the human rights jurisdiction of the SADC Tribunal.⁷⁹¹

⁷⁸¹ SADC Declaration and Treaty, 1992

⁷⁸² SADC Declaration and Treaty, 1992 as well as 2000 SADC Protocol on Tribunal

⁷⁸³ SADC Declaration and Treaty, 1992

⁷⁸⁴ SADC Declaration and Treaty, 1992

⁷⁸⁵ SADC Declaration and Treaty, 1992

⁷⁸⁶ SADC Declaration and Treaty, 1992

⁷⁸⁷ SADC Declaration and Treaty, 1992

⁷⁸⁸ Consolidated SADC Treaty

⁷⁸⁹ *Mike Campbell and Others (Pty) Ltd v The Republic of Zimbabwe*

⁷⁹⁰ Consolidated SADC Treaty

⁷⁹¹ Consolidated SADC Treaty

The government of Zimbabwe raised a question of jurisdiction of the Tribunal on several grounds; firstly, the submission was that the plaintiff did not exhaust local remedies.⁷⁹² In *Mike Campbell and Others (Pty) Ltd v The Republic of Zimbabwe*⁷⁹³ the Tribunal has made reference to the European Court of Human Rights (the ECtHR) and the African Commission on Human Rights and People Rights (the African Commission) which acknowledged that the principle of the exhaustion of local remedies was well established in the procedures of human rights bodies.⁷⁹⁴ In situations where there are no local remedies, the applicant may approach the municipal courts of another member states in order to seek legal recourse.⁷⁹⁵ A practical example, the applicant in *Mike Campbell's* case approached the Northern Gauteng High Court and the Constitutional Court of the Republic of South Africa to seek a court order to enforce the SADC Tribunal rulings.⁷⁹⁶ It is noteworthy that this condition did not apply where no domestic remedies were available or where they were ineffective.⁷⁹⁷ The Supreme Court of Zimbabwe confirmed that the jurisdiction of the courts was ousted in relation to the applicants in lieu of Amendment 17 of the Constitution of Zimbabwe.⁷⁹⁸ Secondly, the Zimbabwean government raised a defence that the Tribunal did not have jurisdiction in relation to human rights disputes.⁷⁹⁹ According to the government of Zimbabwe, the human rights principles and objectives, as contained in Arts. 4(c) and 6(2) of the SADC Treaty were not enforceable, as they did not spell out the benchmarks for measuring the conduct of member states in relation to human rights.⁸⁰⁰ The government of Zimbabwe contends that these principles could only be enforced once a Protocol on Human Rights and Land Reform had been adopted and ratified by member states.⁸⁰¹ In defence, Zimbabwe reiterated that borrowing instead from human rights standards in other treaties amounts to legislating by the Tribunal on behalf of member states⁸⁰². In reply, the Tribunal has stated that the adoption of a separate Protocol on human rights was unnecessary.⁸⁰³ In support of this argument, the Tribunal referred to Art.21 (b) of the Protocol on Tribunal, which mandated the Tribunal to develop its own jurisprudence, having regard to applicable treaties, general principles, and rules of public international law.⁸⁰⁴

⁷⁹² De Wet 2013: 45-63

⁷⁹³ No SC 49/07 (22 February 2008)

⁷⁹⁴ *Mike Campbell and Others (Pty) Ltd v The Republic of Zimbabwe*

⁷⁹⁵ Ebobrah 2009: 37-45

⁷⁹⁶ *Mike Campbell and Others (Pty) Ltd v The Republic of Zimbabwe*

⁷⁹⁷ Nathan 2006: 606-622

⁷⁹⁸ De Wet 2013: 43-63

⁷⁹⁹ *Mike Campbell and Others (Pty) Ltd v The Republic of Zimbabwe*

⁸⁰⁰ De Wet 2013: 43-63

⁸⁰¹ De Wet 2013: 43-63

⁸⁰² *Mike Campbell and Others v Republic of Zimbabwe*

⁸⁰³ *Mike Campbell and Others (Pty) Ltd v The Republic of Zimbabwe*

⁸⁰⁴ SADC Protocol on Tribunal

Magliveras supports the view that Art.21 of the SADC Protocol on Tribunal gives the Tribunal the powers to rule on human rights matters because this judicial court shall develop its own community jurisprudence by taking into account the applicable treaties, general principles, and rules of public international law and any rules and principles of the law of member states.⁸⁰⁵ This provision gives the Tribunal the incidental competence to pronounce upon issues relating to the protection of human rights norms by member states and possibly by SADC Institutions.⁸⁰⁶ The wording "any applicable treaties" includes any regional multilateral human rights instruments, for example, the African Charter on Human and Peoples' Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights, ratified by member states involved in litigation before the Tribunal.⁸⁰⁷ It is noteworthy that human rights norms have been considered as forming part of the general principles of international law.⁸⁰⁸ The argument raised by the Tribunal against the Government of Zimbabwe was justifiable as they confirmed that the principle and objectives could constitute a binding obligation.⁸⁰⁹ This argument is supported by Art.38 (1) (c) of the Statute of the International Court of Justice, which acknowledges, "the general principles of law recognized by civilized nations" as binding source of international law.⁸¹⁰ Art.21 (b) concretises the principle of systematic integration which is contained in Art.31 (3) (c) of the Vienna Convention on the Law of Treaties and constitutes customary international law.⁸¹¹ The provisions require the judicial bodies to take into account any relevant rules of international law applicable in the relations between the parties.⁸¹² The Tribunal acted in accordance with international law when relying on human rights instruments ratified by Zimbabwe in order to determine the meaning of the concepts "human rights" and "rule of law" as articulated in Art.4 (c) of the SADC Declaration and Treaty.⁸¹³ The issue that needs to be determined is to establish whether the principles contained in Arts.4 (c) and 6(2) of the SADC Declaration and Treaty were intended to invest individuals in the member states with rights that could be directly invoked before the Tribunal.⁸¹⁴ Clearly, these provisions are phrased as State obligations and not as individual rights, which is usually the case with human rights treaties

⁸⁰⁵ Magliveras 2016:1-24

⁸⁰⁶ Magliveras 2016:1-24

⁸⁰⁷ All African States except South Sudan, Mozambique, and Botswana, are contracting parties, see <http://indicators.ohchr.org/>

⁸⁰⁸ Meron 1989:88-100

⁸⁰⁹ De Wet 2012: 45-63

⁸¹⁰ Bartels 2011: 13-14

⁸¹¹ SADC Declaration and Treaty, 1992

⁸¹² <http://untreaty.un.org/cod/avl/ha/vclt.html> (accessed 28 November 2012)

⁸¹³ De Wet 2012: 45-63

⁸¹⁴ SADC Declaration and Treaty, 1992

that guarantee enforceable rights.⁸¹⁵ On deciding the merits of the case, the Tribunal concluded that Art.4 (c) of the SADC Declaration and Treaty was violated, while the majority of four judges to one also found a violation of Art. 6(2).⁸¹⁶ The Tribunal found that the fundamental requirement of the rule of law is that those who are affected by the law be heard before they are deprived of a right, interest, or legitimate expectation.⁸¹⁷ It is settled law that the concept of the rule of law should be embraced based on the following premises, the right of access to the courts and the right to a fair hearing before an individual is deprived of a rights.⁸¹⁸

The judges in the *Mike Campbell and Others (Pty) Ltd v The Republic of Zimbabwe* case referred to the decisions of the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACtHR) as examples of persuasive authority.⁸¹⁹ The court further referred to Art.7 (1) of the African Charter, an instrument to which Zimbabwe is a party, and the provision provides a right to appeal to competent national organs against acts violating a fundamental right.⁸²⁰ When interpreting the racial discrimination in Art.6 (2) SADC Treaty, the Tribunal referred to four treaties which Zimbabwe was a party and which outlawed racial discrimination. The following international instruments, namely Art.2 of the African Charter, Art.2 (1) of the International Covenant on Civil and Political Rights (ICCPR) and Art.2 (2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), as well as the Convention on the Elimination of all forms of Racial Discrimination ratified by the government of Zimbabwe.⁸²¹

The Tribunal referred to all these international instruments, which the government of Zimbabwe as a member state is obliged to respect, protect, and promote the principles of non-discrimination and it must therefore prohibit and outlaw any discrimination based on the grounds of race in its laws, policies and practices.⁸²² Art.16 (1) of the SADC Treaty empowers the Tribunal to ensure adherence to and proper interpretation of the provisions of the Treaty and to adjudicate on such disputes as may be referred to it.⁸²³ Based on the literal interpretation of Arts. 4, 5, 6, and 33 of the SADC Treaty gave competence to the Tribunal as

⁸¹⁵ De Wet 2012: 45-63

⁸¹⁶ *Mike Campbell and Others (Pty) Ltd v The Republic of Zimbabwe*

⁸¹⁷ *Mike Campbell and Others v Republic of Zimbabwe*

⁸¹⁸ *Mike Campbell and Others v Republic of Zimbabwe*

⁸¹⁹ *Golder v United Kingdom App No 4451/70 (ECtHR, 21 February 1975)*

⁸²⁰ African Charter on Human and Peoples' Rights ("African Charter") (adopted 27 June 1981). <http://untreaty.un.org/cod/avl/ha/vclt/vclt.html> accessed 28 November 2012

⁸²¹ De Wet 2012:45-63

⁸²² De Wet 2013:45-63

⁸²³ SADC Declaration and Treaty, 1992

having jurisdiction over all issues contained in the Treaty including human rights.⁸²⁴ Art. 14 and 15 of the SADC Protocol on Tribunal requires that all disputes and applications so referred need to be in accordance with the SADC Treaty and the Protocol.⁸²⁵ This gave the necessity to locate human rights within the Treaty framework.⁸²⁶

Ebobrah contends that although *Mike Campbell* is a classical case in which the SADC Tribunal affirms their jurisdiction to preside over the human rights complaint lodged by *Mike Campbell and Others (Pty) Ltd* supported by Art.4(c) of the SADC Treaty.⁸²⁷ However, the manner in which Arts.4, 5, 6, and 33 of the SADC Treaty have been crafted does not give explicit powers to the Tribunal to have competence over human rights matters.⁸²⁸ It is therefore debatable whether the statement of fundamental principles in the SADC Treaty confers rights on citizens or imposes obligations on states.⁸²⁹ Academic commentators in support of human rights jurisdiction under the Treaty regime may find the provisions of Arts. 4, 5, 6, and 33 of the SADC Treaty, as well as the provisions of Arts. 14 and 15 of the SADC Protocol on Tribunal give the Tribunal human rights jurisdiction.⁸³⁰

On the contrary, the decision of the *Campbell* case alone cannot extinguish the contending view, therefore it is in this context that further qualification of the principle of human rights, democracy, and the rule of law would be desirable.⁸³¹ The Tribunal argued that the adoption of a separate Protocol on the Tribunal on Human Rights was unnecessary.⁸³² It is crucial to make reference to Art.21 of the SADC Protocol on Tribunal gives the Tribunal the powers to develop its own community jurisprudence as sufficient to close the lacuna created in the absence of human rights catalogue.⁸³³ De Wet concurs with the argument raised by the SADC Judges and agrees with it that the principles and objectives of the SADC Declaration and Treaty constitute a binding obligation.⁸³⁴ This argument is also supported by the Art.38 (1) (c) of the Statute of the International Court of Justice that acknowledges "the general principles of law recognised by civilised nations as a binding source of international law."⁸³⁵ Art. 31(3) (1)

⁸²⁴ SADC Declaration and Treaty, 1992

⁸²⁵ 2000 SADC Protocol on Tribunal

⁸²⁶ Consolidated SADC Treaty

⁸²⁷ Oosthuizen 2006: 72-93

⁸²⁸ SADC Declaration and Treaty, 1992

⁸²⁹ Ebobrah 2010: 199-213

⁸³⁰ Ebobrah 2010: 199-213

⁸³¹ Consolidated SADC Treaty

⁸³² Nkatha 2018: 1-32

⁸³³ Consolidated SADC Treaty

⁸³⁴ De Wet 2013:45-63

⁸³⁵ Bartels 2011: 14-15

(c) of the Vienna Convention on the Law of Treaties also cement the principle of systematic integration which also constitutes customary international law.⁸³⁶ The provisions require the judicial bodies to take into account any relevant rules of international law applicable to the relations between the parties.⁸³⁷ The Tribunal was correct to make reference to human rights instruments ratified by Zimbabwe in order to determine the meaning of the concepts "human rights" and "rule of law" as stipulated in Art.4(c) of the SADC Treaty. The same applied to the provision of Art.6 (2) of the SADC Treaty.⁸³⁸

A comparative analysis of three regional courts, namely the COMESA, EAC, and SADC have in common the binding nature of their jurisdiction for those states that expressly accept it.⁸³⁹ The ratification or adoption of the normative instruments establishing the judicial body implies *ipso facto* the member state's acceptance of its jurisdiction, without requiring their further consent case by case.⁸⁴⁰

4.1.1.3 Implementation of the Decision and Judgements of African Regional Human Rights Tribunals: Reflections on the barriers to State Compliance and the Lessons Learnt

Ayeni posits that Africa is not lacking in human rights jurisprudence but what is lacking is genuine commitment on the part of state actors to implement the decisions and judgements of the various human rights bodies.⁸⁴¹ Contributing factors to lack of implementation of decisions or judgement of human rights tribunal are poor supervision mechanisms, weak domestic infrastructure, weak institutions caused by strong men syndrome and poor observance of the rule of law, poor institutional designs of regional and sub-regional Human Rights Tribunal, lack of awareness and erroneous perceptions about international human rights system, ineffective follow-up as well as a poor system of governance in many states.⁸⁴²

It is imperative to indicate that the regional systems for the promotion and protection of human rights are vital building blocks and pillars of the international human rights system.⁸⁴³ The Ayeni state that the adoption in 1945 of the United Nations (UN) Charter set in motion the

⁸³⁶ Vienna Convention of the Law of Treaties

⁸³⁷ Bartels 2011: 14-15

⁸³⁸ Bartels 2011: 14-15

⁸³⁹ Tino 2012:141-173

⁸⁴⁰ Tino 2012:141-173

⁸⁴¹ Mugwanya 1999:35-50

⁸⁴² Maluwa 2000: 201-225

⁸⁴³ Padilla and Zwaak 2006: 545-456

process for the internationalisation of human rights which most of the African countries ratified it.⁸⁴⁴ Other international instruments adopted in 1948 are the Universal Declaration of Human Rights (UDHR), which has been described as the centrepiece of international human rights law.⁸⁴⁵ Article 52 of the UN Charter provides for the creation of regional arrangement or agencies, provided such arrangement are in conjunction with the principles and purpose of the United Nations.⁸⁴⁶ This provision of the Charter relates mainly to regional intergovernmental organisations, the emergence of the regional human rights mechanism linked more directly to the regional and international efforts, which followed the adoption of the UDHR.⁸⁴⁷ The significance of the regional human rights systems is that they are accessible, offer relatively more effective institutional mechanisms for the protection of human rights, and provide regional perspectives to the development of international human rights norms and standard.⁸⁴⁸

Ayeni state that two of these tribunals, the African Commission and Children's Rights Committee are quasi-judicial in nature, whilst the African court has the full character of a court.⁸⁴⁹ One interesting feature of the African human rights architecture is the existence of sub-regional trade courts that in instances rely on regional human rights treaties for adjudicating individual complaints.⁸⁵⁰ Although there are several regional sub-regional judicial bodies in Africa, only three of them, namely the ECOWAS Community Court of Justice (ECCJ), the East African Court of Justice (EACJ) and the Tribunal of the Southern African Development Community (SADC Tribunal) have decided significant human rights-related cases to be regarded as human rights tribunals.⁸⁵¹ It is noteworthy that the ECCJ has a clear and unlimited jurisdictional mandate to adjudicate human rights cases.⁸⁵² On the other hand, the EACJ in recent years has assumed limited human rights jurisdiction in terms of Article 6 of the EAC Treaty.⁸⁵³ Despite the disbandment of the SADC Tribunal and the proposed closure of the Tribunal to private individuals, the obligations of the member states of SADC to execute, implement and comply with all the existing decisions of the defunct SADC Tribunal remain active.⁸⁵⁴

⁸⁴⁴ Isa and Feyter 2006: 545-596

⁸⁴⁵ Mungwanya 1999:35-50

⁸⁴⁶ Heyns, Padilla and Zwaak 2006: 545-456

⁸⁴⁷ Article 52 of the United Declaration of Human Rights

⁸⁴⁸ Hart 2010: 532-559

⁸⁴⁹ Viljoen 2012: 12-15

⁸⁵⁰ Okafor 2007: 116-117

⁸⁵¹ Helfer and Slaughter 1997: 273-391

⁸⁵² Heyns, Padilla and Zwaak 2006: 162-171

⁸⁵³ Guzman 2008: 171-235

⁸⁵⁴ Alter, Helfer and McAllister 2013: 739-779

4.1.1.3.1 *State Compliance, Reparations Orders and Human Rights Tribunals*

Ayeni defines state compliance as the conformity between state actions or factual situation at the domestic level on the one hand and discrete obligation or reparation order prescribed in a judicial decision on the other.⁸⁵⁵ Scholars are of the view that compliance is the result of coincidence, inadvertence or reasons extrinsic to a legal rule or reparation order of a Human Right Tribunal (HRT).⁸⁵⁶ Others have argued that the focus on compliance tends to oversimplify the various ways through which international law have effect at the domestic level.⁸⁵⁷

Implementation refers to the process of taking measures whether legislative, judicial or administrative to give effect to a legal rule or decision of HRT.⁸⁵⁸ It is noteworthy to indicate that implementation is a process that leads to compliance, in other words compliance is the end-point or end-result of implementation.⁸⁵⁹

Ayeni state that international tribunal describes all layers of post-national judicial institutions that involves at least two states. In other words, 'international' comprises global, regional and sub-regional arrangements.⁸⁶⁰ It is noteworthy that the judicial bodies set up by the African continental body, the African Union (AU), and those set up by the respective regional economic communities (RECs) in Africa are regarded as African regional tribunals.⁸⁶¹ Scholars such as Ayeni, Helfer and Slaughter defines a tribunal as a judicial body which renders legally binding decisions like domestic courts.⁸⁶² But the narrow definition overlooks the fact that even the so-called courts also exercise quasi-judicial mandates like giving advisory opinions and facilitating amicable settlement.⁸⁶³ Regional Human Rights Tribunals refers to both judicial and quasi-judicial bodies that monitor the implementation of regional human rights treaties through inter-state or individual complaints procedures.⁸⁶⁴ On the other hand, the term "decision" is used in respect of quasi-judicial HRTs to describe the totality of the submissions, views, written

⁸⁵⁵ Ayeni 2018: 1-30

⁸⁵⁶ Raustiala 2000: 387-440

⁸⁵⁷ Guzman 2008: 171-235

⁸⁵⁸ Burgstaller et al 2004

⁸⁵⁹ Raustiala et al 1968

⁸⁶⁰ Helfer and Slaughter 1997: 273-391

⁸⁶¹ Howse and Teitel 2000: 127-136

⁸⁶² Hillebrecht 2014: 35-85

⁸⁶³ Guzman 2008: 171-235

⁸⁶⁴ Helfer and Slaughter 1997: 273-391

observations or findings of the tribunal in respect of specific aspects of the case.⁸⁶⁵ Judgement refers to the totality of written observations and submissions of a court or judicial HRT in respect of a case.⁸⁶⁶

The decisions of the HRTs usually contain one or more 'discrete obligations', 'discrete mandates' or recommendations which states are required to implement in order to redress the violations established against them.⁸⁶⁷ These discrete obligations, mandates or recommendations are referred to as reparation orders.⁸⁶⁸

4.1.1.3.2 Challenges of Regional Human Rights Tribunals in Africa

The single most important challenge facing regional HRTs in Africa is non-compliance by state parties with their decisions.⁸⁶⁹ It is imperative to indicate that in order for the HRTs to fulfil their mandate, there is a need for them to identify and address the barriers to state compliance.⁸⁷⁰ Viljoen and Louw conducted an analysis of the status of compliance with recommendations of the African Commission in 44 communications as at 2004, found that only six (representing 14 percent) of the 44 decisions have been fully complied with.⁸⁷¹ There is debate on how to measure state compliance; however, there is consensus among scholars that the rate of state compliance with recommendations of the African Commission is generally low.⁸⁷² As mechanism of addressing this low compliance with HRTs decision, the establishment of African Court was seen as a solution in addressing many failure of the African Commission by issuing legally binding decisions, has not been able to raise significantly the compliance profile of African states.⁸⁷³ Scholars such as Ayeni, Slaughter and Viljoen concur that the problem of non-compliance seems to be associated with the lack of political will by African heads of states as well as political organs of the AU to enforce decisions of the various regional human rights bodies.⁸⁷⁴ The establishment of additional bodies as the AU is fond of doing is not likely to solve the problem of state' non-compliance.⁸⁷⁵

⁸⁶⁵ Viljoen and Louw 2007: 1-34

⁸⁶⁶ Mutua 1999: 342-363

⁸⁶⁷ Hillebrecht 2010: 35-85

⁸⁶⁸ Ayeni 2018: 1-30

⁸⁶⁹ Viljoen 2004: 344-352

⁸⁷⁰ Louw et al 2005

⁸⁷¹ Viljoen and Louw 2007: 4-5

⁸⁷² Open Society Justice Initiative, *'From Judgement to Justice: Implementing International and Regional Human Rights Decisions'* (Open Society Foundations 2010) 95.

⁸⁷³ Adjolohoun et al 2013

⁸⁷⁴ Ayeni 2018: 1-30

⁸⁷⁵ AllAfrica, 'West Africa: Court President Calls on Ministers Responsible for Regional Integration to Facilitate Implementation of its decisions', available at <https://allafrica.com/stories/201505191500.html> (accessed 22 June 2022)

Another study conducted in 2013 by Adjolohoun found that 66 percent of the merit decisions of the ECCJ have been fully complied with and implemented by states.⁸⁷⁶ Despite this positive outcome, recently the ECCJ has decried non-compliance with its decisions.⁸⁷⁷ Similar challenges was noted regarding failure of some member states of ECOWAS to designate their focal points has some consequences for state compliance, thus non-designation of focal points is not the only cause of state non-compliance.⁸⁷⁸ It is noteworthy that states, which have designated their focal points such as Nigeria still default in complying with judgements of the ECCJ demonstrates that there, are more serious issues at stake than the lack of focal points.⁸⁷⁹ Some of the challenges responsible for the poor rate of state compliance with decisions of regional HRTs in Africa are as follows:

4.1.1.4.1 Poor Coordination

Ayeni posits that lack of coordination is a principal challenge facing HRTs in Africa.⁸⁸⁰ There is a very limited coordination among the various HRTs and this is evident at both regional and sub-regional levels.⁸⁸¹ At the regional level there is a lack of coordination among the three main regional HRTs, namely the African Commission, the African Court and the African Children's Rights Committee.⁸⁸² Scholars posits that there a very limited coordination among three main regional human rights tribunals in Africa and the various sub-regional tribunals.⁸⁸³ The establishment of the African Court of Justice and Human and People's Rights was a mechanism to fill the gaps identified within the African Commission.⁸⁸⁴ It is imperative to indicate that the African Court would have competence to receive appeals from courts of the RECs.⁸⁸⁵ According to their founding treaties; decisions of each of the sub-regional tribunal are final and not appealable to any other regional tribunals.⁸⁸⁶ Ayeni posits that there are three

⁸⁷⁶ Adjolohoun et al 2013

⁸⁷⁷ Alter, Helfer and McAllister 2013: 739-779

⁸⁷⁸ W. Odunsi, 'ECOWAS Court Condemns Countries' Protocol Shun, Low Compliance with Judgement', Daily Post, 1 November 2021, available at <https://dailypost.ng/2021/11/01/ecowas-court-condemns-countries-protocol-shun-low-compliance-with-judgements/> (accessed 22 June 2022).

^{879/879} Department of Political Affairs, African Union Commission, 'African Human Rights Strategy', available at https://au.int/sites/default/files/documents/30179-doc-hrsa-final-table_en3.pdf (accessed 22 June 2022) para.31.

⁸⁸⁰ Ebobrah 2010: 199-211

⁸⁸¹ Mutua 1999: 342-363

⁸⁸² Viljoen 2004: 344-352

⁸⁸³ Ayeni et al 2011

⁸⁸⁴ Alter, Gathii and Helfer 2016: 293-328

⁸⁸⁵ African Commission on Human and Peoples' Rights, Twenty-First Activity Report, EX.CL/322(X) 13, PARA 60

⁸⁸⁶ Viljoen et al 2012

tribunals that exercises full human rights jurisdiction in Africa, namely the African Court, the African Commission and the ECOWAS Court of Justice.⁸⁸⁷ These courts interpret the African Charter, however there is no formal agreement as to which these tribunals has primary responsibility for interpreting the provisions of the Charter.⁸⁸⁸ It is noteworthy to indicate that in principle it would seem the African Court has the overriding competence for the interpretation of the African Charter.⁸⁸⁹ Viljoen states that the complementarity between the African Court and African Commission is that the court can “overrule” the Commission.⁸⁹⁰ The only concern is that there is a lack of clarity on the hierarchy of competing interpretative competences of regional and sub-regional tribunal, which is one challenge that has implications for the harmonious relationship of African HRTs in the future.⁸⁹¹

The ECCJ is the only sub-regional court in 2018, which exercises full human rights jurisdiction based on the African Charter.⁸⁹² The only difference between these regional courts is that the now defunct SADC Tribunal are not linked to the African Charter.⁸⁹³

4.1.1.4.2 Jurisdictional Overlaps

Ayeni posits that the African Court was established to complement the protective mandate of the African Commission.⁸⁹⁴ This explanation implies that the African Commission retains almost exclusive control over the promotion of human and peoples’ rights in terms of the Africa Charter.⁸⁹⁵ Some scholars such as Heyns and Padilla suggested that the African Commission should surrender its protective mandate to the African Court, thus allowing the Commission to focus on promotional activities.⁸⁹⁶ Viljoen is of the view that the suggestion raised by Heyns and Padilla that African Commission should surrender its protective mandate to African Court is premature.⁸⁹⁷ It is imperative to highlight that 33 out of 54 member states have ratified the Protocol setting up the African Court, and only ten states have made article 34(6) declaration which allows individual access to the court, thus four of these states have withdrawn their

⁸⁸⁷ Ayeni 2018: 1-20

⁸⁸⁸ Howse and Teitel 2000: 127-136

⁸⁸⁹ C Gaffey, ‘Why has Morocco Re-joined the African Union after 33 Years?’, News Week, 2 February 2017, available at <https://www.newsweek.com/morocco-african-union-western-sahara-551783> (accessed 22 June 2022).

⁸⁹⁰ Maluwa 2000: 201-205

⁸⁹¹ Mugwanya 1999: 35-50

⁸⁹² Hawkins and Jacoby 2010: 35-85

⁸⁹³ Helfer and Slaughter 1997:273-391

⁸⁹⁴ Okafor 2007:116-117

⁸⁹⁵ Heyns, Padilla and Zwaak 2006: 162-171

⁸⁹⁶ Mulawa 2000: 201-205

⁸⁹⁷ Ayeni 2018: 1-20

special declaration.⁸⁹⁸ Ayeni opined that the protective mandate of the African Commission is the only complaint mechanism available under the African Charter for individuals in the state that are yet to ratify the Court's Protocol.⁸⁹⁹

In certain cases, the jurisdiction of regional court and sub-regional tribunals overlaps.⁹⁰⁰ The recurring question has been at what point does the decision of a sub-regional court create a *re judicata* effects on the jurisdiction of a regional court and vice versa.⁹⁰¹ Ayeni is of the view that while the regional HRTs rely on the African Charter and other AU human rights treaties, sub-regional courts more often than not rely on their founding treaties.⁹⁰²

4.1.1.4.3 *The Problem of Forum Shopping*

Ayeni opined that forum shopping literally means choosing from multiple forums, the practice whereby litigants submit their legal disputes to court they believe would produce the most favourable judgement.⁹⁰³ The practice may lead to a dearth of cases in one tribunal and the overload of cases in another.⁹⁰⁴ Scholars such as Kazoba and Mmbando states that this is a major challenge regional and sub-regional HRTs selected for this study will have to contend with as they develop their jurisprudence.⁹⁰⁵ Viljoen opined that litigants' choice of forum is influenced by a cluster of factors including the type of provision litigants are seeking to enforce, the likelihood of success drawing from the tribunal's previous jurisprudence, and the legal effect of the decision of the tribunal.⁹⁰⁶ Other issues contributing to forum shopping are logistical factors that influences litigants to choose one international tribunal over another is accessibility criteria.⁹⁰⁷ A practical example of forum shopping is the ECOWAS Court of Justice, which has no requirement for exhaustion of domestic remedies has been inundated with cases.⁹⁰⁸ It is imperative to indicate that the dearth of cases in one tribunal and overflow in another tribunal is one challenge the selected regional and sub-regional HRTs will have to face eventually.⁹⁰⁹

⁸⁹⁸ Louw et al 2005

⁸⁹⁹ Kabagambe 2016: 266-276

⁹⁰⁰ Nabanch 2016: 77 -79

⁹⁰¹ Mutangi 2016 282-293

⁹⁰² Viljoen et al 2012

⁹⁰³ Neamtu 2008: 142-156

⁹⁰⁴ Kazoba and Mmbando 2016: 251-265

⁹⁰⁵ Ayeni 2018; 1-20

⁹⁰⁶ Gittleman 1981-1982: 667-714

⁹⁰⁷ Wachira and Ayinla 2006: 465-492

⁹⁰⁸ ECOWAS Court holds 89 session, Delivers 34 Judgements in 2015/2016 Legal Year', Premium Times, 28 September 2026

⁹⁰⁹ Viljoen 2004: 344-352

4.1.1.4.4 *Hostile Response from Government Officials*

Ayeni opined that the African Commission is no stranger to backlashes and hostile responses from state representatives and government delegations.⁹¹⁰ On several occasions, state representatives have mounted high-level resistance to the adoption of reports containing decisions of the Commission, which the government found to be offensive or embarrassing.⁹¹¹ It is noteworthy to mention that the government of Zimbabwe was found to be on wrong side by refusing comply with the decision of the African Commission. A practical example, in 2004, the African Commission submitted its 17th Activity Report to the AU Assembly for adoption as required by article 59 of the African Charter.⁹¹² This report contained a final report of an on-site mission to Zimbabwe in which the Commission presented damning allegations of human rights violations against the government.⁹¹³ When the report was presented for adoption at the third ordinary session of the AU Assembly in 2004, the government of Zimbabwe raised objection that it had no prior access to the mission report thus was not given an opportunity to respond to it.⁹¹⁴ In reaction to the government of Zimbabwe's objection, AU Assembly suspended the publication of the entire 17th Activity Report of the Commission until the comments of the government of Zimbabwe were attached to the mission report.⁹¹⁵

In similar vein, another backlash or resistance against the decisions of the African Commission regarding the 19th Activity Report was spearheaded by Ethiopia, Eritrea, Zimbabwe, Uganda and Sudan.⁹¹⁶ These member states alleges alleged the Commission publicised those resolutions prior to their adoption by the relevant AU organs.⁹¹⁷ In reaction to allegation, the Executive Council of the AU took a decision that the African Commission should expunge the affected resolutions from its activity report until the states concerned responded to the resolution.⁹¹⁸ In case between *Zimbabwe Human Rights NGO Forum v Zimbabwe*⁹¹⁹ the

⁹¹⁰ Kabagambe 2016: 266-278

⁹¹¹ Rules of Procedure of the African Commission 2010, Rule 118(1)-(4)

⁹¹² Ayeni 2018:1-20

⁹¹³ AU Assembly, 'Decisions and Declaration: Decision on the 17th Annual Activity Report of the African Commission on Human and Peoples' Rights – Doc.EX.CL/109(V)', Assembly/AU/Dec.49(III) REV.1.

⁹¹⁴ Wachira and Ayinla 2006: 470-471

⁹¹⁵ AU Assembly, 'Decision and Declaration: Decision on the 17th Annual Activity Report of the African Commission on Human and Peoples' Rights – Doc.EXCL/109 (V)', Assembly/AU/Dec.49(III) Rev.1.

⁹¹⁶ African Commission on Human and Peoples' Rights, Nineteenth Activity Report, EX.CL/236(X) 13, para.38.

⁹¹⁷ Ayeni 2018: 1-20

⁹¹⁸ Resolution of the AU Executive Council entitled 'Decision on the 19th Activity Report of the African Commission on Human Rights and Peoples' Rights', 8th ordinary session, EX.CL./Dec.257 (VIII).

⁹¹⁹ (2006) AHRLR 128 (ACHPR 2006)

government of Zimbabwe demonstrated its dissatisfaction against the African Commission presentation of the 20th Activity Report to the AU Executive Council and the publication of the Commission's decisions. The AU Executive Council refused to approve the decision for the publication until the decision was formally communicated to the government of Zimbabwe and the government was given three months to respond to the decision of the Commission.⁹²⁰

Another case of *Good v Botswana*,⁹²¹ the government of Botswana stated through a Diplomatic Note that 'the Government has made its position clear that it is not bound by the decision of the Commission.'⁹²² Another case of *International Pen and Others (On behalf of Ken SARO-Wiwa) v. Nigeria*,⁹²³ the African Commission issued a provisional measure requesting the government of Nigeria to suspend the execution of the 'Ogoni nine' pending the determination of their complaints before the commission. The request was ignored by the government and proceeded with haste execute all nine applicants.⁹²⁴ Ayeni opined sub-regional tribunals in Africa have experienced more political backlash.⁹²⁵ For example, attempts by the ECCJ, the EACJ and the SADC Tribunal to invest in themselves human rights jurisdiction through creative interpretation of their founding treaties attracted hostile reactions from states.⁹²⁶ It is imperative to indicate that one attempts succeeded, another failed while the third was redirected.⁹²⁷ In the case of *Mike Campbell and Others v. Republic of Zimbabwe*, the tribunal made rulings against the government of Zimbabwe, therefore in retaliation the government mounted a campaign that resulted ultimately in the suspension of the Tribunal and the abolition of access rights for private litigants.⁹²⁸

In case of *Anyang Nyong'o v. Attorney General of Kenya*, the government of Kenya sought to abolish the East African Court of Justice following the ruling of the court, which challenged the election of a Kenya national into the East African Legislative Assembly.⁹²⁹ Another case of *Musa Saidu Khan v. the Gambia*, the government of the Gambia responded by submitting a proposal to the ECOWAS Commission seeking to amend the 2005 ECOWAS Supplementary

⁹²⁰ Ayeni et al 2011

⁹²¹ (2000) AHRLR 25 (ACHPR 1997)

⁹²² African Commission on Human and Peoples' Rights, Combined 32nd and 33rd Activity Report, EX.CL/782(XXII) REV.2,9, para.24.

⁹²³ (2000) AHRLR R 25 (ACHPR 1998)

⁹²⁴ V.O Ayeni, 'Domestic Impact of the African Charter on Human and Peoples' Rights and the Protocol on the Rights of Women in Africa: A case Study of Nigeria', Unpublished LLM Dissertation, University of Pretoria (2011) at 2.

⁹²⁵ Guzman 2008: 171-235

⁹²⁶ Alter, Gathii and Helfer 2016: 293-328

⁹²⁷ Hart 2010: 532-359

⁹²⁸ Ayeni 2008: 1-20

⁹²⁹ Kufuor 1996: 1-11

Protocol.⁹³⁰ The proposed amendment included the provisions that would reduce the powers and jurisdiction of the court, create an appellate chamber and introduce additional admissibility criteria.⁹³¹

4.1.2 Lack of vested powers to sanction

The SADC Tribunal as the regional court in the SADC region should have been given vested powers to sanction or issue penalties to member states who failed to enforce its decisions or judgments.⁹³² One of the shortcomings was that the SADC Treaty and the Protocol on Tribunal had an impact on the functioning of the Tribunal relating to the community's sanction regime.⁹³³ Arts. 24(3) and 32 of the Protocol on Tribunal play a significant role in the analysis of the Tribunal's judgment and sanctions regime of SADC.⁹³⁴ On the other hand, Art. 16(5) of the SADC Treaty and art. 24(3) of the SADC Protocol on Tribunals affirms that decisions of the Tribunal are final and binding.⁹³⁵ Ebobrah argues that there are some ambiguity in the interpretations of these provisions.⁹³⁶ On the one hand, the argument that can be made is that the decision of the Tribunal is final and binding as stipulated in Art. 24(3) of the SADC Protocol on Tribunal and the proviso relates to the absence of appeal structure within the SADC framework and before any other international court or Tribunal.⁹³⁷

These ambiguities in the provision of the SADC treaty and Protocol on Tribunal seem to have been done deliberately to give the SADC Heads of State and Government to decide on appropriate sanction on a case-by-case.⁹³⁸ Art.24 (3) of the SADC Protocol on Tribunal gives the impression that its decision is final and binding but in reality, the SADC Heads of State and Government decides on which appropriate action should be taken against the defaulting member state.⁹³⁹ The question is "Is the SADC Tribunal an independent judiciary whose judgments are final and binding on defaulting member states? It is imperative to have a clear understanding of what is meant by judicial independence; therefore, the SADC Treaty provides that member states shall act in accordance with the principles of human rights, democracy,

⁹³⁰ 'The ECOWAS Court has expressed its concern over non-implementation of its judgement by the member states', Vanguard Online News, 28 June 2016, available at <http://www.vanguardngr.com/2016/06/ecowas-court-laments-non-execution-judgement-member-states/> (accessed 22 June 2022)

⁹³¹ Ayeni 2008: 1-20

⁹³² Nkatha 2019: 1-32

⁹³³ Ebobrah 2010:199-213

⁹³⁴ 2000 SADC Protocol on Tribunal

⁹³⁵ SADC Declaration and Treaty, 1992 and 2000 SADC Protocol on Tribunal

⁹³⁶ Saurombe 2011: 392-456

⁹³⁷ 2000 SADC Protocol on Tribunal

⁹³⁸ Ebobrah 2010:199-213

⁹³⁹ SADC Protocol on Tribunal

and the rule of law.⁹⁴⁰ The provision places an obligation upon the institutions of SADC to reciprocate such principles.⁹⁴¹ Scholars such as Raz posits that in order for the rule of law to flourish, it requires that the independence of the judiciary be guaranteed as well as the courts having the review powers over the implementation of the other principles.⁹⁴²

The principle that a court of law should be independent and impartial is entrenched in many legal systems and in all major international human rights instruments.⁹⁴³ There is a notion that judicial independence derives from the doctrine of the separation of powers as advanced by Montesquieu⁹⁴⁴, a French Philosopher he cautioned that; *"there is no liberty, if the judiciary power is not separate from the legislative and executive. Were it joined with the legislative, the life and liberty of the subjects would be exposed to arbitrary control, for the judge would be the legislator. Were it joined to the executive power, the judge might behave with violence and oppression."*

There is no precise definition of judicial independence but it can be stated that it is the ability of a judicial officer to decide a matter free from any pressure.⁹⁴⁵ It is also submitted that the judicial organ should be independent of any concentrations or influences of power.⁹⁴⁶ In order to bring more clarity on the meaning of judicial independence, a reference to an article by Cannon and Warlam which observed that judicial independence considers protection against outside pressure, such as the executive, governments, the press, media, public debate, and political parties.⁹⁴⁷ Other scholars such as Cannon made an assertion that judicial independence relates to the duty of outsiders not to interfere with the judges⁹⁴⁸.

The importance of judicial independence has been affirmed in various documents such as the United Nations Basic Principles on the Independence of the Judiciary, the International Bar Association Code of Minimum Standards of Judicial Independence approved in New Delhi in 1982, the Montreal Universal Declaration on the Independence of Justice (1983), the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region (1995),

⁹⁴⁰ Art.4 (c) of the SADC Declaration and Treaty

⁹⁴¹ De Wet 2013: 45-56

⁹⁴² Mwanawina 2013:321-335

⁹⁴³ Mwanawina 2013:321-335

⁹⁴⁴ Adjolahoun 2020: 1-40

⁹⁴⁵ Mzikamanda 2011: 1-25

⁹⁴⁶ Mwanawina 2013: 321-335

⁹⁴⁷ Cannon & Warlam, The Judicial Independence of the International Labour Organisation Administrative Tribunal: Potential for Reform, April 2007, <https://www.suepo.org/rights/public/archive/iloat.independence.ailec.final.02.06.07.pdf>(last accessed on 14 August 2013),p14.

⁹⁴⁸ Mwanawina 2013: 321-335

and the Syracuse Principles.⁹⁴⁹ Adopted by the seventh United Nations Conference on the Prevention of Crime and the Treatment of Offenders in 1985 and endorsed by the General Assembly later that year. It is noteworthy that the Montreal Declaration is significant in the present context since it is the only document contains provisions aimed specifically at the international judiciary.⁹⁵⁰ The relevant provision of this declaration, specifically art. 1.2 of the Burg House Principles state that: "*Where a court is established as an organ or under the auspices of an international organisation, the court and judges shall exercise their judicial functions free from interference from other organs or authorities of that organisation. This freedom shall apply both to the judicial process in pending cases, including the assignment of cases to a particular judge, and to the operation of the court and its registry.*"⁹⁵¹

This provision has been echoed in an observation by the African Commission in which they noted that in all cases the independence of a court must be appreciated with regard to the degree of independence of the judiciary vis-a-vis the executive.⁹⁵² A classical case as an example of miscarriage of judicial independence was *Mike Campbell and Others (Pty) Ltd v The Republic of Zimbabwe*, a registered company instituted a case with the Tribunal to challenge the acquisition of agricultural land by the government of Zimbabwe on the basis of amongst others, the implementation of Land Reform Policy which permits the government to expropriate the farms without compensation.⁹⁵³ The matter was pending in the Supreme Court of Zimbabwe at the time.⁹⁵⁴ The Tribunal's judgment was in favour of the applicant and the government of Zimbabwe was ordered to take no steps or permit no steps to be taken, directly or indirectly, whether by its agents or by orders, to evict from or interfere with the peaceful residence on and beneficial use of the farm known as Mount Carmel of Railway.⁹⁵⁵ The government of Zimbabwe scoffed at the Tribunal judgment and then President Mugabe uttered that this judgment was absolute nonsense.⁹⁵⁶

After numerous attempts by applicants to request the SADC Tribunal to intervene in compelling the government of Zimbabwe to comply with the judgment, the Tribunal referred

⁹⁴⁹ Keith Whilling, 'Situating Judicial Review'. Fall 2005

⁹⁵⁰ Mwanawina 2013: 321-335

⁹⁵¹ Montreal Declaration of 1983

⁹⁵² Mwanawina 2013: 321-335

⁹⁵³ *Mike Campbell and Others (Pty) Ltd v The Republic of Zimbabwe*

⁹⁵⁴ *Mike Campbell and Others (Pty) Ltd v The Republic of Zimbabwe*

⁹⁵⁵ (02/07) [2007] SADCT 1 (13 December 2007)

⁹⁵⁶ Chris Chinaka, Mugabe says Zimbabwe Land Seizures will continue, Mail & Guardian, 28 February 2009, <https://www.mg.co.za/article/2009-02-28-mugabe-says-zimbabwe-land-seizure-will-continue> (last accessed on 14 August 2013)

Zimbabwe to the SADC Council of Ministers for appropriate action.⁹⁵⁷ In terms of the SADC Treaty, the Ministers should have recommended sanctions or suspension, but instead of suspending Zimbabwe as it has transgressed the provisions of the SADC Treaty as it has done to Madagascar, the SADC preferred to suspend the Tribunal under the guise of a review process at the request of the Zimbabwe government.⁹⁵⁸

It is noteworthy that the SADC Summit in August 2010 took a decision to reduce operations of the Tribunal to allow time to consider this issue of review, which was eventually commissioned by SADC.⁹⁵⁹ The WTI Advisors led by Prof. Bartels issued the following recommendations: the SADC Tribunal had the legal authority to deal with individual human rights petitions, SADC Community law is supreme to domestic laws and constitutions and decisions of the SADC Tribunal are binding and enforceable within the territories of all SADC member states.⁹⁶⁰

It is noteworthy that African countries protect their own national sovereignty, which they gained through hardship from European colonisers; hence, it is difficult to cede their sovereignty to the courts.⁹⁶¹ Aligning themselves to the protection of their sovereignty these countries resorted to establishing intergovernmental organisations, therefore this model of interstate cooperation is able to suit states' needs for granting their national sovereignty.⁹⁶² The system of intergovernmental organisation limits the role of the judicial institutions and this is the reason why African countries are perceived by Western countries as having no litigation culture, although this mechanism is governed by principles and rules of international law.⁹⁶³ It is imperative to indicate that African countries do not want to pull each other to the court of law; instead, they prefer to use quiet diplomacy as a mechanism for avoiding conflict or confrontation with one another.⁹⁶⁴ These countries use the mechanism that they adopt as non-binding acts, should they decide to bind each other they adopt the agreements and protocols that only bind signatory parties and not create rights and obligations.⁹⁶⁵ In this system, the

⁹⁵⁷ *Mike Campbell and Others (Pty) Ltd v The Republic of Zimbabwe*

⁹⁵⁸ Nicole Fritz, SADC Tribunal: Will Regional leaders support it or sabotage it?, <https://osisa.orgsite/default/files/supfiles/Sabotaging%20the%20SADC%20Tribunal.pdf> (last accessed on 14 August 2013)

⁹⁵⁹ Hulse & Van der Vleuten 2015: 84-103

⁹⁶⁰ See, L Bartels, 'Review of the Role, Responsibilities and Terms of Reference of the SADC' Final Report (6 March 2011) <> accessed 11 August 2017

⁹⁶¹ Schmitter 2011: 8-11

⁹⁶² Schmitter 2011: 8-11

⁹⁶³ Tino 2012: 143-173

⁹⁶⁴ Abegunrin 1985: 190-224

⁹⁶⁵ Tino 2012: 143-173

potential disputes involve member states exclusively and to settle them they prefer to resort to diplomatic and political means in order to preserve their national sovereignty.⁹⁶⁶

A practical example is the suspension of the SADC Tribunal by member states who were not willing to reprimand the government of Zimbabwe for its failure to implement the Tribunal rulings⁹⁶⁷. The problem of the SADC tribunal started soon after its creation when it heard and ruled on a number of cases against the Zimbabwean government between 2007 and 2009.⁹⁶⁸

4.1.3 Understanding the Regional Integration in Southern Africa

The purpose of the discussions on regional integration is to clarify the meaning thereof and the goals that the SADC member states seek to achieve with the integration.⁹⁶⁹ The primary objective of regional cooperation or integration is to reverse the continent's economic decline, promote development, and strengthen the SADC region's position in Africa and the world at large.⁹⁷⁰ The regional integration in the SADC region is in jeopardy due to policymakers who were unduly influenced by the European integration model and failed to face the reality of the political and economic state of African countries.⁹⁷¹ It is imperative to indicate that SADC members are not keen to follow the European model of regional courts, which were bestowed with powers to preside over human rights complaints and to ensure that the rule of law prevails.⁹⁷² These member states have copied this model in order to receive foreign investments because foreign investors want certainty and stability before they can invest in countries where there is a rule of law, democracy, and protection of human rights.⁹⁷³

The SADC Tribunal is one of the institutions of SADC established to ensure that regional integration in the region becomes a reality and that member states adhere to the constitutive documents of the Regional Economic Communities (RECs).⁹⁷⁴ Efforts to ensure regional integration in Africa began at a sub-regional level and not at the continental level.⁹⁷⁵ These efforts yielded little progress, especially in the immediate post-independence era.⁹⁷⁶ The slow pace of regional integration triggers negative thoughts among scholars such as Nkatha who

⁹⁶⁶ Tino 2012: 143-173

⁹⁶⁷ Nathal 2013: 870-892

⁹⁶⁸ Metcalf & Papageorgiou 2017: 154-191

⁹⁶⁹ Laursen 2010: 3-4

⁹⁷⁰ Leistner 1997:112-123

⁹⁷¹ Leistner 1997: 112-123

⁹⁷² Bach 1999: 5-14

⁹⁷³ Ravenhill 1985:205-219

⁹⁷⁴ Venter & Neuland 2007: 131-156

⁹⁷⁵ Nkatha 2018: 1-32

⁹⁷⁶ Buthelezi 2006: 173--216

suggests that it should be recalled, although this project presupposes the existence of the cultural foundation of common loyalties, the objective of similarities of national problems and potential awareness of common interest that are essential for sustaining international institutions.⁹⁷⁷

It is vital to indicate that shared historical, cultural, trade, and development links sustain an affinity that boosts the potential for integration and maintenance of common regional standards.⁹⁷⁸ In accordance with the European Union (EU), the integration process is not only about the rules, directives, and regulations but also about the population of the states playing an active part including the legal persons operating therein⁹⁷⁹. It is noteworthy that the integration rules are of direct concern to them; they are beneficiaries of their correct implementation and application both by the participating states and by the Organisation.⁹⁸⁰ The regional integration in Africa, the constitutive documents or instruments and other documents of various regional economic communities portray these institutions as essentially economic integration schemes.⁹⁸¹ Many of these constitutive documents of Regional Economic Communities (RECs) in Africa have provisions that deal with the protection of human rights, which mark a significant development.⁹⁸²

Regional integration assumes that neighbouring countries that have similar economic, socio-political, and security problems may benefit from integrating their economies, and this system creates a situation of mutual interdependence and development.⁹⁸³

Phooko opines that the primary purpose of the establishment of RECs was to deal with economic issues, which resulted in a connection between the objectives of the regional integration and the realisation of human rights.⁹⁸⁴ It is noteworthy that each of these sub-regional communities has a tribunal that is formed in terms of their respective constituent documents, for example, the Southern African Development Communities Tribunal (SADC Tribunal), the Economic Community of West African States Community Court of Justice (the ECOWAS CCJ), and the East African Court of Justice (EACJ).⁹⁸⁵ These Tribunals play a

⁹⁷⁷ Nkatha 2018: 1-32

⁹⁷⁸ Chigara 2012:341-377

⁹⁷⁹ Cappelatti 1987: 12-22

⁹⁸⁰ Muir, Dawson & de Witte 2013: 1-13

⁹⁸¹ Naldi & Magliveras 2016: 133 - 159

⁹⁸² Nathan 2013: 870-892

⁹⁸³ Nathan 2013: 870-892

⁹⁸⁴ Viljoen 2013: 495-496

⁹⁸⁵ Phooko 2015: 531-565

pivotal role as instruments used to promote regional integration on the African continent and are responsible for interpreting and applying treaty provisions in order to resolve disputes arising from economic integration.⁹⁸⁶ The judicial courts do not have jurisdiction to protect human rights but through express or implied mandates, they have adjudicated over cases involving allegations of the violation of human rights.⁹⁸⁷

4.1.3.1 Jurisdiction of International Organisations

The jurisdiction of international organisations is determined by the constitution or treaty establishing them and this instrument bestows powers that the organisation possesses and the extent to which those powers are to be performed.⁹⁸⁸ In most instances, these constituent documents are not precise regarding the powers that an organisation possesses or must have, especially when this instrument is silent or ambiguous on jurisdictional aspects.⁹⁸⁹ In the case of the SADC Tribunal, the powers are conferred on it by member states through the SADC Treaty and the Protocol on the Tribunal and Rules of Procedures thereof.⁹⁹⁰ The SADC Protocol on Tribunal is silent on whether or not the SADC Tribunal had jurisdiction over human rights cases.⁹⁹¹ It is therefore against this background that this document should also shed light on the doctrine of express and implied powers of an international organisation.⁹⁹² The summary description of express and implied powers will be discussed below:

4.1.3.1.1 Express Powers

Express powers are those powers explicitly conferred upon an organization by the state parties.⁹⁹³ Member states indicate the nature and the extent to which powers must be exercised.⁹⁹⁴ The doctrine of express powers permits organisations to exercise only powers that are given to them by member states through a constituent document.⁹⁹⁵ For example, Art.14 of the SADC Protocol on Tribunal's jurisdiction stipulates that the Tribunal shall have jurisdiction over all disputes that relate to the interpretation and application of the SADC Treaty.⁹⁹⁶ Scholars support this allocation of powers and argue that the SADC Tribunal can do only what its jurisdictional clause mandates it to do and that anything outside would be

⁹⁸⁶ Viljoen: 495-496

⁹⁸⁷ Phooko 2015: 531 -565

⁹⁸⁸ Ebobrah 2008 http://www.escr-et.org/usr_doc/S_Ebobrah.pdf

⁹⁸⁹ Ebobrah 2008 http://www.escr-net.org/usr_doc/S_Ebobrah.pdf

⁹⁹⁰ Soroshi 2003 <http://jeanmonnetprogram.org/archive/papers/03/03040.pdf>

⁹⁹¹ *Mike Campbell and Others (Pty) Ltd v The Republic of Zimbabwe*

⁹⁹² Spencer 2006: 617-672

⁹⁹³ Akade 1998: 437-467

⁹⁹⁴ Phooko 2015:531-565

⁹⁹⁵ Ebobrah 2008 http://www.escr-net.org/usr_doc/S_Ebobrah.pdf

⁹⁹⁶ 2000 SADC Protocol on Tribunal

beyond its mandate.⁹⁹⁷ It is noteworthy that the SADC Treaty and the SADC Protocol on Tribunal made specific reference to the observance of human rights and the rule of law in the preamble.⁹⁹⁸ The treaties also require member states to act in accordance with the principles of human rights, democracy, and the rule of law.⁹⁹⁹ The legal question is whether the principles and aspirations that are contained in the SADC Treaty impose an obligation on member states to respect human rights in their respective territories.¹⁰⁰⁰ The second question is "Does a mere reference to human rights in the SADC Treaty empower the Tribunal through implied powers to adjudicate over cases of human rights? An answer to this question will be addressed in the discussion of *Mike Campbell and Other (Pty) Ltd v The Republic of Zimbabwe* that will follow in the next section.

4.1.3.1.2 Implied Powers

Implied powers are not expressly stated but seem to be implied by express powers in a constituent document.¹⁰⁰¹ The theory of implied powers was modelled on the constitutional and administrative laws of countries such as the United States and England.¹⁰⁰² Scholars such as Hartley, Craig, and De Burca stated that the doctrine of implied powers could be interpreted in a narrow and wide meaning.¹⁰⁰³ The interpretation of this doctrine in a narrow sense means the existence of any other power, which is reasonably necessary for the exercise of the former.¹⁰⁰⁴ On the other hand, a wide interpretation means the existence of a given objective or function implies the existence of any power reasonably necessary to attain it.¹⁰⁰⁵

In practical terms, the contention that implied powers may legitimately be exercised is because the application of another power is for complementing an early existing power, function, or objective¹⁰⁰⁶. The doctrine of implied power denotes that the tribunal could exercise certain powers even though such powers are not contained in its founding document.¹⁰⁰⁷ These powers are deemed to have been conferred on the organisation only if they are essential for the performance of explicit powers and functions.¹⁰⁰⁸ The difference

⁹⁹⁷ Nkatha 2012 AJICL 97; Johnson 2011 <http://www.jdsupra.com/legalnews/enforcing-judgement-in-international-law-69044>

⁹⁹⁸ SADC Declaration and Treaty, 1999 and 2000 SADC Protocol on Tribunal

⁹⁹⁹ Art.4 (c) of the SADC Treaty

¹⁰⁰⁰ Craig and De Burca EU Law 123

¹⁰⁰¹ *McCulloch v Maryland* 17 US 4 Wheat 316 (1819) 316

¹⁰⁰² Phooko 2015: 531-565

¹⁰⁰³ Craig and De Burca: 113-123

¹⁰⁰⁴ Cowell 2013: 153-165

¹⁰⁰⁵ Craig and De Burca: 113-123

¹⁰⁰⁶ Phooko 2015: 531-565

¹⁰⁰⁷ Rama-Montaldo 1970: 114 -118

¹⁰⁰⁸ Ebobrah 2008 http://www.escri-net.org/usr_doc/S_Ebobrah.pdf

between implied and express powers is that the latter requires that only those powers that are set forth in the constituent document should be exercised.¹⁰⁰⁹

It is noteworthy that doctrines of implied and express powers are competing against each other, and the former protects the community interest while the latter protects state sovereignty.¹⁰¹⁰ The litmus test is applied in determining that the implied powers is necessary for the organisation to achieve its object and purpose as specified in the constituent treaty¹⁰¹¹.

Part B: Mike Campbell and Others (Pty) Ltd v The Republic of Zimbabwe

4.1.4 Assessing the SADC Tribunal Classical Zimbabwe case (Mike Campbell and Others v The Republic of Zimbabwe)

Mike Campbell's case is a classical matter, which was presided over before the SADC Tribunal, and the central argument was the expropriation of farms without compensation and the denial of property owners to approach the local courts to seek a legal recourse.¹⁰¹² This case resulted in a vindication of applicants (Mike Campbell and Others) with a total victory whilst the government of Zimbabwe experienced a disaster, which had become the respondent in other cases before the Tribunal whereby the domestic legislative instruments were in violation of the SADC Treaty.¹⁰¹³ In the case of *Barry Gondo*,¹⁰¹⁴ the applicants maintained that the State Liability Act was inconsistent with the provisions of the treaty because it stipulated that State property might not be executed against an order to satisfy a judgment rendered against it. The Tribunal found that the Act was in contravention of the following fundamental rights: the right to be given effective remedy, access to courts, fair hearing, equality before the law, and equal protection of the law.¹⁰¹⁵ This judgement similar to the *Mike Campbell and Others* has touched the raw nerve in the government of Zimbabwe and it concerned the legality of the land reform programme.¹⁰¹⁶ SADC Tribunal presided over a total of nineteen (19) cases and eleven (11) were brought against Zimbabwe mostly in relation to the country's land reform programme.¹⁰¹⁷ The case of *Mike Campbell and Others*

¹⁰⁰⁹ Ebobrah 2008 http://www.escri-net.org/usr_doc/S_Ebobrah.pdf

¹⁰¹⁰ Cheng 2006: 1-56

¹⁰¹¹ Sarooshi 2003 <http://www.jeanmonnetprogram.org/archive/papers/03/030401.pdf>

¹⁰¹² *Mike Campbell and Others (Pty) Ltd v The Republic of Zimbabwe*

¹⁰¹³ Magliveras 2016:1-24

¹⁰¹⁴ *Barry Gondo and Others v The Republic of Zimbabwe, SADC (T) Case No.05/2008, judgment, 09 December 2010*

¹⁰¹⁵ *Barry Gondo and Others v The Republic of Zimbabwe, SADC (T) Case No.05/2008, judgment, 09 December 2010*

¹⁰¹⁶ *Mike Campbell and Others (Pty) Ltd v The Republic of Zimbabwe*

¹⁰¹⁷ Nkatha 2018: 1-32

*(Pty) Ltd v The Republic of Zimbabwe*¹⁰¹⁸, the background of this case lies in the land reform program that was implemented by the Government of Zimbabwe. Since its independence, the government of Zimbabwe has always implemented Agrarian reform, in light of the colonial history; the necessity of land reform was never in doubt.¹⁰¹⁹ The implementation of this reform program by the government resulted in a violent campaign of invading and occupying white-owned land and farms.¹⁰²⁰

Zimbabwe challenged the registration and enforcement of the decision of the SADC Tribunal on the basis that it has not yet ratified the SADC Protocol on the Tribunal.¹⁰²¹ The government of Zimbabwe raised an argument that the Tribunal did not have jurisdiction to receive and adjudicate over the Campbell case.¹⁰²² Secondly, Zimbabwe contended that the judgment in this case could be registered and enforced in its territory.¹⁰²³ The High Court of Zimbabwe found that the SADC member states including Zimbabwe had signed the amended SADC Treaty, which repealed the requirement of two-thirds of SADC member states to ratify an additional protocol.¹⁰²⁴ In that regard, the SADC Protocol on Tribunal became binding on member states, including Zimbabwe without the need for further ratification.¹⁰²⁵ The High Court emphasized that a foreign judgment could not be registered and enforced if it would be contrary to public policy.¹⁰²⁶ Clearly, the government of Zimbabwe is submitting to the jurisdiction of the SADC Tribunal through being a party to the SADC Treaty and the SADC Protocol on Tribunal has created an enforceable legitimate expectation that it would abide by the decisions of the Tribunal.¹⁰²⁷ The High Court of Zimbabwe indicated that the Constitution of Zimbabwe is the supreme law of Zimbabwe and that any other law that is inconsistent with it is void.¹⁰²⁸ The decision of the court has two implications, namely the common law which is used to enforce a foreign judgment.¹⁰²⁹ Secondly, the common law must be construed and applied to conform to the Constitution and any other feature of the judgment that conflicts with the Constitution cannot be recognised or enforced in Zimbabwe.¹⁰³⁰ According to Judge Patel,

¹⁰¹⁸ *Case No.2/2007[2008] SADCT 2*

¹⁰¹⁹ Ebobrah 2011: 216-250

¹⁰²⁰ Nkatha 2018:1-32

¹⁰²¹ Phooko 2018: 1-34

¹⁰²² *Mike Campbell and Others (Pty) Ltd v The Republic of Zimbabwe (03/2009) SADCT 1*

¹⁰²³ Phooko 2018: 1-34

¹⁰²⁴ *Mike Campbell and Others (Pty) Ltd v The Republic of Zimbabwe (03/2009) SADCT 1*

¹⁰²⁵ *Mike Campbell (Pty) Ltd and Others v Government of Zimbabwe (03/2009) SADCT 1*

¹⁰²⁶ *Mike Campbell and Others (Pty) Ltd v The Republic of Zimbabwe(03/2009) SADCT 1*

¹⁰²⁷ Phooko 2018: 1-31

¹⁰²⁸ Section 2 of the Constitution of Zimbabwe Amendment (No.2), 2013

¹⁰²⁹ Fitzmaurice 1957: 2023-293

¹⁰³⁰ Rogoff 1996: 559-686

public policy could not be covered by common law to circumvent the Constitution.¹⁰³¹ In his view, Judge Patel it was contrary to public policy for Zimbabwe to require the government to act against a constitutionally mandated program.¹⁰³²

Phooko disagrees with Judge Patel's view that the Constitution of Zimbabwe takes precedence over international law.¹⁰³³ That sentiment would make international law meaningless if international law were to be enforced only at the mercy of the state concerned.¹⁰³⁴ Judge Patel's judgment misguided the role of international law and allowing such would be of no use for the countries to conclude international pacts or treaties, as they could discharge their obligations only as and when they wished.¹⁰³⁵ It is imperative to indicate that in terms of international law, Zimbabwe or any other country may not rely on its domestic laws to evade its international obligation.¹⁰³⁶ According to Art.27 of the Vienna Convention on the Law of Treaties stipulates that "State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance".¹⁰³⁷ This principle is affirmed in a case between the *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*¹⁰³⁸, the court in the case said, "A State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force".¹⁰³⁹ It is against this background that the SADC Treaty or community law should be treated as international law when it comes to domestic law.¹⁰⁴⁰ It is noteworthy that both community law and international law systems are created through state consent and therefore have similar characteristics.¹⁰⁴¹ The High Court of Zimbabwe should have applied this principle of international law, as its domestic laws contradicted the provisions of the SADC Treaty.¹⁰⁴² The government of Zimbabwe has a duty to carry out its treaty obligations in good faith.¹⁰⁴³ It can be strongly submitted that Judge Patel misconstrued the principles of international law and allowed himself to succumb to political

¹⁰³¹ *Mike Campbell (Pty) Ltd and Others v Government of Zimbabwe (03/2009) SADCT 1*

¹⁰³² *Mike Campbell (Pty) Ltd and Others v Government of Zimbabwe (03/2009) SADCT 1*

¹⁰³³ Phooko 2015: 531-565

¹⁰³⁴ Phooko 2018: 1-31

¹⁰³⁵ *Mike Campbell and Others (Pty) Ltd v The Republic of Zimbabwe*

¹⁰³⁶ Bosl & Diescho 2009: 275-317

¹⁰³⁷ Vienna Convention on the Law of Treaties (1969)

¹⁰³⁸ 1932 PCIJ Series A/B No.44 21

¹⁰³⁹ *Treatment of Polish Nationals and other persons of Polish Origin or Speech in the Danzig Territory*

¹⁰⁴⁰ Phooko 2018: 1-31

¹⁰⁴¹ Phooko 2018: 1-31

¹⁰⁴² Phooko 2018:1-31

¹⁰⁴³ Rosenne et al (1997)

pressure from the government of Zimbabwe with its land reform program despite this policy infringing upon the rights of the farm owners.¹⁰⁴⁴ The assertion of the High Court of Zimbabwe that international law and domestic law are distinct and the latter enjoy supremacy in their respective domains.¹⁰⁴⁵ Therefore, neither law enjoys supremacy over the other.¹⁰⁴⁶ The court has failed to articulate its position in considering established principles of international law when there is a conflict between domestic and international law.¹⁰⁴⁷

It is noteworthy that the government of Zimbabwe went further to amend its constitution by effecting Amendment 17 into the constitution and this amendment took away the rights of the farmers to seek a legal recourse in the local courts.¹⁰⁴⁸ The farmers approached the North Gauteng High Court, which affirmed the judgment of the SADC Tribunal whereby the government of Zimbabwe was instructed to cease from embarking on the forceful removal of farm owners.¹⁰⁴⁹ The government was instructed to consider paying compensation to farm owners who already lost their farms.¹⁰⁵⁰ It is, therefore, imperative to highlight the importance of access to justice and its definition.¹⁰⁵¹ Access to justice is a basic principle of the rule of law and a fundamental human right that opens the door to achieving other important rights, therefore failure to access justice can impede the realisation of other rights.¹⁰⁵²

In ordinary legal parlance, access to justice means the ability of people to seek and obtain a remedy through formal and informal institutions of justice in conformity with human rights standards; however, in reality the interpretation of this concept considers socio-economic realities.¹⁰⁵³ Magwanda is correct in his definitions of access to justice and the literal interpretation of this definition makes the amendment 17 of the Constitution of Zimbabwe tantamount to denial of justice to the victims of the land reform program whereby the farm owners were denied a legal recourse in any court of law in Zimbabwe.¹⁰⁵⁴ The referral of their complaint to the SADC Tribunal was the only legal remedy available to them, hence the

¹⁰⁴⁴ Phooko 2018:1-31

¹⁰⁴⁵ Phooko 2018:1-31

¹⁰⁴⁶ Rama-Montaldo 1970: 111-156

¹⁰⁴⁷ Phooko 2018:1-31

¹⁰⁴⁸ Murungi & Gallinetti 2010: 118-143

¹⁰⁴⁹ *Mike Campbell and Others (Pty) Ltd v The Republic of Zimbabwe*

¹⁰⁵⁰ *Mike Campbell and Others (Pty) Ltd v The Republic of Zimbabwe*

¹⁰⁵¹ A Magaisa, 'The Land question in Zimbabwe: the judiciary as an instrument of recovery', in B Chigara, *Southern African Development Community Land Issues: Towards a New Sustainable Land Relations Policy* (Routledge, Oxford and New York, 2011)

¹⁰⁵² Magwanda 2021: 17-22

¹⁰⁵³ Foundation for Human Rights (2019) 'Access to justice'. Available at <http://www.fhr.org.za/index.php/programmes/access-justice>

¹⁰⁵⁴ *Mike Campbell and Others (Pty) Ltd v The Republic of Zimbabwe*

applicants were denied to exhaust local remedies available to them, which is the domestic courts.¹⁰⁵⁵

The applicants in *Mike Campbell and Others (Pty) Ltd v The Republic of Zimbabwe* received a judgment in their favour; therefore, they enforced this decision on the government of Zimbabwe in line with Art.32 (1-3) which read in conjunction with Rule 74 of the Protocol on Tribunal.¹⁰⁵⁶ After the Government of Zimbabwe deliberately ignored the Tribunal judgment, then the applicants had to put into effect the provisions of Art.32 (4) of the Protocol on Tribunal to force the government to honour the Tribunal's judgment.¹⁰⁵⁷ At the ultimate end, the Tribunal enforced Art.32 (5) of the Protocol on Tribunal by referring the matter to SADC Heads of State and Government to take appropriate action.¹⁰⁵⁸ The legal basis for the government of Zimbabwe not to enforce the Tribunal judgment was that Zimbabwe had not ratified the Protocol on Tribunal.¹⁰⁵⁹ This has raised many legal issues which among others were deliberated in a court case, *Gramara (Pty) Limited and Another v The Government of Zimbabwe*¹⁰⁶⁰, whereby the Tribunal decided that the Republic of Zimbabwe is bound by the jurisdiction of the Tribunal. Despite this judgment, the High Court declined to register this decision by the SADC Tribunal; hence, the issue of enforcement remains an illusion.¹⁰⁶¹

The argument raised by the government of Zimbabwe is that the Tribunal does not have jurisdiction to preside over human rights matters because the SADC Heads of State and Government have not ratified the Protocol on Human Rights.¹⁰⁶² Applicant lawyers disputed this argument and the Tribunal made use of a doctrine of implied powers to argue that the Tribunal has jurisdiction in terms of Art.4 (c) of the SADC Treaty, which outlines the principles of human rights, democracy and rule of law in which SADC member states must abide with them.¹⁰⁶³ The Tribunal judges unanimously agreed that the member states were bound to abide by the principles in Art.4(c) of the SADC Treaty, and failure to respect and protect this principle automatically gives the Tribunal the power to preside over the complaint lodged against the defaulting member state.¹⁰⁶⁴

¹⁰⁵⁵ *Mike Campbell and Others (Pty) Ltd v The Republic of Zimbabwe*

¹⁰⁵⁶ SADC (T) 1/2007

¹⁰⁵⁷ SADC (T) 1/2007

¹⁰⁵⁸ SADC (T) 1/2007

¹⁰⁵⁹ SADC (T) 1/2007

¹⁰⁶⁰ Case No.5483/09

¹⁰⁶¹ Mkhawire 2010: 567-573

¹⁰⁶² *Mike Campbell and Others (Pty) Ltd v The Republic of Zimbabwe*

¹⁰⁶³ *Mike Campbell and Others (Pty) Ltd v The Republic of Zimbabwe*

¹⁰⁶⁴ *Mike Campbell and Others (Pty) Ltd v The Republic of Zimbabwe*

The doctrine of express and implied powers has been applied even in European sub-regional courts.¹⁰⁶⁵ It is imperative to refer to other disputes, which involved the United Nations whereby the General Assembly requested an advisory opinion from the International Court of Justice (ICJ) on whether the United Nations had the capacity to bring an international claim against the responsible government for the people who had died while in the service of the United State.¹⁰⁶⁶ The advice was sought with a view to obtaining reparations through the victim.¹⁰⁶⁷ The court indicated that the Charter of the United Nations (UN Charter) "does not expressly confer upon the Organisation the capacity to include, in its claim for reparation, damage caused to the victim or to persons entitled through him".¹⁰⁶⁸ The court answered this question in the affirmative and said that under international law, an organisation must be construed as being given implied powers that are necessary for discharging its duties even if such powers are not expressly provided for in the constituent document.¹⁰⁶⁹

The ECOWAS Community Court of Justice (CCJ) was established in terms of Arts.6 (1) (e) and 15 (1) of a Revised Treaty of the Community of the ECOWAS (1993) and this provision did not make any reference to human rights but it only made reference to "recognition, promotion, and protection of human and people rights".¹⁰⁷⁰ Thereafter, the ECOWAS CCJ was created by Protocol A/P.1/7/91 and it became operational in 2005.¹⁰⁷¹ The primary objective of the establishment of ECOWAS CCJ was to deal with disputes between member states and institutions of ECOWAS.¹⁰⁷² Art.9 of ECOWAS CCJ makes a provision for member states to have an option to bring cases before ECOWAS CCJ on behalf of their nationals regarding the interpretation and application of the provisions of the Treaty.¹⁰⁷³

By implication, it means that the protection of individual rights is dependent on the mercy of states, and this created a problem since states are unwilling to litigate against each other.¹⁰⁷⁴ A primary example was the case between *Afolabi Olajide v Federal Republic of Nigeria*¹⁰⁷⁵; the matter involved the allegation of human rights violation. A Nigerian businessperson lodges

¹⁰⁶⁵ S.K Verma, 'An Introduction to Public International Law 10, 11, 37 (PHI Learning Pty Ltd, 2004 (1998)

¹⁰⁶⁶ Shaw 2003: 574-670

¹⁰⁶⁷ Dupuy 1999: 807-923

¹⁰⁶⁸ Tammelo 1965: 347-350

¹⁰⁶⁹ Reparation for Injuries Suffered in the Service of the United Nations Advisory Opinion, 1949 ICJ Reports 174 (11 April 1949)

¹⁰⁷⁰ Phooko 2015: 531-565

¹⁰⁷¹ ECOWAS Community Court of Justice Protocol A/P.1/7/91 (1991)

¹⁰⁷² Art.76(2) of ECOWAS Community Court of Justice Protocol A/P.1/7/91 (1991)

¹⁰⁷³ Protocol A/P.1/7/91

¹⁰⁷⁴ Phooko 2015: 531-565

¹⁰⁷⁵ ECW/CCJ/APP/01/03

a complaint against the government of Nigeria about the closure of the border, such a decision has negatively affected his business, and that was in violation of the principle of the free movement of persons and goods as contained in the Revised Treaty of Community of West African States and African Charter on Human Rights.¹⁰⁷⁶ The complainant alleged that he suffered financial damages.¹⁰⁷⁷ In defence, the government of Nigeria cited that the complainant does not have the jurisdiction of the ECOWAS CJJ to adjudicate an individual case involving a violation of human rights.¹⁰⁷⁸

In its ruling, the court referred to Protocol A/P1/7/91, which stated that only member states could bring cases before it and dismissed the application.¹⁰⁷⁹ Phooko found that the ECOWAS CCJ has adopted a narrow interpretation of the instruments establishing the ECOWAS CCJ by relying on the doctrine of express powers.¹⁰⁸⁰ In comparison, the ECOWAS CCJ made reliance strictly on the provision of Art.4 (c) of the Revised Treaty of Community of West African States whilst the SADC Tribunal in its interpretation of Art.4(c) of the SADC Treaty applied a wide interpretation by using the doctrine of implied interpretation of the provisions of a Treaty.¹⁰⁸¹ It is imperative to discuss the right to property under the United Declaration on Human Rights and the Banjul Charter.¹⁰⁸² These two international legal instruments have a role to play in this thesis document because in *Mike Campbell's* case, the central issue was the determination of property rights.¹⁰⁸³ Art.14 protects the property but also allows acquisitions in the public interest that conform to domestic laws.¹⁰⁸⁴

Shay makes a comparative analysis between the African Charter on Human Rights and People's Rights and the American Convention, specifically Art.21 makes a provision that requires just compensation, but allows states to subordinate property rights with domestic legislation.¹⁰⁸⁵ It is imperative to highlight that international courts have been wary of protecting private interests as robustly as human rights such as prohibition against torture or arbitrary detention.¹⁰⁸⁶ Nading cited scholars who claim that private property ownership is a second-tier human right when compared to the right to life, liberty, or security.¹⁰⁸⁷ Other international

¹⁰⁷⁶ *Afolabi Olajide v Federal Republic of Nigeria ECW/CCJ/APP/01/03*

¹⁰⁷⁷ *Afolabi Olajide v Federal Republic of Nigeria ECW/CCJ/APP/01/03*

¹⁰⁷⁸ *Afolabi Olajide v Federal Republic of Nigeria ECW/CCJ/APP/01/03*

¹⁰⁷⁹ *Ecowas Community Court of Justice Protocol A/P.1/7/91 (1991)*

¹⁰⁸⁰ Ruppel 2009: 275-317

¹⁰⁸¹ *Mike Campbell and Others (Pty) Ltd v Republic of Zimbabwe*

¹⁰⁸² Rosenne et al (1997)

¹⁰⁸³ *Mike Campbell and Others (Pty) Ltd v Republic of Zimbabwe*

¹⁰⁸⁴ African Charter on Human Rights and People's Rights

¹⁰⁸⁵ Shay 2012: 133 -171

¹⁰⁸⁶ Nading 2002: 737 -786

¹⁰⁸⁷ Nickel 2008:984-1001

treaties such as the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights failed to mention the right to property.¹⁰⁸⁸

Property rights involve a balance between individual rights and national welfare; hence, international law does not protect absolute property rights but instead provides that the right to private property must be balanced with public interest concerns such as land reform.¹⁰⁸⁹

These anomalies contributed to the complexities in *Mike Campbell and Others (Pty) Ltd v The Republic of Zimbabwe*, whereby the applicants were denied a legal recourse by the government of Zimbabwe when they affected the amendment 16B which prevented them from approaching local courts for a legal remedy against the infringement of their right to property. The applicants in this case went further by approaching the African Commission of Human and People's Rights, which made a ruling against them. The government of Zimbabwe signed both the UDHR and the Banjul Charter, and both treaties have provision such as Arts 17 and 14, which addresses property rights. Art.17 of UDHR guarantees individuals the right to own property and not to have it arbitrarily deprived.¹⁰⁹⁰

Secondly, another provision, art.8 of UDHR further guarantees that when fundamental rights are violated, individuals have a right to an effective remedy by a court or tribunal United Declaration on Human Rights.¹⁰⁹¹ On the other hand, the Banjul Charter, specifically Art.14 also guarantees the right to property, although it allows the government to take property for the public good in conformity with appropriate laws.¹⁰⁹² Art.17 also guarantees individuals the right to due process and to have claims heard before an independent court.¹⁰⁹³ Concisely, these provisions provide the basis for property protection for landowners in Zimbabwe.¹⁰⁹⁴

The signing of the UDHR and Banjul Charter by the government of Zimbabwe made it bound by the provisions of these treaties, including the protection of the right to property of individuals.¹⁰⁹⁵ In this case, the government decided to act contrary to the provisions of these treaties and amended the Constitution in order to effect amendment 16B to prevent farm

¹⁰⁸⁸ Shay 2012: 133-171

¹⁰⁸⁹ Nading 2002: 737-786

¹⁰⁹⁰ United Declaration on Human Rights

¹⁰⁹¹ United Declaration on Human Rights

¹⁰⁹² Banjul Charter

¹⁰⁹³ Banjul Charter

¹⁰⁹⁴ *Mike Campbell and Others (Pty) Ltd v Republic of Zimbabwe*

¹⁰⁹⁵ Nkatha 2012: 87-109

owners from seeking legal recourse.¹⁰⁹⁶ Clearly, the actions of the government of Zimbabwe were contrary to international law by enforcing domestic law over the international agreement.¹⁰⁹⁷

4.1.6 Tension between the Zimbabwe Judiciary and the SADC Tribunal regarding the legality of Amendment 16A and 16B

The Zimbabwe Supreme Court issued its decision on the constitutionality of Amendments 16A and 16B in *Mike Campbell and Others Pty Ltd v Minister of National Security Responsible for Land, Land Reform and Resettlement*¹⁰⁹⁸, the court held that land reform is a non-justiciable political question and the constitution could legally deny a right to access to court to challenge land acquisition. The court reneged in its obligation to protect the rights of individuals against arbitrary decisions of the government.¹⁰⁹⁹ The court argued that the protections the person receives under the constitution for their private property have a political and legislative character, which is beyond its jurisdiction.¹¹⁰⁰ Petrica opined that Zimbabwe's political system was marked by a classical form of authoritarianism, for example, the political power was centralised around the then President Robert Mugabe and his cabal which was composed of the ruling party members and supporters.¹¹⁰¹ The holders of the political power relied on nationalism when promoting a culture of lawlessness and intolerance towards other parts of the society, among others political parties, civil society organisations, labour unions, and professionals from all sectors, including the judiciary.¹¹⁰² On the contrary, the decision the SADC Tribunal held in *Mike Campbell and Others (Pty) Ltd v The Republic of Zimbabwe* those Amendments 16A and 16B of the Constitution of Zimbabwe violate international law because they are discriminatory and deny individuals their fundamental right to access courts and have their grievances heard.¹¹⁰³

The SADC Treaty, Art.4(c) states that the SADC Tribunal has jurisdiction to hear cases involving individual human rights and the rule of law.¹¹⁰⁴ The Supreme Court accepted the SADC Tribunal's validity and that it should adhere to the Tribunal's decision, except in matters

¹⁰⁹⁶ Zenda F, 'The SADC Tribunal and the Judicial Settlement of International Disputes (LLD-Dissertation University of South Africa 2010)

¹⁰⁹⁷ Klabbbers, Introduction to International Law (Cambridge University Press Cambridge 2002)

¹⁰⁹⁸ [2008]SC 49/07,28 [ZIM]

¹⁰⁹⁹ *Mike Campbell and Others (Pty) Ltd v The Republic of Zimbabwe*

¹¹⁰⁰ *Mike Campbell v Minister of National Security Responsible for Land, Land Reform and Resettlement* [2008]SC 49/07,28 [ZIM]

¹¹⁰¹ Petrica 2020: 61 -67

¹¹⁰² Petrica 2020: 61 -67

¹¹⁰³ *Mike Campbell v Republic of Zimbabwe, Case No.2/2007*

¹¹⁰⁴ SADC Declaration and Treaty, 1992

where the decision would contradict public policy.¹¹⁰⁵ In the case of *Gramara v Republic of Zimbabwe*, the Zimbabwe High Court accepted that a state cannot invoke its own domestic deficiencies to evade international obligations and that it must make a good faith effort to conform to treaty obligations.¹¹⁰⁶

The court further states that the Zimbabweans and the international community have a legitimate expectation that Zimbabwe will adhere to SADC Tribunal decision and enforce its judgments.¹¹⁰⁷ In its final analysis of the issues before it, the court balanced these concerns against Zimbabwe's public policy on land reform and Zimbabwean's legitimate expectation that Zimbabwe would follow its own constitution, *Gramara* held that the SADC Tribunal decision was contrary to public policy and unenforceable domestically.¹¹⁰⁸ The ramifications of Amendments 16A and 16B of the Zimbabwe Constitution provide the government agencies with broad discretion to take land, leading to arbitrary takings based on racial criteria.¹¹⁰⁹ These provisions violate the right to property guaranteed in Art.14 of the Banjul Charter and the prohibition on non-arbitrary takings in Art.17 (2) of the UDHR.¹¹¹⁰ Chávez has found that the Zimbabwe land reform program is far from meeting international or domestic standards and can be considered a "tyrannical land reform regime".¹¹¹¹

It is noteworthy that Art. 31(1) of the Vienna Convention makes all treaties to be interpreted in good faith, according to their ordinary meaning, while considering their object and purpose.¹¹¹² This convention presumes that states negotiate treaties within the context of their international obligations; therefore, the interpretation of good faith could mean that states would apply it in accordance with internationally accepted principles.¹¹¹³

Applying the Vienna Convention dictates the interpretation of Art.14 of the Banjul Charter; therefore, it is clear that the Charter is not meant to provide states with the flexibility to take land.¹¹¹⁴ It is noteworthy that the Banjul Charter is a human rights treaty; therefore, it is unreasonable to interpret the Charter as if it legitimizes arbitrary takings of property or refuses to protect property owners who are targeted based on their race.¹¹¹⁵ By using the Vienna Convention's requirement to consider the ordinary meaning of the treaty language, Art.14 of

¹¹⁰⁵ *Mike Campbell and Others v The Republic of Zimbabwe*

¹¹⁰⁶ *Gramara Ltd v Republic of Zimbabwe*

¹¹⁰⁷ *Gramara v Republic of Zimbabwe Gramara v Republic of Zimbabwe*

¹¹⁰⁸ *Gramara v Republic of Zimbabwe*

¹¹⁰⁹ Shay 2012: 133-171

¹¹¹⁰ Banjul Charter and United Declaration of Human Rights

¹¹¹¹ Chavez 2008: 591-603

¹¹¹² Vienna Convention

¹¹¹³ Shay 2012: 133-171

¹¹¹⁴ Banjul Charter and Vienna Convention

¹¹¹⁵ Udombana 2004: 105-110

the Banjul Charter only allows taking in the general interest of the community.¹¹¹⁶ The interpretation of Art.14 of the Banjul Charter takes into account the interest of the community in the case where the government wants to infringe on the property rights of individuals.¹¹¹⁷ Amendment 16A and 16B of the Zimbabwe Constitution allows arbitrary application and racial discrimination, which infringes Art.8 of the UDHR, which provides a remedy to victims of human rights violations perpetrated by the state.¹¹¹⁸ Joyner also emphasizes that when a state allows human rights violations, it becomes obligated to provide a remedy.¹¹¹⁹ The argument raised by the President of Zimbabwe, Robert Mugabe that the implementation of Land Reform was a rational method to redress unlawful colonial land dispossessions.¹¹²⁰ On the other hand, post-colonial practice requires states to respect owners who have current titles to land in order to protect the rule of law.¹¹²¹

Scholars such as Shay, Van Banning, and Joyner share the same view that Zimbabwe's land reform program degrades the rule of law and breeds violence and that it is contrary to the general interest of its citizens.¹¹²² It can be argued that the government of Zimbabwe became a law unto itself and the parliament by effecting Amendments 16A and 16B acted *ultra vires* on the provisions of treaties to which they are signatories.¹¹²³ In support of the statement made, reference is made to Art. 17(2) of the International Convention on the Elimination of All Forms of Racial Discrimination, which declares that all human beings are equal before the law and are entitled to equal treatment, and condemns all forms of racial discrimination.¹¹²⁴ The government of Zimbabwe's decision to target or expropriate the farms belonging to whites is tantamount to an act of discrimination based on race.¹¹²⁵

It is noteworthy that the Zimbabwe's land reform law is arbitrary under Art.17 of the UDHR, at the same time not appropriate under Art.14 of the Banjul Charter because it does not provide any objective criteria to guide land expropriations.¹¹²⁶ It is racially discriminatory if the land reform allows the abuse of property rights by the government.¹¹²⁷ Additionally, the Zimbabwe

¹¹¹⁶ Banjul Charter

¹¹¹⁷ Udombana 2004: 105-110

¹¹¹⁸ United Declaration of Human Rights

¹¹¹⁹ Van Banning 2002: 282 - 290

¹¹²⁰ Dancaescu 2003: 615-618

¹¹²¹ Van Banning 2002: 282 - 290

¹¹²² Hellum & Derman 2004: 1785-1792

¹¹²³ Shay 2012:133-171

¹¹²⁴ Shay 2012:133-171

¹¹²⁵ Leah Hyslop, White Farmers in Zimbabwe Struggle against Increasing Violence, The Telegraph (June 11,2010), <http://www.telegraph.co.uk/expat/expatnews/7818110/White-farmers-in-Zimbabwe-against-increasing-violence.html>

¹¹²⁶ Banjul Charter and United Declaration of Human Rights

¹¹²⁷ Hartnack 2009: 363-364

land reform does not define basic terms to provide guidance to implementing authorities to even which land should be acquired and who is eligible for redistribution.¹¹²⁸ In *Mike Campbell's* case the SADC Tribunal has noted that the criteria for redistribution is not "reasonable and objective" but arbitrary and based primarily on considerations of race.¹¹²⁹ The approach used in expropriating land by the government of Zimbabwe is vexatious in the sense that it is known that land reform is a mechanism used to expropriate or acquire underutilized land but in Zimbabwe, the law allows even economically productive land to be targeted for redistribution.¹¹³⁰ The Tribunal concludes that refusing to adopt fair measuring criteria invites abuse and de facto racial discrimination.¹¹³¹ The manner in which the government of Zimbabwe effected changes or Amendment 16A and 16B of the Constitution of Zimbabwe was a strategy for ZANU-PF to canvass votes for the elections.¹¹³² It is clear that the land reform program discriminated against white farmers based on disproportionate impact and it intentionally targets them.¹¹³³

4.1.6.1 The Zimbabwean Supreme Court erred by not following its Declaration of Rights, the SADC Tribunal decision, or the South African persuasive precedent in Campbell

The Zimbabwe Supreme Court missed the opportunity to dictate land redistribution until objective criteria were formed, invalidate Amendments 16A and 16B completely, or provide damage to the white farm owners who claimed their land was targeted because of their race.¹¹³⁴

Despite the opportunity to invalidate Amendment 16A and 16B or compensate the white farmer for their lost farms, the government of Zimbabwe ignored the possibility that that land reform program could be implicitly discriminatory, instead, it decided that because Amendment 17 did not make reference to race, therefore its provisions were not racially discriminatory.¹¹³⁵ This decision was *contra bonos mores* as a matter of Zimbabwe's domestic law and international law.¹¹³⁶ Firstly, the Zimbabwe Declaration of Rights ensures that property may only be acquired under the authority of law and that individuals have a right not to be treated

¹¹²⁸ Mitchell 2001: 587-593

¹¹²⁹ Shay 2012:133-171

¹¹³⁰ Brian MacGarry, 'Land for which?: Some Unanswered Questions, 17 (1994)

¹¹³¹ *Mike Campbell Ltd v Republic of Zimbabwe*

¹¹³² See Zimbabwe says No, GURDIAN.CO.UK (Feb 16, 2000) available at <http://www.guardian.co.uk/world/2000/feb/16/zimbabwe.guardianleaders>.

¹¹³³ Shay 2012: 133 -171

¹¹³⁴ *Mike Campbell and Others (Pty) Ltd v Minister of National [2008]SC 49/07*

¹¹³⁵ Shay 2012: 133-171

¹¹³⁶ *Mike Campbell and Others (Pty) Ltd v The Republic of Zimbabwe*

in a racially discriminatory manner.¹¹³⁷ The Zimbabwe Supreme Court erred by maintaining that a law that does not reference race cannot trigger the anti-discrimination treatment effect.¹¹³⁸ This assertion contradicts Art.56 (5) of the Constitution of Zimbabwe of 2013, which stipulates that law can still be discriminatory if it does not mention race but is discriminatory in effect.¹¹³⁹ Additionally, the Zimbabwe Supreme Court ignored its obligations in the international realm by not adhering to the SADC Tribunal's decision in *Campbell*.¹¹⁴⁰ Hemel and Schalkwyk assert that despite any obligation to register the judgment, it is difficult to enforce judgments domestically when the political will is absent.¹¹⁴¹

On the other hand, the SADC Tribunal applied international principles in holding that Amendments 16A and 16B arbitrarily targeted land with a racially discriminatory intent or if it disproportionately affects one race, the law violates anti-discriminatory standards.¹¹⁴² Maposa argues that it is concerning for the government to have so much discretion in implementing land reform, a politically charged issue where independent oversight is particularly important to prevent racially discriminatory practices.¹¹⁴³ The argument put by *Mike Campbell* that the Zimbabwean government planned to end white land ownership in Zimbabwe, passed Amendments 16A and 16B to accomplish this goal more quickly, and with fewer obstacles from the courts was accepted by the Tribunal.¹¹⁴⁴ The SADC Tribunal in its conclusion stated that Amendments 16A and 16B constitute indirect discrimination.¹¹⁴⁵

It is noteworthy that the decisions of the South African courts are used as precedents by other regional courts.¹¹⁴⁶ The South African precedent is persuasive on land reform issues, as the colonial history led to the unequal distribution of land in South Africa is quite similar to that of Zimbabwe.¹¹⁴⁷ In comparison between South Africa and Zimbabwe, the courts in South Africa held that arbitrary takings based on race, or without objective criteria are illegal, and as such, hence it has registered the SADC Tribunal's decision in *Campbell*.¹¹⁴⁸ In the case of *Bato Star Fishing v Minister of Environmental Affairs and Tourism*¹¹⁴⁹, the court stated that the

¹¹³⁷ Art.16(1) of the Constitution of Zimbabwe of 1979 (as amended by Act No.5 of 2005)

¹¹³⁸ *Mike Campbell and Others (Pty) Ltd v The Republic of Zimbabwe*

¹¹³⁹ Constitution of Zimbabwe of 2013

¹¹⁴⁰ *Gramara Ltd v Republic of Zimbabwe* [2010]HC 33/09

¹¹⁴¹ Alex Bell, 'Zimbabwe: Farmers Slam Fresh Onslaught of Land-Grab Violence, ALLAFRICA.COM (October28,2010) available at <http://allafrica.com/stories/201010290064.html>

¹¹⁴² *Mike Campbell and Others (Pty) Ltd v The Republic of Zimbabwe*

¹¹⁴³ Shay 2012: 133-171

¹¹⁴⁴ *Mike Campbell Ltd v Republic of Zimbabwe, Case No.2/2007*

¹¹⁴⁵ Moyo 2009: 590-614

¹¹⁴⁶ Nikken 2009: 246-247

¹¹⁴⁷ Shay 2012: 133-171

¹¹⁴⁸ *Fick v Republic of Zimbabwe, Case No. 01/2010*

¹¹⁴⁹ 2004 4 (SA) 490 (CC)

jurisprudence of the South African Constitutional Court is very informative in this regard: "The measure that brings about transformation will inevitably affect some members of the society adversely, particularly those coming from previously advantaged communities."¹¹⁵⁰ Mayo opined that states are not allowed to legislate themselves out of their obligations under international law just because land reform is purportedly intended to address the historical injustice.¹¹⁵¹

Shay states that the Supreme Court of Zimbabwe disregarded its Declaration of Rights that protects due process.¹¹⁵² Art.16 states, "No property shall be compulsorily acquired except under authority of law that requires the authority to give reasonable notice."¹¹⁵³ Art.16 (1) (a)-(c) requires that landowners receive notice when their land is targeted for acquisitions, and it gives landowners the opportunity to challenge land acquisitions based on an argument that the acquisition was not "reasonably necessary" to achieve a public purpose.¹¹⁵⁴ The Supreme Court of Zimbabwe did not recognise the principle as articulated in Art.16 of the Constitution of Zimbabwe but the court agreed to oust judicial review of land acquisitions.¹¹⁵⁵ The court found that it was legal because the provision as stipulated in the Amendment 16B was passed with proper legislative approval according to prescribed procedures.¹¹⁵⁶ The Supreme Court has failed to exercise its judicial oversight and to decide whether Amendment 16B impermissibility interferes with core due process values by claiming that property acquisitions are a non-judicial political question and when the legislature makes an unambiguous law regarding this matter it is beyond the scope of the court to interfere.¹¹⁵⁷

The contravention of the Declaration of Rights contradicts the Supreme Court's own precedents in *Commercial Farmer's Union v Minister of Lands* in which it held that taking private property without notice or a right to challenge the taking violated due process.¹¹⁵⁸ Clearly, the court's contradiction of its precedents and silence regarding the passing of laws that infringe on international treaties is a sign that the court's independence is in doubt.¹¹⁵⁹ Shay opines that it is strange that the Supreme Court did not even refer to this decision, or its mandatory precedential value, in its Campbell decision.¹¹⁶⁰

¹¹⁵⁰ Shay 2012: 133-171

¹¹⁵¹ Mayo 2009: 590 - 614

¹¹⁵² *Mike Campbell and Others (Pty) Ltd v The Republic of Zimbabwe*

¹¹⁵³ Constitution of Zimbabwe of 1979 (as amended by Act No.5 of 2005)

¹¹⁵⁴ Constitution of Zimbabwe of 1979 (as amended by Act No.5 of 2005)

¹¹⁵⁵ *Mike Campbell and Others (Pty) Ltd v The Republic of Zimbabwe*

¹¹⁵⁶ Shay 2012: 133-171

¹¹⁵⁷ Shay 2012:133-171

¹¹⁵⁸ Nading 2002: 737-786

¹¹⁵⁹ *Commercial Farmer's Union v Minister of Lands*, No.262/2000

¹¹⁶⁰ Van Banning 2002: 283-289

Additionally, the Supreme Court improperly refused to register the SADC Tribunal's decision in *Gramara* by citing that it would be against the public policy to do so.¹¹⁶¹ The Tribunal should be applauded and credited for correctly applying international principles and concluding the case as if Amendment 16B was passed legally and still subject to judicial review and those individuals must be allowed to challenge it in court.¹¹⁶²

The decision of the Supreme Court of Appeal of Zimbabwe was influenced by politics and a departure from the principle of judicial independence and this assertion is based on the court decision to decline to recognize the SADC Tribunal's judgment as a matter of policy.¹¹⁶³ The Supreme Court's reliance on public policy as a defence not to declare Amendment 16B irrational was incorrect because no public policy or justification excuses denying landowners basic due process guarantees.¹¹⁶⁴ Refusing to register the decision of the SADC Tribunal by Zimbabwe is in violation of its obligations under the SADC Protocol on the Tribunal.¹¹⁶⁵ Reference is made to Art. 32(3) which states that the decisions of the Tribunal shall be binding upon the parties to the dispute in respect of that particular case and enforceable within the territories of the States concerned.¹¹⁶⁶

4.1.6.2 Amendments 16A and 16B illegally deny landowners compensation for land that is acquired for redistribution

The government of Zimbabwe is in violation of the SADC Tribunal's decision in *Mike Campbell and Others (Pty) Ltd v The Republic of Zimbabwe* because it has refused to pay sufficient compensation to landowners for acquired land.¹¹⁶⁷ The Tribunal was of the view that the government of Zimbabwe claimed that it is impermissible to rely on Amendment 16A to avoid its international law obligation to pay compensation.¹¹⁶⁸

The Declaration of Human Rights of the Constitution of Zimbabwe of 1979 demands fair compensation to owners of property but the government of Zimbabwe impermissibly denied responsibility to pay landowners whose land is taken for distribution.¹¹⁶⁹ On the other hand, Great Britain reneged from the agreement entered into with Zimbabwe when the Southern Rhodesia was declared independent whereby Britain undertook to pay compensation to farm

¹¹⁶¹ *Gramara Ltd v Republic of Zimbabwe* [2010]HC 33/09

¹¹⁶² *Mike Campbell Ltd v Republic of Zimbabwe*, Case No. 2/2007

¹¹⁶³ *Mike Campbell Ltd v Republic of Zimbabwe*, Case No. 2/2007

¹¹⁶⁴ *Mike Campbell Ltd v Republic of Zimbabwe*, Case No.2/2007

¹¹⁶⁵ *Mike Campbell Ltd v Republic of Zimbabwe*, Case No. 2/2007

¹¹⁶⁶ SADC Protocol on Tribunal

¹¹⁶⁷ *Mike Campbell Ltd v Republic of Zimbabwe*, Case No.2/2007

¹¹⁶⁸ *Mike Campbell Ltd v Republic of Zimbabwe*, Case No.2/2007

¹¹⁶⁹ Constitution of Zimbabwe (as amended by No.5 of 2005)

owners whose farms were identified for land redistribution.¹¹⁷⁰ Art.16A (1) (c) (ii) asserts that even if Great Britain refuses to pay land owners, Zimbabwe still has no right to pay compensation.¹¹⁷¹

The ramification of non-payment of compensation is that such undermines the entire land redistribution program by breeding anger about unfair deprivation and uncertainty about legitimate ownership.¹¹⁷² Maposa is of the view that non-payment of compensation both undermines the rule of law and produces doubt in the people that its government is committed to justice.¹¹⁷³ It is noteworthy to indicate that the Campbell case is the first classical dispute on human rights; therefore, SADC Tribunal has developed jurisprudence on this issue.¹¹⁷⁴ Comparative analysis of other international treaties, for example American Convention on Human Rights clearly requires just compensation to accompany expropriation.¹¹⁷⁵ By referring to the provisions of the Declaration on Human Rights of the Constitution of Zimbabwe and the American Convention on Human Rights, the SADC Tribunal arrived at a conclusion that Amendment 16A violates these legal instruments by failure to have a provision to allow payment of compensation.¹¹⁷⁶ Based on the unconstitutional provisions of the Constitution of Zimbabwe of 1979, especially Amendment 16A, the SADC Tribunal directed Zimbabwe to pay landowners who had been denied compensation.¹¹⁷⁷ SADC Tribunal concluded that Zimbabwe is in breach of its SADC obligations by continuing to refuse to pay compensation to any landowners whose land has been taken.¹¹⁷⁸

4.1.7 Referral of decisions of SADC Tribunal to be enforced in South Africa by South African Courts.

Applicants who sought legal recourse to the SADC Tribunal after the Government of Zimbabwe failed to enforce the judgments granted in favour of individuals who approached the regional court.¹¹⁷⁹ Among others, the case of *Crawford Lindsay Von Abo and The Government of the Republic of South Africa and Four Others*¹¹⁸⁰, the High Court of South

¹¹⁷⁰ Constitution of Zimbabwe (as amended by No.5 of 2005)

¹¹⁷¹ Constitution of Zimbabwe (as amended by No.5 of 2005)

¹¹⁷² Mouri 1994: 329-356

¹¹⁷³ Mysliwiec 2009: 398-399

¹¹⁷⁴ Brian Raftopoulos, 'The Politics of the Movement for Democratic Change, New Zimbabwe (November 12, 2009 available at <http://www.newzimbabwe.com/pages/opinion140.14149.html>

¹¹⁷⁵ Art.21(2) of the American Convention on Human Rights

¹¹⁷⁶ *Mike Campbell Ltd v Republic of Zimbabwe, Case No. 2/2007*

¹¹⁷⁷ *Mike Campbell Ltd v Republic of Zimbabwe, Case No. 2/2007*

¹¹⁷⁸ *Fick v Republic of Zimbabwe, Case No. 01/2010*

¹¹⁷⁹ Magliveras 2016: 1-24

¹¹⁸⁰ *North Gauteng High Court, Pretoria, Case no. 3106/07*

Africa registered the SADC Tribunal decision in the Campbell case in the application in the case of *Louis Karel Fick and Two Others against the Government of the Republic of Zimbabwe*.¹¹⁸¹ The registration of these two cases clearly shows that although the Tribunal decisions were not enforceable in the Republic of Zimbabwe, they are enforceable in neighbouring South Africa.¹¹⁸²

Its primary objective in approaching South African courts was to bring about recognition and enforcement of the decisions of the SADC Tribunal, therefore this reveals the tension between the SADC Community law and domestic law when enforcing decisions of the sub-regional courts that uphold state regional obligations.¹¹⁸³ It is imperative to make the distinction between monism and the dualism theory of law.¹¹⁸⁴ The former means that international law becomes applicable in domestic law upon ratification.¹¹⁸⁵ The monism theory views international law and domestic law as one legal system.¹¹⁸⁶ In the latter model, international law and domestic law are regarded as two distinct legal systems; therefore, ratified international treaties need to be incorporated into domestic law before they can have the force of national law.¹¹⁸⁷

The shortfall identified in the SADC legal instruments, especially the SADC Treaty and SADC Protocol on Tribunal is that these instruments do not have provisions that deal with the nature of the relationship between international law and national law of member states.¹¹⁸⁸ Secondly, these instruments fail to regulate the relationship between community (SADC) law and the domestic law of member states or the relationship between the community itself and international law.¹¹⁸⁹ In giving a context to the Constitution of Zimbabwe¹¹⁹⁰, its section 111B of Amendment 17 deals with the reception of international law in domestic law and stipulates that "Any convention, treaty or agreement acceded to, concluded or executed by or under the authority of the President with one or more foreign states or government or international organisation – shall be subject to the approval of parliament, and (b) shall form part of the law of Zimbabwe unless it has been incorporated into the law by or under an Act of Parliament. Clearly, this provision gives the expression that international law obligations have to be

¹¹⁸¹ Case no. 77881/2009

¹¹⁸² Mkhawire 2010: 567-573

¹¹⁸³ Phooko 2018: 1-33

¹¹⁸⁴ Hondora T, 'The establishment of the SADC Tribunal: Troubled beginnings' (17 December 2010), available at <http://ssm.comabstract=1727342> (accessed 26 January 2011)

¹¹⁸⁵ Ebobrah 2009: 35-45

¹¹⁸⁶ Marian 2007: 42

¹¹⁸⁷ Kuntz 1953: 662

¹¹⁸⁸ Cheng 2006: 23-345

¹¹⁸⁹ Phooko 2018: 1-33

¹¹⁹⁰ Constitution of Zimbabwe (as amended on 14 September 2005, up to including Amendment No.17)

incorporated into local law through legislation. In relation to the Gramara case, the applicants sought to register and enforce the SADC Tribunal's judgment in *Mike Campbell and Others (Pty) Ltd v The Republic of Zimbabwe*.¹¹⁹¹ A point in limine in the Gramara was that Zimbabwe challenged the registration and enforcement of the decision of the SADC Tribunal on the basis that it had not yet ratified the SADC Protocol on Tribunal, therefore the regional court does not have jurisdiction to receive and adjudicate over the Campbell case.¹¹⁹²

The Northern Gauteng High Court found that the SADC member states including Zimbabwe had signed the amended SADC Treaty which repealed the requirement of two-thirds of SADC member states to ratify an additional protocol, therefore the SADC Protocol on Tribunal become binding on member states, including Zimbabwe without a need for further ratification.¹¹⁹³

The domestic legal basis for registration was the Foreign Civil Judgement Act, 32 1988, and the Recognition of Foreign Arbitral Awards Act 40 of 1977, and this application for registration was not opposed by the Government of Zimbabwe.¹¹⁹⁴ The reason why Zimbabwe did not oppose the application of registration was that they did not take the application seriously until the effects were felt in the wake of the registration.¹¹⁹⁵ The consequences of the registration of cost order in South Africa paved the way for the attachment of Zimbabwean property situated in Cape Town and these properties were rented for commercial purposes.¹¹⁹⁶ It is noteworthy to highlight that the attachment of Zimbabwean government assets was done in accordance with section 14(3) of the South African Foreign State Immunities Act, 87 of 1981, which exempts property of a foreign State that is used for commercial purposes from immunity for the purpose of execution.¹¹⁹⁷ The Supreme Court of Appeal (SCA) also confirmed this decision of the North Gauteng High Court in September 2012.¹¹⁹⁸ The SCA further confirmed that Zimbabwe had forfeited any immunity, which it may have enjoyed from the jurisdiction of South African courts by committing itself to the SADC Treaty and Protocol on Tribunal.¹¹⁹⁹

¹¹⁹¹ *Gramara (Private) Limited v Government of the Republic of Zimbabwe* Case No. HC 33/2009

¹¹⁹² *Gramara (Private) Limited v Government of the Republic of Zimbabwe* Case No. HC 33/2009

¹¹⁹³ *Gramara (Private) Limited v Government of the Republic of Zimbabwe* Case No. HC 33/2009

¹¹⁹⁴ De Wet 2012: 45-63

¹¹⁹⁵ De Wet 2012: 45-63

¹¹⁹⁶ *Republic of Zimbabwe v Sheriff of Wynberg North and Others*, Case No 2009/34015 (22 November 2011)

¹¹⁹⁷ *Republic of Zimbabwe v Sheriff of Wynberg North and Others*, Case No 2009/34015 (22 November 2011)

¹¹⁹⁸ *Republic of Zimbabwe v Sheriff of Wynberg North and Others*, Case No 2009/34015 (22 November 2011)

¹¹⁹⁹ *Fick (SCA) (n 52) par 20.*

It is imperative to mention that section 2 of the Foreign States Immunity Act incorporates the international law principles of sovereign immunity from jurisdiction before the domestic courts of a foreign State.¹²⁰⁰ However, on the other hand, section 3 of the same Act forfeits such immunity by means of express waiver.

Art.32 (3) of the SADC Protocol on Tribunal renders the decision of the Tribunal enforceable in the territories of all member states. Many scholars share the same interpretation of this Art.32 (3) which makes the judgment of the SADC tribunal enforceable to all member states who ratified this Protocol.¹²⁰¹ This provision waives any immunity in which Zimbabwe could have been entitled to claim from the jurisdiction of the courts of member states and agreed that orders of the Tribunal would be enforceable in those courts.¹²⁰² The South African courts relied on domestic legislation that is predominantly used in the conflicts of laws context to register human rights verdicts against sovereign states in South Africa.¹²⁰³ The SCA finally disregarded the fact that the Tribunal is suspended by the parties at least as far as the validity of the decision of the Tribunal was concerned, therefore the decision taken by the regional court prior to its suspension remained valid and enforceable.¹²⁰⁴

The government of Zimbabwe approached the Constitutional Court of South Africa in order to seek legal recourse after the North Gauteng High Court ordered the attachment of properties that belong to the government of Zimbabwe that is situated in Cape Town, South Africa.¹²⁰⁵ These properties would be sold at auction in order to compensate the farmers whose farms were taken by the Government of Zimbabwe through their land reform program.¹²⁰⁶ In arriving in its decision, the Constitutional Court decided that when South Africa and Zimbabwe ratified the SADC Treaty and SADC Protocol on the Tribunal, they undertook to implement the decisions of the Tribunal in their respective countries.¹²⁰⁷

The court further stated that there is no need for these countries to transform such obligations into national law through enabling legislation, although their constitution requires them to do so.¹²⁰⁸ The approach taken by the Constitutional Court was accepted by scholars who correctly pointed out the court's failure to refer to traditional theories of the reception of international law

¹²⁰⁰ Foreign States Immunity Act, 1981

¹²⁰¹ Art.32 (3) of SADC Protocol on Tribunal

¹²⁰² Foreign States Immunity Act, 1981

¹²⁰³ De Wet 2012:45-63

¹²⁰⁴ Bingham 2007: 67-85

¹²⁰⁵ *Mike Campbell and Others (Pty) Ltd v The Republic of Zimbabwe*, CAS 2/2007

¹²⁰⁶ Ebobrah 2009: 312-335

¹²⁰⁷ Phooko 2018: 1-33

¹²⁰⁸ Oppong 2008 http://www.kas.de/upload/auslandshomepages/namibia/MR12008/MR12008_07_Oppong.pdf 11.

into national law.¹²⁰⁹ The only concern was that the court was salient on the dualist approach of the South African legal system regarding the incorporation of international law into domestic law.¹²¹⁰ By implication, this lacuna could create the impression that international obligations are automatically binding in South Africa without a need for incorporation.¹²¹¹ Phooko is of the view that the court has failed to interpret and apply properly the dualist approach, which requires the international law to be incorporated through national legislation in order to bind South Africa at a domestic level.¹²¹²

The court has applied undomesticated law and by so doing it has departed from its own jurisprudence which had clarified the status of international (SADC Community law) in South Africa.¹²¹³ The court has applied a monist approach, which is not in line with section 231 of the Constitution of the Republic of South Africa, which deals with the incorporation of treaty law into the South African jurisdiction.¹²¹⁴ The effect of the court is that the undomesticated SADC Community law and/or international law has the force of law in South Africa.¹²¹⁵ Ultimately, the properties that belonged to the government of Zimbabwe were ultimately sold in auction to compensate the white farmers who were dispossessed of their farms.¹²¹⁶ It is noteworthy that the Government of Zimbabwe undertook to pay R200 000 as compensation to affected farmers, but to date, Zimbabwe has not yet paid a cent.¹²¹⁷ The remaining white farmers who lost their land during Zimbabwe's large-scale expropriation were sceptical about the Zimbabwean government's recent compensation offer.¹²¹⁸ The government of Zimbabwe was offering to settle a US\$ 3.5 billion (about R64 billion) land compensation deal over 10 years.¹²¹⁹ This was the latest change to an agreement signed in 2020 with farmers who had lost their land more than two decades ago.¹²²⁰ De Jager stated that the government of Zimbabwe had offered payment terms of 20 years, but had since decided to speed up the process.¹²²¹ The

¹²⁰⁹ De Wet 2013: 1-19

¹²¹⁰ Ebobrah and Nkhatha 2010: 85

¹²¹¹ Oppong 2006: 296

¹²¹² Phooko 2018: 1-33

¹²¹³ Gathii 2012: 245-283

¹²¹⁴ Phooko 2018: 1-33

¹²¹⁵ Fick CC case para 59

¹²¹⁶ Shay 2012: 133-171

¹²¹⁷ Shumba 2003:95-115

¹²¹⁸ De Jager, Farmer's Weekly, Scepticism abounds over Zimbabwe's compensation offer to farmers, (March.07.2023)

¹²¹⁹ De Jager, Farmer's Weekly, Scepticism abounds over Zimbabwe's compensation offer to farmers, (March.07.2023)

¹²²⁰ De Jager, Farmer's Weekly, Scepticism abounds over Zimbabwe's compensation offer to farmers, (March.07.2023)

¹²²¹ De Jager, Farmer's Weekly, Scepticism abounds over Zimbabwe's compensation offer to farmers, (March.07.2023)

Zimbabwean Minister of Finance committed that the compensation would be financed through treasury bonds with prescribed assets status, and would not be liable to taxation.¹²²²

On the contrary, the white farmers living in the Southern African region rejected Zimbabwe's offer to settle an R3.5 billion dollar as land compensation deal over ten years.¹²²³ The amended agreement was signed in 2020 with farmers who had been removed from their properties more than 20 years ago.¹²²⁴ De Jager stated that they would put pressure on the government of Zimbabwe to return their farms to them.¹²²⁵

4.1.8 The Suspension of the SADC Tribunal

The government of Zimbabwe began a land distribution program, which led to forcible expropriation of white-owned landholdings.¹²²⁶ This decision has led to a number of white farmers including, Mike Campbell, to have their farms expropriated¹²²⁷. Being discontent with the decision of the government, Mike Campbell challenged the Zimbabwe government's decision and filed an application with the SADC Tribunal, alleging discrimination based on race, lack of due process in the deprivation of property, and denial of access to the courts.¹²²⁸ The judgment of the SADC Tribunal against the government of Zimbabwe did not only create hostility towards this judicial body but would also consider it as an enemy that needed to be dealt with once and for all.¹²²⁹ In summary, in June 2008 the Tribunal held Zimbabwe to be in contempt of court due to its failure to comply with the interim ruling of December 2007 in Mike Campbell's case.¹²³⁰

This non-compliance was reported to the Summit, which referred the matter to the SADC Committee of Ministers of Justice for consideration and advice.¹²³¹ A second contempt was noted in June 2009 where it was found to have completely failed to give the effect of judgment

¹²²² De Jager, Farmer's Weekly, Scepticism abounds over Zimbabwe's compensation offer to farmers, (March.07.2023)

¹²²³ De Jager, SABCNews, White Zimbabwe farmers reject 3.5billion dollar deal, March.07, 2023

¹²²⁴ De Jager, Farmer's Weekly, Scepticism abounds over Zimbabwe's compensation offer to farmers, (March.07.2023)

¹²²⁵ De Jager, SABCNews, White Zimbabwe farmers reject 3.5billion dollar deal, March.07, 2023

¹²²⁶ Phooko 2015: 531-565

¹²²⁷ Shivambu 2019:1-5

¹²²⁸ Shivambu 2019:1-5

¹²²⁹ Nkatha 2012: 1-20

¹²³⁰ Magliveras 2016:1-24

¹²³¹ *Mike Campbell and Others (Pty) Ltd v The Republic of Zimbabwe*

of November 2008 in Mike Campbell.¹²³² The Tribunal also reported non-compliance with its judgment by the government of Zimbabwe to the Summit to take appropriate action.¹²³³

It is imperative to make reference to Arts.34 and 5 (3) of the 1998 Protocol which grants individuals and NGOs with observer status before the African Human Rights Commission to lodge complaints with the African Human Rights Court, and only if the respondent state has submitted a declaration accepting this head of jurisdiction.¹²³⁴ It is noteworthy that there are only 30 out of 54 African Union (AU) member states that ratified the 1998 Protocol with the majority of SADC countries, including Zimbabwe, Namibia, Madagascar, Zambia, Swaziland, and DRC are not among them.¹²³⁵ This state of affairs clearly shows that African countries and SADC states in particular, are against the idea of a Pan-African Human Rights Court.¹²³⁶ Notable that African and SADC states do not fully support the idea that a supranational judicial organ may be empowered to rule on their human rights record and possibly condemn it.¹²³⁷ The decision of the SADC Head of States and Government shows an absence of institutional independence since the Tribunal ceased to exist because of a pronouncement made outside the scope of acceptable norms of separation of powers and judicial independence.¹²³⁸ According to an expert opinion submitted to the European Court of Human Rights pointed that the principle of judicial independence is a general principle of law recognised by the international community and the significance of judicial independence has been recognised by many international courts and human rights supervisory mechanisms.¹²³⁹

Art.10 of the Universal Declaration of Human Rights read in conjunction with Art.14 of the International Covenant on Civil and Political Rights guarantees judicial independence and the fundamental provisions of international treaty law are regarded as forming part of the *jus cogens*.¹²⁴⁰ The legal phraseology "*jus cogens*" also guarantees judicial independence.¹²⁴¹ It

¹²³² *William Campbell and Richard Thomas Etheredge v The Republic of Zimbabwe, SADC (T) Case No. 03/2009, Ruling, 5 June 2009*, at <http://www.saflii.org/sa/cases/SADCT/2009/1.html>

¹²³³ *Mike Campbell and Others (Pty) Ltd v The Republic of Zimbabwe Mike Campbell and Others (Pty) Ltd v The Republic of Zimbabwe Mike Campbell and Others (Pty) Ltd v The Republic of Zimbabwe*

¹²³⁴ Magliveras 2016: 1-24

¹²³⁵ Centre of Human Rights, Faculty of Law, University of Pretoria, Report: Rwanda's withdrawal of its acceptance of direct individual access to the African Human Rights Court, 22 March 2016, at: <http://www.chr.up.ac.za/index.php/centre-news-a-events-2016/1604-report-rwanda-withdrawals-of-its-acceptance-of-direct-individual-access-to-the-African-human-rights-court.html>

¹²³⁶ Kaahwa 1999: 61-83

¹²³⁷ Magliveras 2016: 1-24

¹²³⁸ Mwanawina 2013: 321-335

¹²³⁹ *ECHR, Baltasar Garzon v Spain, Expert Opinion On International Legal Standards Regarding Judicial Independence*, http://www.interights.org/userfiles/Annex_2_Judicial_Independence_filed.pdf (last accessed on 14 August 2013)

¹²⁴⁰ United Nations Declaration of Human Rights and International Covenant on Civil and Political Rights

¹²⁴¹ Mkhawane 2010: 567-573

is on this basis that anything in the SADC Treaty could be interpreted to imply that the Summit had such powers to suspend the activities of the Tribunal.¹²⁴² Those powers would be in breach of well established international norms of judicial independence would be quashed by Art.53 of the Vienna Convention¹²⁴³ since judicial independence is accepted and recognised by the international community.

The suspension of the Tribunal has sent shock waves within the region signalling the analogy that the judicial body and its judges did not enjoy a measure of institutional independence.¹²⁴⁴ The protections surrounding judicial independence include transparent appointment procedures, security of tenure, separation of powers, and freedom from any outside pressure or interference, and appropriate social protection.¹²⁴⁵ It is against this background that the international court should be exemplary, and be perceived to be, wholly independent of the Contracting Parties, who may also be respondents before it.¹²⁴⁶ The Tribunal was empowered to pronounce on the validity of state actions and to give advisory opinions on various matters as well as the interpretation of the Treaty and other documents. In the event that the state is in breach of its obligation or is acting in a manner that defeats the regional agenda, the independence of the Tribunal, to pronounce on such matters is not guaranteed.¹²⁴⁷

In the present matter, the SADC Tribunal decided on the infringement of rights matter by the government of Zimbabwe, which a judgment was in favour of the applicants, and the Tribunal sought intervention from the SADC Council of Ministers who also advised to seek advice from WTI Advisors for recommendations on the operations of the Tribunal.¹²⁴⁸ Ultimately, the Summit decided to suspend the operations of the Tribunal, which clearly interferes with the operational activities of the SADC Tribunal.¹²⁴⁹ The suspension of the Tribunal hampered the development of international law jurisprudence within the region as the Tribunal was only beginning to establish the hegemony of international law.¹²⁵⁰ The legal effect of the suspension of the Tribunal was that this decision amounted to halting or dismissal of judicial officers thus hampered the operations of the regional court.¹²⁵¹ A practical example is the case of *Fedsure*

¹²⁴² Thomashausen 2002: 26-37

¹²⁴³ "A treaty is void if, at the time of its conclusion, it conflicts with the peremptory norm of general international law. For the purpose of the present Convention, a peremptory norm of general international law is a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character".

¹²⁴⁴ Mwanawina 2013:321-335

¹²⁴⁵ Mwanawina 2013:321-335

¹²⁴⁶ Oppong 2010: 115-135

¹²⁴⁷ Mwanawina 2013:321-335

¹²⁴⁸ Mike Campbell and Others (Pty) Ltd v The Republic of Zimbabwe

¹²⁴⁹ Bochenek 1995: 483-496

¹²⁵⁰ Mwanawina 2013:321-335

¹²⁵¹ Campbell Ltd..., (2008) SC 49/07

*Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council*¹²⁵² the court made a finding that the judiciary will not be negatively affected by decisions of executive bodies unless such decisions have been empowered by a provision of law. A reference is also made to the international court case of *Amnesty International and Others v Sudan*¹²⁵³; an African Commission concluded that the government does not contest the dismissal of 100 judges who were opposed to the formation of special courts and military tribunals. The court further highlighted that to deprive the court of the personnel qualified to ensure that they operate impartially thus denies the right to individuals to have their case heard by such bodies.¹²⁵⁴ Such actions by the government against the judiciary constitute violations of the Arts. 7(1) (b) and 26, which provides the right to have their cases, be heard before an impartial and independent tribunal.¹²⁵⁵ Clearly, the SADC leaders reacted to Tribunal judgments principally in the Mike Campbell case by suspending its operations have to the following pitfalls: ¹²⁵⁶lack of commitment to accept and execute the judgments in good faith; as well as fear that the Tribunal would act as a human rights court and become uncontrollable.¹²⁵⁷

The decision to suspend the Tribunal was a result of the other SADC countries yielding to Zimbabwe and acting in solidarity with the then President Mugabe given his status of a founder of the Front Line State, and hero of the liberation struggle against colonialism and white supremacist regime.¹²⁵⁸

4.1.9.1 The legal consideration about the suspension of the SADC Tribunal

Shumba opines that the case before the Tribunal was the constitutional amendments that were contrary to Zimbabwe's obligations under SADC statutes and that the Zimbabwean courts had failed to adjudicate on the matter.¹²⁵⁹ Despite the decision and the court order, which was granted in favour of the applicants, which protects their possession, occupation,

¹²⁵² 1998(2)SA 374 (CC)

¹²⁵³ (2000) AHRLR 297 (ACHPR)

¹²⁵⁴ *Amnesty International and Others v Sudan*

¹²⁵⁵ United Declaration of Human and Peoples Rights

¹²⁵⁶ Cruz & Kingah, Addressing human rights in the Court of Justice of the Andean Community and Tribunal of the Southern African Development Community (SADC), UNI-CRIS Working Paper W-2014/1, February 2014, p16, at: <http://www.ucrm.org/fileadmin/workingpapers/W-2014-pdf>

¹²⁵⁷ Nathan 2013: 870-892

¹²⁵⁸ Cruz & Kingah, Addressing human rights in the Court of Justice of the Andean Community and Tribunal of the Southern African Development Community (SADC), UNI-CRIS Working Paper W-2014/1, February 2014, p16, at: <http://www.ucrm.org/fileadmin/workingpapers/W-2014-pdf>

¹²⁵⁹ Shumba 2022: 290-310

and ownership of land and payment of compensation to the evicted, the government of Zimbabwe ridiculed the Tribunal and its decisions.¹²⁶⁰

The political decision of the SADC Heads of State and Government to suspend the activities of the Tribunal did not invalidate the legal validity of the 2000 SADC Protocol on the Tribunal, which is still operational.¹²⁶¹ There is no provision regulating the termination of the Tribunal or member states withdrawal, therefore the 2000 SADC Protocol on Tribunal would cease to operate only when the new protocol regulating the same matter enters into force.¹²⁶² It is imperative to indicate that the Tribunal decision in *Mike Campbell* was not well received by SADC member states.¹²⁶³ The Tribunal judges proved that they could interpret the law and took decisions independently without fear or favour by holding SADC member states accountable.¹²⁶⁴ The question is whether the Tribunal has exceeded its mandate due to non-elaborate provisions on the protection of human rights in the SADC instruments.¹²⁶⁵ The suspension of the Tribunal clearly showed that SADC member states are ultimately SADC's ruling authority.¹²⁶⁶ The Tribunal's judges raised scathing publications against the decision taken by Summit, which declared it illegal and *ultra vires*, as they have failed to follow the prescribed procedure.¹²⁶⁷

Naldi and Magliveras state that regardless of the fact that the decision of the Summit was acceptable or not, such a decision only concerned SADC's internal legal order as member states thought fit at the precise moment.¹²⁶⁸ It was an act with no consequences outside the realm of SADC.¹²⁶⁹ However, the UN Special Rapporteur on the Independence of the Judges and lawyers thought differently and raised their concern that the decision to prohibit the Tribunal from presiding over new and pending cases until the completion of the revision process launched in May 2011 is *ultra vires* and in breach of the Protocol on the Tribunal.¹²⁷⁰

It is noteworthy that the internationalisation of the Tribunal suspension was also pursued by the Zimbabwean farmers acting as an applicant in *Mike Campbell and Others (Pty) Ltd v Republic of Zimbabwe* whereby they proceeded on two fronts, namely they challenged the

¹²⁶⁰ Shumba 2022: 290-310

¹²⁶¹ Tino 2021 :103-128

¹²⁶² Scholtz 2011: 197-201

¹²⁶³ Nathan 2013: 883-884

¹²⁶⁴ *Mike Campbell and Others (Pty) Ltd v The Republic of Zimbabwe* 2/2007

¹²⁶⁵ Cowell 2013:157-163

¹²⁶⁶ Naldi & Magliveras 2016: 133-159

¹²⁶⁷ Erasmus 2015: 4-10

¹²⁶⁸ Ebobrah 2010: 199-213

¹²⁶⁹ Naldi & Magliveras 2016:133-159

¹²⁷⁰ The letter dated 29 December 2011,

[https://spdb.ohchr.org/hrdb/20th/AL_Other_SADC_29.12.11_\(6.2011\).pdf](https://spdb.ohchr.org/hrdb/20th/AL_Other_SADC_29.12.11_(6.2011).pdf). Accessed June 2016

legality of the Summit's decision before the African Commission of Human and Peoples Rights (hereinafter 'African Commission') in December 2011.¹²⁷¹ Secondly, they requested an advisory opinion on their validity by the African Court on Human and Peoples Rights (hereinafter 'African Court') in November 2012.¹²⁷² Unfortunately, in all these attempts applicant applications for legal recourse against the SADC Heads of State and Government failed.¹²⁷³

4.1.9.2 The effects of domestic litigation aimed to resurrect the SADC Tribunal

4.1.9.2.1 South African High Court case

In the case of the *Law Society of South Africa and Others v The President of the Republic of South Africa and Others*¹²⁷⁴, the Law Society of South Africa lodged, an application challenging the President of South Africa's participation in the suspension of the SADC Tribunal in 2011. The case further challenged the President's decision to sign the 2014 Protocol establishing a new SADC Protocol on the Tribunal.¹²⁷⁵ The North Gauteng High Court concurs with the applicants and declared the actions of the President of South Africa in participating in the suspension of the Tribunal and subsequent signing of the 2014 Protocol on the SADC Tribunal as being unlawful, irrational, and unconstitutional.¹²⁷⁶

4.1.9.2.2 Constitutional Court of South Africa

The signing of the 2014 SADC Protocol on the Tribunal on 18 August 2014 by SADC Heads of State and Government was the last step in the long history of the SADC Tribunal.¹²⁷⁷ This protocol is not yet signed by member states, it introduces relevant legal changes to the regional judicial system, and these changes marked the intention of SADC leaders to move their regional cooperation to a rule-based system.¹²⁷⁸ Shivamba observed that the Constitutional Court in South Africa confirmed the order of constitutional invalidity made by

¹²⁷¹ *Mike Campbell and Others (Pty) Ltd v The Republic of Zimbabwe SADC (T) 2/2007*

¹²⁷² *Mike Campbell and Others (Pty) Ltd v The Republic of Zimbabwe SADC (T) 2/2007*

¹²⁷³ *Mike Campbell and Others (Pty) Ltd v The Republic of Zimbabwe SADC (T) 2/2007*

¹²⁷⁴ [2018] 2 All SA 806 at par 72

¹²⁷⁵ See Madisa K, 'Zuma goes continental after Concourt refuses to scrap prison sentence' available at <https://timeslive.co.za/politics/2021-09-18-zuma-goes-continental-after-concourt-refuses-to-scrap-prison-sentence/> (accessed 10 January 2022)

¹²⁷⁶ *Law Society of South Africa and Others v The Republic of South Africa and Others* [2018] 2 All SA 806

¹²⁷⁷ Erasmus 2015: 2-5

¹²⁷⁸ Tino 2021: 103-128

the High Court under these terms "The President's participation in the decision-making process and his own decision to suspend the operations of the Southern African Development Community Tribunal is unconstitutional, unlawful and irrational."¹²⁷⁹ The court also held that the President's signature of the 2014 SADC Protocol was unconstitutional, unlawful, and irrational.¹²⁸⁰ The court directed the current sitting President to withdraw his signature from the 2014 Protocol.¹²⁸¹ The South African President officially informed SADC of its decision to withdraw its signature at the 39th SADC Summit of Heads of State and Government held in August 2019.¹²⁸²

4.1.9.2.3 Tanzania High Court

The Tanganyika Law Society challenged the government's participation in the suspension of the SADC Tribunal.¹²⁸³ The Tanzanian High Court found that the President of Tanzania had violated its obligations under the SADC Treaty by participating in the suspension of the Tribunal and replacing the Protocol establishing the SADC Tribunal with a new Protocol in contravention of the SADC Treaty.¹²⁸⁴ Tanzanian court emphasized that "The suspension of the operation of the SADC Tribunal; and failure or refusal to appoint judges is contrary to the Treaty provisions, was inimical to the Rule of Law as a foundational principle's inherent to the legitimacy of the community; and as expressly entrenched in the SADC Treaty."¹²⁸⁵

The court confirmed that all SADC member state are bound by the Treaty obligations, to give effect to the Treaty and that the SADC Tribunal as established under the Treaty still exist as an international court.¹²⁸⁶ The court reiterates that it was the basic principle of international law that if a party treats a treaty as valid it is precluded from later denouncing its effects.¹²⁸⁷ The court concluded that all SADC member states were bound to implement the Treaty in good faith and that the SADC Tribunal was rendered secure from any control or influence of any State parties.¹²⁸⁸ However, it could not as one of the State parties hold an independent

¹²⁷⁹ Oppong 2010: 115-135

¹²⁸⁰ Mike Campbell and Others (Pty) Ltd v The Republic of Zimbabwe

¹²⁸¹ Mkhandawire 2010: 567-573

¹²⁸² Shivamba 2019: 1-5

¹²⁸³ Shivamba 2019: 1-5

¹²⁸⁴ Shivamba 2019: 1-5

¹²⁸⁵ Tanganyika Law Society and Others v United Republic of Tanzania, No.009/2011

¹²⁸⁶ Tanganyika Law Society and Others v United Republic of Tanzania, No.009/2011

¹²⁸⁷ Tanganyika Law Society and Others v United Republic of Tanzania, No.009/2011

¹²⁸⁸ Tanganyika Law Society and Others v United Republic of Tanzania, No.009/2011

tribunal hostage to unilateral withdrawal of confidence expressed in a motion challenging its legality.¹²⁸⁹

4.1.9.3 Review Commission by Prof Bartel

Frietz¹²⁹⁰ observed that the opening paragraph of the review commission maintains that it was mandated by the review of the role and responsibilities and terms of reference of the SADC Tribunal that led to the recommendations that require a new protocol. It is noteworthy that the recommendations of the review commission led by Prof Burtels as commissioned by the 2010 summit supports the retention of the jurisdiction over dispute between natural and legal persons and SADC member states.¹²⁹¹ There is nowhere in the recommendations of the commission that the old tribunal be dissolved and a new protocol be adopted.¹²⁹² It is concerning that despite the recommendations of the experts the Summit's hostility towards the Tribunal but conscious about the legality, these officials (Committee of Minister of Justices) stood by the recommendations that individuals be given access to the tribunal.¹²⁹³ The Summit stance was that the tribunal's powers to pronounce on human rights issues be narrowed and each state should voluntarily sign on to such jurisdiction.¹²⁹⁴ The new development was that the SADC leaders offered the region a protocol for a new court.¹²⁹⁵ The jurisdiction of the new tribunal is that no one in the region but the governments would be able to access it.¹²⁹⁶ The President of the Republic of South Africa, JG Zuma signed the protocol, indicating South Africa's intention to ratify and make a new tribunal operative.¹²⁹⁷ The appending of signature into this new protocol has created the impression that South Africa supports the application of discriminatory law and such paints a bleak picture of the constitutional democracy, to which the country ascribes.¹²⁹⁸ Manyathi-Jele notes the mobilisation regarding the restoration of the SADC Tribunal by member states and reconsidering their decision to adopt a new protocol.¹²⁹⁹

The lobbying for the restoration of the SADC Tribunal was deliberated during a round-table discussion of stakeholders at the Centre for Human Rights at the University of Pretoria.¹³⁰⁰

¹²⁸⁹ Tanganyika Law Society and Others v United Republic of Tanzania, No.009/2011

¹²⁹⁰ Frietz 2014, Quith death of an important SADC institution, South African Litigation Centre

¹²⁹¹ Lubbe & du Plessis, 'Compensation for Expropriation in South Africa, and International Law: The leeway and the Limits'

¹²⁹² Frietz 2014, Quith death of an important SADC institution, South African Litigation Centre

¹²⁹³ Frietz 2014, Quith death of an important SADC institution, South African Litigation Centre

¹²⁹⁴ Frietz 2014, Quith death of an important SADC institution, South African Litigation Centre

¹²⁹⁵ Cowell 2013: 1-15

¹²⁹⁶ Frietz 2014, Quith death of an important SADC institution, South African Litigation Centre

¹²⁹⁷ Meckler 2016: 1007 - 1038

¹²⁹⁸ Klabbers et al (2009)

¹²⁹⁹ Manyathi-Jele 2014, SADC stakeholders form a coalition to lobby for the restoration of a SADC Tribunal, De Rebus

¹³⁰⁰ Mkhawire 2010: 567-573

The primary objective of this round-table discussion was to deliberate on the legal effect of the adoption of the new protocol by the SADC Summit.¹³⁰¹

Stakeholders resolved that they would campaign against the ratification of the new protocol and explore and coordinate alternative strategies to restore individual access to the Tribunal to strengthen democracy and improve the rule of law within SADC.¹³⁰²

Professor Hansungule further argues that other options are available for citizens besides the tribunal, such as the enforcement mechanisms set up in the United Nations systems, the African Charter on Human and People's Rights, and the Common Market for Eastern and Southern Africa Treaty, which promote the protection of human rights.¹³⁰³ He cautioned that the existence of these options methods should not be taken as a reason to consider that the case for the tribunal was lost.¹³⁰⁴

In his findings, Dire determined that the court used international law in the application of South African constitutional provisions¹³⁰⁵. In *Mike Campbell's* case, the SADC Tribunal judgment was not concerned with the President's violation of international law, rather it was preoccupied with whether the President's participation in the SADC process that led to the removal of competence of the SADC Tribunal to hear complaints from private person was unconstitutional, irrational and therefore unlawful.¹³⁰⁶ The Constitutional Court arrived at the decision that the President's conduct was unconstitutional, irrational, and therefore unlawful. To arrive at a decision the court relied on international law, the court concluded that the President had breached South Africa's international law obligations.¹³⁰⁷ Analysis of Dire on this court case focused on the international law analysis of the judgment, which assessed not only whether the court came to the correct conclusion about the President's conduct, which violated South Africa's international law obligations, but also whether the court followed the correct methodology.¹³⁰⁸ Dire is of the view that the approach of the majority to the international law in determining whether the constitution had been violated was met with criticism by Judges Cameroon and Froneman in their concurring judgment in the SADC Tribunal.¹³⁰⁹

¹³⁰¹ Manyathi-Jele 2014, SADC stakeholders form a coalition to lobby for the restoration of a SADC Tribunal, De Rebus

¹³⁰² Manyathi-Jele 2014, SADC stakeholders form a coalition to lobby for the restoration of a SADC Tribunal, De Rebus

¹³⁰³ Sedutla 2013, Whither the SADC Tribunal, De Rebus

¹³⁰⁴ Tino 2013:141-163

¹³⁰⁵ Viljoen 2017: 176 - 189

¹³⁰⁶ Strydom & Hopkins 2013: 30-58

¹³⁰⁷ Woolman, Bishop & Brickhill 2013: 30-52

¹³⁰⁸ Du Plessis & Coutsooudis 2019: 136

¹³⁰⁹ Dire 2020: 129-153

Dire posits that the court was wrong in the manner in which it identified the existence, content, and breach of international law obligations, and its reasoning was found to be illogical.¹³¹⁰ A concern is the approach followed by the court in determining the existence of an international law obligation, what the content of that obligation is, and whether the President breached that obligation.¹³¹¹ Dire differs with the judges in this case that the determination that there has been a breach of international law should not be arrived at lightly, therefore it has to be shown by viewing the source of the legal obligation, whether treaty or customary law.¹³¹² Then recounting the content of the obligation and the conduct that is alleged to have been breached.¹³¹³

4.1.9.3 Land Expropriation in Zimbabwe and its Lessons for Namibia and South Africa

The discussions of this study revolve around the legal effect of the suspension of the SADC Tribunal in the Southern African Development Communities (SADC).¹³¹⁴ It is imperative to outline the underlying reasons why the Tribunal was suspended.¹³¹⁵ One fundamental reason is that this regional judicial body was confronted with the challenges of finding itself having to preside over contentious issues, namely land redistribution.¹³¹⁶ It is noteworthy that land issues are a contentious issue due to colonial dispossession.¹³¹⁷ Post-colonial era African countries attained their independence during the 1960s, therefore most countries guarded with jealousy this independence by resolving that they should reverse the colonial land dispossession by effecting land reform programs to return the land back to the African people.¹³¹⁸ A primary example is the implementation of the Land Reform Program by the government of Zimbabwe, which resulted in Amendments 16A and 16B of the Constitution of Zimbabwe of 1979.¹³¹⁹ These amendments paved the way for land redistribution, which was clouded by the infringement of international treaties and domestic laws.¹³²⁰ The ramifications of the land reform program effected by the government of Zimbabwe resulted in a spate of violence, economic depression, and famine caused by a shortage of basic food.¹³²¹ It is noteworthy that the ruling party implemented the land reform program out of anger and political

¹³¹⁰ Scholtz & Ferreira 2011: 331-358

¹³¹¹ Dire 2020: 129-153

¹³¹² Schroeder & Muller 2011: 358 - 372

¹³¹³ Dire 2020: 129-153

¹³¹⁴ *Mike Campbell and Others (Pty) Ltd v The Republic of Zimbabwe*

¹³¹⁵ Erasmus 2011:17-34

¹³¹⁶ Karen, James & Laurence 2016: 1007-1038

¹³¹⁷ Achiume 2017: 1-36

¹³¹⁸ Dube & Migdley 2008: 303 -341

¹³¹⁹ *Swissbourgh Diamond Mines and Others v The Kingdom of Lesotho*

¹³²⁰ Naldi & Magliveras 2016: 133-159

¹³²¹ Helderling & Robinson 2012: 1-38

influence; ZANU PF Party led by then President Mugabe resulted in a disaster.¹³²² On the political side, the majority party in government pushed for a referendum to bring the amendments in the Constitution of Zimbabwe as a mechanism to effect the land reform program as a way of redistributing land owned by the white minority in Zimbabwe to be transferred to poor subsistence farmers in order to minimize or end inequality.¹³²³ The farm owners approached courts to seek legal recourse against the infringement of their property rights by the government, which allowed war veterans in Zimbabwe to embark on land grabbing of farms.¹³²⁴ The Amendment 16B of the Constitution of Zimbabwe, 1979 (as amended in 2005) prohibited farm owners from instituting legal action against infringement of their property rights.¹³²⁵

Although the High Court and Supreme Court of Zimbabwe decided against the complainants (*Mike Campbell Ltd and Others*), the affected parties approached the SADC Tribunal for legal recourse.¹³²⁶ The SADC Tribunal made conclusion that the Amendments 16A and 16B infringed the property rights of the affected parties, and the government of Zimbabwe was found to have infringed their domestic and international laws by reneging from its international obligations.¹³²⁷ The next discussion will highlight some lessons learned from the unconstitutional land reform program, which was implemented out of anger and without taking cognisance of international treaties and domestic laws, which protect the property rights of individuals.

4.1.9.4 **A lesson learned from Land Reform Program by Zimbabwe**

The land question has remained an albatross in southern African countries that were born out of European settler colonialism.¹³²⁸ The manner in which Zimbabwe attempted to put closer to the land question through compulsory land expropriation without compensation.¹³²⁹ It is important to indicate Zimbabwe's failure of the "Willing buyer, willing seller" policy and the British reneging from their colonial responsibility to fund land purchases for resettlement.¹³³⁰ Adekoye reiterated that the negative impact of the failure of the Willing buyer and Willing seller

¹³²² Ndlovu 2011: 63-79

¹³²³ Heywood 2010: 481-493

¹³²⁴ *Mike Campbell and Others (Pty) Ltd v The Republic of Zimbabwe*

¹³²⁵ *Mike Campbell and Others (Pty) Ltd v The Republic of Zimbabwe*

¹³²⁶ *Mike Campbell and Others (Pty) Ltd v The Republic of Zimbabwe*

¹³²⁷ *Mike Campbell and Others (Pty) Ltd v The Republic of Zimbabwe*

¹³²⁸ Adekoye 2019: 105-118

¹³²⁹ Nathan 2011: 131-145

¹³³⁰ Adekoye 2019: 105-118

policy triggered land occupation or invasion in 1998 and also officialised by the government in 2001 had some disastrous consequences on the national economy.¹³³¹

It is important to highlight that southern African countries such as Namibia and South Africa are confronted with land agitation, as was the case of Zimbabwe; it is therefore prudent for these countries to look into Zimbabwe's case and derive beneficial lessons.¹³³² One primary lesson is that the land reform issue should not be undertaken under emotional conditions and political expediency.¹³³³

4.1.9.5 Land Reform Resolution in South Africa

The conclusion of the 55th edition of the ANC's five-year elective conference marked an important moment in South Africa's political landscape.¹³³⁴ This conference witnessed the formulation of ambitious resolutions spanning social, economic and political spheres. The ANC government has made strides in returning land to communities displaced by repressive apartheid policies, the overall progress in the land reform programme has been slow.

Statistical analysis of the Commission on Restitution of Land Rights (CRLR) state that eighty-two thousand nine hundred and seventy six (82 976) land claims lodged before the cut-off date of 30 December 1998 have been settled. This translate to 3.8million hectares benefitting 2.3 million beneficiaries, with the allocation of R22billion to these opted for financial compensation, R25 billion for the acquisition of land, and R5 billion for grants.

Setou opined that despite this progress, there is growing frustration and discontent regarding the sluggish pace of land reform. The reports such as High Level Panel and the Presidential Advisory Panel on Land Reform Report have delved into the causes of slow progress of land redistribution. Scholar such as Setou concur on several key impediments such as lack of government capacity and coordination, corruption, elite bias, inadequate legislative frameworks, uncertainty about reform objectives, budgetary constraint, and insufficient post-settlement support. It is imperative to indicate that that the ANC government and the left-leaning political parties considered that the amendment of section 25 of the Constitution to allow land expropriation with compensation as a transformative solution to expedite land reform.

¹³³¹ Hulse 2016: 2-31

¹³³² Huber & Ruth 2017: 462 - 484

¹³³³ Peterson 2012: 13-21

¹³³⁴ Setou 2024:1-28

A new bill aims to align expropriation law with the constitution and to ensure that expropriation is not arbitrarily used and only used as a last resort. The purpose of the expropriation must be clear and fair and the affected parties must have a recourse to the courts. The bill further provides that the owner must receive a just and equitable amount of compensation for the property, reflecting an equitable balance between public interest and interest of the owner.

Setou states some of the challenges making underutilised land productive in South Africa, which demands a comprehensive approach. Some of the threats facing the country's agricultural land are the land degradation, water scarcity and urban encroachment. Strategies to be developed to ensure that underutilised land become useful are that state land with 30-year leasehold rights aims to safeguard that land for farming purposes. In order to ensure that this government project yield positive outcome the authorities need to take stock of who has benefitted and evaluate successes and challenges faced by the beneficiaries to make improvement. Although, this discussion has an indirect relevance to the topic at hand, it is imperative to make comparative analysis on how the South African government is developing measures to ensure that the implementation of land reform becomes a success. The land reform will be successful if all the parties involved plays their role to ensure that land allocation to beneficiaries benefit from the project and also the owners of the land also receive reasonable compensation. On the contrary, the government of Zimbabwe embarked on violent actions and forcefully removed white farmers in their farms. The farms that were dispossessed were allocated to war veterans aligned to ZANU-PF and majority of them were unable to use the allocated land due to lack of finances to farm the land. The inability of war veterans to raise capital or lack of access to finance and restrictions that inhibit the use of land as collateral further compound the issue. The mechanism used by the government of Zimbabwe failed to balance the interest of the public and private interest of farm owners.

The establishment of Land Reform and Agricultural Development Agency in 2021 by the government of South Africa is envisioned to collaborate closely with the government on various agricultural sector issues, from skills transfer to the practical implementation of land reform. The purpose of the Agency was to ensure that there is a skills transfer between new landowners and former owners so that the land can be utilised for food production. On the other hand, the government of Zimbabwe made legislative amendment to the Constitution in order to ensure that expropriation of land without compensation take place. The ramification of the implementation of expropriation of land without compensation was that it has affected the economy, high inflation and increased food prices of the country, as well as declining in food production.

It is imperative to indicate that the government of Zimbabwe should have taken the approach taken by South Africa in implementing land reform in order to address the land imbalance of the past. The government should have ensured that it balances both the public and the private interest, however the then President of Zimbabwe, Robert MOGABE took a populist stance to mobilise support for votes during the National Elections as he realised that he is losing support in government.

4.2 Conclusion

This chapter demonstrated the significance of the provisions of the SADC Treaty and SADC Protocol on Tribunal, which were referred to by the SADC Tribunal judges to conclude that the government of Zimbabwe is legally bound to respect the human rights, democracy and the rule of law as entrenched in Article 4 (c) of the SADC Treaty.

Other provisions of the SADC Treaty have stated clearly that the SADC Tribunal has the power to establish its jurisprudence by referring to the legal instruments of other regional courts, international treaties, and international law. The interpretation of the provisions of the SADC Treaty and SADC Protocol on Tribunal in *Mike Campbell and Others (Pty) Ltd v The Republic of Zimbabwe* brought the demise of the SADC Tribunal. The Tribunal judges who demonstrated their independence by interpreting the law without fear or favor threatened the SADC Heads of State and Government.

This discussion in this chapter provides a lesson to be learned by other southern African countries such as South Africa and Namibia regarding the implementation of land reform by the government of Zimbabwe. The approach taken by the government of Zimbabwe in dealing with land reform as a mechanism of addressing the land imbalance of the past demonstrated a populist stance of then President Robert Mugabe. He amended the Constitution of Zimbabwe to implement the expropriation of land without compensation targeting the white-owned farms and some black farmers, especially those supporting the opposition party such as the Movement for Democratic Changes (MDC). The government of Zimbabwe committed a mistake by expropriating the land, which was actively used to produce food for the country, as a result, the economy declined, food prices increased and inflation increased.

The SADC member state's failure to reprimand the government of Zimbabwe for their failure to comply with the SADC Tribunal ruling is a clear indication of them protecting their sovereignty at the expense of human rights. Secondly, the decision to suspend the functioning

of the Tribunal pending the outcome of the review commission was indirectly closing its operations whilst in the meantime promulgating a new SADC Protocol on Tribunal to limit the jurisdiction to preside over interstate matters only.

Chapter 5:

Assessment of the provisions of 1999 SADC Declaration and Treaty and its 2001 amended Treaty and 2014 SADC Protocol on Tribunal

5.1 Introduction

This chapter will assess the provision of the SADC Declaration and Treaty and its 2001 Amendment as a constitutive document that guides the SADC member state on the regional integration process. This regional instrument was adopted at the SADC Summit, which took place in August 1992 in Windhoek, Namibia, potentially marking a major step forward for Southern Africa. One of the central founding objectives of the Southern African Development Coordination Conference (SADCC) was the forging of links to create genuine and equitable regional integration. In the context of major deficiencies in the region's transport and communication infrastructure, exacerbated by South African aggression and destabilisation, the region agreed to give priority to cooperating in infrastructural projects.

The SADC Protocol on Tribunal is constituted in terms of Art.16 of the Treaty and shall function in accordance with the provisions of the treaty, the SADC Protocol on Tribunal, and the Rules. The Protocol on Tribunal also made provisions regarding the composition of judges, their qualification, and their judicial competence and experience in international law.

The adoption of a new Protocol on Tribunal by the SADC Summit, the Heads of State and Government took place in August 2014. It is important to highlight that the new Protocol is not yet in force, and the document introduces relevant legal challenges to the regional judicial system and raises questions about the SADC leader's intention to move their regional cooperation toward a rule-based system. The discussion will highlight important provisions of the 1999 SADC Declaration and Treaty, which will be followed by detailed deliberation on comparative analysis of the 2000 SADC Protocol on Tribunal and the new 2014 SADC Protocol on Tribunal.

5.2 The 1999, SADC Declaration and Treaty

The SADC Declaration and Treaty outline the legal status of SADC which is an international organisation having legal personality and power to enter into a contract, acquire, own, or dispose of movable or immovable property, and to sue and be sued¹³³⁵.

Other provisions, which are important, are the principles, objectives, and general undertakings that underpin the SADC organisation. Art.4¹³³⁶ of 1999 SADC Declaration and Treaty which outlines the principles that SADC member states should abide by and this provision states that SADC and its member state shall act in accordance with the following principles:

- (a) Sovereign equality of all member states;
- (b) Solidarity, peace and security;
- (c) Human rights, democracy, and the rule of law;
- (d) Equity, balance, and mutual benefit; and
- (e) Peaceful settlement of disputes

It is imperative to indicate that SADC seeks to achieve certain objectives in order to attain its mandate as a regional organisation.¹³³⁷ Art.5¹³³⁸ of 1999, SADC Declaration and Treaty state these objectives, which are the following:

- (i) Achieve development and economic growth, alleviate poverty, enhance the standard and quality of life of the people of southern Africa, and support the socially disadvantaged through regional integration;
- (ii) Evolve common political values, systems, and institutions;
- (iii) Promote and defend peace and security;
- (iv) Promote self-sustaining development on the basis of collective self-reliance and interdependence of member states;
- (v) Achieve complementarity between national and regional strategies and programs;
- (vi) Promote and maximise productive employment and utilisation of resources of the region;
- (vii) Achieve sustainable utilisation of natural resources and effective protection of the environment;

¹³³⁵ Art.3

¹³³⁶ 1999 SADC Declaration and Treaty

¹³³⁷ Ruppel 2009: 173-186

¹³³⁸ 1999 SADC Declaration and Treaty

- (viii) Strengthen and consolidate the long-standing historical, social, and cultural affinities and links among the people of the region;

Art.9 made provision for institutions that should be established in order to ensure that SADC as the Regional Economic Communities (RECs) achieves its objectives which among others the regional integration.¹³³⁹ It is prudent to indicate that among the institutions that need to be established is the Tribunal.¹³⁴⁰

Art.16 makes provision for the establishment of the Tribunal, which shall be constituted to ensure adherence to, and the proper interpretation of the provisions of this Treaty and subsidiary instruments and to adjudicate upon such dispute as may be referred to it.¹³⁴¹ Sub-paragraph 2-5 outlines the composition and functions, procedures, and other matters governing the Tribunal.¹³⁴² The Tribunal is also mandated to give advisory opinions on matters that may be referred to it by the Summit or the Council. The decisions of the Tribunal shall be final and binding.¹³⁴³

5.3 A Critical analysis of the 2000 SADC Protocol on the Tribunal and the newly adopted 2014 SADC Protocol on the Tribunal

Historically, the Tribunal was established in 1992 by Art.9 of the SADC as one of the institutions.¹³⁴⁴ The 2000 Protocol on Tribunal and Rules of Procedure regulates its composition, functioning, and jurisdiction.¹³⁴⁵ It is noteworthy that although the Protocol on Tribunal was signed in 2000, the regional court became operational in 2005¹³⁴⁶. Art.38 stipulates that the Protocol entered into force after the deposit of the instrument of ratification by two-thirds of the signing States¹³⁴⁷. The member states effected the amendment of the Treaty of the Southern African Development Community in 2001, especially Art.22 that regulates the adoption of Protocols in detail and repealed from paragraph 2, the following provision "each Protocol shall thereafter become an integral part of the Treaty."¹³⁴⁸ This wording was moved to Art.16 that changed to read as follows, "The composition, powers, functions, procedures and other related matters governing the Tribunal shall be prescribed in

¹³³⁹ SADC Declaration and Treaty, 1999

¹³⁴⁰ Art.9 (f)

¹³⁴¹ 2000 SADC Protocol on Tribunal

¹³⁴² Article 16 (5) & (6) of 2000 SADC Protocol on Tribunal

¹³⁴³ 2000 SADC Protocol on Tribunal

¹³⁴⁴ 2000 SADC Protocol on Tribunal

¹³⁴⁵ 2000 SADC Protocol on Tribunal

¹³⁴⁶ Tino 2014:103-126

¹³⁴⁷ 2000 SADC Protocol on Tribunal

¹³⁴⁸ SADC Declaration and Treaty, 1992

a Protocol.¹³⁴⁹ It is worth bearing in mind that natural and legal persons might resort to the Tribunal against SADC institutions as well as against any member state. Prior to the affected member state or individual can approach the Tribunal; they had first to exhaust any domestic legal remedy¹³⁵⁰. Arts.20A and 31(b) of the 2000 Protocol on Tribunal and SADC Protocol on Trade articulates that the Tribunal has the appellate function in relation to trade panels.¹³⁵¹

Since the inception of the SADC Tribunal, the court only heard 20 cases, and none of them was initiated by member states or concerned a preliminary ruling¹³⁵². The primary reason why the Tribunal has adjudicated few cases is due to member states' reluctance to sue each other because of being strongly characterised by the will to preserve their own sovereignty¹³⁵³. The 2000 SADC Protocol on Tribunal accorded this regional court to preside over disputes between the Organisation and its staff¹³⁵⁴, and in certain instances resorted to by individuals lamenting violations of their human rights by SADC member states.¹³⁵⁵ It is noteworthy that both SADC legal instruments, namely the SADC Declaration and Treaty, as well as the 2000 SADC Protocol on Tribunal, do not expressly have a provision that gives the Tribunal jurisdiction over disputes concerning human rights violations.¹³⁵⁶

Art.4 (c) of the SADC Declaration and Treaty refers to human rights, democracy, and the rule of law as governing principles of interstate cooperation.¹³⁵⁷ A classic case of *Mike Campbell and Others (Pty) Ltd* dealt precisely with the assessment of the validity of the Zimbabwean Government's land reform program.¹³⁵⁸ The applicants contested the unlawful expropriation of private land without compensation.¹³⁵⁹ The SADC Tribunal ruled that the Zimbabwean legislation violated human rights, democracy, and the rule of law; therefore, it was in breach of Art. 4 (c) and Art 6 of the SADC Treaty requiring member states to abide by these principles.¹³⁶⁰ The reaction of the government of Zimbabwe against the judgment of the SADC Tribunal clearly indicated the tendency of Zimbabwe to give primacy to municipal law and

¹³⁴⁹ 2000 SADC Protocol on Tribunal

¹³⁵⁰ 2000 SADC Protocol on Tribunal

¹³⁵¹ 2000 SADC Protocol on Tribunal and SADC Protocol on Trade

¹³⁵² Pirker 2011: 93-114

¹³⁵³ Piscitelli 2010: 131-147

¹³⁵⁴ Tino 2014:103-126

¹³⁵⁵ Tino 2014:103-126

¹³⁵⁶ Phooko 2015:531-567

¹³⁵⁷ 1999 SADC Declaration and Treaty

¹³⁵⁸ SADC (T) 2/2007

¹³⁵⁹ *Mike Campbell and Other (Pty) Ltd v The Republic of Zimbabwe*

¹³⁶⁰ *Mike Campbell and Others (Pty) Ltd v The Republic of Zimbabwe*

jurisdiction over SADC Law¹³⁶¹, and its reluctance to surrender some aspects of its sovereignty to the Organisation.¹³⁶²

Art.36 of the SADC Treaty and Art.32 of the Agreement amending the Treaty, the latter became effective after its adoption by three-quarters of all members of the summit.¹³⁶³ On the other hand, its entry into force made effective the incorporation of the 2000 Protocol on Tribunal into the SADC Treaty as provided for by the amended Art.16, no further ratification was needed.¹³⁶⁴

There is an anomaly between the provisions of both the SADC Treaty and 2000 SADC Protocol on Tribunal, specifically Art.32 (5) of the 2000 SADC Protocol on Tribunal read in conjunction with the SADC Treaty does not explain what "appropriate action" means, and this gives the Summit a great discretionary power in this determination.¹³⁶⁵ It could have been better if these provisions had adopted some economic sanctions or suspension against the non-compliant state.¹³⁶⁶

The new changes brought by the new Protocol on Tribunal adopted in August 2014 introduce important changes in the SADC judicial system and have serious implications for the development of the regional integration process.¹³⁶⁷ A comparison between the 2000 Protocol on Tribunal and the new 2014 Protocol on Tribunal as a mechanism to identify strong and weak points. The discussion will revolve around the new Protocol, especially the provision that regulates the composition and the functioning of the Tribunal, its competence and jurisdiction, applicable law, and the enforcement of its judgment, excluding its rules of procedure, which have not yet been adopted.¹³⁶⁸

Art.29 stipulates that the Tribunal shall adopt its own rules by a two-thirds majority.¹³⁶⁹ This provision will repeal Art.23 of the 2000 Protocol on Tribunal stipulates that the rules annexed to this protocol shall form an integral part thereof.¹³⁷⁰

¹³⁶¹ Richard Thomas Etheredge v Minister of State for National Security Responsible land

¹³⁶² Kingah 2013: 7-8

¹³⁶³ SADC Declaration and Treaty, 1992

¹³⁶⁴ Tino 2014:103-126

¹³⁶⁵ 2000 SADC Protocol on Tribunal

¹³⁶⁶ Van der Mei 2009: 69 - 80

¹³⁶⁷ Mkhandawire 2010: 567-573

¹³⁶⁸ Tino 2014:103-126

¹³⁶⁹ 2000 SADC Protocol on Tribunal

¹³⁷⁰ 2014 SADC Protocol on Tribunal

5.3.1 Composition and functions of the "new" Tribunal

The provisions regulating the composition and functioning of the Tribunal are borrowed from the 2000 Protocol on Tribunal.¹³⁷¹ In some instances, the new Protocol regulates more in detail whilst some technical aspects than the 2000 Protocol on Tribunal.¹³⁷² Art.3 of the 2014 SADC Protocol on Tribunal state that the candidates have to possess the qualifications required for appointment to the highest judicial offices in their respective member states or to be jurist of recognised competence.¹³⁷³ On the other hand, Art.3 of the 2000 Protocol of the Tribunal states that the candidates must have experience in international law.¹³⁷⁴

The 2014 Protocol on Tribunal states that the composition of judges will consist of not less than 10 judges appointed from nationals of member states.¹³⁷⁵ Regarding the judge's designation, they continue to be selected by the Council of Ministers from the list of candidates nominated by member states and appointed by the Summit.¹³⁷⁶ These judges are expected to carry out their duties independently, impartially, and conscientiously during the execution of their mandate, which will last for five years and will be renewable once.¹³⁷⁷ It is important to highlight that SADC judges are not appointed on a full-time basis in order to ensure that the Tribunal shall sit when required to consider a matter submitted to it.¹³⁷⁸

Arts 10 and 12 of the 2014 SADC Protocol on Tribunal regulate the judge's resignation, expiration of terms, and recusal are the same as those of the 2000 Protocol on Tribunal (Art.8 and 9) but the only difference is that the new Protocol also regulates the hypothesis of judge's removal from office.¹³⁷⁹ The judges may be removed if they become permanently incapacitated or have committed a serious breach of their duties or a serious act of misconduct.¹³⁸⁰ The disciplinary actions will be undertaken by an independent ad hoc tribunal, which will decide the question of removal.¹³⁸¹

On the other hand, Art.12 (4) states that the affected judge has to recuse himself or herself in the matter concerned.¹³⁸² The difference between these two legal instruments is that the new Protocol on Tribunal seems to be more complete than that provided for by the 2000

¹³⁷¹ Nathan 2013: 870 - 892

¹³⁷² 2014 SADC Protocol on Tribunal

¹³⁷³ 2014 SADC Protocol on Tribunal

¹³⁷⁴ 2000 SADC Protocol on Tribunal

¹³⁷⁵ Article 7 of 2014 SADC Protocol on Tribunal

¹³⁷⁶ Article 6 of 2014 SADC Protocol on Tribunal

¹³⁷⁷ Article 7 of 2014 SADC Protocol on Tribunal

¹³⁷⁸ Article 9 of 2014 SADC Protocol on Tribunal

¹³⁷⁹ Article 11 of 2014 SADC Protocol on Tribunal

¹³⁸⁰ Article 12 of 2014 SADC Protocol on Tribunal

¹³⁸¹ 2000 SADC Protocol on Tribunal

¹³⁸² 2014 SADC Protocol on Tribunal

Protocol.¹³⁸³ Art.15 states that the Tribunal should have a President and a registry consisting of the registrar and his or her staff.¹³⁸⁴ The sitting of the Tribunal continues to be in public otherwise decided and all deliberations shall be conducted in closed sessions and shall remain confidential¹³⁸⁵. The 2000 Protocol on Tribunal, Art.27 provides a similar regulation as Art.32 of the 2014 SADC Protocol on Tribunal, which states that an adviser, agent, or representative of their choice shall represent the parties to the dispute before the Tribunal, and even those states, which are not parties to the dispute, may be granted to intervene before the Tribunal.¹³⁸⁶ On the contrary, Art.30 of the 2000 SADC Protocol on Tribunal is much more specific and it states that a third party applying for intervention does not have to prove the existence of his own legal interest that may be affected by the subject matter of the dispute.¹³⁸⁷

5.3.1.1 The Composition of the Bench

The 2014 Protocol on the Tribunal made minor changes with regard to the Tribunal's composition, structure, and operation.¹³⁸⁸ The Tribunal remains composed of not less than ten judges, nationals of member states.¹³⁸⁹ Each member state may nominate not more than two candidates¹³⁹⁰ taking into account gender representation. Art.3 (3) states that three judges should hear cases although in some instances cases may be heard by a full bench comprising of five judges.¹³⁹¹ The 2014 Protocol on Tribunal requires fair representation of the Member State's legal system, comprising of civil, Roman-Dutch, and common law traditions.¹³⁹²

The 2014 SADC Protocol on Tribunal also made provision regarding the requirement of qualification for the appointment to the highest judicial offices in their states or must be a jurist of recognised competence and have experience in international law.¹³⁹³ A procedure regarding the appointment of judges is that they are appointed by the Summit upon recommendation by the Council.¹³⁹⁴ The only additional provision within the 2014 Protocol on Tribunal is that the Summit also appoints the President.¹³⁹⁵ On the contrary, this provision is a reversal procedure

¹³⁸³ See, 2000 SADC Protocol on Tribunal and 2014 SADC Protocol on Tribunal

¹³⁸⁴ 2014 SADC Protocol on Tribunal

¹³⁸⁵ Arts 36 and 37 of the 2014 SADC Protocol on Tribunal

¹³⁸⁶ See, 2000 SADC Protocol on Tribunal and 2014 SADC on Protocol

¹³⁸⁷ 2000 SADC Protocol on Tribunal

¹³⁸⁸ 2014 SADC Protocol on Tribunal

¹³⁸⁹ 2014 Protocol, Art.3(1); 2000 Protocol on Tribunal, Art.3(1)

¹³⁹⁰ 2014 Protocol on Tribunal, Art.3(3) ; 2000 Protocol on Tribunal, Art.3(3)

¹³⁹² Art. 4(2)

¹³⁹³ 2014 Protocol on Tribunal, Art.3(1); 2000 Protocol on Tribunal, Art.3(1)

¹³⁹⁴ 2014 Protocol on Tribunal, Art.4(4); 2000 Protocol on Tribunal, Art.4(4)

¹³⁹⁵ 2014 Protocol on Tribunal

set out in the 2000 Protocol, where the Tribunal elected the President is an alarming development.¹³⁹⁶ The changes regarding the appointment of the President constitute a serious departure from generally accepted international practice, which reserves such to the judges themselves.¹³⁹⁷

The changes brought the Tribunal's demise, which involves the interference on the independence of the judges.¹³⁹⁸ Art.7 (1) of the 2014 Protocol on Tribunal and Art. 6(1) of the 2000 Protocol outlines the duration in which the Tribunal judges serve, which is 5 years with the possibility of one further renewable period.¹³⁹⁹ The 2014 SADC Protocol on Tribunal made provision that all judges are part-time.¹⁴⁰⁰ On the contrary, the 2000 Protocol on Tribunal states that the removal of judges from office is regulated by the rules.¹⁴⁰¹ The 2014 Protocol on Tribunal states that the judges are removed if they become incapacitated or have committed a serious breach of his or her duties or a serious act of misconduct.¹⁴⁰² Art.11 (2) of the 2014 Protocol on Tribunal has a safeguard against the interference of the Summit and the removal of judges in terms of this provision has to be approved by an ad hoc tribunal.¹⁴⁰³ The SADC followed similar practices of other Regional Economic Communities (RECs), namely the COMESA Treaty, EAC Treaty, and ECOWAS Protocol by allowing the tribunals to make decisions regarding the removal of judges.¹⁴⁰⁴

It is imperative to refer to Art.17 (2) of the SADC Treaty, which states that the duties of judges are to perform their responsibility independently, or impartially or the function of their office.¹⁴⁰⁵ This provision further states that Tribunal judges should be committed to SADC's international character shall not seek or receive instructions from member states, and shall refrain from any action incompatible with their position as international staff responsible for SADC.¹⁴⁰⁶ On the contrary, the 2014 Protocol on Tribunal does not have a corresponding commitment to the bench's independence ensuring that they are not subjected to inducement, pressure, influence, threats, or other interference.¹⁴⁰⁷

¹³⁹⁶ 2000 Protocol on Tribunal, Art.7(1)

¹³⁹⁷ Art.21(1) OF Statute of the International Court of Justice (ICJ)

¹³⁹⁸ Tino 2013: 103-120

¹³⁹⁹ 2014 Protocol on Tribunal; 2000 Protocol on Tribunal

¹⁴⁰⁰ Art.9 (1), 2014 Protocol on Tribunal

¹⁴⁰¹ 2000 SADC Protocol on Tribunal

¹⁴⁰² Art.11(1)

¹⁴⁰³ 2014 SADC Protocol on Tribunal

¹⁴⁰⁴ Art.20(1) of COMESA; Art.26 of EAC Treaty; Art.4(7) ECOWAS Protocol

¹⁴⁰⁵ SADC Declaration and Treaty, 1999

¹⁴⁰⁶ Article 17 (2) of the SADC Declaration and Treaty, 1999

¹⁴⁰⁷ Cowell 2013: 1-15

Art.17 (1) of the SADC Treaty does provide that member states shall not seek to influence the Organisation's staff when discharging their functions.¹⁴⁰⁸ Art.12 (2) provides the mechanism of avoiding a conflict of interest by requiring a judge who has had previous involvement with a case to recuse himself or herself.¹⁴⁰⁹

5.3.1.1.2 Jurisdiction

The SADC Tribunal under the 2000 Protocol on Tribunal is similar to European Union (EU) law and competencies of the Court of Justice of the European Union (CJEU).¹⁴¹⁰ Allowing natural and/or legal persons to have open, direct access to the Tribunal might not have been supported by some member states but it was a progressive feature shared with other RECs.¹⁴¹¹

Art.33 of the 2014 Protocol on Tribunal reverts to the position under traditional international law regarding the settlement of disputes by restricting the scope of the Tribunal's contentious jurisdiction to disputes between member states only.¹⁴¹² These changes brought by the new Protocol on Tribunal were regressive as they are in conformity with international law and do not go against the content of Art.16 of the SADC Treaty.¹⁴¹³

It is noteworthy that the natural and/or legal persons must now pursue their complaints against member states before domestic courts making any prospects of success entirely dependent on the availability of domestic remedies and the willingness of courts to delve into often complex technical cases¹⁴¹⁴, although there have been some precedents before the courts of South Africa.¹⁴¹⁵ Another mechanism is that member states must rely on the principle of diplomatic protection and persuade an appropriate state of the merits to take up their case and seize the Tribunal.¹⁴¹⁶ The 2000 Protocol on Tribunal provided for the exclusivity of the Tribunal's jurisdiction over all disputes between member states and the Organisation between natural/legal persons and the Organisation, and between the Organisation and its staff.¹⁴¹⁷ It is imperative to indicate that some protocols adopted within the SADC establish other dispute settlement mechanisms to solve interstate litigations arising from their applications.¹⁴¹⁸ SADC

¹⁴⁰⁸ SADC Declaration and Treaty, 1992

¹⁴⁰⁹ 2014 SADC Protocol on Tribunal

¹⁴¹⁰ Phooko 2015: 531-567

¹⁴¹¹ COMESA Treaty, Art.26; EAC Treaty, Art.30(1)

¹⁴¹² 2014 SADC Protocol on Tribunal

¹⁴¹³ SADC Declaration and Treaty, 1992 and 2014 SADC Protocol on Tribunal

¹⁴¹⁴ R V Secretary of State for Transport, ex parte Factortame [1990]ECR-I-2433

¹⁴¹⁵ Government of the Republic of Zimbabwe v Fick and Others, Order of 20 September 2012, [2012]ZASCA 122, <http://www.saflii.org.za/cases/ZASCA/2012/122.html>, accessed June 2016

¹⁴¹⁶ Naldi & Magliveras 2016: 133-159

¹⁴¹⁷ Tino 2014:103-126

¹⁴¹⁸ Scholtz 2011: 197 - 201

member states can still resort to the Tribunal as one of the means at the State's disposal to settle their disputes.¹⁴¹⁹ A practical example is the case of *Swart v Southern African Development Community*, which considered the application for the judicial review of the SADC's decision not to renew the applicant's employment contract.¹⁴²⁰ One of the points in this matter was that the High Court lacked jurisdiction not only because SADC was an international organisation but also because it is Tribunal, which had exclusive jurisdiction over labour disputes.¹⁴²¹ The High Court established that refusing to allow the applicant to have access to the court would result in denial of justice since no alternative was then available.¹⁴²² The 2014 Protocol on Tribunal has left SADC staff without a remedy; the Tribunal's competence over staff cases has also been removed.¹⁴²³ An alternative remedy was the establishment of the SADC Administrative Tribunal (SADCAT).¹⁴²⁴

The principle of exhaustion of all available remedies under the domestic jurisdiction before referring the matter to the Tribunal is fundamental before the member state may approach the Tribunal to adjudicate on the matter.¹⁴²⁵ The SADC Tribunal had jurisdiction to give preliminary rulings to national courts and advisory opinions at the request of the SADC Summit and Council of Ministers.¹⁴²⁶ On the other hand, the 2014 Protocol on Tribunal endows the Tribunal with the power to solve only interstate litigations concerning the interpretation of the SADC Treaty and Protocols.¹⁴²⁷ Similarities between these protocols are that both limit the jurisdiction of the Tribunal *ratione materiae* as well as *ratione personae* and only save its competence to give advisory opinions on such matters as the Summit or Council.¹⁴²⁸ In order to explain the *ratione materiae*, the provision of Art.33 of the new Protocol states "*the Tribunal shall have jurisdiction on the interpretation of the SADC Treaty and Protocols relating to disputes between member states*".¹⁴²⁹ This provision indicates that the 2014 Protocol on Tribunal shall exercise only an interpretative function and it may not assess the validity or the correct application of SADC law anymore.¹⁴³⁰ It confines the SADC Tribunal to concern itself only with interpreting the SADC Treaty and Protocols and excludes all other normative acts adopted by

¹⁴¹⁹ Pascale 2015: 853 - 880

¹⁴²⁰ High Court in Botswana, *Swart v Southern African Development Community*, MISCA No.229 of 2011, judgement, 11 October 2011, 2011 1 BLR 410 HC, http://www.elaws.gov.bw/rep_export.php?id=4512&type=pdf. Accessed June 2016.

¹⁴²¹ Art.19, 2000 Protocol on Tribunal

¹⁴²² *Swart v Southern African Development Community*

¹⁴²³ 2014 SADC Protocol on Tribunal

¹⁴²⁴ Tino 2014: 141 - 162

¹⁴²⁵ Oppong 2010: 115 - 135

¹⁴²⁶ Tino 2014:103-126

¹⁴²⁷ 2014 SADC Protocol on Tribunal

¹⁴²⁸ Chigara 2009: 530 -533

¹⁴²⁹ 2014 SADC Protocol on Tribunal

¹⁴³⁰ Johnson 2006: 1-28

SADC Institutions in order to reach the goals of the Organisation shall be excluded from its jurisdiction.¹⁴³¹ Additionally, this provision does not provide for the possibility for the Tribunal to settle disputes referred to it in light of arbitration agreements included in international treaties concluded by some member states.¹⁴³² The 2014 Protocol on Tribunal does not confer powers to the Tribunal to settle disputes between the Organisation and its staff.¹⁴³³ On the contrary, the 2000 Protocol on Tribunal gave the Tribunal power to settle disputes between the Organisation and Staff, which was the same practice of other regional organisations (European Union (EU), COMESA, CEMAC, EAC, and ECOWAS) whose courts have jurisdiction over a dispute concerning the Organisation and its employees.¹⁴³⁴

Art.50 provides that any member state, which is a party to the 2014 SADC Protocol on Tribunal, may withdraw from it upon expiration of twelve months from the date of giving written notice to that effect to the Executive Secretary.¹⁴³⁵ The 2000 Protocol on Tribunal did not have a similar clause as Art.50 of the new protocol.¹⁴³⁶ In contrast, in terms of this protocol, the jurisdiction of the SADC Tribunal was compulsory for member states, which had expressly accepted it.¹⁴³⁷ Art.16 of the SADC Treaty states that the Protocol on the Tribunal forms an integral part of the Treaty, so member states may not opt out of it as long as they remain members of the SADC.¹⁴³⁸ It is crucial to highlight that member states by inserting Art.50 of the new protocol ignored the important benchmark provided for by the SADC Treaty, which was a primary source of law of the Organisation.¹⁴³⁹

The inclusion of Art.50 of the new protocol was in contravention of the SADC Treaty; therefore, member states before they can include clauses such as Art.50 they should amend Art.16 of the SADC Treaty.¹⁴⁴⁰

Under *ratione personae* limitation of the Tribunal jurisdiction, the Tribunal shall have jurisdiction over the interpretation of the SADC Treaty and Protocols relating to interstate disputes.¹⁴⁴¹ Art.33 allows only SADC member states to resort to the Tribunal, which means natural and legal persons are excluded from approaching the Tribunal for seeking a legal recourse.¹⁴⁴² Literally natural and legal person does not have a *locus standi* to litigate before

¹⁴³¹ Tino 2014:103-126

¹⁴³² Brown & Kennedy 2000: 346-347

¹⁴³³ 2014 SADC Protocol on Tribunal

¹⁴³⁴ Tino 2014:103-126

¹⁴³⁵ 2014 SADC Protocol on Tribunal

¹⁴³⁶ 2000 SADC Protocol on Tribunal

¹⁴³⁷ 2000 SADC Protocol on Tribunal

¹⁴³⁸ SADC Declaration and Treaty

¹⁴³⁹ Erasmus 2015:11-12

¹⁴⁴⁰ Tino 2014: 103-126

¹⁴⁴¹ Taylor 2016: 168 – 170

¹⁴⁴² 2014 SADC Protocol on Tribunal

the Tribunal¹⁴⁴³. Tino states that *ratione personae* limitation of jurisdiction is consistent with and confirms the strongly intergovernmental legal nature of the SADC.¹⁴⁴⁴

5.3.1.1.3 Decisions: Binding Force, Execution and Action for Non-Compliance

Art.38 (1) of the 2014 Protocol on Tribunal has provisions relating to the decisions that tend to follow established international standards.¹⁴⁴⁵ These decisions must be taken by a majority, and delivered in open court.¹⁴⁴⁶ On the other hand, the 2000 Protocol on Tribunal has express provisions for judges to make separate or dissenting opinions, although it seems to be implied from the wording of Art.38 (2) of the 2014 Protocol on Tribunal. For example, in the Mike Campbell case, there was a dissenting view made by Judge Tshosa.¹⁴⁴⁷ The judges of the SADC Tribunal comprise three judges; this provision effectively means that decisions will be delivered if two judges agree.¹⁴⁴⁸ The judicial organ of an intergovernmental organisation engaged in economic integration being able to base decisions on only two judges is unique and at variance with normal international practice.¹⁴⁴⁹ On the contrary, the requirement requiring decisions to be reasoned has been omitted from the 2014 Protocol on Tribunal.¹⁴⁵⁰ Actually, it is unlikely that the Tribunal can pass judgment in a vacuum without explanation, contrary to all demands of natural justice and the rule of law.¹⁴⁵¹

Both the 2014 Protocol on the Tribunal and the 2000 Protocol on the Tribunal have similar provisions, which make the Tribunal decisions and rulings final and binding upon the parties to the case.¹⁴⁵²

The only difference is that the provisions of the 2014 Protocol on Tribunal made it explicit that these stipulations do not apply to advisory opinions.¹⁴⁵³ Secondly, the new Protocol further omitted the previous requirement that the Tribunal must initially satisfy itself that it has

¹⁴⁴³ 2014 Protocol of Tribunal

¹⁴⁴⁴ Tino 2014:103-126

¹⁴⁴⁵ 2014 SADC Protocol on Tribunal

¹⁴⁴⁶ Bilder 1982, Merrills 2006: 547-548

¹⁴⁴⁷ 2000 SADC Protocol on Tribunal and 2014 SADC Protocol on Tribunal

¹⁴⁴⁸ De Burca 2008: 451 - 452

¹⁴⁴⁹ Both COMESA Court and ECOWAS Court are composed of seven judges, COMESA Treaty, Art.20(1) and ECOWAS Protocol, Art.3(2)

¹⁴⁵⁰ De Wet et al (2014)

¹⁴⁵¹ American Convention on Human Rights, Art.66(1) and Art.59(1) Rules of IACHR; European Convention on Human Rights, Art.45(1) and Rule 74(1) of the European Court of Human Rights Rules; CJEU Statute, Art.36; COMESA Treaty, Art.31(1), EAC Treaty, Art.35(1); ECOWAS Protocol, Art.19(2)

¹⁴⁵² 2014 Protocol on Tribunal, Art.38(3), 44(2); 2000 Protocol on Tribunal, Arts.24(3), 32(3)

¹⁴⁵³ Erasmus 2015: 5-25

jurisdiction and that claims are well founded in fact and in law.¹⁴⁵⁴ Naldi and Magliveras state that it is essential that for the Tribunal to be considered a credible institution such jurisdictional rules be maintained.¹⁴⁵⁵ Both the 2014 and 2000 Protocol on Tribunals have provisions that give the Tribunal the capacity to review its judgments in the light of new facts has been retained subject to conditions.¹⁴⁵⁶

The litigants in terms of the 2014 Protocol on Tribunal are restricted to only member states and they must comply with its decisions and guarantee their execution.¹⁴⁵⁷ It is noteworthy that the international judicial body, the Tribunal has no power to enforce its decision. Art.44(4) of the 2014 Protocol on Tribunal gives the member state who failed to comply with a decision awarded against it, any other member who claims to be affected by the decision would be entitled to bring the matter to the attention of the Tribunal.¹⁴⁵⁸ Both the 2000 and 2014, Protocol on Tribunal has provisions that obliges the Tribunal to examine the validity of complaints of non-compliance and must refer them to the Summit for appropriate action.¹⁴⁵⁹ The only concern or loophole is that the latter is silent on the procedure to be followed.¹⁴⁶⁰ Additionally, the 2014 Protocol on Tribunal does not indicate the nature of the latter is action and this gives a discretion on how to react and its consistent action shows that it does not consider itself compelled to act.¹⁴⁶¹ A reference is made to Art.33 of the SADC Treaty, which offers other avenues for action.¹⁴⁶² Art.33(1) is of direct relevance and persistent failure without good reason to fulfil Treaty obligations which means the Tribunal decisions are an obligation that the membership must at all times observe.¹⁴⁶³ This proviso does not prescribe specific sanctions to be imposed on recalcitrant states and gives the Summit the discretion to decide them on a case-by-case basis.¹⁴⁶⁴ This illustrates the political nature of discretion. On the contrary, in the 2000 Protocol the monitoring of compliance extended to 'any party concerned' could include natural and legal persons who are able to show legitimate interest.¹⁴⁶⁵ This legal instrument also if the decision was enforceable in the member state's territory and that the domestic law governing their execution was legislation on the enforcement of foreign judgments.¹⁴⁶⁶ This clause has been omitted in the 2014 Protocol on Tribunal, which is a

¹⁴⁵⁴ Nottebohm, Preliminary Objection, ICJ Reports 1953

¹⁴⁵⁵ Naldi & Magliveras 2016: 133-159

¹⁴⁵⁶ 2014 Protocol on Tribunal, Art.40; 2000 Protocol on Tribunal, Art.26

¹⁴⁵⁷ 2014 Protocol on Tribunal, Art.44(1); 2000 Protocol on Tribunal, Art.32(2), (3)

¹⁴⁵⁸ Naldi & Magliveras 2016: 133-159

¹⁴⁵⁹ 2014 Protocol on Tribunal, Art.44(4); 2000 Protocol on Tribunal, Art.32(5)

¹⁴⁶⁰ Klein 2009: 261 -262

¹⁴⁶¹ Gathii 2011: 285 - 298

¹⁴⁶² SADC Declaration and Treaty, 1992

¹⁴⁶³ 2014 SADC Protocol on Tribunal

¹⁴⁶⁴ 2000 SADC Protocol on Tribunal

¹⁴⁶⁵ 2000 Protocol on Tribunal, Art.32(1)

¹⁴⁶⁶ 2000 Protocol on Tribunal, Art.32(1), (3)

regrettable exercise.¹⁴⁶⁷ The Tribunal's scope and efficacy were severely limited but also the whole of the SADC enterprise was undermined.¹⁴⁶⁸ The ramification of these limitations is that the Tribunal decisions cannot be effectively implemented and enforced within member states.¹⁴⁶⁹ It is noteworthy that there should be uniformity in law and adherence to law are vital components of any integration process.¹⁴⁷⁰

In considering the intergovernmental nature of the SADC Tribunal, the enforcement mechanism of its judgments would come before national courts, for example, the Supreme Court of Zimbabwe which states that they were persuasive at best but not binding.¹⁴⁷¹ This assertion is because the 2000 Protocol had not been incorporated into domestic law and therefore had no legal status in Zimbabwe.¹⁴⁷² In contrast, the 2000 Protocol constitutes an integral part of the SADC Treaty, the High Court in Zimbabwe delivered a more coherent argumentation in *Gramara v Republic of Zimbabwe*, where the applicant had sought the registration in Zimbabwe of the judgment in *Mike Campbell* for the purpose of enforcement.¹⁴⁷³ The court indicated that Zimbabwe was subject to the Tribunal's jurisdiction and thus bound by its decision whose enforcement was governed by the common law adhering to the incorporation theory, namely customary international law forms part of municipal law unless inconsistent with statute.¹⁴⁷⁴ The High Court concluded that enforcing the said judgment would be contrary to public policy as it would be fundamentally at odds with the land reform program sanctioned by the Constitution of Zimbabwe and upheld by its Supreme Court.¹⁴⁷⁵

Naldi and Magliveras pointed out the argument made by the Constitutional Court of South Africa, which held a different view that the decision in *Mike Campbell* was legally enforceable in its territory.¹⁴⁷⁶ Art.32 of the 2000 Protocol on Tribunal as well as the South African Constitution allowed access to domestic courts for the enforcement of foreign judgement, which included decisions of international courts and regional tribunals.¹⁴⁷⁷ In the matter of

¹⁴⁶⁷ Hulse & Van der Vlueten 2015: 90-113

¹⁴⁶⁸ Gubbay 2009: 21-23

¹⁴⁶⁹ Cruz & Kingah 2014: 16-45

¹⁴⁷⁰ Naldi & Magliveras 2016: 133-156

¹⁴⁷¹ *Commercial Farmers Union v Minister of Lands & Rural Resettlement and Others*, 2010 (2) SA 925 (ZS)

¹⁴⁷² Naldi & Magliveras 2016: 133-156

¹⁴⁷³ *Gramara (Pty) Ltd and Colin Bailie Cloete v Government of the Republic of Zimbabwe and Attorney General of Zimbabwe and Norman Kapanga (Intervener)*, Decision 24 November 2009 and 26 January 2010, http://archive.kubatana.net/docs/landr/high_court_patel_gramara_goz_100126.pdf. Accessed June 2016

¹⁴⁷⁴ Dugard 2000: 46-49, 51-54

¹⁴⁷⁵ Naldi & Magliveras 2016: 133-156

¹⁴⁷⁶ *Fick v Republic of Zimbabwe*

¹⁴⁷⁷ *Naldi v Magliveras* 2016:133-156

Swart v Southern African Development Community, the tribunal dealt with the application for judicial review of the decision not to renew the applicant's employment contract.¹⁴⁷⁸ The application centred on whether SADC was a public body of authority.¹⁴⁷⁹ The court was in the affirmative because this institution served the varying interests of the member states and, therefore served a public purpose to member states and their citizens.¹⁴⁸⁰ The judgment suggests that in the Republic of South Africa, the courts of Botswana would be receptive to orders for enforcing the Tribunal judgments, if there is some *nexus* between the applicants requesting enforcement and the content of the judgment.¹⁴⁸¹

It is imperative that the Tribunal has handled Zimbabwe's refusal to comply with the judgments rendered in the *Mike Campbell* saga and how the Summit reacted to its non-compliance.¹⁴⁸² The Tribunal held the government of Zimbabwe to be in contempt of court on three occasions.¹⁴⁸³ Firstly, it was in June 2008 when Mike Campbell lodged a complaint that Zimbabwe had failed to comply with the order on the interim relief granted in December 2007.¹⁴⁸⁴ The Tribunal reported the matter to Summit, which was due to meet for its ordinary annual session in August 2008.¹⁴⁸⁵ Attempts were made by the Tribunal to ensure that the Summit take action against recalcitrant Zimbabwe, clearly indicating that this regional court treated decisions on interim measure as legally binding.¹⁴⁸⁶ On the contrary, the Summit avoided taking any action against Zimbabwe; it referred the matter of non-compliance to the SADC Ministers of Justice for consideration and advice.¹⁴⁸⁷

Secondly, in June 2009 the applicants (*Mike Campbell and Others*) lodged an urgent application on 7 May 2009 whereby a declaration was sought that Zimbabwe was in breach and in contempt of the aforementioned judgment of November 2008.¹⁴⁸⁸ The applicant adduced enough material to show the existence of a failure on the part of [Zimbabwe] and it is urgent to comply.¹⁴⁸⁹ Naldi and Magliveras state that it is not known whether the Summit

¹⁴⁷⁸ *Swart v Southern African Development Community*

¹⁴⁷⁹ *Swart v Southern African Development Community*

¹⁴⁸⁰ Klabbers 2009: 218-220

¹⁴⁸¹ *Swart v Southern African Development Community*

¹⁴⁸² *Mike Campbell and Others (Pty) Ltd v The Republic of Zimbabwe*

¹⁴⁸³ *Mike Campbell and Others (Pty) Ltd v The Republic of Zimbabwe*

¹⁴⁸⁴ Naldi & Magliveras 2016: 133-156

¹⁴⁸⁵ *Mike Campbell and Others (Pty) Ltd v The Republic of Zimbabwe*

¹⁴⁸⁶ Pillay et al (2011)

¹⁴⁸⁷ Decision 11, SADC Summit of Heads of State and Government, Sandton, South Africa, 16-17 August 2008, at: http://www.sadc.int/files/1213/5292/8402/Summit_Record_-_August2008.pdf. Access June 2016

¹⁴⁸⁸ *Mike Campbell and Others (Pty) Ltd v The Republic of Zimbabwe*

¹⁴⁸⁹ SADC Tribunal, William Campbell and Richard Thomas Etheridge v The Republic of Zimbabwe, SADC (T) Case No.03/2009, Ruling, 5 June 2009, <http://saflii.org/sa/cases/SADCT/2009/1.html>. Accessed in June 2016

discussed a non-compliance of the Tribunal ruling by the government of Zimbabwe but according to information given to South Africa's National Assembly, the Summit again mandated the SADC Ministers of Justice to discuss it, and present recommendations.¹⁴⁹⁰

Thirdly, in the summer of 2010, the Tribunal not only found Zimbabwe to be in contempt of court but also had the opportunity to dismiss the aforementioned finding of the Zimbabwe High Court in Gramara that the judgment in Mike Campbell could not be enforced domestically because the land reform was Zimbabwe's official State policy.¹⁴⁹¹ Upon learning that Zimbabwe showed no interest in complying with the judgment, the Tribunal referred the matter to Summit.¹⁴⁹² Instead of ensuring that Zimbabwe complies with the Tribunal judgments, the Summit suspended its operation.¹⁴⁹³

5.3.1.1.4 Advisory Jurisdiction

Art.20 and rule 86 deal with the competency of the Tribunal to give an advisory opinion at the request of only the Summit and/or the Council.¹⁴⁹⁴ The Tribunal's authority to render advisory opinion appears to have been mandatory, this interpretation is based on the usage of a word "shall" which makes the provisions more instructive and mandatory.¹⁴⁹⁵ This provision is in line with Art.16 (4) of the SADC Treaty.¹⁴⁹⁶ On the other hand, the 2014 Protocol on Tribunal makes a substantive change to the Tribunal's advisory jurisdiction, leaving the member states unable to take advantage of the provision.¹⁴⁹⁷

5.3.1.1.5 The Applicable Law

The 2014 Protocol on Tribunal effected drastic changes to the law, which the Tribunal may apply.¹⁴⁹⁸ This was the mechanism or strategy used by the Summit to reduce the powers of the Tribunal in ensuring its independence and impartiality¹⁴⁹⁹. Art.21 of the 2000 Protocol states that the Tribunal could invoke the SADC Treaty, the Protocols, and subsidiary instruments, any applicable treaties, general principles of public international law, and the legal systems of member states.¹⁵⁰⁰ On the contrary, Art.35 of the 2014 Protocol places limits that only the SADC Treaty and the Protocols which precludes the Tribunal from having recourse

¹⁴⁹⁰ Naldi 2014: 390 - 391

¹⁴⁹¹ *Mike Campbell and Others (Pty) Ltd v The Republic of Zimbabwe*

¹⁴⁹² Mkhawire 2010: 567-573

¹⁴⁹³ Meckler 2016: 1007-1038

¹⁴⁹⁴ 2000 Protocol on Tribunal

¹⁴⁹⁵ 2000 SADC Protocol on Tribunal

¹⁴⁹⁶ SADC Declaration and Treaty, 1992

¹⁴⁹⁷ Nathan 2013: 870 - 892

¹⁴⁹⁸ 2014 SADC Protocol on Tribunal

¹⁴⁹⁹ Erasmus et al (2012)

¹⁵⁰⁰ 2000 SADC Protocol on Tribunal

to such legal sources, as customary international law, which has been shaped by Western States, and judicial pronouncement from regional human rights bodies, for example African Commission and the African Court.¹⁵⁰¹ This limitation takes the Tribunal steps backward since it seeks the judicial body to only interpret the SADC Treaty and Protocols almost in a vacuum and without reference to international law and other principles pertaining to the norms enshrined in the SADC Treaty.¹⁵⁰²

It is noteworthy that the direct interest in *Mike Campbell*, the Tribunal invoked the relevant provisions of regional and global human rights instruments as well as the jurisprudence of the African Commission and of the European and the Inter-American Human Rights Courts.¹⁵⁰³ The Tribunal referred to Art.4 (c) of the SADC Treaty, which empowers this judicial body to have jurisdiction to hear human rights complaints, democracy, and the rule of law.¹⁵⁰⁴ It was expected that this provision could also be inserted in the 2014 Protocol taking into account that SADC member states have ratified international treaties such as the Covenant on Human Rights.¹⁵⁰⁵ Comparative analysis of SADC and other Regional Economic Communities (RECs) such as ECOWAS their constitutive documents (ECOWAS Treaty) have provisions that recognises the protection of human rights as a fundamental principle.¹⁵⁰⁶ In a case *Hadijatou Mani Koraou v Niger*¹⁵⁰⁷, the Court of Justice stated that it was charged with protecting human rights, including those enshrined in the African Charter. On the contrary, the 2014 Protocol seeks to prevent the Tribunal from deciding cases on human rights issues this objective cannot be guaranteed success.¹⁵⁰⁸

5.3.1.1.6 Costs

A change of the judicial system, the applicant before the judicial organs of intergovernmental organisation do not have to pay for the proceedings as their operations are covered by the organisation.¹⁵⁰⁹ Art.46 (2) of the 2014 Protocol states that the proceeding shall be free of charge unless the Tribunal decides otherwise.¹⁵¹⁰ A loophole in this provision is that it does not specify instances the Tribunal may do so.¹⁵¹¹ The 2014 Protocol authorises only member

¹⁵⁰¹ Naldi & Magliveras 2016: 133 -156

¹⁵⁰² Magwanda 2021: 17 - 22

¹⁵⁰³ Naldi & Magliveras 2016: 133-156

¹⁵⁰⁴ Chigara 2009: 530 - 533

¹⁵⁰⁵ Ashimizo 2011: 203-205

¹⁵⁰⁶ Art.4(g) of ECOWAS Treaty

¹⁵⁰⁷ Judgement No.ECW/CCJ/JUD/06/08, 27 October 2008, paras. 41-42, (2008) African Human Rights Law Reports 182, commentary in Allain (2009)

¹⁵⁰⁸ 2014 SADC Protocol on Tribunal

¹⁵⁰⁹ Naldi & Magliveras 2016: 133-156

¹⁵¹⁰ 2014 SADC Protocol on Tribunal

¹⁵¹¹ 2014 SADC Protocol on Tribunal

states to bring cases to the court, it is clear that their ability to petition the Tribunal should be regarded as a service that SADC offers to its membership, and expenses are covered by budgetary contributions.¹⁵¹²

5.3.1.1.7 Ratification, Entry into force and Withdrawal

The 2014 Protocol is subject to ratification and shall enter into force 30 days after it has been ratified by two-thirds of the membership, for example, ten member states.¹⁵¹³ That means that the 2000 Protocol will be repealed on the same day it has come into effect.¹⁵¹⁴ The 2014 Protocol does not have a transitional provision and this is problematic for at least two reasons.¹⁵¹⁵ Firstly, there is no continuity between the existing and the new Tribunal.¹⁵¹⁶ Legally, the course of life of the existing Tribunal cannot be erased, its judgments are precedents and legacy, therefore the question of their continued validity needs to be addressed.¹⁵¹⁷

Secondly, the 15 member states participate in the SADC, those five members, which would not have ratified the 2014, Protocol on the very day it enters into force will be unable to petition the Tribunal for as long as they remain non-parties, presumably no cases may be brought against them.¹⁵¹⁸ On the other hand, the 2000 Protocol has not been abrogated, the Tribunal is still in existence, and technically, and it could become operative again if new judges were appointed.¹⁵¹⁹ It is noteworthy that attempts to block or stop the signing or ratification of the 2014 Protocol by legal professional bodies operating at the level of membership before the domestic courts.¹⁵²⁰ A practical example is the *Law Society of South Africa v Constitutional Court*; the court declared that the signing and ratifying of the 2014 Protocol by the President of the Republic of South Africa was unlawful, irrational, and unconstitutional.¹⁵²¹ The Law Society of South Africa argued that the respondents have breached the rights of the South African population to have access to justice and have failed to comply with mandatory procedures for the amendment of treaties.¹⁵²²

¹⁵¹² Art.48 of 2014 Protocol on Tribunal

¹⁵¹³ Art.53

¹⁵¹⁴ 2000 SADC Protocol on Tribunal

¹⁵¹⁵ Naldi & Magliveras 2016: 133-156

¹⁵¹⁶ Erasmus 2015: 2-5

¹⁵¹⁷ Naldi & Magliveras 2016: 133-156

¹⁵¹⁸ Tino 2014: 103-125

¹⁵¹⁹ Naldi & Magliveras 2016:133-156

¹⁵²⁰ *SADC stakeholders form coalition to lobby for restoration of a SADC Tribunal*, De Rebus, The SA Attorney's Journal, Issue 546, October 2014, p.5

¹⁵²¹ *Law Society of South Africa v Constitutional Court*

¹⁵²² *Law Society of South Africa v Constitutional Court*

Another example is the case of *Tanganyika Law Society* lodged an application before the High Court citing the violation of the Constitution of Tanzania.¹⁵²³ In defence of the matter, the Tanzanian Attorney-General has recommended that the action be dismissed as untenable.¹⁵²⁴

Art.50 of the 2014 Protocol on Tribunal allows contracting parties to withdraw by giving 12 months' notice even after the withdrawal.¹⁵²⁵ The provision further states that a member state who wants to withdraw will continue to be bound by outstanding obligations for as long as they have not discharged it.¹⁵²⁶ It is imperative to indicate that a member state that has not complied with one or more decisions may not decide to withdraw in order to avoid its duty to do so.¹⁵²⁷ On the contrary, the 2000 Protocol does not have a provision that deals with the withdrawal of member states but has a clause that deals with the amendment, which is lacking in the 2014 Protocol.¹⁵²⁸

In accordance with Art.37 of the 2000, SADC Protocol on Tribunal member states did not have to conclude a new Protocol but could have negotiated whatever changes they thought fit to be effected in the Protocol.¹⁵²⁹

It is noteworthy that the withdrawal of member state from the 2014 Protocol was not sanctioned by the SADC Treaty, particularly Art.16(2) which states that the Tribunal forms an integral part of the Treaty and as a legal instrument, it is a separate from the Protocols articulated in Art.22 of the document.¹⁵³⁰ The SADC Treaty is a constitutive document, which is a legally binding document enshrining SADC aims and committing member states to specific procedures and practices.¹⁵³¹ Art.16 of the SADC Treaty made it clear that a contracting party may separately denounce the Tribunal Protocol unless the member state in question decides to withdraw from the Organisation as well.¹⁵³² The SADC Treaty provisions do not permit member state to withdraw from SADC, which means there is a *la carte* membership.¹⁵³³ Art.16 of the SADC Treaty establishes the SADC Tribunal; therefore, it cannot be regulated under the Protocol.¹⁵³⁴

¹⁵²³ <http://allafrica.com/stories/201407080938.html>. Accessed June 2016

¹⁵²⁴ <http://allafrica.com/stories/201510160387.html>. Accessed June 2016

¹⁵²⁵ 2014 SADC Protocol on Tribunal

¹⁵²⁶ 2014 SADC Protocol on Tribunal

¹⁵²⁷ 2014 SADC Protocol on Tribunal

¹⁵²⁸ Art.37 of 2000 Protocol

¹⁵²⁹ 2000 Protocol on Tribunal

¹⁵³⁰ SADC Declaration and Treaty, 1992

¹⁵³¹ SADC Declaration and Treaty, 1992

¹⁵³² SADC Declaration and Treaty, 1992

¹⁵³³ SADC Declaration and Treaty, 1992

¹⁵³⁴ Tino 2014: 103-126

Both the 2000 and 2014 Protocols on the Tribunal only served the purpose of laying down the details of the Tribunal's powers, functions, and operations.¹⁵³⁵ The withdrawal clause in the 2014 Protocol seems to have been a good thing in certain respects.¹⁵³⁶ However, the suspension of the Tribunal in 2010 took only one member state, Zimbabwe and its President, Robert Mugabe, and those loyal to him by SADC leaders to bring about the suspension.¹⁵³⁷ It is important to mention that SADC leaders should have advised the government of Zimbabwe to either comply with the Tribunal judgments or opt out of withdrawal from the Organisation, instead of unlawfully suspending the regional court.¹⁵³⁸

It was an undesirable development that SADC member states failure to subject themselves to the Tribunal supervision, even under limited jurisdiction of the 2014 Protocol is a question of treading a fine balance in ensuring that the grievances of one member state do not derail the work of the SADC as a whole.¹⁵³⁹

5.4 The reviewing process of the SADC Tribunal

In context to the suspension of the Tribunal's activities, the Summit decided to review its role, functions, and terms of reference.¹⁵⁴⁰ These changes were effected, despite the advisory opinion of the World Trade Institute Advisors (WTIA), which submitted the report in February 2011 stating that the SADC Tribunal was properly constituted under international law and, therefore its decision should be binding on Zimbabwe.¹⁵⁴¹ Additionally, they recommended that the Tribunal should be allowed to function.¹⁵⁴² The final report was then presented to the Summit or Heads of State and Government in 2012, the report was not accepted, therefore review of the Tribunal's role was not as severe as the Summit expected.¹⁵⁴³ The SADC Minister of Justice was conscious that the decision taken by Summit is no more legal but political, therefore they realised that they should have proposed some amendments to the 2000 Protocol on Tribunal, which might have dissolved the antagonism felt for it by the Summit.¹⁵⁴⁴

¹⁵³⁵ 2000 SADC Declaration and Treaty, 1992 and 2014 SADC Protocol on Tribunal

¹⁵³⁶ 2014 SADC Protocol on Tribunal

¹⁵³⁷ Lenz et al (2012)

¹⁵³⁸ Naldi & Magliveras 2016: 133-156

¹⁵³⁹ Naldi & Magliveras 2016: 133-156

¹⁵⁴⁰ Munson 1976: 164-182

¹⁵⁴¹ Bartels 2011 <http://www.scribd.com/doc/115660010/WTIA-Review-of-the-Role-Responsibilities-and-Terms-of-Reference-of-the-SADC-Tribunal-Final-Report>.

¹⁵⁴² Tino 2014:103-126

¹⁵⁴³ Donaghy B, 'Constructive ambiguity in neighbour mediation', available at http://www.mediate.com/article/donaghy_B3.cfm (accessed 13 February 2011)

¹⁵⁴⁴ Tino 2014:103-126

Tino states that *ratione personae* are consistent with and confirm the strongly intergovernmental legal nature of the SADC.¹⁵⁴⁵ The SADC Heads of State and Government disregarded completely the SADC Ministers of Justice report that affirms the legal existence of the SADC Tribunal during the 2012 Maputo Summit. Instead, the Summit resolved that a new Protocol on Tribunal would have to be negotiated among member states and its jurisdiction would have been limited to resolving interstate disputes.¹⁵⁴⁶ By implication that resolution meant to remove the rights of natural and legal persons to approach the Tribunal.¹⁵⁴⁷

Clearly, the solidarity principle among member states became visible when the Summit decided to suspend the Tribunal by negotiating a new Protocol, instead of defying Zimbabwe's failure to abide by Art.4(c) of the SADC Treaty by observing the principles such as the human rights, democracy and rule of law.¹⁵⁴⁸ It is obvious that it was the member state's desire to prevent future political embarrassment to any member state of the kind yielded by the Tribunal's ruling against Zimbabwe.¹⁵⁴⁹ It is noteworthy that there is a poor human rights record in the SADC member states and they do not want to be held accountable by the Tribunal located outside their countries and far from their political influence.¹⁵⁵⁰ The SADC member states hesitation to cede the exercise of part of their sovereignty and the strong intergovernmental nature of their cooperation.¹⁵⁵¹

The review process of the SADC Tribunal ended in 2014 with the adoption of the new Protocol.¹⁵⁵² Clearly, during the SADC Summit held to review and adopt the new Protocol on Tribunals, all SADC member states attended at the 34th Summit, and the text of the new Protocol was adopted by consensus and no member state raised a formal objection to its adoption.¹⁵⁵³ Surprisingly, only nine member states signed the new Protocol. The lack of political will to sign the new Protocol reveals uncertainty among SADC member states about the convenience of this new Tribunal.¹⁵⁵⁴ Some member states decided to delay signing the new Protocol not impending its entry into force, which is subordinated to the deposit of the instruments of ratification by two-thirds of member states.¹⁵⁵⁵

¹⁵⁴⁵ Brownlie 2008: 610 - 630

¹⁵⁴⁶ Tino 2014:103-126

¹⁵⁴⁷ Meckler 2016: 1007 - 1038

¹⁵⁴⁸ Phooko 2015: 531 -565

¹⁵⁴⁹ Colby 2003: 18-25

¹⁵⁵⁰ Tino 2014:103-126

¹⁵⁵¹ Hinsley 1986:62-72

¹⁵⁵² Deng et al (1996:2)

¹⁵⁵³ Thomas 2001: 587 - 593

¹⁵⁵⁴ Magliveras 2016: 1-24

¹⁵⁵⁵ Art.52-54 of New Protocol on Tribunal

The signing of the new Protocol on Tribunal is still pending as no member state has ratified it.¹⁵⁵⁶ This condition gives the 2000 Protocol on Tribunal to continue to be in force and the SADC Tribunal continues to exist by virtue of the SADC Treaty, although it is not operational.¹⁵⁵⁷ Briefly, SADC member states did not comply with the procedure provided for in Art.37 of the 2000 SADC Protocol on Tribunal concerning its amendment.¹⁵⁵⁸

5.5 Conclusion

This chapter has demonstrated the similarities and differences between the provisions of the 2000 and 2014 Protocol on the Tribunal. The similarities between some of the provisions of the 2000 SADC Protocol on Tribunal and the 2014 SADC Protocol on Tribunal show that SADC Heads of State and Government did not have reasons to back their decision to disband the SADC Tribunal. The SADC member states left with no option but to act in solidarity with the government of Zimbabwe to avoid the embarrassment of President Robert Mugabe, the father figure of the Front Line States.

Looking at the history of the SADC Tribunal, this region has not presided over the matter that involves member states themselves, which means that the SADC Head of State and Government avoided litigating against each other at all costs. The only exception is the human rights case that involved President Ravalomanana of Madagascar due to insurgency that manifested in that country. These two cases (Mike Campbell and Others v the Republic of Zimbabwe and the Madagascar insurrection) showed that SADC member states do not treat cases that are put before the SADC equally. The lacuna that was created in Art.32 (2) of the 2000 SADC Protocol on the Tribunal to allow member states and institutions of the Community to take measures necessary to ensure execution of decisions of the Tribunal. In the present case, the SADC Tribunal has 2008, 2009 and 2010 approached the SADC Heads of State and Government to force the government of Zimbabwe to comply with the court rulings. Instead, the SADC member states decided to suspend the functions of the Tribunal pending the outcomes of the review commission led by Prof Bartels.

The argument raised by the government of Zimbabwe that they have not ratified the 2000 SADC Treaty as required by the Constitution of Zimbabwe, therefore they are not bound by the decisions of the regional court is invalid and spurious. A mere fact the government of Zimbabwe have signed the SADC Treaty, as the constitutive document of the SADC, and the

¹⁵⁵⁶ Klazen 2010: 147 -155

¹⁵⁵⁷ Masungu 2003: 88-96

¹⁵⁵⁸ Tino 2014:103-126

allocation of judge to constitute a panel of judges to preside on matters before the SADC Tribunal. These actions show that the government of Zimbabwe is bound by the decision of the tribunal. Secondly, the argument that the provisions of Art.4 (c) of the SADC Treaty do compel member states to adhere to the principles of human rights, democracy, and the rule of law is also invalid and spurious. These principles are part of the constitutive document, the SADC Treaty; therefore, it is prudent that the application of this constitutive document includes these principles. These principles cannot detached from the whole document but they form part of the entire legal instrument. The SADC Tribunal judges were correct to utilise Art.4 (c) of the SADC Treaty to develop its jurisprudence by acquainting the tribunal with jurisdiction to preside over human rights matters as they find expression on the wording of the proviso.

CHAPTER 6:

Comparative Analysis on Regional (ECOWAS CCJ, EACJ, SADC Tribunal) and International Courts (European Court of Justice, Andean Tribunal Justice)

6.1 Introduction

This chapter will make a comparative analysis of functions, composition, and jurisdiction of the regional courts (ECOWAS CCJ, East African Community Justice (EACJ) and Southern African Development Communities (SADC) Tribunal in Africa and the international courts comprising of European Court of Justice and Andean Tribunal Justice. The COMESA, EAC, and SADC Treaties rate the judicial body among the main organs of their regional organisation.¹⁵⁵⁹ The COMESA and EAC Treaties contain provisions with detailed rules about their composition, role, and functions, and confer to their courts the task of adopting their own rules of procedure.¹⁵⁶⁰ On the other hand, the SADC Treaty provides only for the establishment of a Tribunal whose composition, functions, powers, and rules are prescribed in a protocol to be adopted by the Summit later.¹⁵⁶¹

African states have shown strong attachment to their own national sovereignty which they gained with difficulty after a long time of European colonialism.¹⁵⁶² This fact explains why the African states have decided to establish mainly intergovernmental organisation since the 1960s and 1970s.¹⁵⁶³ This legal model of interstate cooperation is able to suit the state's needs for guarding their national sovereignty.¹⁵⁶⁴ The issue of sovereignty is significant, especially in African countries, which guard their independence with jealousy.¹⁵⁶⁵ Scott observed a similar trend in an incident where the United Kingdom refused to decolonise the Chagos Island.¹⁵⁶⁶

¹⁵⁵⁹ Art.9, EAC Treaty; Art.7, COMESA Treaty; Art.9, SADC Treaty

¹⁵⁶⁰ Arts.23-47, EAC Treaty, Arts.19-44, COMESA Treaty

¹⁵⁶¹ Virzo 2011: 285-313

¹⁵⁶² Achiume 2017: 1-36

¹⁵⁶³ Chris Chinaka, 'SADC Shows Approval for Mugabe, News Africa (August 17, 2004), available at http://www.iol.co.za/news/africa/sadc-shows-approval-for_mugabe-219728 ("Mugabe's seizure of white-owned farms and his contested re-election in 2002 are a major focus of a Southern African Development Community (SADC) summit that opened on Monday.")

¹⁵⁶⁴ Tino 2014: 140-172

¹⁵⁶⁵ Melber 2005: 135-136

¹⁵⁶⁶ Scott 2023:867 - 895

It is noteworthy that there are mechanisms to the Chagos Island sovereignty dispute, including military reasons for the United Kingdom's hesitancy to return the island, purported environmental concerns that have delayed the Chagossians' chances of reclaiming their homeland, and the Chagossians' economic and social struggle through their diaspora.¹⁵⁶⁷ It is acknowledged the issue under discussion is not relevant to this thesis but the central point is the protection of sovereignty by countries, as well as to highlight the ramifications of colonialism in the affected countries.¹⁵⁶⁸

African states are reluctant to cede the exercise of some sovereign powers to an international organisation, which translates into a low degree of institutionalisation of interstate cooperation and into the conferral of few not very relevant functions to the regional entity.¹⁵⁶⁹ The judicial institutions have a marginal role; that is the reason why the African continent has been perceived as having no litigation culture.¹⁵⁷⁰ It is imperative to mention that intergovernmental organisations are governed by principles and rules of international law.¹⁵⁷¹ In the concept of an intergovernmental organisation, the member states cooperate by adopting non-binding acts, if they decide to bind each other, they adopt agreements or protocols, only binding signatory parties and not directly creating rights and obligations for individuals.¹⁵⁷² In this system, the potential disputes involve member states exclusively and to settle them they prefer to resort to diplomatic and political means in order to preserve their national sovereignty.¹⁵⁷³

Over the past decade, apart from the creation of the continental body known as the African Union (AU), there has been a proliferation of sub-regional economic communities such as the Economic Community of West African States (ECOWAS), East African Community (EAC) and the Southern African Development Community (SADC).¹⁵⁷⁴ These regional organisations were established under various Treaties as the Treaty Establishing the East African Community (1999), the Treaty of the Economic Community of West African States (1975), and the Treaty of the Southern African Development Community (1999).¹⁵⁷⁵

The Regional Economic Communities were established to deal with economic issues, thus there has been a nexus between the objectives of regional and the integration and the

¹⁵⁶⁷ Scott 2023: 867 - 895

¹⁵⁶⁸ Gilley 2017: 1-11

¹⁵⁶⁹ Tino 2014: 140-172

¹⁵⁷⁰ Gough, D.H. (1995), 'Black English in South Africa', in V.De Klerk (ed), *English Around in the World: Focus on Southern Africa*. Amsterdam: John Benjamins

¹⁵⁷¹ Karen & Alter et al (2013)

¹⁵⁷² Eric Voeten, 'International Courts Data, available at: <http://www9.georgetown.edu/faculty/ev42/ICdata.htm>

¹⁵⁷³ Tino 2014: 140-172

¹⁵⁷⁴ Helfer & Slaughter 2005: 899-1023

¹⁵⁷⁵ Steinberg 2004: 247-268

realisation of human rights¹⁵⁷⁶ each of these sub-regional communities has a tribunal that is established in terms of their constituent documents.¹⁵⁷⁷ These tribunals are the Southern African Development Community Tribunal (SADC Tribunal), the Economic Community of West African Court of Justice (ECOWAS CCJ), and the East African Court of Justice (EACJ).¹⁵⁷⁸ The tribunals play a significant role in promoting regional integration on the African continent and they are responsible for interpreting and applying treaty provisions in order to resolve dispute arising from economic integration.¹⁵⁷⁹ It is important to mention that the protection of human rights was not originally within their jurisdiction through express or implied mandates; they have adjudicated over cases involving allegations of the violation of human rights.¹⁵⁸⁰ Jurisdiction is defined as the power or competence of a tribunal to adjudicate over a legal dispute and issue a binding judgment.¹⁵⁸¹

Cheng states that the Tribunal derives such power or competency from a constituent document that defines its power.¹⁵⁸² It is noteworthy that in cases where the instrument is silent about certain powers of the Tribunal, the tribunal may decide to resort to an implied mandate in order to adjudicate over a legal issue before it.¹⁵⁸³

6.2 Jurisdiction of Sub-regional courts over human rights in Africa

Phooko states that three regional courts in Africa, namely ECOWAS CCJ, the EACJ, and the SADC Tribunal have also been confronted with cases that required the exercise of implied power.¹⁵⁸⁴ These implied powers are at the centre of the controversy that led to the suspension of some of the regional courts, particularly the SADC Tribunal.¹⁵⁸⁵ The problem was caused by loopholes in the constituent documents of the previously mentioned organisations, which were salient or not clear with regard to the ability of the tribunal to adjudicate over cases involving human rights violations.¹⁵⁸⁶

The next paragraph will highlight how the regional courts dealt with human rights complaints brought before them by individuals and the discussion will determine whether this court had

¹⁵⁷⁶ Viljoen 2012 : 495-496

¹⁵⁷⁷ Phooko 2015: 531-565

¹⁵⁷⁸ Helfer 2006: 255-267

¹⁵⁷⁹ Viljoen 2012: 495-496

¹⁵⁸⁰ Hulse and Van der Vleuten 2015: 84-103

¹⁵⁸¹ Karisson 2014: 1-31

¹⁵⁸² Scholtz 2011: 197-201

¹⁵⁸³ Nkatha 2012: 96-109

¹⁵⁸⁴ Ekongo, J (2011), 'SADC Tribunal Should Serve Our Interest', New Era, 27 July.

¹⁵⁸⁵ Sasa, M (2009), 'Zim Pulls out of SADC Tribunal', The Herald, 2 September, www.zimbabwesituation.com/sept3.2009.html (accessed 8 December 2010)

¹⁵⁸⁶ Phooko 2015: 531-565

the jurisdiction to adjudicate human rights complaints or whether the judges of these courts used the implied powers to have jurisdiction over these matters.¹⁵⁸⁷

6.2.1 The East African Court of Justice

The background of the EAC was that the regional organisation was established for economic integration in post-colonial East Africa dates back to the East African Co-operation Treaty of 1967 (EAC) Treaty concluded between Kenya, Uganda, and Tanzania but entered into force in 2000.¹⁵⁸⁸ The EAC is founded on the principles of good governance including the recognition, protection, and promotion of human and people's rights in accordance with the African Charter.¹⁵⁸⁹ The EAC Treaty refers to respect for human rights as a component of good governance, which refers to aspects of the human rights record.¹⁵⁹⁰ The EAC Treaty, as the judicial organ of the EAC, establishes the East Africa Court of Justice (EACJ).¹⁵⁹¹ Art.9 of the Treaty Establishing East African Community (1999) establishes the East African Court of Justice as the judicial organ of the East African Community.¹⁵⁹²

This judicial court was established in 1999 and became operational in 2001.¹⁵⁹³ Art.27 (1) governs the jurisdiction of the court and gives this court a competency to interpret and apply the provision of the said Treaty.¹⁵⁹⁴ The powers of this court to adjudicate human rights cases would be determined in the future by the Council.¹⁵⁹⁵ It is clear that pending the previously mentioned determination the EACJ does not have jurisdiction over human rights violations.¹⁵⁹⁶

The issue regarding the EACJ having an implied mandate was deliberated in the matter between *Katabazi v Secretary General of the East African Community*¹⁵⁹⁷, the applicant was charged with treason. They had been arrested and remanded in custody.¹⁵⁹⁸ The High Court

¹⁵⁸⁷ Accadoga Chiledi, 'Africa: Southern African Development Community is born, INTER PRESS SERV., August.17, 1992.

¹⁵⁸⁸ Shivumba 2019: 1-5

¹⁵⁸⁹ East African Co-operation Treaty of 1967

¹⁵⁹⁰ East African Co-operation Treaty of 1967

¹⁵⁹¹ Shivumba 2019: 1-5

¹⁵⁹² Treaty Establishing the East African Community (1999)

¹⁵⁹³ Aoki-Okabe Maki, 'Increasing Popular Participation in the Treaty-making Process: The Legislative Process of Section 190 of the 2007 Constitution of Thailand <https://ir.ide.go.jp/?action=pages_view_main&active_action=repository_view_main_item_detail&item_id=37817&item__no=1&page_id=39&block_id=158> accessed 14 March 2019

¹⁵⁹⁴ Treaty Establish the East African Community (1999)

¹⁵⁹⁵ Art.9 of Treaty Establishing the East African Community (1999)

¹⁵⁹⁶ Phooko 2015: 531-565

¹⁵⁹⁷ (Ref No.1 of 2007) 2007 EACJ 3(1 November 2007)

¹⁵⁹⁸ *Katabazi v Secretary General of the East African Community*, No.1 of 2007 (2007 EAC 3)

of Uganda had subsequently granted bail to some of the accused.¹⁵⁹⁹ After their release, security personnel who re-arrested the accused surrounded the court.¹⁶⁰⁰ The applicant had been prosecuted before a military court for similar charges¹⁶⁰¹. The Uganda Law Society approached the Constitutional Court of Uganda and challenged the constitutionality of the prosecution.¹⁶⁰² The Constitutional Court ruled that the detention of the applicant is unconstitutional and ordered that the accused person be released.¹⁶⁰³ The Government of Uganda had failed to honour the court order, and the matter was brought before the EACJ¹⁶⁰⁴.

In the EACJ, the applicant argued that the military charges, continued detention, and failure to observe a court order violated arts.6 (d),7(2) and 8(1) (c) of the Treaty Establishing the East African Community, among others.¹⁶⁰⁵ Specifically, art.6 (d) stipulates that the fundamental principles that shall govern the achievement of the objectives of the community by the Partner States include adherence to the principles of democracy, the rule of law, and the recognition, promotion, and protection of human rights as contained in the African Charter on Human and People's Rights.¹⁶⁰⁶ The Treaty Establishing the East African Community states that Partner States undertook to abide by the principles of good governance, including adherence to the principle of democracy, the rule of law, and universally accepted standards of human rights.¹⁶⁰⁷ Art.8 (1) (c) states that Partner States should abstain from any measures likely to jeopardise the achievement of those objectives or implementation of the provisions of the Treaty.¹⁶⁰⁸

Despite these clear provisions of the Treaty Establishing the East African Community (1999) the Attorney General of Uganda challenged the court's jurisdiction to deal with human rights.¹⁶⁰⁹ The argument was that the Council had not yet adopted the protocol that would have extended the court's power to adjudicate over human rights cases.¹⁶¹⁰ The High Court agreed that it had no jurisdiction over human rights cases, as there was no protocol that had been adopted to operationalise its human rights mandate.¹⁶¹¹

¹⁵⁹⁹ *Katabazi v Secretary General of the East African Community, No.1 of 2007 (2007 EAC 3)*

¹⁶⁰⁰ Ebobrah 2009: 79-82

¹⁶⁰¹ Alter, Helfer & McAllister 2013: 730-731

¹⁶⁰² Kate D.A. Costa, Nigeria: Ghana Threatens to Expel Foreign Retailers, DAILY TRUST, June 29,2012 available at <https://allafrica.com/stories/201206290777.html>

¹⁶⁰³ Josh Kron, Bombers Kill More Than 50 in Attacks in Uganda, N.Y Times, July 11,2010, available at <http://www.nytimes.com/2010/07/12/world/africa/12uganda.html>:

¹⁶⁰⁴ Helfer 2018: 235-253

¹⁶⁰⁵ *Katabazi v Secretary General of the East African Community, No.1 of 2007 (2007 EAC 3)*

¹⁶⁰⁶ Treaty Establishing the East African Community (1999)

¹⁶⁰⁷ Art.7(2)

¹⁶⁰⁸ Treaty Establishing the East African Community (1999)

¹⁶⁰⁹ Gathii 2011: 23-45

¹⁶¹⁰ *Katabazi v Secretary General of the East African Community, No.1 of 2007 (2007 EAC 3)*

¹⁶¹¹ *Katabazi v Secretary General of the East African Community, No.1 of 2007 (2007 EAC 3)*

The EACJ assumed the jurisdiction and concluded that the intervention by the armed security agents of Uganda to prevent the execution of a court order violated the principle of the rule of law and the Treaty Establishing the East African Community.¹⁶¹² The EACJ concluded that to uphold Uganda's defence that the re-arrest of the accused persons was necessary for security reasons would leave a dangerous precedent, which would undermine the rule of law.¹⁶¹³ The court opted to extend its powers by assuming implied powers to adjudicate over human rights cases by way of considering the overall objectives and purpose of the Treaty.¹⁶¹⁴ The decision of the EACJ clearly demonstrated the ability of the court to interpret the provisions of a Treaty in a manner that does not run counter to the promotion and protection of human rights.¹⁶¹⁵

It is noteworthy that there are those who received this decision of the EACJ negatively and some articulated that the court does not have jurisdiction over human rights matters but the interpretation of the provisions of Treaty Establishing the East African Community, clearly permits this court to deal with human rights cases.¹⁶¹⁶

6.2.2 The SADC Tribunal

A brief background on the Southern African Development Community (SADC) is that the institution is the Southern Africa sub-regional equivalent of ECOWAS and EAC with a current membership of sixteen states.¹⁶¹⁷ The institution was established to promote economic development into a community based on human rights, democracy, and the rule of law.¹⁶¹⁸ Since its establishment in 1992, the SADC has pledged its commitment to regional integration and poverty eradication within Southern Africa through economic development whilst ensuring peace and security.¹⁶¹⁹ The SADC Tribunal was first envisioned in 1992 in terms of Art.9 of the Treaty of SADC.¹⁶²⁰

The SADC Protocol on Tribunal gives the Tribunal a mandate to hear disputes between States, and between natural or legal persons and States.¹⁶²¹ Although it was established in 2000, the SADC Tribunal only started operating on 18 November 2005 when the first judges of the court were sworn in.¹⁶²² The jurisdiction of the SADC Tribunal involves the interpretation

¹⁶¹² *Katabazi v Secretary General of the East African Community, No.1 of 2007 (2007 EAC 3)*

¹⁶¹³ *Katabazi v Secretary General of the East African Community, No.1 of 2007 (2007 EAC 3)*

¹⁶¹⁴ Viljoen 2012:504-508

¹⁶¹⁵ Phooko 2015:531-565

¹⁶¹⁶ Bartels 2011 <http://www.scribd.com/doc/115660010/WTIA-Review-of-the-Role-Responsibilities-and-Terms-of-Reference-of-the-SADC-Tribunal-Final-Report>.

¹⁶¹⁷ Murungi & Gallinetti 2010:119-143

¹⁶¹⁸ Von Staden 2016:27-52

¹⁶¹⁹ SADC Declaration and Treaty, 1992

¹⁶²⁰ Shivamba 2019:1-5

¹⁶²¹ Alter 2012: 139-145

¹⁶²² Shivamba 2019:1-5

and application of the SADC Treaty, including its protocols and subsidiary instruments, which apply within the SADC.¹⁶²³ It is noteworthy that the provisions of the SADC Treaty and 2000 Protocol on Tribunal are silent on whether the SADC Tribunal can adjudicate cases of human rights violations.¹⁶²⁴ Despite the absence of express jurisdiction on human rights in these legal instruments, the SADC Treaty does refer to human rights and other fundamental principles such as democracy and the rule of law that a civilised nation ought to observe.¹⁶²⁵

The cause of disagreement in *Mike Campbell and Others (Pty) Ltd v Republic of Zimbabwe*¹⁶²⁶ was the determination of whether the SADC Tribunal has jurisdiction to receive and adjudicate human rights violations. The facts of this case were discussed in the above chapters, but for the purpose of providing clarity and understanding of this fact will be discussed in summary, this case involved Zimbabwe's controversial land reform policy.¹⁶²⁷ The applicants challenged the Zimbabwe Land Reform policy that authorised the expropriation of their farms without compensation.¹⁶²⁸ In support of their case, the applicants contended that the acquisition of land without compensation breached the government of Zimbabwe's obligation under the SADC Treaty to act in accordance with the principles of human rights, democracy, and the rule of law, among others.¹⁶²⁹

On the other hand, the Government of Zimbabwe in defence argued that the SADC Tribunal had no jurisdiction to adjudicate over human rights cases under the SADC Treaty because the Treaty "only outlines the principles and objectives of SADC" not the standard against which actions of member states can be assessed.¹⁶³⁰

They further state that the SADC Tribunal may not borrow the previously mentioned standard from other instruments, as doing so would be tantamount to legislating on behalf of member states.¹⁶³¹ Lastly, the Government of Zimbabwe contended that there is no protocol dealing with human rights or land reform that would give effect to the principles stipulated in the SADC treaty.¹⁶³² Art.21 (b) gave the SADC Tribunal the powers to develop its jurisprudence through the use inter alia, of applicable treaties and rules of public international law.¹⁶³³ This provision gives the Tribunal wide powers to consult other sources for answers when the SADC Treaty

¹⁶²³ Art.16(1), SADC Treaty; Art.14 of the SADC Protocol on the Tribunal

¹⁶²⁴ Phooko 2015:531-565

¹⁶²⁵ Phooko 2015:531-565

¹⁶²⁶ 2008 SADCT 2 (28 November 2008)

¹⁶²⁷ *Mike Campbell and Others (Pty) Ltd v The Republic of Zimbabwe*

¹⁶²⁸ *Mike Campbell and Others (Pty) Ltd v The Republic of Zimbabwe*

¹⁶²⁹ 2008 SADCT 2 (28 November 2008)

¹⁶³⁰ 2008 SADCT 2 (28 November 2008)

¹⁶³¹ 2008 SADCT 2 (28 November 2008)

¹⁶³² SADCT 2 (28 November 2008)

¹⁶³³ 2000 Protocol on Tribunal

did not provide any.¹⁶³⁴ The Tribunal in adjudicating the matter relied on Art.4 (c) of the SADC Treaty which obliges member states to act in accordance with the principles of human rights, democracy, and the rule of law when it adjudicate cases involving human rights violations.¹⁶³⁵

The Tribunal contended that the previously mentioned provision empowered it to deal with any human rights dispute.¹⁶³⁶ The following SADC legal instruments accorded the Tribunal with powers to adjudicate human rights disputes:

- (i) SADC Treaty (1999);
- (ii) 2000 SADC Protocol on Tribunal;
- (iii) The preamble of the SADC Treaty, and
- (iv) Description of the objectives and principles of the SADC Treaty.

The decision of the SADC Tribunal in *Mike Campbell v Republic of Zimbabwe* was subject to criticism from scholars of international law, the same as EACJ in the case *Katabazi v Secretary General of East African Community* who have lauded the progressive decision rendered by these regional courts.¹⁶³⁷ This decision was strongly criticised by certain SADC governments, especially Zimbabwe and Tanzania whereby both Presidents of these countries, Robert Mugabe and Jakaya Kikwete once stated, "*We have created a monster that will devour us all*".¹⁶³⁸ The Government of Zimbabwe ignored the judgment of the SADC Tribunal even though this court submitted several complaints to the Summit about Zimbabwe's non-compliance.¹⁶³⁹

The lack of action by Summit against non-compliance with the SADC Tribunal judgment by the government of Zimbabwe indicated a political-legal challenge, and this was noted in the report of the Summit questioning the existence and functioning of the SADC Tribunal.¹⁶⁴⁰ Phooko is of the view that the Zimbabwean land reform program was designed to address identical colonial injustices in the aforementioned countries; SADC member states showed solidarity and therefore supported Zimbabwe.¹⁶⁴¹ On the other hand, countries such as Angola, Swaziland, and the Democratic Republic of Congo had an interest in the demise of the SADC Tribunal because of poor human rights records in their territories.¹⁶⁴²

¹⁶³⁴ Article 21 of the SADC Declaration and Treaty

¹⁶³⁵ SADCT 2 (28 November 2008)

¹⁶³⁶ *Mike Campbell and Others (Pty) Ltd v The Republic of Zimbabwe*

¹⁶³⁷ Lenz 2012: 166-194

¹⁶³⁸ Nyathi 2017: 167-178

¹⁶³⁹ *Louis Karel Fick v The Republic of Zimbabwe*

¹⁶⁴⁰ Phooko 2015: 531-565

¹⁶⁴¹ Phooko 2015: 531-565

¹⁶⁴² Phooko 2015: 531-565

It is noteworthy to highlight that human rights abuse in southern African has been the order of the day, for example in Botswana, the Bushmen and gay people in Malawi would have approached the SADC Tribunal seeking a legal recourse against the infringement of their human rights.¹⁶⁴³ Finally, it could have been argued that Lesotho voted and supported the Summit decision because it was facing a commercial case that would have been potentially having far-reaching cost implications against the country.¹⁶⁴⁴

Clearly, the lack of action against the government of Zimbabwe showed that states solidarity triumphed over the rule of law, as Campbell's decision and other factors ultimately resulted in the suspension of the SADC Tribunal, which was viewed as exceeded its mandate or threat to state sovereignty.¹⁶⁴⁵

6.2.3 ECOWAS CJJ

ECOWAS is a fifteen-member group of West African states formed in 1975 to promote economic integration within the region.¹⁶⁴⁶ The Protocol that operationalise the ECOWAS Court was adopted in 1991, and in 1993 the Treaty of ECOWAS was amended to recognize the promotion and protection of human and people's rights in accordance with the African Charter on Human and People's Rights (African Charter).¹⁶⁴⁷ It is important to indicate that in 2005 and 2006 respectively, the ECOWAS Treaty was amended further to give the ECOWAS Court competence to determine cases of violation of human rights occurring in any of the member states.¹⁶⁴⁸ Arts.6 (1) (e) and 15(1) made a provision for the establishment of the ECOWAS CCJ¹⁶⁴⁹ This judicial court was subsequently created by Protocol A/P.1/7/91 and it became operational in 2005.¹⁶⁵⁰ Initially, this court was created to deal with disputes between member states or between states and institutions of the ECOWAS.¹⁶⁵¹ Art.9 made provision for member states to bring cases before the ECOWAS CCJ on behalf of their nationals regarding the interpretation and application of the provisions of the Treaty.¹⁶⁵² The difference between ECOWAS CCJ and EACJ and SADC Tribunal is that the protection of individual's

¹⁶⁴³ Kumm 2004: 907-918

¹⁶⁴⁴ Swissborough Diamond Mine (Pty) Ltd v Kingdom of Lesotho 2010 SADCT 4 (11 June 2010)

¹⁶⁴⁵ Hulse 2012 <http://www.e-ir.info/2012/10/25/silencing-a-supranational-court-the-rise-and-fall-of-the-sadc-tribunal/>.

¹⁶⁴⁶ Klabbers 2009: 207-209

¹⁶⁴⁷ Shivamba 2019:1-5

¹⁶⁴⁸ ECOWAS Treaty of 1993

¹⁶⁴⁹ Revised Treaty of the Community of West African States

¹⁶⁵⁰ <https://theadvocatengr.com/2016/02/ecowas-parliament-adoption-of-supplementantary-act-out-greatest-achievement-ekweremadu/> (accessed 16-04-2016)

¹⁶⁵¹ Art.76(2) of ECOWAS Community Court of Justice Protocol A/P.1/7/91(1991)

¹⁶⁵² ECOWAS Community Court of Justice Protocol A/P.1/7/91(1991)

rights is dependent on the mercy of states whilst the latter made reference to the protection of human rights, democracy, and the rule of law despite these provisions lack an express jurisdiction regarding the receiving and adjudication of human rights violations.¹⁶⁵³ The *Afolabi Olajide v Federal Republic of Nigeria*¹⁶⁵⁴, the case involved an allegation of human rights violations that came before the court. A Nigerian businessman instituted action against the government of Nigeria about the closure of Nigeria's border with Benin.¹⁶⁵⁵ The applicant cited that the closure of the border negatively affected his business and that it was in violation of the principle of the free movement of persons and goods as contained in the Revised Treaty of Community of West African State and the African Charter on Human and People's Rights.¹⁶⁵⁶ He contended that he suffered financial damages. In defence, the respondent objected to the jurisdiction of the ECOWAS CCJ to adjudicate an individual case involving a violation of human rights. In arriving at its conclusion, the court ruled that under Protocol A/P1/7/91 only member states could bring cases before it and dismissed the application. This decision was a major blow against the protection of human rights.¹⁶⁵⁷

ECOWAS CCJ made a dramatic turn in 2009 by making a ground breaking decision that declares all Nigerians are entitled to education as a legal and human right, thus concretising the fact that the ECOWAS CCJ is committed to bringing human rights cases within its jurisdiction and is not afraid to declare violations of the same.¹⁶⁵⁸ It is noteworthy that ECOWAS CCJ adopted a narrow interpretation of the instruments establishing the ECOWAS CCJ by relying on the doctrine of express powers.¹⁶⁵⁹ Art.4 (c) provides for the recognition, promotion, and protection of human and people's rights in accordance with the provisions of the African Charter on Human and People's Rights.¹⁶⁶⁰

¹⁶⁵³ Lake 2013: 557-579

¹⁶⁵⁴ ECW/CCJ.APP/01/03

¹⁶⁵⁵ *Afolabi Olajide v Federal Republic of Nigeria*, ECW/CCJ.APP/01/03

¹⁶⁵⁶ *Afolabi Olajide v Federal Republic of Nigeria*, ECW/CCJ.APP/01/03

¹⁶⁵⁷ Viljoen 2012: 507-517

¹⁶⁵⁸ Socio-Economic Rights and Accountability Project (SERAP) v Federal Republic of Nigeria and Universal Education Commission ECW/CCJ/APP/0808

¹⁶⁵⁹ *Afolabi Olajide v Federal Republic of Nigeria*, ECW/CCJ.APP/01/03 ECW/CCJ.APP/01/03

¹⁶⁶⁰ ECOWAS Community Court of Justice Protocol A/P.1/7/91(1991)

6.3 Jurisdiction and Competencies

The role of judicial bodies in an economic integration process depends on their jurisdiction and on the powers that member states agree to confer on them.¹⁶⁶¹ There are similarities between the COMESA, EAC, and SADC Treaties, which ensure the adherence to law in the interpretation and application of the Treaty.¹⁶⁶² The judicial courts fall under the regional bodies and are entitled to adjudicate upon the following: disputes concerning member states violation of obligations arising from the treaty and other subsidiary instruments¹⁶⁶³, disputes concerning the legality of the organization's acts and its organ's actions ¹⁶⁶⁴, disputes between the organisation and its staff¹⁶⁶⁵, the regional courts are competent to give advisory opinions¹⁶⁶⁶; and they also adjudicate upon matters referred to them through preliminary reference¹⁶⁶⁷.

These regional courts have in common the binding nature of their jurisdiction for those states, which expressly accept it.¹⁶⁶⁸ This means the ratification or adoption of the normative instrument establishing the judicial body implies *ipso facto* the member states acceptance of its jurisdiction, without requiring their further consent case by case.¹⁶⁶⁹ The SADC Protocol on Tribunal accords the Tribunal with exclusive jurisdiction over all disputes between member states and SADC, between natural/legal persons and SADC, and between SADC and its staff.¹⁶⁷⁰ Clearly, the Protocol on Tribunal does not provide the Tribunal with exclusive jurisdiction over disputes between member states.¹⁶⁷¹ This protocol differs from other protocols signed by SADC member states, which have clauses that have dispute settlement mechanisms to solve interstate litigations arising from their application.¹⁶⁷² The SADC Protocol on Trade provides for an arbitral mechanism and resort to the Tribunal is possible just to appeal the panel reports.¹⁶⁷³ On the contrary, another protocol provides that any dispute regarding the interpretation or application that cannot be settled amicably shall be referred to the Tribunal.¹⁶⁷⁴ On the other hand, the jurisdiction of COMESA and EAC courts, its exclusivity

¹⁶⁶¹ Tino 2012: 143-174

¹⁶⁶² Art.23(1), EAC Treaty; Art.19, COMESA Treaty; Art.16, SADC Treaty

¹⁶⁶³ Arts.28-29, EAC Treaty; Art.24-25, COMESA Treaty; Art.15-17, SADC Treaty

¹⁶⁶⁴ Art.28-30, EAC Treaty; Art.24 and 26, COMESA Treaty; Arts. 17-18, SADC Treaty

¹⁶⁶⁵ Art.31, EAC Treaty; Art.27(1), COMESA Treaty; Art.19 SADC Treaty

¹⁶⁶⁶ Art.36, EAC Treaty; Art.32, COMESA Treaty; Art.20, SADC Treaty

¹⁶⁶⁷ Art.34, EAC Treaty; Art.30, COMESA Treaty; Art.16, SADC Tribunal and Rules of Procedure Art.75

¹⁶⁶⁸ Hulse 2016: 1-32

¹⁶⁶⁹ Tino 2012: 143-173

¹⁶⁷⁰ Tino 2012: 143-173

¹⁶⁷¹ Bach 1983: 605-623

¹⁶⁷² Tino 2012:143-173

¹⁶⁷³ Flesmes 2009: 135-157

¹⁶⁷⁴ For example, the Protocol on Extradition (2002), the Protocol against corruption (2001), the Protocol on the Control of firearm, ammunition, and Other Related Material (2001), the Protocol on Culture,

is not expressly stated in the treaties but can be inferred by some provisions.¹⁶⁷⁵ Art.34(1) of the COMESA Treaty and Art.38 of the EAC Treaty provide that any dispute concerning the interpretation or application of this treaty or any of the matters referred to the Court pursuant to this Chapter shall not be subjected to any other method of settlement other than those provided for in this Treaty.¹⁶⁷⁶ These provisions implicitly stated that these two courts have exclusive jurisdiction.¹⁶⁷⁷ Notwithstanding this provision, some protocols adopted within the EAC establish other mechanisms to solve disputes arising from their applications, which erode the jurisdiction of the court.¹⁶⁷⁸

A practical example is the Customs Union and the Common Market Protocols.¹⁶⁷⁹ The Protocol on the Establishment of Custom Union states that should an amicable settlement fail, the dispute may be brought before the East African Committee on Trade Remedies established under Art.24 of the Protocol.¹⁶⁸⁰ The mandate of the East African Court of Justice (EACJ) is to ensure the adherence to EAC law and taking into account that the Customs Union Protocol is part of it, the provision and the establishment of such a committee seem to be contradictory because they deprive the EACJ of its own jurisdiction.¹⁶⁸¹

On the contrary, the Common Market Protocol does not establish a new dispute resolution body, but it gives the national courts the competence to solve disputes arising from its interpretation and application.¹⁶⁸² The EAC Court is deprived of its jurisdiction but matters concerning the Common Market could be referred to it through the preliminary reference.¹⁶⁸³ It is noteworthy that the role of the EACJ in the realisation of the Common Market solely depends on the discretion of the national judges to refer the matter for interpretation by the court.¹⁶⁸⁴ The EACJ as compared to COMESA Treaty and SADC Treaty is that its exclusive jurisdiction intends to function in a restrictive way, namely only in relation to the jurisdiction of

information and Sports (2001), the Protocol on Health (1999) and Protocol on combatting illegal drugs (1996)

¹⁶⁷⁵ COMESA Treaty

¹⁶⁷⁶ Art.34(1), COMESA Treaty; Art.38, EAC Treaty

¹⁶⁷⁷ Kayihura 2010:583-592

¹⁶⁷⁸ Ruhingisa 2010: 575-582

¹⁶⁷⁹ Protocol on the establishment of the East African Customs Union (2004); Protocol on the establishment of the East African Community Common Market (2009)

¹⁶⁸⁰ Protocol on the Establishment of Custom Union (2004)

¹⁶⁸¹ Tino 2012: 143-173

¹⁶⁸² Protocol on the establishment of the East African Community Common Market (2009) Protocol on the establishment of the East African Community Common Market (2009)

¹⁶⁸³ Alter 2012: 135-154

¹⁶⁸⁴ Alter 2012: 135-154

other international regional courts and not so other mechanisms established within the EAC.¹⁶⁸⁵

6.3.1 Contentious competence

In ensuring the respect for the law of the organisation in the interpretation and application of the treaties, the regional courts are entitled to wide competencies, which seem to be largely inspired by those provided in the European Union (EU) judicial system.¹⁶⁸⁶

The primary function of the regional courts is to settle disputes concerning a member state's infringement of treaty obligations.¹⁶⁸⁷ Arts.29 and 25 of the EAC Treaty and COMESA Treaty respectively, confer on the Secretary General the competence to activate this procedure, which is divided into two phases.¹⁶⁸⁸ When the Secretary-General considers that a member state has failed to fulfil an obligation or has infringed a provision of the treaty he may submit his findings to the member state concerned in order to submit its observations on the findings.¹⁶⁸⁹ The affected member state should submit its observations to the Secretary-General within a prescribed time or if those observations are unsatisfactory, the Secretary-General shall refer the matter to the Council, which shall decide whether the matter should be referred by the Secretary-General of the court immediately or be resolved by the Council.¹⁶⁹⁰ The only difference is that in COMESA and EAC infringement procedures, the Secretary General's power is not as discretionary as the European Commission's power.¹⁶⁹¹ Under the COMESA and EAC Secretary General cannot autonomously decide to refer the matter to the court, but must first direct it to the Council.¹⁶⁹²

It is imperative to indicate that in essence, the involvement of the Council in this procedure underlines the intergovernmental nature of interstate cooperation within COMESA and EAC.¹⁶⁹³ Additionally, the Secretary-General does not have exclusive power to activate such infringement action.¹⁶⁹⁴ That means if a member state or an individual considers that a member state is in breach of an obligation or a treaty or of a treaty provision, they can refer the matter directly to the court without involving the Secretary-General in the contentious phase.¹⁶⁹⁵ In

¹⁶⁸⁵ Tino 2012:143-173

¹⁶⁸⁶ Art.258 of Treaty on Functioning of European Union (TFEU)

¹⁶⁸⁷ EAC Treaty and COMESA Treaty

¹⁶⁸⁸ Art.29 EAC Treaty; Art.25 COMESA Treaty

¹⁶⁸⁹ Art.258 of Treaty on Functioning of European Union (TFEU)

¹⁶⁹⁰ Tino 2012: 143-173

¹⁶⁹¹ Rehungisa 2006: 1-40

¹⁶⁹² Tino 2012: 143-173

¹⁶⁹³ Faneback & Lenya et al (2015)

¹⁶⁹⁴ Gibb 1998: 287-306

¹⁶⁹⁵ Art.28 and 30, EAC Treaty; Art.24 and 26, COMESA Treaty and Art.17-18, SADC Treaty

contrast, the SADC Protocol on Tribunal did not made proviso for an infringement procedure comparable to that of the European Court of Justice (ECJ).¹⁶⁹⁶

This provision only conferred to the Tribunal the competence to settle disputes between member states, individuals and member states, and SADC institutions and member states.¹⁶⁹⁷ The SADC Protocol on Tribunal did not specify the object or the procedure of these judicial actions.¹⁶⁹⁸ It is noteworthy that the SADC Tribunal's mission is to ensure adherence to SADC law, which means that this judicial court hears cases brought before it during its activity and this court could hear and determine matters concerning member state's failure of SADC obligation.¹⁶⁹⁹ The similarities between EAC, COMESA, and SADC judicial bodies is that they can solve disputes against the institutions of the organisation.¹⁷⁰⁰ The SADC Protocol on Tribunal did not explain the object of this action but it simply articulated that claims against SADC institutions were brought before the Tribunal by a legal or natural person and by each member state.¹⁷⁰¹ In essence, the SADC Protocol on Tribunal does not have the right to challenge the legality of a SADC act before the tribunal.¹⁷⁰² In contrast, the COMESA and EAC Treaties prescribe a clear and complete regulation for such judicial action.¹⁷⁰³ They provide that a person, who is a resident in a member state, and each member state, may refer the legality of any act or action of the institutions for determination by the court.¹⁷⁰⁴ The legality of such acts or actions is assessed because they are *ultra vires*, unlawful, and infringement of the treaty provisions, or the outcome of misuse or abuse of power.¹⁷⁰⁵ The provisions of the treaties differ with the EU judicial system; the claimant does not have to allege a specific interest or the violation of its own right, which justifies his resort to the court.¹⁷⁰⁶ The member state and legal or natural persons are supposed to have a general interest in respect of the law of the organisation.¹⁷⁰⁷ On the contrary, in COMESA and EAC, an institution may not challenge the legality of an act adopted by another institution.¹⁷⁰⁸

¹⁶⁹⁶ Arts.15 and 17, SADC Protocol on Tribunal

¹⁶⁹⁷ SADC Declaration and Treaty, 1992

¹⁶⁹⁸ Tino 2012: 143-173

¹⁶⁹⁹ Tino 2012: 143-173

¹⁷⁰⁰ Arts.28 and 30, EAC Treaty; Arts.24 and 26, COMESA Treaty and Arts.17-18, SADC Protocol on Tribunal

¹⁷⁰¹ 2000 SADC Protocol on Tribunal

¹⁷⁰² Peter Berries, 'Regional Integration in Southern Africa – A Guidebook', invent available at <https://www.sadc.int/tribunal>.

¹⁷⁰³ Von Staden 2012:1023-1049

¹⁷⁰⁴ Tino 2012: 143-173

¹⁷⁰⁵ Art.30, EAC Treaty; Art.26 COMESA Treaty

¹⁷⁰⁶ Mkhandawire 2010: 567-573

¹⁷⁰⁷ Carozza 2003: 67-80

¹⁷⁰⁸ Jacobs 2003: 547-556

Art.24 of COMESA and art.28 of the EAC stated that the court may also hear and determine the legality of an institution's action, particularly when a claimant considers that an institution has failed to fulfil its obligations under the treaty, he may refer the matter to the court for adjudication.¹⁷⁰⁹ In contrast, under the COMESA system, only the council's action may be challenged.¹⁷¹⁰ Under the EAC, the East African Court of Justice (EACJ) may determine the legality of the actions of every EAC organ and institution.¹⁷¹¹ It is noteworthy that in the COMESA system, only member states may refer these kinds of matters to the court, whilst under the EAC system, the right to resort to the judicial body is extended also to natural and legal persons.¹⁷¹²

6.3.2 Preliminary ruling

In order to ensure a uniform interpretation and the correct application of the law of the organisation in each member state, the provisions of the EAC, COMESA, and SADC judicial systems provide for the preliminary ruling procedure.¹⁷¹³ These provisions establish the mechanism of dialogue and cooperation between the regional court and national judges, which is important to grant the unity and coherence of the law of the organisation.¹⁷¹⁴ There is a similarity between COMESA, EAC, and SADC provisions with Art.267 of the Treaty on Functioning of European Union (TFEU).¹⁷¹⁵ The interaction of the regional judicial bodies and the national courts through references for a preliminary ruling is essential in making the law of the organisation effective and in developing uniform jurisprudence in the region.¹⁷¹⁶

The preliminary ruling mechanism is crucial to the application of the law of the organisation at the national level; to date it has not been tested in any regional organisation under consideration.¹⁷¹⁷

¹⁷⁰⁹ COMESA Treaty & EAC Treaty

¹⁷¹⁰ COMESA Treaty

¹⁷¹¹ EAC Treaty

¹⁷¹² Tino 2012: 143-173

¹⁷¹³ Art.34, EAC Treaty; Art.30, COMESA Treaty and Art.16 of SADC Protocol on Tribunal and Art.75-77 of Rules of Procedures

¹⁷¹⁴ Gathii et al (2011)

¹⁷¹⁵ Grant: 2007: 35-41

¹⁷¹⁶ Kayihura 2010: 583-592

¹⁷¹⁷ Onoria 2010:74-94

6.3.3 Advisory opinion

In addition to judicial contentious competence, the COMESA, EAC, and SADC courts may also give advisory opinions.¹⁷¹⁸

The intergovernmental organs of these organisations, namely the Summit and Council, can request the advisory opinions.¹⁷¹⁹ The EAC and COMESA Treaties grant the right to request an advisory opinion also to each member state and limit the object of such a request to questions of law arising from the treaty, which affects the organisation.¹⁷²⁰ On the contrary, under the SADC there is nothing about this was provided in the normative instruments, which stated simply that the Tribunal shall give advisory opinions on such matters as the Summit or the Council may refer to it.¹⁷²¹ All these treaties (COMESA, EAC, and SADC) are silent about the effect of such advisory opinions, therefore being opinions only; they are not supposed to be binding.¹⁷²²

6.3.4 Individual's role in the regional judicial system

Individuals have not been granted access to judicial bodies under Africa's economic integration processes.¹⁷²³ In COMESA and EAC, the judicial system grants individuals direct and wide access to the regional courts.¹⁷²⁴ They may challenge the legality of any act adopted respectively by COMESA and EAC organs and institutions without alleging their own interest or the violation of their right to justify their claim.¹⁷²⁵

It is imperative to state that the EAC and COMESA Treaties grant individuals a wider right to access regional justice than that provided for in the EU judicial system.¹⁷²⁶ Specific reference is Art.263 states that a legal and natural person may challenge exclusively the legality of an act addressed to that or which is of direct and individual concern to them, and against a regulatory act, which is of direct concern to them and does not entail implementing measures.¹⁷²⁷

¹⁷¹⁸ Art.36, EAC Treaty, Art.32, COMESA Treaty, and Art.20, SADC Protocol on Tribunal

¹⁷¹⁹ Alter, Gathii & Helfer 2016: 293-328

¹⁷²⁰ Tino 2012: 143-173

¹⁷²¹ Art.20, SADC Protocol on Tribunal

¹⁷²² Follesdal 2016 148-158

¹⁷²³ Schirm et al (2006)

¹⁷²⁴ Art.30, EAC Treaty; Art.26, COMESA Treaty

¹⁷²⁵ Tino 2012: 143-173

¹⁷²⁶ Schirm 2010: 197-221

¹⁷²⁷ Treaty on Functioning of European Union (TFEU)

Individuals are supposed to have a general interest in granting the protection of the organisation's legal order. In the case of *Sitenda Sebalu v EAC Secretary General*¹⁷²⁸, the Attorney General of the Republic of Uganda, the court dealt with Art.30 of the EAC Treaty, which states that a claimant is not required to show a right or interest that was infringed and/or damage that was suffered because of the matter complained.¹⁷²⁹ The court decided that it was enough if it was alleged that the matter complained of infringed a provision of the Treaty in a relevant manner.¹⁷³⁰ It is noteworthy that their wide right has a territorial limit only a legal order or natural person who is resident in the territory of a member state may resort to the regional court.¹⁷³¹ In contrast, in the EU judicial system, every natural and legal person may resort to the ECJ aside from his residence or citizenship.¹⁷³² In contrast to the EU, judicial system, COMESA, and EAC natural and legal persons may resort to the regional court directly when they consider a member state to have failed its obligation or to be in breach of the law of the organisation.¹⁷³³ Under the EAC system, such a right has no limit, whereas in COMESA, individuals have to exhaust domestic judicial remedies before referring the matter to the court for determination.¹⁷³⁴ Under the EU judicial system, individuals may challenge the legality of national acts in respect of the EU law exclusively before the national judge.¹⁷³⁵ Moreover, they may not directly activate an infringement action, before the ECJ, they may only request the European Commission to act.¹⁷³⁶

The exhaustion of local remedies seems to be a limit in a regional judicial system.¹⁷³⁷ Nevertheless, in light of the preliminary ruling procedure, it can be also seen as an important instrument for using the law to push forward the integration process.¹⁷³⁸ On the other hand, the SADC Protocol on Tribunal granted individuals direct access to regional justice.¹⁷³⁹ They may resort to the Tribunal against SADC institutions and member states but they should exhaust all available remedies under the domestic jurisdiction before referring the matter to the regional judicial body.¹⁷⁴⁰ The case of *Mike Campbell and Others (Pty) Ltd and Others v*

¹⁷²⁸ Reference No.1 of 2010

¹⁷²⁹ *Sitenda Sebalu v EAC Secretary General*, No.1 of 2010

¹⁷³⁰ *Sitenda Sebalu v EAC Secretary General*, No.1 of 2010

¹⁷³¹ Mowbray 2015: 313-315

¹⁷³² Tino 2012: 143-173

¹⁷³³ Gruszczynski & Werner, eds, *Deference in International Courts and Tribunals: Standards of Review and Margin of Appreciation* (Oxford: Oxford University Press, 2014)

¹⁷³⁴ Shany 2005: 907-940

¹⁷³⁵ Ruhangisa, E.J, (2006). *Litigation in the East African Court of Justice*. [Online]. Available at <https://www.ealawsociety.org/Joomla/UserFiles/ruhangisa.pdf>

¹⁷³⁶ Tino 2012: 143-173

¹⁷³⁷ Ruhangisa, E.J.2012. *The rule of law and access to justice in East Africa: the East African Court of Justice*. [Online] available at <https://www.deniva.or.ug/reports/eac/RuleOfLawToJustice.pdf>

¹⁷³⁸ Ruppel & Banganwabo 2008: 21-63

¹⁷³⁹ Art.15 and 18, SADC Protocol on Tribunal

¹⁷⁴⁰ Ruhangisa 2010: 575-582

*Republic of Zimbabwe*¹⁷⁴¹ states that the rationale for the exhaustion of local remedies is to enable local courts to first deal with the matter because they are well placed to deal with the legal issues involving national law before them.¹⁷⁴² The reason is to ensure that the international tribunal does not deal with cases that could easily have been disposed of by national courts.¹⁷⁴³ The SADC Head of States and Government suspended the Tribunal and decided a new protocol should be negotiated and its mandate should be confined to disputes between member states concerning the interpretation of the SADC Treaty.¹⁷⁴⁴ This decision took the SADC two steps backward, and then the tribunal will be unable to receive or adjudicate upon disputes between natural and legal persons and member states.¹⁷⁴⁵ Tino is of the view that the decision of the Summit nullifies the individual's direct access to regional justice and it renders the judicial remedy nugatory in the SADC context.¹⁷⁴⁶ The Summit decision expresses the unwillingness of member states to be sued in an international forum, which is seen as interference in their own internal affairs and a threat to their national sovereignty.¹⁷⁴⁷ It is noteworthy that in SADC but also in COMESA and EAC, most of the cases heard by regional judicial bodies were filed by a legal or natural person who disputed above all member states' failure in fulfilling their treaty obligations.¹⁷⁴⁸

It is clear that member states decision to establish permanent court indicates their intention to subject their interstate cooperation to the rule of law, thus moving from a power-oriented organisation to a rule-oriented one.¹⁷⁴⁹ Clearly, the individual's direct access to justice is crucial and it overcomes the traditional reluctance of states to sue each other.¹⁷⁵⁰ The significance of the rule-oriented is that it performs the constitutional function of limiting the power of governments to decide which disputes are worth litigating, and enhances the legitimacy of the organisation's legal order.¹⁷⁵¹

¹⁷⁴¹ SADC (T) 2/2007

¹⁷⁴² Ruppel 2009b: 173-186

¹⁷⁴³ Virtzo 2011: 285-313

¹⁷⁴⁴ Tino 2012: 143-173

¹⁷⁴⁵ Tino 2012: 143-173

¹⁷⁴⁶ Rao 2004: 929-961

¹⁷⁴⁷ Tino 2012: 143-173

¹⁷⁴⁸ Tino 2012: 143-173

¹⁷⁴⁹ Van Der Mei 2009a: 403-425

¹⁷⁵⁰ Tino 2012: 143-173

¹⁷⁵¹ Tino 2012: 143-173

6.3.5 Applicable law and enforcement of the regional judgment

The regional judicial bodies are required to settle regional disputes by ensuring adherence to the law of the organisation.¹⁷⁵² Art.21¹⁷⁵³ states that the Tribunal applied not only the treaty but also primary and secondary SADC law, and developed its jurisprudence taking into account applicable treaties, general principles and rules of public international law, and any rules and principles of the law of member states.¹⁷⁵⁴

In this case, the Tribunal referred to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to examine the definition of torture.¹⁷⁵⁵ In contrast, the COMESA and EAC Treaties do not expressly provide what is the applicable law in regional courts as Art.23 of the EAC Treaty and Art.19 of the COMESA Treaty seem to have been limited to treaty provisions only.¹⁷⁵⁶ The analysis of the jurisprudence reveals that these courts used to have regard for rules and agreements of international law and for the jurisprudence of other international or regional courts.¹⁷⁵⁷ At the end of the proceedings, the regional courts deliver a judgment that is final and binding.¹⁷⁵⁸ The only exception is the EAC judicial system, in which only the Appellate Division rulings are final.¹⁷⁵⁹ In the COMESA and EAC systems, the regional rulings concerning the interpretation of treaty provisions have precedence over decisions delivered by national courts on a similar matter.¹⁷⁶⁰ It is noteworthy that the primacy of regional jurisprudence is granted and, consequently, the national judges have to comply with it when they apply the law of the organisation in domestic disputes.¹⁷⁶¹

In COMESA and EAC systems, the execution of a judgment of the regional court, which imposes a pecuniary obligation on a person, is governed by rules of civil procedure in force in the member state in which execution is to take place.¹⁷⁶² It is imperative to state that this provision is similar to Art.299 of the TFEU.¹⁷⁶³ In contrast, Art.32 of the SADC Protocol on Tribunal states that the execution of regional rulings was governed by rules of civil procedure

¹⁷⁵² Virzo 2011: 285-313

¹⁷⁵³ SADC Protocol on Tribunal

¹⁷⁵⁴ United Republic of Tanzania v Cinexpan (Mauritius) Ltd, Cinexpan (Zanzibar) Ltd & Ajaye Jogoo

¹⁷⁵⁵ United Republic of Tanzania v Cinexpan (Mauritius) Ltd, Cinexpan (Zanzibar) Ltd & Ajaye Jogoo

¹⁷⁵⁶ COMESA Treaty and EAC Treaty

¹⁷⁵⁷ East African Law Society and Others v Attorney General of the Republic of Kenya and Others (2008)

¹⁷⁵⁸ Van Der Mei 2009b. The East African Community: the Bumpy Road to Supranationalism, Maastricht Working Paper No.7. Maastricht: Faculty of Law

¹⁷⁵⁹ Jacobs 2003: 547-556

¹⁷⁶⁰ Art.33(2), EAC Treaty, Art.29(2), COMESA Treaty

¹⁷⁶¹ Tino 2012: 143-173

¹⁷⁶² Art.44, EAC Treaty; Art.40, COMESA Treaty

¹⁷⁶³ Maonera F.2005. Dispute settlement under COMESA. Tralac Working Paper No 7. Stellenbosch: tralac

for registration and enforcement of foreign judgments in the territory of the member states in which the judgment is to be enforced.¹⁷⁶⁴

It is noteworthy to state that member states and institutions are under obligation to take all necessary measures to implement regional rulings.¹⁷⁶⁵ There are similarities between the COMESA Treaty and SADC Protocol on Tribunal because they all provide a specific mechanism of enforcement to be applied if a member state fails to comply with a ruling of the court against it. On the contrary, the EAC judicial system does not provide an enforcement mechanism for the EACJ's rulings. Art.34 (4) of the COMESA Treaty prescribes sanctions, as it shall be considered necessary to be imposed against a party who defaults in implementing its decisions. The provision of Art.58 of the Rules of Procedure provides that such sanction consist of a fine whose amount is defined by the court at its discretion. It is important to indicate that the absence of the state's intervention and the central and discretionary role of the regional court seems to give this enforcement mechanism a sort of supranational nature.¹⁷⁶⁶ Clearly, the enforcement mechanism of COMESA seems not to be subject to politics and it allows the interest of the organisation to prevail over that of the member states.¹⁷⁶⁷ In contrast, in the SADC system, the last decision is up to the Summit.¹⁷⁶⁸ The Tribunal was just entitled to ascertain a member state's non-compliance with its judgment.¹⁷⁶⁹ The Tribunal had to report its findings to the Summit for the latter to take appropriate action; this mechanism reflected the intergovernmental nature of interstate cooperation within SADC.¹⁷⁷⁰ The procedure of enforcement was applied with reference to the failures of Zimbabwe to comply with the Tribunal's decision in the Campbell and Gondo cases.¹⁷⁷¹

The crux of the matter in these cases was that the Campbell judgment involved the unlawful expropriation of private land without compensation¹⁷⁷² while Gondo's case concerned a provision of the State Liability Act of Zimbabwe which was considered to be in breach of the SADC Treaty as it provided that state-owned property was immune from execution, attachment, or process to satisfy judgment debt of the state.¹⁷⁷³ In these cases, the Tribunal ruled that Zimbabwe's legislation violated human rights, democracy, and the rule of law, and

¹⁷⁶⁴ SADC Protocol on Tribunal

¹⁷⁶⁵ Klazen 2010: 147-155

¹⁷⁶⁶ Kayihura 2010: 583-592

¹⁷⁶⁷ Tino 2012: 143-173

¹⁷⁶⁸ Mkhanwire 2010: 567-573

¹⁷⁶⁹ Tino 2012: 143-173

¹⁷⁷⁰ Mkhandawire 2010: 567-573

¹⁷⁷¹ Mike Campbell (Pty) Ltd and Others v Republic of Zimbabwe (2007); Mike Campbell (Pty) Ltd and Others v Republic of Zimbabwe (2008); Mike Campbell (Pty) Ltd and Others v Republic of Zimbabwe v Republic OF Zimbabwe (2009); Gondo and Others v Republic of Zimbabwe (2010)

¹⁷⁷² Chigara 2009: 530-533; Ruppel 2009: 173-186

¹⁷⁷³ Ashimizo 2011: 203-205

it was in breach of Art.4(c) and Art. 6(2) of the SADC Treaty requiring member states to comply with these principles.¹⁷⁷⁴ It is noteworthy to mention that Zimbabwe on two occasions refused to comply with the Tribunal's judgments alleging the invalidity of the Tribunal Protocol and the 2001 Amendment Treaty.¹⁷⁷⁵ The argument was that both instruments lacked two-thirds ratifications to enter into force.¹⁷⁷⁶ In enforcing its legal instruments, the Tribunal referred the instance of Zimbabwe's non-compliance to the SADC Summit for "appropriate action".¹⁷⁷⁷ The provisions of the SADC Protocol on Tribunal and the Rules of Procedure did not explain what "appropriate action," meant. In order to address such a shortcoming or loophole, the Summit should have adopted an economic sanction or suspension of the non-compliant state.¹⁷⁷⁸ The decision of the Summit to suspend the Tribunal means that within the SADC, the legal and natural persons will not be able to seek legal recourse against their government's unlawful actions.¹⁷⁷⁹ Clearly, this decision violates individuals' rights to access justice and to effectively ventilate their issues within the regional courts.¹⁷⁸⁰ The Summit's decision to suspend the Tribunal and close it down is a violation of the principles of judicial independence and of the rule of law within SADC.¹⁷⁸¹

Both applicants, namely Ben Freeth and Luke Tembani approached the African Commission on Human Rights and People's Rights seeking an advisory opinion to determine whether the closure of the SADC Tribunal is legal or not.¹⁷⁸² Additionally, even the civil society movement approached the African Commission on Human Rights to establish the decision of SADC Heads of State and Government regarding the suspension of the Tribunal is illegal.¹⁷⁸³ Therefore, SADC will not be able to ignore such a possible ruling given that it is required to coordinate its policies and programs with those of the African Union.¹⁷⁸⁴ This decision is a clear indication that the SADC remains a power-oriented system.¹⁷⁸⁵

¹⁷⁷⁴ Mkhandawire 2010: 567-573

¹⁷⁷⁵ Phooko 2017: 1-34

¹⁷⁷⁶ Tino 2012: 143-173

¹⁷⁷⁷ Oppong

https://www.kas.de/upload/auslandshomepage/namibia/MR12008.MRI2008_07_Oppong.pdf

¹⁷⁷⁸ Tino 2012: 143-173

¹⁷⁷⁹ Tino 2012: 143-173

¹⁷⁸⁰ Nkatha 2010: 81-92

¹⁷⁸¹ Tino 2012: 143-173

¹⁷⁸² Oppong 2010: 115-135

¹⁷⁸³ Magwanda J, One Step Forward, Two Step Back: The Rise and Fall of the SADC Tribunal. ESR Review. Vol.22/2021

¹⁷⁸⁴ De Wet 2013: 45-63

¹⁷⁸⁵ Erasmus 2011:17-34

6.3.6 Regional Jurisprudence

The analysis of the jurisprudence of the regional courts reveals that the cases brought before them are relatively few.¹⁷⁸⁶ The potential cost of litigation, lack of awareness of the integration process and of rights flowing from it, and low intra-African trade may account for this.¹⁷⁸⁷ It is imperative that the utilisation of the regional courts to litigate economic integration issues has been scanty.¹⁷⁸⁸ It is important to indicate that all the judgments resulted from actions instituted by individuals alleging breach of the law of the organisation.¹⁷⁸⁹ The parties often disputed wrongful acts by member states in violation of human rights, both the SADC Tribunal and the EAC Court heard disputes involving such matters.¹⁷⁹⁰ The courts draw their general engagements in respect and protection of human rights provided for in their treaties.¹⁷⁹¹ For example in the case of *Katabazi*, the EACJ stated that even if it will not assume jurisdiction to adjudicate on human rights disputes, it cannot abdicate from exercising its jurisdiction on interpretation under Art.27(1) merely because the reference includes an allegation of human rights violations.¹⁷⁹²

Similarly, in the Campbell and Tembani cases, the SADC Tribunal had to justify its competence on human rights matters.¹⁷⁹³ Taking into account that it was entitled to respect the SADC law, the Tribunal stated that its competence on such matters derived from the application of the SADC Treaty, Art.4(c), and from the rules of international law that it had to apply in accordance with the SADC Protocol on Tribunal.¹⁷⁹⁴ Both the SADC Tribunal and EACJ reveal their attitude to extend their own jurisdiction and to develop their autonomous jurisprudence on human rights matters through a broad interpretation of treaty provisions, without losing sight of their main task, namely that of ensuring the correct and uniform interpretation and application of the law of the organisation.¹⁷⁹⁵

There are similarities between the SADC Tribunal, EACJ and the ECJ in the manner in which they develop their own jurisprudence on fundamental rights over the years, insofar as this was functional to the economic integration process and even though the statutory treaty did not

¹⁷⁸⁶ Tino 2012: 143-173

¹⁷⁸⁷ Gathii 2014:249-250

¹⁷⁸⁸ Alter & Helfer 2013: 737-739

¹⁷⁸⁹ Ethiopia v Eritrea (2001)

¹⁷⁹⁰ Viljoen 2012: 331-367

¹⁷⁹¹ Art.6 and 8, EAC Treaty; Art.4(c), SADC Treaty

¹⁷⁹² Katabazi and 21 Others v Secretary General and Attorney General of the Republic of Uganda (2007)

¹⁷⁹³ Nathan 2006: 606 - 622

¹⁷⁹⁴ Lambrechts 2001: 22-27

¹⁷⁹⁵ Tino 2012: 143-173

confer on it a specific competence on such matters.¹⁷⁹⁶ It is worth noting that in their judgments on human rights matters, both the SADC Tribunal and the EACJ refer to the African Charter on Human and People's Rights as the main normative instrument to be applied.¹⁷⁹⁷ In contrast to the COMESA Court and the SADC Tribunal, the EACJ did not adjudicate only human rights complaints but also presided over issues concerning the regional integration process.¹⁷⁹⁸ In the case of *Anyang' Nyong'o*, the EACJ had the opportunity to explain the legal nature of the organisation law system and the relationship between EAC law and national law.¹⁷⁹⁹ The key issue in this case was to determine whether the procedure adopted by the Kenyan National Assembly to elect the nine Kenyan members of the East African Legislative Assembly (EALA) was compatible with Art.50 of the EAC Treaty.¹⁸⁰⁰ The court had to interpret art.50 in order to settle the dispute before it and in doing so; it addressed some more general legal issues concerning the effects of EAC law.¹⁸⁰¹ The EAC Treaty uphold the principle of sovereign equality, it must be acknowledged that by the very nature of the objectives they set out to achieve, each Partner State is expected to cede some amount of sovereignty to the community and its organisation in limited areas to enable them to play their role.¹⁸⁰² The EACJ further considered the ECJ's jurisprudence an important source of inspiration to solve disputes brought before it.¹⁸⁰³ The EACJ ruled that the Kenyan election rules were in breach of the EAC Treaty, Art.50 states that the National Assembly must establish the procedure for election rather than for nomination of EALA members.¹⁸⁰⁴ The judgment is relevant not only for EACJ's attitude to take guidance from the ECJ but also for the member state's reaction.¹⁸⁰⁵

In other cases such as *Costa v Enel*¹⁸⁰⁶, the judges make a point that where there is a conflict between the law of the organisation and national law, the former is given the primacy in order for it to be applied uniformly and effectively.¹⁸⁰⁷ The influence of politics on the independence of the regional court was noted when the member state disregarded the interim ruling which stated that Kenyan elections were *prima facie* at odds with the EACJ Treaty and the consequent suspension of the inauguration of the EALA was not highly regarded.¹⁸⁰⁸ It is

¹⁷⁹⁶ Tino 2012: 143-173

¹⁷⁹⁷ Art.6, EAC Treaty

¹⁷⁹⁸ Tino 2012: 143-173

¹⁷⁹⁹ *Anyang' Nyong'o & Others v Republic of Kenya* (2007)

¹⁸⁰⁰ Tino 2012:143-173

¹⁸⁰¹ *Anyang' Nyong'o & Others v Republic of Kenya* (2007)

¹⁸⁰² Tino 2012: 143-173

¹⁸⁰³ *Anyang' Nyong'o & Others v Republic of Kenya* (2007)

¹⁸⁰⁴ *Anyang' Nyong'o & Others v Republic of Kenya* (2007)

¹⁸⁰⁵ Tino 2012: 143-173

¹⁸⁰⁶ Case 6/64 (1964)

¹⁸⁰⁷ *Costa v Enel* (1964)

¹⁸⁰⁸ Tino 2012: 143-173

noteworthy that member states regarded this ruling as judicial interference in political matters, and then responded by amending the treaty provisions concerning the judicial power.¹⁸⁰⁹ Among others, the main amendment concerned the extension of grounds for removing a judge from office and the court's jurisdiction.¹⁸¹⁰ The amendment also concerned the restructuring of the court into two divisions.¹⁸¹¹ The EAC member states further agreed to limit the regional judicial power they themselves decided to establish to protect the rule of law.¹⁸¹² The behaviour of EAC member states reveals a lack of recognition and awareness that being part of a common project and a common 'supranational' entity implies a loss of sovereignty and the possibility of being bound against one's own will.¹⁸¹³

In a case of *East African Law Society and Others v The Attorney General of Kenya*¹⁸¹⁴, the EACJ made a determination of whether the amendments effected by EAC member states were lawful. The judges concluded that the lack of people's participation in the impugned amendment process was inconsistent with the spirit and the intention of the treaty, particularly the amendment of the provision on the grounds that removing or suspending judges infringed EAC Treaty, particularly Art.38(2).¹⁸¹⁵ It is noteworthy that the EACJ is not the only regional court in eastern and southern Africa seeking guidance from the ECJ's jurisprudence.¹⁸¹⁶ In addition, COMESA judges are advised to take guidance from the rich jurisprudence of the European Court of Justice (ECJ).¹⁸¹⁷ In the case of *Kabeta Muleya v Common Market for Eastern and Southern Africa and Erastus Mwencha*, the judges stated that in order to interpret the COMESA law and particularly the Rules of Procedure, the jurisdiction and the rules of Procedure of our court are modelled on those of the European Court of Justice, therefore it is true that while decisions and judgments of the European Court of Justice do not bind our court, they are of enormous persuasive value.¹⁸¹⁸ The attitude of eastern and southern African judges to draw 'inspiration' from the ECJ's jurisprudence concerns a more general trend to unidirectional fertilisation involving not only African but also southern and Central American regional courts.¹⁸¹⁹ Scholars such as Tino, Brown, and Tatham opined that this trend consists of borrowing, stating, and applying legal principles elaborated by the ECJ in the different

¹⁸⁰⁹ Costa v Enel (1964)

¹⁸¹⁰ Ojomo et al (2014)

¹⁸¹¹ Tino 2012:143-173

¹⁸¹² Enabulele 2012: 286 - 296

¹⁸¹³ Tino 2012: 243-173

¹⁸¹⁴ Reference No.3 of 2007

¹⁸¹⁵ East African Law Society and Others v the Attorney General of Kenya, Reference No.3 of 2007

¹⁸¹⁶ Alter, Hefer & McAlister, 'A new International Human Rights Court for West Africa', 754

¹⁸¹⁷ George Letsas, 'A theory of Interpretation of the European Convention on Human Rights (Oxford: Oxford University Press, 2007), 89

¹⁸¹⁸ Kabeta Muleya v Common Market for Eastern and Southern Africa and Erastus Mwencha (2002)

¹⁸¹⁹ Brown 2008: 219-245

integration process.¹⁸²⁰ This phenomenon of unidirectional fertilisation is explained by the fact that these judicial bodies are young and do not have their own legal precedents to refer to in order to solve regional disputes.¹⁸²¹ This phenomenon is considered favourably because it contributes to the circulation of relevant legal principles to develop and strengthen the regional integration process and because it tends to make the jurisprudence of several regional bodies homogenous regarding similar legal issues.¹⁸²² Tino is of the view that African judges do not borrow passively the ECJ's jurisprudence by quoting it in a pertinent way and even if they follow the European judge's legal reasoning they do not always reach the same conclusion.¹⁸²³

6.4 Backlash against International Courts in West, East and Southern Africa: Causes and Consequences

The discussion under this sub-heading will cover the backlash or pushbacks against the International Court by Regional Economic Communities (RECs) of the West, East, and Southern Africa. This part will establish the causes of why the members of states of these regional communities reacted against decisions taken by regional courts.

Many scholars, journalist, and attorneys raised their concerns about backlashes against international courts (ICs).¹⁸²⁴ The vast majority of state-approved revisions of IC founding treaties have expanded the court's jurisdiction and access rules rather than overturning disfavoured decisions or sanctioning judges.¹⁸²⁵

Some of the outcomes of these proposals were different, for example in West Africa; member states rejected the Gambia's effort to curb the ECOWAS Court's broad access to private complainants in human rights cases.¹⁸²⁶ Secondly, in East Africa, while Kenya failed to persuade neighbouring countries to eliminate the EACJ or oust its Kenyan judges, it achieved other meaningful reforms by creating an appellate division, adding strict time limits for filing

¹⁸²⁰ Tino 2012: 143-173

¹⁸²¹ See Romano, 'Rule of Prior Exhaustion of Domestic Remedies', 564 *et seq*; Crawford and Grant, 'Local Remedies, Exhaustion of', pars 13-34

¹⁸²² Tino 2012:143-173

¹⁸²³ McDonald 1993: 123 - 145

¹⁸²⁴ Voeten 1-39

¹⁸²⁵ Alter 2014: 84-120

¹⁸²⁶ Alter & Helfer 2017a. The Authority of the Andean Tribunal of Justice in a Time of Regional Political Crisis. Oxford University Press available at <https://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199680788.001.001/acprof-9780199680788-chapter-7>. (accessed 11 July 2018)

complaints, and providing rules for removing judges accused of corruption at home.¹⁸²⁷ Lastly, in Southern Africa, Zimbabwe maneuverer to suspend the SADC Tribunal and its judges.¹⁸²⁸

In summary, the three regional courts are alike in several respects and each is associated with a regional integration community in which the primary goal of economic liberalization is supplemented by a softer commitment to human rights and good governance.¹⁸²⁹ These regional communities include several common institutional features, namely the adoption of legally binding rules and collective decisions by consensus, a requirement to consult with civil society groups, and in principle at least, a commitment to put common state and societal interest above the preference of any one government.¹⁸³⁰ The ECOWAS, EAC, and SADC are each comprised of a mix of emerging or fragile democracies and authoritarian regimes.¹⁸³¹ All these three include a national legal system with little tradition of judicial independence and at least some countries where the rules of law are fragile or illusory.¹⁸³²

Another commonality with these three regional courts is the design features of the ability of individuals and Non-Governmental Organisation (NGOs) to file suits directly with the courts against member states alleging violations of international law.¹⁸³³ It is noteworthy that many of the African nations have a tradition of strong executive branches, weak judiciaries, citizens who share a deep post-colonial distrust of external interference, and reluctance on the part of political leaders to challenge the actions of other African governments.¹⁸³⁴

6.4.1 The ECOWAS Court of Justice: A Failed Backlash

The ECOWAS Court has adjudicated cases filed by individuals and NGOs alleging violations of human rights.¹⁸³⁵ Unlike those tribunals, the ECOWAS judges have an express mandate to hear such cases, for example 2005 Protocol that expanded the court's delegated powers by granting it jurisdiction to determine cases of violations of human rights that occur in any member state in response to complaints by private litigants.¹⁸³⁶ The 2009 backlash emanated from the suit against Gambia that fell squarely within the court's human rights authority.¹⁸³⁷

¹⁸²⁷ Davids & Shirlow, 2016. 'Dissecting Backlash: The Unarticulated Causes of Backlash and its consequences. SSRN Scholarly Paper. Rochester, NY: Social Science Research Network. Available at <https://paper.ssrn.com/abstract=2834000> (accessed 06 May 2017)

¹⁸²⁸ Canovan, Margaret.1999. Trust the People! Populism and the Two Faces of Democracy. Political Studies 47 (1): 2-16

¹⁸²⁹ Alter, Gathii and Helfer 2015: 1-40

¹⁸³⁰ Alter, Gathii and Helfer 2015: 1-40

¹⁸³¹ Boehme 2017: 50-70

¹⁸³² Alter, Gathii and Helfer 2015: 1-40

¹⁸³³ Alter, Gathii and Helfer 2015: 1-40

¹⁸³⁴ Ellner 2012: 96 -114

¹⁸³⁵ Helfer 2002: 1832-1911

¹⁸³⁶ Art.3 and 4, 2005 Supplementary Protocol

¹⁸³⁷ Lupu 2013: 437 -454

The Supplementary Protocol was approved by fifteen ECOWAS member states, but unlike most treaties, it entered into effect provisionally on the day it was signed.¹⁸³⁸ The move enabled the court to begin hearing human rights cases immediately, which is something ECOWAS officials and national political leaders alike supported to give recently appointed judges something to do.¹⁸³⁹ This protocol gives the ECOWAS Court broad jurisdiction over human rights complaints.¹⁸⁴⁰ Private litigants from all fifteen West African nations have direct access to the court without the need to exhaust domestic remedies.¹⁸⁴¹ This design feature of the protocol is unusual, meaning that other global and regional human rights systems, including the African Court of Human and People's Rights, have multiple filtering mechanisms.¹⁸⁴² The commission vets complaints, optional jurisdiction, exhaustion requirements, and a restriction on which actors can refer cases – creating multiple hurdles that protect states against unwanted judicial scrutiny.¹⁸⁴³

The first human rights cases to reach the ECOWAS Court were two complaints filed in 2007 by an NGO, the Media Foundation for West Africa, on behalf of Gambia journalists who had been arrested, detained, and tortured for publishing news articles critical of the government.¹⁸⁴⁴ The Gambia has long been ruled by one of the most repressive executives in West Africa.¹⁸⁴⁵ The ECOWAS Court judgment and damage award in the *Manneh* case sent shock waves across West Africa.¹⁸⁴⁶ As the same human rights lawyer noted, with a \$100, 00 fine, the embarrassment was huge.¹⁸⁴⁷ The second case is concerning the detention and torture of Musa Saidykhan was harder to ignore because a journalist was alive-exhibited clear signs of torture, and pursued the case from the safety of exile.¹⁸⁴⁸ The government had also learned from the *Manneh* case the costs of remaining mute in the face of credible allegations of human rights abuses.¹⁸⁴⁹ It responded to Saidykhan's complaint with a broadside of legal and political arguments, including a jurisdictional challenge and a claim that the suit was an

¹⁸³⁸ Supplementary Protocol of the ECOWAS

¹⁸³⁹ 1991 ECOWAS Court Protocol

¹⁸⁴⁰ Supplementary Protocol of the ECOWAS

¹⁸⁴¹ Mudde et al (2004)

¹⁸⁴² Caldwell et al (2017)

¹⁸⁴³ Alter, Gathii and Helfer 2015: 1-40

¹⁸⁴⁴ *Manneh v The Gambia*, ECW/CCJ/JUD/03/08 (June 5, 2008); *Saidykhan v The Gambia*, ECW/CCJ/RUL/05/09 (June 30, 2009)

¹⁸⁴⁵ Voeten 2013: 411 - 436

¹⁸⁴⁶ Simmons Beth.2009. 'Mobilising for human Rights: International Law in Domestic Politics'. Cambridge University Press.

¹⁸⁴⁷ *Manneh v The Gambia*, ECW/CCJ/JUD/03/08 (June 5, 2008); *Saidykhan v The Gambia*, ECW/CCJ/RUL/05/09 (June 30, 2009)

¹⁸⁴⁸ ECOWAS Torture Case against the Gambia Nears an End, Afrol News, Sept. 22, 2010, available at <http://www.sfrol.com/article/36623>

¹⁸⁴⁹ *Manneh v The Gambia*, ECW/CCJ/JUD/03/08

affront to (Gambian) sovereignty.¹⁸⁵⁰ The ECOWAS stood their ground and the court published an interim ruling that carefully considered and rejected each of the Gambia's objections.¹⁸⁵¹ As a mechanism of reducing the powers of the ECOWAS Court, the Gambian government submitted to the ECOWAS Commission, an official request to revise the 2005 Protocol accompanied by a draft Supplementary Act, revealing the seriousness of the government's intentions.¹⁸⁵² The Act consisted of five specific amendments to the ECOWAS Court's jurisdiction and access rules: that with respect to human rights cases, the Court should only have jurisdiction in respect of international instruments ratified by the respondent country, also in human rights cases, the ECOWAS Court's jurisdiction should be made subject to the exhaustion of domestic remedies, cases should only be admissible if instituted not later than 12 months after the exhaustion of local remedies, cases should not be anonymous; and the court should not hear cases that are before other international mechanisms of settlement.¹⁸⁵³

The changes brought by the government of Gambia was the amendment to the Revised ECOWAS Treaty to create an appeals procedure for all decisions of the community court, a proposal that the Council of Ministers had previously asked the ECOWAS Commission and the judges themselves to consider and that was still under review.¹⁸⁵⁴ This proposal appears relatively modest and uncontroversial, particularly in light of the expansiveness of the ECOWAS Court's delegated human rights powers.¹⁸⁵⁵ However, media empires such as the Media Foundation for West Africa and other human rights groups in the region managed to notice the true motivation for the proposals and their harmful consequences.¹⁸⁵⁶ In the press release issued, the ECOWAS Commission called for a meeting of experts to consider the Gambia's proposal whereby eleven NGO's civil society organisations denounced the amendments.¹⁸⁵⁷ The Gambian government's proposal regarding the amendment of the ECOWAS Treaty was to weaken the ECOWAS Court's capacity to deal effectively with tyrannical government trampling on citizen's rights.¹⁸⁵⁸ On the contrary, the NGOs proposed the exhaustion of local remedies aimed to deprive citizens of free access to an independent

¹⁸⁵⁰ Alter, Gathii and Helfer 2015:1-40

¹⁸⁵¹ Alter, Gathii and Helfer 2015: 1-40

¹⁸⁵² Saine 2008: 450 - 473

¹⁸⁵³ West Africa: Country Submits Proposals to Amend ECOWAS Protocol, FOROYAA Newspaper (Serrekunda) (Sept.25, 2009) available at <http://allafrica.com/stories/printable/200909250810.html>

¹⁸⁵⁴ A. Jallow, Right groups sue Gambia over access to ECOWAS court, Sept.30, 2009, available at <http://listserv.icors.org/scripts/wa-ICORS.exe?A2=ind0909E&L=GAMBIA-I&F=&S=&P=11181>.

¹⁸⁵⁵ Alter, Gathii and Helfer 2015: 1-40

¹⁸⁵⁶ Gibson & Caldeira 1995: 459-480

¹⁸⁵⁷ International Freedom of Expression Exchange, Four IFEX members, civil society groups fear Gambia proposal will prevent ECOWAS Court from ruling in Saidkhan case, Sept. 28 2009, available at [http://www.ifex.org/west Africa/2009/09/28/ecowas court jurisdiction/](http://www.ifex.org/west%20Africa/2009/09/28/ecowas%20court%20jurisdiction/)

¹⁸⁵⁸ Bogdandy & Vetzke 2011: 1341-1345

judicial instrument that is not available in many countries in a region where the judiciary is an arm of the executive.¹⁸⁵⁹

The primary objective of the Gambian government in limiting the ECOWAS Court's jurisdiction to ratified human rights treaties was a ploy to prevent the Court from adjudicating the (Saidykhan) case against the Gambia.¹⁸⁶⁰ It is noteworthy to mention that Gambia was one of the African countries that have not ratified the United Nations Convention against Torture.¹⁸⁶¹ The NGOs in their press release challenged the legality of the Gambian proposal on multiple grounds and they further lambasted the revision of the 2005 Protocol as an attempt to limit access of the community citizen to the court with respect to the protection of human rights and weaken the ability of the court to effectively exercise its jurisdiction and to advance the objectives and fundamental principles of the Community.¹⁸⁶²

The Gambian government went to the extent of lodging an appeal, that exercise was viewed by NGOs and Law Society Organisations as an effort to undermine the authority of the ECOWAS Council of Ministers, which had previously commissioned a study of this issue.¹⁸⁶³ Finally, the complainants tied the proposal to the Gambia's ongoing bad faith refusal to comply with the court's judgment and damage awards in the Manneh case.¹⁸⁶⁴ Ultimately, legal experts across West Africa converged in the Nigeria capital to consider the proposals and all sources agreed that the ECOWAS Committee of Legal Experts recommended against narrowing the courts' human rights powers.¹⁸⁶⁵ Their decision effectively shelved the proposal, the sources disagreed as to whether the justice minister rejected the Gambian proposal unanimously, defeated it by a 9-6 vote, or whether the government withdrew the proposal.¹⁸⁶⁶ The defeat of the Gambian government's proposal to amend the ECOWAS Treaty would not have occurred without the extensive mobilization efforts of the region's human rights NGOs and attorneys.¹⁸⁶⁷ The mechanism used by NGOs and attorneys included among others, the

¹⁸⁵⁹ Alter, Gathii and Helfer 2015: 1-40

¹⁸⁶⁰ Abebe, Daniel and Tom Ginsburg.2018, 'The Dejudicialisation of International Politics?', *International Studies Quarterly*

¹⁸⁶¹ Alter, Gathii and Helfer 2015: 1-40

¹⁸⁶² A Jallow, Rights groups sue Gambia over access to ECOWAS Court, Sept 30, 2009, available at <http://listserv.icors.org/scripts/wa-ICORS.exe?A2=ind0909E&L=GAMBIA-I&F=&S=&P=11181>.

¹⁸⁶³ Alter, Karen J.2000, 'The European Union's Legal System and Domestic Policy: Spillover or Backlash? *International Organisation*.

¹⁸⁶⁴ Alter, Gathii and Helfer 2015: 1-40

¹⁸⁶⁵ Interview with Human Rights Advocate, Modou Nyang, Amendment to ECOWAS Court Mandate: Gambia Isolated by State Parties, Sept. 30, 2009, available at <http://listserv.icors.org/scripts/wa-ICORS.exe?A2=ind0910A&L=gambia-I&F=&S=&P=76>

¹⁸⁶⁶ Media Foundation for West Africa, Press Statement: Justice Ministers Endorse Expert's decision (Oct.14, 2009), available at http://www.medisfound.org/index.php?option=com_content&task=view&id=451&Itemid=45.

¹⁸⁶⁷ Alter, Gathii and Helfer 2015: 1-40

issuance of press statements, filing of emergency suits, and demanding access to a key meeting, these actors ensured that the government's backlash campaign was well publicised, that procedures were followed and that their voices would be heard when experts convened to discuss the proposals.¹⁸⁶⁸ In subsequent cases, the ECOWAS Court continued to develop its human rights jurisprudence, *albeit* in a manner suggesting that it was aware of the political limits of its authority and the serious challenges of securing compliance with its judgments.¹⁸⁶⁹

In that regard, the judges have condemned clear human rights abuses, including in high-profile cases while rejecting litigant pleas to construe its jurisdiction expansively and using public speeches and meetings to argue for governments to comply with its judgment.¹⁸⁷⁰ It is noteworthy that the ECOWAS Court pursued these actions notwithstanding a multiyear delay in judicial appointments, during which time the existing judges remained in office and continued to hear cases.¹⁸⁷¹ The swearing of new judges by the Judicial Council in 2014, brought developments and progress within the ECOWAS Court and its human rights authority now rests on a more solid legal and political foundation.¹⁸⁷²

6.4.2 The EACJ: A Backlash Redirected

The East African Community (EAC) was launched in 1999 and its primary objective was to revive an earlier EAC that operated from 1967 to 1977 it also consolidated colonial-era cooperation and regional institutions dating back to 1917.¹⁸⁷³ The establishment of renewed EAC showed a commitment to sub-regional integration and cooperation that involved not only the state but also the private sector and the people of East Africa. The EAC judicial arm, the East African Court of Justice (EACJ) has a similar historical legacy. This court replaced the East African Court of Appeal, which was established in 1902 and closed down in 1977 with the collapse of the earlier EAC.¹⁸⁷⁴ It is imperative to indicate that the EACJ is sometimes confused with its historical precursor; it is an International Court (IC) with different and

¹⁸⁶⁸ Ken. Parliamentary Debates. National Assembly (Hansard), 16 May 2007.1339-1429 [http://info.mzalendo.com/hansard/sitting/national assembly/2007-05-16-09-00-00](http://info.mzalendo.com/hansard/sitting/national%20assembly/2007-05-16-09-00-00)

¹⁸⁶⁹ People's daily Online, December 16,2006, available at <http://english.people.com.cn/200612/16/pri nt20061216 333151.html>

¹⁸⁷⁰ Alter, Helfer and McAllister 2013: 766-768

¹⁸⁷¹ Art.4(3) of the 1991 Protocol

¹⁸⁷² Alter, Gathii and Helfer 2015: 1-40

¹⁸⁷³ Alter, Karen.2014, 'The New Terrain of International Law: Courts, Politics, Rights'. Princeton University Press

¹⁸⁷⁴ Alter, Gathii and Helfer 2016: 293-328

narrower jurisdiction to interpret and apply EAC treaties and other legal texts.¹⁸⁷⁵ As other judicial courts established in Africa, the EACJ's jurisdiction concerns human rights.¹⁸⁷⁶

The difference was that other judicial courts such as the ECOWAS Court, which had an express mandate to hear human rights cases, and the SADC Tribunal, which interprets a sub-regional treaty that includes human rights commitment. The EACJ Treaty explicitly states that the EACJ shall have a human rights jurisdiction as will be determined by the EAC Council at a suitable subsequent date once member state" conclude a protocol to operationalise the extended jurisdiction.¹⁸⁷⁷ Although EAC member states are yet to adopt such a protocol, human rights cases account for most of EACJ's sixty rulings to date.¹⁸⁷⁸ There seems to be a sustained advocacy by human rights lawyers in East Africa who have successfully urged courts to interpret references to the rule of law, social justice, and human rights in the objective and fundamental principles clauses of the EAC Treaty as a justifiable commitment to protect individual rights even in the absence of the protocol's adoption.¹⁸⁷⁹

The similarity with the SADC Tribunal was that member states of these regional communities have repeatedly contested the EACJ's jurisdiction to entertain these human rights suits.¹⁸⁸⁰ The EACJ reaffirmed its stance to apply the judicial expansionist approach whereby it filled the *lacunae* left in the constitutive document (EAC Treaty).¹⁸⁸¹ When the International courts use the expansionist approach to increase their scope of authority as a mechanism of developing their own jurisprudence, member state tends to be against such an approach and have the view that these judicial court encroach in the space of the executive by not interpreting the law but legislating it.¹⁸⁸² The court acknowledged that it is not a human rights tribunal but it frequently reasserted its powers to interpret every provision in EAC legal instruments, including those relating to human rights.¹⁸⁸³

A case, *Anyang Nyong'o v Attorney General of Kenya*¹⁸⁸⁴, this case does involve human rights rather than dealing with the matter whereby the Kenyan government was upset because the EACJ in its ruling in a contentious case, ordered the community officials to reject the slate of

¹⁸⁷⁵ Art.27(1) of the Treaty for the Establishment of the East African Community (hereinafter the EAC Establishment Treaty)

¹⁸⁷⁶ Gathii 2014: 249-280

¹⁸⁷⁷ Art.27 (2) of the EAC Establishment Treaty.

¹⁸⁷⁸ East African Court of Justice – Decisions, available at <http://eacj.org/page id=2414>.

¹⁸⁷⁹ Art.6(d) and Art.7(2) of the EAC Establishment Treaty

¹⁸⁸⁰ Alter, Gathii and Helfer 2015: 1-40

¹⁸⁸¹ Alter, Helfer & McAlister 2013: 737-779

¹⁸⁸² Alter, Helfer & Gathii 2016b: 293-328

¹⁸⁸³ Alter, Gathii and Helfer 2015: 1-40

¹⁸⁸⁴ Reference No.1 of 2006 at 3 (Nov.17, 2006), available at <http://www.saflii.org/ea/cases/EAC/2006/3.pdf>.

candidates chosen by the government to sit in the East African Legislative Assembly (EALA).¹⁸⁸⁵ The case concerned Art.50 of the EAC Treaty, which required holding an election for seats in the EALA. Instead of holding the election as the provisions of the EAC treaty have stipulated, the Kenyan government had divided the EALA seats among the country's political parties in proportion to their strength in the parliament.¹⁸⁸⁶ The opposition parties approached the EACJ with the objective of inflicting an embarrassing loss on the governing party in the lead-up to national elections.¹⁸⁸⁷ The EACJ's interim ruling barred Community officials from recognizing Kenya's slate of EALA nominees until the court had decided the case on the merits.¹⁸⁸⁸ The Kenyan government took a similar approach to the government of Zimbabwe by triggering a campaign to kill the sub-regional court or bring its judges under greater member state control. The difference between these regional courts was that EACJ survived the backlash in no small part due to the efforts of the East African Law Society, which swiftly came to the court's defence.¹⁸⁸⁹ On the other hand, the SADC Tribunal could not survive the backlash, and it is suspended to date.¹⁸⁹⁰ In defence of the EACJ, the Law Society published editorials in the press and sent a letter to the presidents of the three-member state of EAC member states.¹⁸⁹¹

Two aspects of the court's ruling especially vexed the government; firstly, the Kenyan government viewed the decision as unwelcome external interference in a sensitive domestic political dispute and even worse taking the opposition side.¹⁸⁹² Kenyan President, Kibaki labelled the EACJ ruling as undermining the country's sovereignty.¹⁸⁹³ Secondly, the Kenyan government objected to a ruling that its interpretation of the EAC Treaty binds national courts and the exhaustion of domestic remedies doctrine did not bar the court from hearing suits from private litigants.¹⁸⁹⁴

One of the key strategies used by the Kenyan government represented by the Solicitor-General had a meeting with the EACJ President with the primary objective of urging the President and his Kenyan judges to recuse themselves from the Nyong'o case.¹⁸⁹⁵ They were

¹⁸⁸⁵ Caron, David & Esme Shirlow, 2016, 'Dissecting Backlash: The Unarticulated Causes of Backlash and its Unintended Consequences'. SSRN Scholarly Paper. Rochester, NY: Social Science Research Network, available at <https://papers.ssrn.com/abstract=2834000>. (accessed 6 May 2017)

¹⁸⁸⁶ Anyang Nyong'o v Attorney General of Kenya, Ref No.1 of 2006, at 2-5

¹⁸⁸⁷ Anyang Nyong'o v Attorney General of Kenya, Ref No.1 of 2006 at 2-5

¹⁸⁸⁸ Anyang Nyong'o v Attorney General of Kenya, Ref No.1 of 2006, at 2-5

¹⁸⁸⁹ Canovan 1999: 2-16

¹⁸⁹⁰ Nyathi 2017: 167-178

¹⁸⁹¹ Press release, E African Law Society, No Integration Without The Rule of Law (Dec.4, 2006)

¹⁸⁹² Ferejohn 2002. Judicializing Politics, Politicising Law. Law and Contemporary Problems, 65:41

¹⁸⁹³ Helfer 2002: 1832 -1911

¹⁸⁹⁴ Anyang Nyong'o v Attorney General of Kenya, Ref No.1 of 2006, at 2-5

¹⁸⁹⁵ Lupu 2013: 437-454

threatened that should they not, the Solicitor-General would file a formal recusal motion asserting that Kenyan judges had engaged in "corruption, unethical practice, and absence of integrity in the performance of their judicial offices in Kenya."¹⁸⁹⁶

Another difference from regional courts such as ECOWAS Court and SADC Tribunal is that judges of EACJ continue to serve as national judges while appointed to the sub-regional court, which is not a full-time judicial body whilst judges of the former courts are appointed on a permanent basis.¹⁸⁹⁷ The EACJ judges unanimously backed their Kenyan colleagues and scheduled the recusal motion for a public hearing.¹⁸⁹⁸ The government threatened judges that they would expose their involvement in corrupt activities and further advised that Kenyan judges had been suspended from their duties in Kenyan courts due to allegations of corruption and they could not render fair judgment in the Nyong'o case.¹⁸⁹⁹ Ultimately, the Kenyan government had to withdraw its complaints against one of the judges who had voluntarily resigned from the Kenyan judiciary and had to apologise.¹⁹⁰⁰ As for the second judge, the EACJ found no basis to question his impartiality and dismissed the government's motion. Later the Kenyan Court found that the corruption investigation violated the judge's "natural justice rights" and ordered his reinstatement in the national judiciary.¹⁹⁰¹

The Kenyan government developed a new strategy after its failure to oust Kenyan judges and they proposed an amendment to the EAC Treaty. This proposal had several goals and they are as follows¹⁹⁰²: to pressure the judges to refrain from further adverse rulings in the Nyong'o litigation, to restrict the court's ability to hear cases from private litigants, to create an appellate chamber staffed by pro-government jurists; and to create a procedure to remove judges for misconduct.

In defence of the rule of law, the East African Law Society perceived the amendments as not in good faith but this proposed change in the constitutive document was viewed as a brazen

¹⁸⁹⁶ Staff Write, Kibaki Rails at EAC Court as Rwanda, Burundi Join Up, The East African (Dec.4, 2006) <http://theeastafican.co.ke/news/-/2558/252342/-/t6awg5z/-/index.html>

¹⁸⁹⁷ Helfer & Showalter 2017: 1-46

¹⁸⁹⁸ Anyang Nyong'o v Attorney General of Kenya, Ref No.1 of 2006, at 2-5

¹⁸⁹⁹ Anyang Nyong'o v Attorney General of Kenya, Ref No.1 of 2006, at 2-5

¹⁹⁰⁰ Hirschl 2008: 93-118

¹⁹⁰¹ Republic v Chief Justice of Kenya and Others Ex Parte Ole Keiwa (2010); Mwaalimu Mati, Kenya is guilty of judicial Interference, E. AFR (Feb.26, 2007), <http://www.theeastafican.co.ke/opOrEd/-/434748/253402/-/rbk891z/-/index.html>

¹⁹⁰² Onoria 2010: 57-84

and illegal ploy to threaten and cow down the court¹⁹⁰³ and intimidate judges.¹⁹⁰⁴ Be as it may, the Kenyan Attorney General Wako chaired a meeting of EAC Attorneys General at which the proposed amendment was considered and finalised a draft amendment of the EAC Treaty.¹⁹⁰⁵ The draft amendment was also approved by the Council of Ministers at an extraordinary meeting and submitted to member states for comments.¹⁹⁰⁶ The Summit endorsed the amendment on December 14, 2006, on the side-lines of a non-EAC meeting¹⁹⁰⁷, and they entered into force in May 2007 after all three states had ratified them.¹⁹⁰⁸ The amendment of the EAC Treaty has made substantial changes to the EACJ's structure, jurisdiction, and access rules.¹⁹⁰⁹ Firstly, they split the court into two divisions, provided rules for appeals to the Appellate Division, added new rules for suspending EACJ judges due to allegations of misconduct in their respective countries, clarified that the court had no power to review cases for which jurisdiction is conferred by the Treaty on organs of the Partner States and a two-month time limit for a legal and natural person to file complaints challenging national actions or decisions as contrary to the Treaty.¹⁹¹⁰

Scholars such as Alter, Gathii, and Helfer criticises these amendments and states that they were designed to weaken the court in multiple ways.¹⁹¹¹ It is vital to indicate that the creation of an Appellate division provided a safety valve to reverse decisions of the First Instance Division that the government found objectionable.¹⁹¹² The mechanism used by member states to exercise this safety valve was by appointing more government-friendly judges to the Appellate Division and by frequently appealing orders and rulings of the First Instance Division.¹⁹¹³ The adoption of the amendment triggered a vociferous reaction from civil society groups, opposition politicians, and the plaintiffs in the Nyong'o case, all of them focused on the circumvention of EAC and national procedures.¹⁹¹⁴ Among others, the exclusion of the East African Law Society from the discussion led up to the EAC-level amendment process.¹⁹¹⁵

¹⁹⁰³ East African Law Society and 4 Others v Attorney General and 3 Others, Reference No.3 of 2007 (August.2008), available at <http://eaci.org/wp-content/upload/2012/11/Ref-3-of-2007.pdf>

¹⁹⁰⁴ East African Law Society Press Release, No Integration without the Rule of Law, December 4, 2006 at 2.

¹⁹⁰⁵ Report of the Extraordinary Meeting of the Council of EAC Ministers (7-8 December, 2006)

¹⁹⁰⁶ Report of the Extraordinary Meeting of the Council of EAC Ministers (7-8 December, 2006)

¹⁹⁰⁷ East Africa: Irate Kibaki Clips the wings of EACJ Judges, The East African (Dec,19,2006)

¹⁹⁰⁸ Onoria 2012: 57-84

¹⁹⁰⁹ Hirschl 2008: 93-118

¹⁹¹⁰ Art.26(1), 26(2) and 30(2) of the Revised EAC Treaty

¹⁹¹¹ Alter, Gathii & Helfer 2016a: 293-328

¹⁹¹² Alter, Gathii and Helfer 2015: 1-40

¹⁹¹³ Batros and Fecadu 2013: 1-58

¹⁹¹⁴ Alter, Gathii & Helfer 2016b: 293- 328

¹⁹¹⁵ People's Daily Online, December 16, 2006, available at http://english.people.com.cn/200612/16/print20061216_333151.html

Additionally, the Nyong'o plaintiffs also challenged the amendments in the domestic suits, but the High Court of Kenya ruled that it could not restrain the executive branch from exercising its powers to enter into treaties.¹⁹¹⁶ The East African Law Society challenged the amendment's adoption as a violation of the EAC Treaty and the court reaffirmed that any East African can bring a suit challenging member state infringement of the Treaty.¹⁹¹⁷ The EACJ's judges concurred with the Law Society that the amendments were procedurally defective because the member states had not allowed the private sector and civil society to participate in their drafting.¹⁹¹⁸

It is noteworthy that the Kenyan efforts to overturn the EACJ's edicts in the Nyong'o case were unsuccessful.¹⁹¹⁹ The court confirmed its interim injunction against swearing in the Kenyan EALA members and ordered Kenya to undertake fresh elections consistent with the EAC Treaty.¹⁹²⁰ In reaction against the ruling of the EACJ, the Kenyan government lobbied Uganda and Tanzania but the presidents of these two countries stood behind the EACJ.¹⁹²¹ Lack of support from other member states has led Kenya to finally capitulate.¹⁹²² The President of Uganda, Museveni sent emissaries to persuade Kenyan leaders to put their political house to avoid impeding the EAC integration agenda.¹⁹²³

6.4.3 The SADC Tribunal: A successful Backlash

The Southern African Development Community (SADC) is considered the youngest regional community as compared to its sub-regional cousins (ECOWAS and EAC) whose integration projects have roots in the immediate post-independence period.¹⁹²⁴ Scholars, Alter, Gathii, and Helfer were of the view that the SADC solicited financial support from the European governments, thus political leaders in the region were concerned that the European aid might be diverted to other priorities, decided to visibly emulate the supranational "EU-style common market model" without much debate on the advantages and disadvantages of each

¹⁹¹⁶ *Nyang Nyong'o and 10 others v AG, Nairobi High Court Civil Case No.49 of 2006 in* <http://kenyalaw.org/caselaw/case/view/37525>.

¹⁹¹⁷ *East Africa Law Society v Attorney General of Kenya*, Application No.9 of 2007 Arising from Reference No.3 of 2007, available at [http://eacj.org/wp-content/uploads/2013/10/EACJ application No.9 2007.pdf](http://eacj.org/wp-content/uploads/2013/10/EACJ_application%20No.9%202007.pdf).

¹⁹¹⁸ Reference No.3 (Nyong'o v Attorney General of Kenya)

¹⁹¹⁹ Alter & Helfer 2010: 563 - 592

¹⁹²⁰ Nyong'o v Attorney General of Kenya, Reference No.1 of 2006.

¹⁹²¹ Nyakundi Nyambonga, Partners Decline to Support Kenya's plea, All Africa, (May 9,2009), available at <http://allafrica.com.proxy.lib.duke.edu/stories/200705081068.html>

¹⁹²² Alter & Helfer 2017b, 'Transplanting international courts: the law and politics of the Andean Tribunal of Justice. First Edition. International Courts and Tribunals Series. Oxford: Oxford University Press.

¹⁹²³ Alter, Gathii and Helfer 2015: 1-40

¹⁹²⁴ Voeten 2013: 411 - 436

arrangement.¹⁹²⁵ The emulation of the European Courts existed alongside and often in conflict with the member states strong desire to retain a more sovereignty-preserving institution in practice.¹⁹²⁶

The SADC Treaty is very clear that the envisioned tribunal requires the adoption of a separate protocol before it can be established.¹⁹²⁷ Two technical aspects of the 2000 SADC Protocol on Tribunal are essential to understand the political backlash that began almost a decade later, the procedure for the protocol's entry into force, and the provisions authorizing private litigants to file suits challenging member states violations of SADC rules.¹⁹²⁸ It is imperative to determine whether the 2000 SADC Protocol on Tribunal entered into force when three-quarters of the Heads of State of SADC adopted it, as articulated in the SADC Treaty.¹⁹²⁹ Alternatively, did the Protocol require domestic ratification by two-thirds of the member states as specified in the Treaty?¹⁹³⁰ The answers to the above questions will bring clarity to the argument raised by Zimbabwe which championed the latter view, claiming lack of consent to the SADC Tribunal's jurisdiction because its Parliament had not ratified the Protocol.¹⁹³¹

The technicalities raised by the Zimbabwe government mask a more fundamental political question.¹⁹³² The 2000 SADC Protocol on Tribunal authorised SADC judges to interpret and apply the SADC Treaty, its protocols, and subsidiary instruments.¹⁹³³ The tribunal's jurisdiction extended to the dispute between natural or legal persons and member states by the expansive directive to the Tribunal to develop its community jurisprudence having regard to applicable treaties, general principles, and rules of public international law.¹⁹³⁴ In summation, a classic case of *Mike Campbell and Others (Pty) Ltd v Republic of Zimbabwe*, a white landowner from Zimbabwe and the Tribunal's fate became intertwined with the Campbell litigation.¹⁹³⁵ The historical background of Zimbabwe during post-independence, the best land ended up in the hands of a relatively small number of white farmers.¹⁹³⁶ As a mechanism of addressing the land imbalance, the government followed a "Willing seller, Willing buyer" approach to land

¹⁹²⁵ Lenz 2011: 155-163

¹⁹²⁶ Nathan 2013: 876-877

¹⁹²⁷ SADC Declaration and Treaty, 1992

¹⁹²⁸ Alter, Gathii and Helfer 2015: 1-40

¹⁹²⁹ Art.36 (1) of SADC Treaty

¹⁹³⁰ Art.38 of SADC Protocol on Tribunal

¹⁹³¹ Nathan 2013: 876-877

¹⁹³² Zyayi, C, 'Southern African Development Community Tribunal Suspended', The Herald, 17 August, available at <https://panafricannews.blogspot.com/2010/08/south-african-development-community.html> (accessed 10 December 2010)

¹⁹³³ Art.4 of 2000 SADC Protocol on Tribunal

¹⁹³⁴ Art.21(b) of 2000 SADC Protocol on Tribunal

¹⁹³⁵ *Campbell and Others v Republic of Zimbabwe*, Case No. SADC (T) 2/2007 (28 November 2008)

¹⁹³⁶ Nkatha 2010: 81 -92

reform that was part of the settlement ending the Rhodesian civil war and white minority rule.¹⁹³⁷ This approach did not yield positive results as expected, thus few white farmers agreed to sell.¹⁹³⁸ As a result, Zimbabwe adopted a more robust method of forced land expropriation, which involved violent occupations, limited compensation, and redistribution of land to Mugabe political loyalists.¹⁹³⁹ It is noteworthy that Mugabe used his control over the Parliament and Supreme Court to close legal loopholes that white farmers had used to challenge the forced expropriations.¹⁹⁴⁰ Other mechanisms used by Mugabe were a push-through statute and a constitutional amendment authorising automatic land seizures without compensation.¹⁹⁴¹ The Zimbabwe government notified Mike Campbell in 2006 of its intention to seize his farm.¹⁹⁴² In defence, Mike Campbell challenged the decision before the Zimbabwean Supreme Court.¹⁹⁴³ He also applied with the SADC Tribunal, alleging violations of three human rights; discrimination based on race, lack of due process in the deprivation of property, and lack of access to the courts.¹⁹⁴⁴

It is noteworthy that the adoption of the Land Reform by Zimbabwe President, Robert Mugabe was a mobilisation effort to lobby votes from land reform supporters.¹⁹⁴⁵ Even the effort at mediation by the region's political leaders failed, but the SADC Tribunal judges issued a series of rulings, judgments, and contempt orders that broadly interpreted both their jurisdiction and the SADC Treaty, which resulted in a backlash by Mugabe.¹⁹⁴⁶

The SADC Tribunal judgment issued in November 2008 was made bold in multiple respects, firstly, about jurisdiction, the judges unanimously claimed the authority to hear suit alleging human rights violations by SADC member states.¹⁹⁴⁷ In defence, the Zimbabwe government argued that the references to human rights in the "Principles" and General Undertakings" clauses of the SADC Treaty were too vague to be judicially enforced and could only be adjudicated after the adoption of a separate protocol on human rights and land reform.¹⁹⁴⁸ The SADC Tribunal judges have stated that Art.4 (c) of the SADC Treaty requires member states

¹⁹³⁷ Alter, Gathii and Helfer 2015: 1-40

¹⁹³⁸ Brownlie 2003: 31-32

¹⁹³⁹ Moyo and Chambati 2013: 133- 143

¹⁹⁴⁰ Zvakanyorwa Wilbert Sadomba, A decade of Zimbabwe's land Revolution: The Politics of the War Veteran Vanguard, in Land and Agrarian Reform in Zimbabwe: Beyond White-Settler Capitalism.

¹⁹⁴¹ Alter, Gathii and Helfer 2015: 1-40

¹⁹⁴² Rosenne 2004: 66-80

¹⁹⁴³ Minister of National Security Responsible for Land, Land Reform and Resettlement, Constitutional App No. 124/06 at 2 (Jan.22, 2008), <http://zimlil.org.zw/judgement/supreme-court/2008/1>.

¹⁹⁴⁴ Mike Campbell and Others (Pty) Ltd v Republic of Zimbabwe, Case No.2/2007

¹⁹⁴⁵ Nkatha 2012: 20-37

¹⁹⁴⁶ SADC Overview: Protocols, <http://www.sadc.int/about-sadc/overview/sa-protocols>

¹⁹⁴⁷ Mike Campbell and Others (Pty) Ltd v Republic of Zimbabwe, Case No.2/2007

¹⁹⁴⁸ Viljoen 2012: 492-510

“to adhere to human rights, democracy and the rule of law”; therefore this provision forms the basis for why they have decided that the tribunal should preside over the matter.¹⁹⁴⁹

On the merits, the Tribunal ruled that Zimbabwe had violated the landowner's human rights in three respects, namely denying access to justice, failing to provide fair compensation, and discrimination based on race.¹⁹⁵⁰ The SADC Tribunal confined its decision to access to justice issue, which was found to be a gross violation of fundamental human rights whilst the other two struck at the heart of Zimbabwe's land redistribution program, which was found to be more political than legal.¹⁹⁵¹ In its conclusion, the Tribunal found that Zimbabwe had violated the SADC Treaty's equality clause.¹⁹⁵²

In defence, the Zimbabwe government argued that the program was a way to correct the inequities persisting from colonialism.¹⁹⁵³ They further indicated that most owners of large agricultural landowners happened to be white could be attributed to racism but this circumstance was brought by colonial history.¹⁹⁵⁴ The Tribunal judges disagree with the defence of the Zimbabwe government of wanting to raise colonial history as its basis for adopting the land reform, which tends to violate the rights to property owners.¹⁹⁵⁵ The judges further state that the land reform program had a disparate impact on white farmers that was "unjustifiable and disproportionate" as well as arbitrary and based primarily on considerations of race.¹⁹⁵⁶

The Tribunal judges were of the view that the land under the Land Reform Program was distributed to the poor, landless, and other disadvantaged and marginalised groups.¹⁹⁵⁷ Based on the facts before the court there can be no doubt that it is unfair discrimination to award the spoils of expropriation primarily to the ruling party adherents.¹⁹⁵⁸ The Tribunal further states that the international law required the government "to protect possession, occupation, and ownership of" the white farmers still on their land, and to compensate those whose land had

¹⁹⁴⁹ Ruppel 2009: 173 - 198

¹⁹⁵⁰ Mike Campbell and Others (Pty) Ltd v Republic of Zimbabwe, Case No.2/2007

¹⁹⁵¹ Alter, Gathii and Helfer 2015: 1-40

¹⁹⁵² Mike Campbell and Others (Pty) Ltd v Republic of Zimbabwe, Case No.2/2007

¹⁹⁵³ Mike Campbell and Others (Pty) Ltd v Republic of Zimbabwe, Case No.2/2007

¹⁹⁵⁴ Cowell 2013: 1-15

¹⁹⁵⁵ Mike Campbell and Others (Pty) Ltd v Republic of Zimbabwe, Case No.2/2007 Mike Campbell and Others (Pty) Ltd v Republic of Zimbabwe, Case No.2/2007

¹⁹⁵⁶ Mike Campbell and Others v Republic of Zimbabwe, SADC (T) 03/2009 [2009]SADCT 1 (5 June 2009)

¹⁹⁵⁷ Di Lieto 2009: 432-436

¹⁹⁵⁸ Mike Campbell and Others v Republic of Zimbabwe, SADC (T) 03/2009 [2009]SADCT 1 (5 June 2009)

already been seized.¹⁹⁵⁹ Scholars such as Alter, Githii, and Helfer stated that Mugabe's statements after the Tribunal ruled in favour of the farmers showed that Zimbabwe disregarded this judgment and further his instruction to his Minister of Justice, Patrick Chinamasa that he should develop a strategy to challenge the Campbell case and discredit the Tribunal.¹⁹⁶⁰ The Zimbabwe government used the same strategy used by the Kenyan government in the Nyang'o case whereby they disregarded the EACJs ruling which was in favour of the applicants.¹⁹⁶¹ In addition, the Kenyan government adopted a strategy to blackmail their two judges that they are allegedly involved in corruption.¹⁹⁶²

In his approach, Zimbabwe's Minister of Justice addressed the meeting of Ministers of Justice and Attorneys General held in July 2009 and he capitalised on the ambiguity in the entry into force rules of the 2000 SADC Protocol on Tribunal.¹⁹⁶³ Chinamasa argued that the court was never properly established because two-thirds of the member states, including Zimbabwe had never ratified the Protocol.¹⁹⁶⁴ As a result, the SADC Tribunal rulings were invalid and member states were under no obligation to comply with them.¹⁹⁶⁵ Later Chinamasa informed the SADC Tribunal Registrar that Zimbabwe would not appear before the Tribunal anymore, and neither would the government be bound by any decisions already made or future ones emanating from the Campbell's case.¹⁹⁶⁶

The Summit instructed the Ministers of Justice to prepare a report that proposes an amendment to the SADC legal instrument by August 2012.¹⁹⁶⁷ This decision officially suspended the SADC Tribunal, although some scholars and NGOs continue to challenge the suspension's legality.¹⁹⁶⁸ As a mechanism of mobilising support against the suspension of the SADC Tribunal, the SADC judges gave speeches, and NGOs held conferences, and drafted resolutions and press statements.¹⁹⁶⁹ Additionally, these groups prepared legal briefs outlining their objections to the suspension and proffering recommendations for a redesigned tribunal,

¹⁹⁵⁹ Mike Campbell and Others v Republic of Zimbabwe, SADC (T) 03/2009 [2009]SADCT 1 (5 June 2009)

¹⁹⁶⁰ Alter, Githii and Helfer 2015: 1-40

¹⁹⁶¹ Dube & Midgley et al (2008)

¹⁹⁶² Erasmus 2015: 2-5

¹⁹⁶³ Meckler 2016: 1007-1038

¹⁹⁶⁴ Mkhandawire 2010: 567-573

¹⁹⁶⁵ Mabasa Sasa, Zim Pulls out of SADC Tribunal, Herald (Zimbabwe) (2 Sept, 2009), available at www.zimbabwesituation.com/sep3_2009.html.

¹⁹⁶⁶ Mabasa Sasa, Zim Pulls out of SADC Tribunal, Herald (Zimbabwe) (2 Sept, 2009), available at www.zimbabwesituation.com/sep3_2009.html.

¹⁹⁶⁷ Phooko 2015: 853-880

¹⁹⁶⁸ Saurombe 2015:156-169

¹⁹⁶⁹ Scholtz W & Ferreira G, 'Much Ado About Nothing? The SADC Tribunal's Quest for the Rule of Law Pursuant to Regional Integration' [2011] 71 *Zeitschrift fur auslandisches offentliches Recht und Volkerrecht* 331,352

which would preserve direct access for private litigants and review of human rights violations.¹⁹⁷⁰

Resolutions of SADC Lawyers, Judges, and Rule of Law Advocates adopted at the second Regional Legal Consultative Conference on the Review of the SADC Tribunal.¹⁹⁷¹ On the other hand, the Ministers of Justice adopted a revised Tribunal Protocol that offered a compromise.¹⁹⁷² The draft preserved private litigant's suits challenging violations of SADC rules but narrowed the Tribunal's standing requirements and made its human rights jurisdiction contingent adoption of a new protocol.¹⁹⁷³ The crucial issue of the Campbell case, the draft Protocol was unequivocal, meaning all actions, decisions, judgments and other administrative acts undertaken under the 2000 Protocol on Tribunal shall remain valid and in force.¹⁹⁷⁴ The Zimbabwe government lambasted the Ministers of Justice for a revised Tribunal Protocol, which is perceived as being staged-managed to target the country's land redistribution policies.

6.5 Comparative Analysis between Andean Community and the Tribunal of the Southern African Development Community

6.5.1 Introduction

The purpose of the sub-heading is to make a comparative analysis between the Andean Community and the Southern African Development Community (SADC) in order to determine how regional tribunals of these regional communities are dealing with human rights issues in order to explore options for South-South judicial cooperation through adjudicative cross-fertilization while taking into account specificities that characterize both regions.¹⁹⁷⁵ The points of focus should be the scope of human rights covered by each of the regional tribunals, the *locus standi* of individuals before the tribunals, the benefit of the regional tribunal, and the

¹⁹⁷⁰ Draft Protocol Tribunal in the Southern African Development Community 2000 AS Amended, SADC.MJ/2/2012/4 (June 19, 2012), available at http://www.osisa.org/sites/default/files/draftsadc_protocol.pdf.

¹⁹⁷¹ (July 28, 2011), available at <http://www.africancourtcoalition.org/images/docs/subregionalcourt/sadctribunal/2nd%20Consultative%20conference%20on%20review%20of%20SADC%20-%20Resolutions.pdf>.

¹⁹⁷² Felix Nijini, Zimbabwe win the key battle at Maputo Summit, Southern Times (20 Aug.2012), available at <http://www.southerntimesafrica.com/newsarticle.php?Id=7372&title=Zimbabwe%20wins%20key%20battle%20at%20Maputo%20Summit%type=83#.UdeDGP1vSg>.

¹⁹⁷³ Pascale 2015: 853 -880

¹⁹⁷⁴ A Saurombe, 'Land Reform: Unfulfilled Obligation in Southern Africa and Beyond' [2015] 10 *International Journal of African Renaissance Studies* 156, 169.

¹⁹⁷⁵ Molano-Cruz & Kingah 2014: 99 - 124

restrictive role of politics in the functioning of the tribunals. It is imperative to indicate that the regional organisations were created to foster regional integration and this development has increased since 1990. The development is one of the main traits of contemporary regionalism. Contemporary regionalism has been characterised by the receptiveness of regional organisations to human rights precepts. The pursuit of human rights is considered an objective in the treaties of many regional bodies.¹⁹⁷⁶ The drafters of such provisions construct these clauses as a matter of ritual.¹⁹⁷⁷ It is vital to mention that in those regional entities with activities of civil societies characterised by constitutional consciousness, regional policies are being forged to activate and fully use these treaty provisions on human rights.¹⁹⁷⁸ The primary focus of this sub-heading is to determine how the regional courts in the South, particularly, the Tribunal of the Andean Community (CAN) and the Southern African Development Community (SADC), have adjudicated on matters that pertain to human rights.¹⁹⁷⁹ It is pivotal to evaluate how these entities, which were created with the goal of economic integration, have broadened their mandate over the years to entertain cases hinges on human rights issues.¹⁹⁸⁰ The expansion of the scope of these regional organisations was characterised by a number of reasons, which were the following: It provides an understanding of how willing regional courts may expand their mandates; and it indicates how politics remains vital in judicial processes.¹⁹⁸¹

It is imperative that regional judicial authorities are boldly prepared to widen their mandate; this has to be understood within clear limits of what is politically acceptable.¹⁹⁸² In order to provide more clarity for gaining a broader vision, it is important to examine the role of the courts in regional integration in the South from an angle of human rights because regional integration cannot be an end in itself.¹⁹⁸³

6.5.2 Political Issues in both Regions

Andean Community (CAN) comprises of countries, namely Bolivia, Colombia, Ecuador and Peru is an economic integration organisation created in 1969 following the endorsement of the Cartagena Agreement.¹⁹⁸⁴ Prior CAN comprised countries such as Bolivia, Chile, Colombia, Ecuador, and Peru.¹⁹⁸⁵ Venezuela and Chile joined this regional economic

¹⁹⁷⁶ Bridges Africa.2012. Leaders Renewed Their Call to Boost Regional Trade at the 19th African Union Summit, available at <http://ictsd.org/i/news/bridges-africa/139326/>

¹⁹⁷⁷ Abi-Saab 1999: 918 -933

¹⁹⁷⁸ Molano-Cruz and Kingah 2014:99 -127

¹⁹⁷⁹ Alter, Helfer & Guerzovich 2009: 1-47

¹⁹⁸⁰ Bos et al (1984)

¹⁹⁸¹ Dupuy 1999: 791 -808

¹⁹⁸² Charney, Jonathan.1998,' Is International Law Threatened by Multiple International Tribunals? The Hage: Martinus Nijhoff

¹⁹⁸³ Brownlie 1987: 153-162

¹⁹⁸⁴ Burley & Mattli 1993: 41-76

¹⁹⁸⁵ Molano-Cruz and Kingah 2014:99-127

community in 1973 and 1976 respectively.¹⁹⁸⁶ Despite the extreme fragility of the political links between CAN members during the last decade, the institutional structure of the Andean integration organisation is unanimously considered a robust approach to all integration processes in Latin America and the Caribbean.¹⁹⁸⁷ It is noteworthy that Andean countries and CAN institutions have played a crucial role in structuring the most recent Latin American regional integration experiences.¹⁹⁸⁸ Andean regionalism process has always gone hand in hand with Latin American integration movements.¹⁹⁸⁹ On the other flank of the Atlantic, the SADC was created in 1992 to replace the Southern African Development Coordination Conference that was founded in 1981 as a regional response to the Front Line States to resist the adverse policies of the South African apartheid governments.¹⁹⁹⁰

The primary goal of the SADC organisation was the realisation of sustainable economic growth, the provision of support for the socially disadvantaged, and the promotion of common values through democratic and legitimate institutions, as well as the consolidation of democracy, security, and stability.¹⁹⁹¹ The two regions share important traits, for example, the overlapping of membership, wrangling leadership, and ties with the main regional power.¹⁹⁹² For example, in South America, many regional organisations are closely linked to political relations and alliances between given leaders.¹⁹⁹³

Besides CAN, in South America, there are other regional communities such as Mercado Comun Del Sur (Mercosur), the Union de Naciones de America (ALBA), and most recently the Alianza Del Pacifico.¹⁹⁹⁴ On the other flank, in Southern Africa, there are many instances of overlaps as some SADC States also belong to the East African Community (EAC), the Common Market for Eastern and Southern Africa (COMESA), the Economic Community of Central African States (ECCAS) and the Indian Ocean Commission (IOC). These two regions have different motives and interests for preserving overlapping institutions, which vary in both regions.¹⁹⁹⁵

Another similarity between these regional organisations is wrangling leadership, which is common in these regions¹⁹⁹⁶. The leadership divide appears to be more personal than

¹⁹⁸⁶ Delmas-Marty, Mereille.2003,' Global Law: A Triple Challenge. Ardsley: Hotei Pub and Brill

¹⁹⁸⁷ Ebobrah 2009:79-101

¹⁹⁸⁸ Molano-Cruz and Kingah 2014:99-127

¹⁹⁸⁹ Fischer-Lescano & Teuber 2004: 999-1046

¹⁹⁹⁰ Molano-Cruz and Kingah 2014:99-127

¹⁹⁹¹ Art.1(1) (a-c) of 1992 SADC Treaty

¹⁹⁹² Nkatha, Lucyline & Gallinetti 2010: 118-143

¹⁹⁹³ Molano-Cruz and Kingah 2014:99-124

¹⁹⁹⁴ Franck 1988: 705-759

¹⁹⁹⁵ Molano-Cruz and Kingah 2014:99-124

¹⁹⁹⁶ Tino 2014: 103-127

ideological, political ideologies have played an important role in shaping how leaders perceive the purpose of regional integration.¹⁹⁹⁷ For example, one of the reasons offered by Venezuela for leaving the CAN was that President Hugo Chavez believed the decision of Colombia and Peru to sign a Free Trade Agreement (FTA) with the USA rendered the CAN weak.¹⁹⁹⁸ On the contrary, in Southern Africa, there have also been leadership disputes in southern Africa, although these have revolved around events in Zimbabwe and the question of how the region should respond to the humanitarian challenges this country has endured for many years.¹⁹⁹⁹ It is noteworthy that some African leaders have handled the issue of Zimbabwe differently, for example, President Thabo Mbeki of South Africa applied a conciliatory approach, whilst President Ian Khama of Botswana has been very outspoken against the conduct of Robert Mugabe and has been frustrated with SADC's weakness in addressing the human rights abuse that have been taking place in that country.²⁰⁰⁰

One more similarity between these two regions is that they both behave differently when dealing with the supposed regional powers.²⁰⁰¹ Some of the member states in the respective regional organisation have explicit or implicit ambitions to lead the regions.²⁰⁰² For example, in South America, efforts to reclaim leadership positions occur at different levels. In all efforts, Brazil stands out even if Venezuela, Colombia, and Argentina are also important players in certain areas.²⁰⁰³ Clearly, Colombia has been the leading nation within the CAN, and events in the country tend to affect the other three members of the organisation. On the other hand, in Southern Africa, South Africa is the leading nation within both the region and the continent as a whole.²⁰⁰⁴

6.5.3 Proliferation of International and Regional Adjudicative Bodies

The proliferation of regional institutions such as regional courts and tribunals, particularly in Africa, Latin America, and Europe.²⁰⁰⁵ On the other hand, Asia is lagging behind in this regard from a Neo-Functional perspective, however, some scholars such as Burley and Mattli argued that community law would spill over into new legal domains as litigants realise that regional

¹⁹⁹⁷ Molano-Cruz and Kingah 2014:99-124

¹⁹⁹⁸ Pauwelyn 2004: 903-916

¹⁹⁹⁹ Molano-Cruz and Kingah 2014:99-124

²⁰⁰⁰ Molano-Cruz and Kingah 2014:99-124

²⁰⁰¹ Molano-Cruz and Kingah 2014:99-124

²⁰⁰² Ruppel 2012: 89-120

²⁰⁰³ Pauwelyn, Joost, 2003, 'Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law': Cambridge: Cambridge University Press.

²⁰⁰⁴ Molano-Cruz and Kingah 2014:99-124

²⁰⁰⁵ Smis, Stefaan & Stephen Kingah.2009. The Southern African Development Community (International Encyclopedia of Laws). The Hague: Kluwer Law International.

court's precedents can apply to a broad range of issues.²⁰⁰⁶ A normative structure for international trade also encourages the construction of new rules, which leads to new cases, which create additional opportunities for litigation and the expansion of norms.²⁰⁰⁷ Tammelo is of the view that fragmentation presents a significant challenge.²⁰⁰⁸ The main issue often identified is the danger of opposition between norms. The central UN entity that drafts international treaties, the International Law Commission, has asserted that such situations may arise between conflicting general norms, disputing general and special norms, and lastly quarrelling special norms relating to special fields or areas.²⁰⁰⁹

There is a general view that the discussion on fragmentation is also rather academic.²⁰¹⁰ Some jurists take for granted that conflicts within the international legal system are simply unavoidable²⁰¹¹. Others are disinclined to regard the issue as a problem, especially if aspects such as trade, human rights, security, and energy are seen as being part of a whole rather than as compartmentalized issues.²⁰¹² On the other hand, there is a dearth of comparisons of Southern regional courts and tribunals as such, for example, the Court of Justice of the Andean Community (CJAC) and the SADC Tribunal fall into this category of regional judicial organ initially created to address trade integration norms, which also addressed issues hanging on human rights.²⁰¹³ These two regional courts, namely the CJAC and SADC Tribunal were established through treaties signed in 1979 and 1992 respectively.²⁰¹⁴ The CJAC heard numerous issues, actions for non-compliance, and labour matters, as well as cases revolving around annulment actions.²⁰¹⁵ The Andean leaders or member states adopted the Charter of the Promotion and Protection of Human Rights in 2002.²⁰¹⁶ A number of cases in terms of human rights matters evoked by the court through solid arguments to resolve differences and utilisation of constructive interpretation.²⁰¹⁷ In the case of SADC, the Tribunal was established through the SADC Treaty in 1992 but it became effective in 2005.²⁰¹⁸ Human rights matters are considered delicate in SADC.²⁰¹⁹ A human rights mandate was contemplated for the SADC Tribunal in the parlays preceding its creation, but the proposal was rejected. These two

²⁰⁰⁶ Molano-Cruz and Kingah 2014: 99-125

²⁰⁰⁷ Tammelo 1967: 347 -360

²⁰⁰⁸ Tammelo 1965: 337-350

²⁰⁰⁹ Koskenniemi 2007: 1 -257

²⁰¹⁰ Salmon 1965: 285-319

²⁰¹¹ Rossseau 1932: 191-192

²⁰¹² Delmas- Marty 2003:27 -32

²⁰¹³ Molano-Cruz and Kingah 2014: 99-125

²⁰¹⁴ Vargas Mendoza 2010: 469-502

²⁰¹⁵ Molano-Cruz and Kingah 2014: 99-125

²⁰¹⁶ Pauwelyn 2004: 903-916

²⁰¹⁷ Molano-Cruz and Kingah 2014: 99-125

²⁰¹⁸ Nyathi 2017: 167 -178

²⁰¹⁹ Draper 2015: 67 - 82

regional courts are the example of tribunals that are proliferating around the world.²⁰²⁰ Their similarities were that they both created to interpret the rules of the respective regional organisations.²⁰²¹

6.5.4 Comparison of the Rules and Tribunals

6.5.4.1 Court of Justice of the Andean Community

The article of the Cartagena agreement articulates the objectives of regional integration, which aimed at bringing about an enduring improvement in the standard of living of the sub-region's population.²⁰²² In essence, this provision means that people and the protection of people are matters directly linked to the Andean regional integration process. Reference is made to Chapter XVI of the Agreement, which clearly states that social and economic cooperation is only possible through respect for human rights principles.²⁰²³

The provision further states that in achieving social justice, strengthening non-discrimination, participation and the formation of citizenship values, promoting a social support system embracing programs on education and the protection and well-being of the working population, as well as women's participation in economic activity and child and family protection.²⁰²⁴ It is imperative that paying attention to the needs of ethnic and other minority groups must be the goals of regional programs and regional actions aimed at the social development of the Andean people.²⁰²⁵ Briefly, the Charter of Andean integration connects the regional process with the promotion and protection of human rights.²⁰²⁶ The Andean Council of Presidents adopted the Charter of Promotion and Protection of Human Rights in 2002 and this legal instrument is considered a declaration of community values rather than a binding source of community law.²⁰²⁷ On the other hand, the CJAC is a CAN judicial body established in 1979 by the Treaty Establishing the Tribunal of Justice of the Cartagena Agreement.²⁰²⁸ The CJAC settles any disputes that may arise from any action relating to regional norms and the court is granted jurisdiction on two types of claims, namely, non-compliance action in terms of Article

²⁰²⁰ Molano-Cruz and Kingah 2014: 99-125

²⁰²¹ Hafner 2002: 321 - 339

²⁰²² Cartagena Agreement of Andean Community

²⁰²³ Cartagena Agreement of Andean Community

²⁰²⁴ Burley, 1993:41-76

²⁰²⁵ Bos et al (1984)

²⁰²⁶ Molano-Cruz and Kingah 2014:99-1

²⁰²⁷ Charter of Promotion and Protection of Human Rights in 2002

²⁰²⁸ Dupuy 1999: 791-808

17²⁰²⁹ and nullification actions as stipulated in Article 27.²⁰³⁰ In case when the matter is before the CJAC is regarding the non-compliance, it can adjudicate as to whether a member state has breached community law and establish a corresponding sanction.²⁰³¹ It is noteworthy that individuals, corporations, and member countries may raise complaints of non-compliance with the Andean General Secretariat.²⁰³²

This Treaty also grants individuals the power to bring an action to nullify decisions that have been taken by CAN authorities that affect the applicant's rights or legitimate interest.²⁰³³ Articles 28-31 bestow the CJAC with the authority in terms of the interpretation of community law at the request of national judges in pending proceedings.²⁰³⁴ The preliminary ruling is not the harmonisation of the internal laws of member countries but rather ensures that community law is given the same interpretation in all member countries.²⁰³⁵

6.5.4.2 The SADC Tribunal

Article 4 (c) of the SADC treaty of 1992 states that the SADC shall act in accordance with human rights principles. This provision is not explicitly stated as a goal whilst Article 5 (1) (a) has a vital implication in the pursuit of human rights, especially from the perspective of human development.²⁰³⁶ The provision states that one of the objectives of the regional body shall be to promote sustainable and equitable economic growth and socio-economic development that will ensure poverty alleviation with the ultimate objective of its eradication, enhance the standard and quality of life of the people of southern Africa and support the socially disadvantaged through regional integration.²⁰³⁷ Article 9(1) (g) outlines that the Tribunal is one of the SADC institutions and stresses that the jurisdiction of the court and constitutional and institutionally embedded within the treaty framework.²⁰³⁸ Article 16 regulates the function of the Tribunal and this proviso stipulates that the main task of the regional court is to ensure adherence to and the proper interpretation of the provisions of this treaty and subsidiary instruments and to adjudicate upon disputes as may be referred to it.²⁰³⁹ The composition, powers, and procedures sanctioning the operation of the Tribunal are clearly articulated in the

²⁰²⁹ Treaty Establishing the Tribunal Justice

²⁰³⁰ Treaty Establishing the Tribunal Justice

²⁰³¹ Fischer-Lescano 2004: 999-1046

²⁰³² Jenks 1954: 401-453

²⁰³³ Molano-Cruz and Kingah 2014:99-125

²⁰³⁴ Treaty Establishing the Tribunal Justice

²⁰³⁵ Molano-Cruz and Kingah 2014:99-125

²⁰³⁶ SADC Declaration and Treaty, 1992

²⁰³⁷ SADC Declaration and Treaty, 1992

²⁰³⁸ SADC Declaration and Treaty, 1992

²⁰³⁹ SADC Declaration and Treaty, 1992

SADC Protocol on Tribunal as an integral part of Art.16 of the SADC Treaty.²⁰⁴⁰ The powers of the Tribunal are envisaged to provide an advisory opinion as referred to it by the Summit or the Council.²⁰⁴¹ The Tribunal has jurisdiction to interpret the SADC Treaty, protocols, and agreements entered into between given SADC states.²⁰⁴² The jurisdiction of the Tribunal is limited to presiding over disputes between states, disputes between natural or legal persons, and states on the other. It is noteworthy that a legal or natural person cannot refer disputes against states to the Tribunal unless national remedies have been exhausted.²⁰⁴³ Article 16 (5) states that the decision of the Tribunal is final and binding on member states.²⁰⁴⁴

This provision clearly states that the member states cannot appeal the decision or judgment imposed by the Tribunal, therefore such a decision or judgement must be enforced.²⁰⁴⁵ This provision has a loophole or *lacuna*, which grants the political role-players (Head of States and Government) the autonomy to veto the judgment and rulings of the Tribunal.²⁰⁴⁶ There is a similarity between these two regional courts, namely the CJAC and the Tribunal in the sense that also the latter is open to preliminary ruling proceedings.²⁰⁴⁷ The Tribunal can also exercise original jurisdiction on questions of interpretation submitted to it from national courts.²⁰⁴⁸ Article 17 also grant the Tribunal exclusive jurisdiction in state-community disputes, however, Article 18 further grant exclusivity in the jurisdiction which also extends to cases between natural or legal person and the Community, as well as those between staff and the community on the employment-related matter.²⁰⁴⁹ The difference between the CJAC and the SADC Tribunal is related to the enforcement mechanism of decisions or judgments of these courts.²⁰⁵⁰ The CJAC judgments and decisions are final whilst the Tribunal's judgment or decision is final but the final word is that of the Summit or Head of States and Government.²⁰⁵¹ Clearly, the Tribunal operates at the mercy of the political elites but also depends on the Community's finances, which come from the dues paid by member states.²⁰⁵²

²⁰⁴⁰ SADC Declaration and Treaty, 1992

²⁰⁴¹ Art.16 of the SADC Treaty of 1992 and Art.20 of the SADC Protocol on Tribunal

²⁰⁴² Art.14 of the SADC Treaty

²⁰⁴³ Ebobrah 2009: 79-101

²⁰⁴⁴ SADC Treaty of 1992

²⁰⁴⁵ Nkatha, Lucyline & Gallineti 2010: 118-143

²⁰⁴⁶ Molano-Cruz and Kingah 2014: 99-125

²⁰⁴⁷ Pauwelyn et al (2003)

²⁰⁴⁸ Art.16 of SADC Treaty of 1992

²⁰⁴⁹ Art.19 of the SADC Treaty of 1992

²⁰⁵⁰ Kelsen et al (1992)

²⁰⁵¹ Art.32 of SADC Treaty of 1992

²⁰⁵² Charney et al (1998)

6.5.5 Practice and Protection of Human Rights at the Regional Level

6.5.5.1 The Court of Justice of the Andean Community

After the Court of Justice of the European Union (CJEU) and the European Court of Human Rights, the CJAC is the third most active international court.²⁰⁵³ From 1984 to 2011, this CJCA has issued decisions on 2003 prejudicial interpretations, 117 non-compliance actions, 52 annulments, and 9 labour demands.²⁰⁵⁴ The statistics clearly show that when countries resort to the dispute resolution mechanism, they are able to remedy non-compliance with community law, especially regarding trade matters.²⁰⁵⁵ Most cases presided over have dealt with intellectual property matters, specifically interpretation of the Decision 486 of 2000, which is a governing document for intellectual property in the Andean Community.²⁰⁵⁶ It is noteworthy that within CAN, intellectual property is regulated at the regional rather than the national level.²⁰⁵⁷ The CJAC's workload relating to human rights has increased noticeably since 2003; one year after the Andean Council of Presidents adopted the Charter of Promotion and Protection of Human Rights.²⁰⁵⁸ In the protection of human rights, this court used techniques such as the interpretation, arguments, and the resolution of contradictions.²⁰⁵⁹ Another mechanism used by this court in handling human rights matters was a resort to the diplomatic system to protect the rights of the Andean community.²⁰⁶⁰

An example of a human rights case dealt with by CJAC was a case concerned with the protection of the rights of children.²⁰⁶¹ In 2006, a game production company brought an action against Ecuador for non-compliance with Decision 439, relating to the principle and norms for the trade liberalization of community services.²⁰⁶² In its judgment, the CJAC examined whether internal rules regulating slot machines violated the Andean service trade regimes.²⁰⁶³ The judgment stated that the right to free access to the gambling market must give way to the good health of people and in particular, children.²⁰⁶⁴

²⁰⁵³ Bos et al (1984)

²⁰⁵⁴ Brownlie 1987: 153-162

²⁰⁵⁵ Molano-Cruz and Kingah 2014: 99-125

²⁰⁵⁶ Hafner 2002: 321-339

²⁰⁵⁷ Alter, Helfer & Guerzovich 2009: 1-46

²⁰⁵⁸ Molano-Cruz 2011:35-45

²⁰⁵⁹ Mendoza 2010: 1-56

²⁰⁶⁰ Mendoza 2010: 1-56

²⁰⁶¹ Shany, Yuval.2010, 'Assessing the Effectiveness of International Courts: Can the Unquantifiable be Quantified. Hebrew University International Law Research Paper No. 03-10. [Online] https://papers.ssrn.com/sol3/paper.cfm?bstrack_id=1669954.

²⁰⁶² Stone 1999: 147-184

²⁰⁶³ Spelliscy 2001: 143-175

²⁰⁶⁴ Mendoza 2010: 469-502

6.5.5.2 The SADC Tribunal

There is a dearth of human rights litigation before the SADC Tribunal.²⁰⁶⁵ Predominantly, the case presided before this court was related to labour and land rights questions, with secondary aspects of property rights playing prominence in Zimbabwe.²⁰⁶⁶ In terms of matters related to labour rights, which were mainly aspects of the unlawful termination of employment, the Tribunal did not adopt a clear approach of siding consistently with employees.²⁰⁶⁷

The Tribunal was at pains to reject the claims of the plaintiff who demanded costs for the wrongful termination of a contract due to pending criminal charges in Malawi.²⁰⁶⁸ In its judgment, the Tribunal took the decision in favour of the SADC that the claimant was not entitled to any compensation under the circumstances.²⁰⁶⁹ In the landmark case involving *Mike Campbell*, the Tribunal adjudicated in favour of Campbell and the claimants.²⁰⁷⁰ It ruled that the action of the government of Zimbabwe, in expropriating the farms of the claimants was tantamount to acting in violation of the SADC Treaty.²⁰⁷¹ The Tribunal seeks to protect the rights of the SADC citizens, including their property rights.²⁰⁷² It is noteworthy that Campbell's case epitomized a deeper problem in Zimbabwe that harks back to 1979 when the government of the United Kingdom decided in the Lancaster Agreement that it would regularly pay the government in Harare in exchange or as consideration for the white landowners to maintain their industrial concerns.²⁰⁷³

The United Kingdom reneged from the Lancaster Agreement by falling short of payment, and this forced the President of Zimbabwe to lean on the constitutional amendment (Amendment 17 of 2004) to seize the farms that were predominantly owned by white farmers.²⁰⁷⁴ President Mugabe used the land issue as a mechanism to settle political grievances; this argument is because the expropriated land was allocated to cronies of the ruling party (ZANU PF) who could not use the agricultural field same as it was in the control of the white farmers.²⁰⁷⁵ In *Mike Campbell's* case, the applicant (white farmers) relied on the SADC Treaty rules to make

²⁰⁶⁵ Magwanda 2021: 17-22

²⁰⁶⁶ Molano-Cruz and Kingah 2014:99-125

²⁰⁶⁷ *Mtigwi v SADC Secretariat Case No. SADC (T) 1/2007*.

²⁰⁶⁸ *Mtigwi v SADC Secretariat Case No. SADC (T) 1/2007*

²⁰⁶⁹ *Mtigwi v SADC Secretariat Case No. SADC (T) 1/2007*

²⁰⁷⁰ *Mike Campbell and Others (Pty) Ltd and Others v Republic of Zimbabwe Case No. SADC (T) 2/2007*

²⁰⁷¹ *Mike Campbell and Others (Pty) Ltd and Others v Republic of Zimbabwe Case No. SADC (T) 2/2007*.

²⁰⁷² Masungu 2003: 88-96

²⁰⁷³ Molano-Cruz and Kingah 2014:99-125

²⁰⁷⁴ Thomas 2003: 691-712

²⁰⁷⁵ Torres 2013: 33-46

Scholars such as Molano-Cruz and Kingah were of the view that the SADC Tribunal judges were not politically sensitive enough to understand how unsettling their ruling would be on the regional court.²⁰⁷⁶ It is noteworthy that the SADC region is still marked by strong political ties among the rulers who were linked by the strong bonds of the liberation struggles and who are not ready to delegate their political sovereignty to unselected judges who may be attuned to or steeped in the sensitive historical details that underpins the political realities of the region.²⁰⁷⁷ The SADC region is faced with difficult issues, among others including the land as exposed by Zimbabwean land reform challenges.²⁰⁷⁸ It is vital that its leaders confront the choice of whether to adhere strictly to the rule of law as entrenched in the SADC Treaty and rules or to support one of its peers to pacify historical expediciencies.²⁰⁷⁹ Molano-Cruz and Kingah posits that even if there has been some resistance by governments in the SADC to adopt a Bill of Rights, the Campbell case provided a good opportunity for SADC leaders to project their regional system as one based on the rule of law.²⁰⁸⁰

The SADC member states failed to take the opportunity as the *Campbell* case became the benchmark of the Tribunal's key role in the integration of legal and institutional systems in its region of jurisdiction.²⁰⁸¹

6.5.5.3 Backlashes against International Courts

6.5.5.3.1 What are Backlashes against International Courts?

The term backlash has been used by scholars to describe resistance against investment arbitration, NAFTA dispute settlement, the Court of Justice of the European Union (CJEU), International Human Rights Courts, the European Court of Human Rights (ECtHR), the Inter-American Court of Human Rights (IACHR), African Regional Courts, and the International Criminal Court (ICC).²⁰⁸² It is important to indicate that backlash refers to government actions that aim to curb or reverse the authority of an international court.²⁰⁸³ It is noteworthy that the court decision may trigger a backlash, which may ultimately target the court rather than just the ruling²⁰⁸⁴. The first type of backlash targets a court's general authority, for example, the

²⁰⁷⁶ Klazen 2010: 147-155

²⁰⁷⁷ Bugaric & Kuhelj et al (2018)

²⁰⁷⁸ Forere & Du Plessis 2023: 265-573

²⁰⁷⁹ Molano-Cruz and Kingah 2014:99-125

²⁰⁸⁰ Huber & Ruth

²⁰⁸¹ Molano-Cruz and Kingah 2014:99-125

²⁰⁸² Voeten 2013: 411-436

²⁰⁸³ Waibel et al (2010)

²⁰⁸⁴ Alter, Gathii and Helfer 2016: 1-40

government of Zimbabwe succeeded in eliminating the SADC Tribunal.²⁰⁸⁵ The United States of America is in the process of following a similar approach to Zimbabwe by using their veto power to veto the appointments to the World Trade Organisation (WTO) Appellate Body (AB)²⁰⁸⁶.

A second type of backlash applies only to a court's authority over an individual country.²⁰⁸⁷ In this instance, the government has the option to eliminate a court altogether but they can typically extract themselves from a court's jurisdiction.²⁰⁸⁸ For example, Venezuela pulled out of the IACtHR, Rwanda withdrew its declaration granting its citizens access to the African Court on Human and People's Rights (ACPHR), and Burundi has left the International Criminal Court (ICC).²⁰⁸⁹ A similar approach was followed by Bolivia, Ecuador, Indonesia, Poland, South Africa and Venezuela, which sought to withdraw from investment arbitration where possible²⁰⁹⁰. It is imperative to indicate that the South African High Court blocked South Africa's President Jacob Zuma's attempt to withdraw from the ICC.²⁰⁹¹ However, British Prime Minister Theresa May has stated repeatedly that the UK should leave the ECtHR and the Conservative Party endorsed this policy in its party manifesto²⁰⁹².

6.5.5.3.2 Explanation of Backlash

There is a growing literature on backlashes against international courts, but this literature has not yet developed a general theory of why backlashes occur.²⁰⁹³ Some of the literature focuses on explaining the success or failure of backlash attempts²⁰⁹⁴, the implication of international courts²⁰⁹⁵ and legal academia, and on mapping backlashes²⁰⁹⁶. Scholars such as Sandholtz, Bei, and Caldwell have developed an explanation for backlashes in specific contexts.²⁰⁹⁷ There

²⁰⁸⁵ Friezt 2014: 193-198

²⁰⁸⁶ Shaffer, Elsig and Pollack 2017: 1-24

²⁰⁸⁷ Sandholtz, Bei & Caldwell et al (2017)

²⁰⁸⁸ Helfer and Showalter et al (2017)

²⁰⁸⁹ Shaffer, Elsig, abd Pollack et al (2017)

²⁰⁹⁰ Peinhardt and Wellhausen 2016: 571-576

²⁰⁹¹ Alter, Gathii, and Helfer et al (2016b)

²⁰⁹² Inglehart and Norris.2016. Trump, Brexit and the Rise of Populism: Economic Have-Nots and Cultural Backlash. SSRN Scholarly Paper. Rochester, NY: Social Science Research Network. Available at <http://papers.ssrn.com/abstract=2818659>. Accessed 24 July 2018.

²⁰⁹³ Posner et al (2017)

²⁰⁹⁴ Alter, Gathii and Helfer 2016: 1-40

²⁰⁹⁵ Helfer, Laurence.2018. Populism and International Human Rights Institutions: A Survival Guide. SSRN Scholarly Paper. Rochester, NY: Social Science Research Network. Available at <https://paper.ssrn.com/abstract=3202633>. Accessed 20 August 2018

²⁰⁹⁶ Madsen, Cebulak and Wiebusch 2018: 197-220

²⁰⁹⁷ Sandholtz, Bei and Caldwell et al (2017)

are reasons why there were backlashes against the decisions of the international courts among other the following:

- i) **Implementation Costs** – the first theory links backlashes to the rising number of binding international court judgments.²⁰⁹⁸ In case where there is a cumulative implementation cost increase that exceeds the benefits of staying inside the regime, then the government is likely to trigger backlashes.²⁰⁹⁹ For example, the government of Zimbabwe lobbies other member states to suspend the SADC Tribunal as a mechanism of retaliating against the payment of compensation as ordered by the Tribunal.²¹⁰⁰
- ii) **Democratisation**: theorists linked the growing importance of international courts and law in investment, trade, and human rights to democratisation²¹⁰¹. Governments have incentives to promise that they will improve human rights, respect property rights, prosecute war criminals, and adherence to provisions of trade agreements.²¹⁰² On the contrary, the same government has incentives to violate those promises later.²¹⁰³ For example, the government of Zimbabwe in its constitution made provisions for the protection of human rights, and property rights, as well as an undertaking to pay compensation in the case when private property is expropriated by the government.²¹⁰⁴ This government has reneged from its promise of protecting private property rights and payment of compensation.²¹⁰⁵ Additionally, the government of Zimbabwe is also a SADC member state; therefore, it is bound by the provisions of the SADC Treaty, which among others includes Article 4 (c) which states that member states shall abide by the principle of human rights, democracy, and the rule of law.²¹⁰⁶ Again, the Mugabe government reneged from abiding with these principles.²¹⁰⁷ It is noteworthy that if democracy and democratisation were responsible for commitment to international courts, then the more recent democratic reversals, particularly the *Mike Campbell* incident in Zimbabwe make this country responsible for backlash.²¹⁰⁸ Voeten states that

²⁰⁹⁸ Madsen, Cebulak and Wiebusch et al (2018)

²⁰⁹⁹ Abebe and Ginsburg et al (2018)

²¹⁰⁰ Ebobrah 2010: 199-213

²¹⁰¹ Simmons 2009:220-225

²¹⁰² Moravcsik et al (2000)

²¹⁰³ Mansfield et al (2011)

²¹⁰⁴ Constitution of Zimbabwe (as amended in 2015)

²¹⁰⁵ Amendment 17 to the Constitution of Zimbabwe

²¹⁰⁶ SADC Declaration and Treaty, 1992

²¹⁰⁷ *Mike Campbell and Others (Pty) Ltd v The Republic of Zimbabwe*

²¹⁰⁸ Haftel and Thompson et al (2017)

populism is associated with a backlash against liberal democracy²¹⁰⁹. The credible commitment logic assumes that deviating from international court judgments should be politically unpopular.²¹¹⁰ Simmons has developed a presumption that civil society and public opinion mobilise on behalf of international law rather than against it²¹¹¹. The international courts are supposed to protect a democratic public from the kliptocratic tendencies of the elites.²¹¹² Scholars are of the view that if leaders could gain electorally from defying international courts, then their commitment to them does not make reform promises more credible²¹¹³. The democratic theories assume that international courts are substitutes for poorly functioning domestic courts.²¹¹⁴ For example, the SADC Tribunal served its role as the substitute for the national court, in this case, both the Zimbabwe High Court and the Supreme Court of Appeal failed to exercise their judicial independence to protect the property rights of white farmers against arbitrary actions of the government.²¹¹⁵

6.5.5.3.3 Populism and the International Judiciary

Voeten states that populists often identify themselves as involved in a struggle with groups that international courts with liberal mandates are set up to protect.²¹¹⁶ There are instances where international courts will come down with rulings that populists can use to mobilise support²¹¹⁷. For example, Mugabe used a land reform program as mobilisation tool for support since he realised that the general elections were nearer, therefore he used his powers and populist stance to mobilize his party to develop a referendum for the constitutional amendment in order to effect changes that will permit expropriation of land without compensation.²¹¹⁸ It is noteworthy that opposing these court rulings can be a source of popularity for leaders who rely on populist mobilization²¹¹⁹.

²¹⁰⁹ Voeten 2013:411-436

²¹¹⁰ Jandhyala, Henisz and Mansfield et al (2011)

²¹¹¹ Simmons 2009: 220-225

²¹¹² Moravcsik et al 2000

²¹¹³ Saine 2008: 450-473

²¹¹⁴ Simmons and Danner et al 2010

²¹¹⁵ Chigara 2012: 341-377

²¹¹⁶ Hinich and Munger 1996: 11-33

²¹¹⁷ Mudde 2004: 543 - 582

²¹¹⁸ Da Gama 2003: 129 -141

²¹¹⁹ Voeten 2013:411-436

Secondly, populism offers ideology to challenge the authority of a court rather than just the ruling.²¹²⁰ The actions of the government of Zimbabwe are a practical example, whereby the SADC Tribunal as the regional court was attacked rather than the ruling or judgment passed by the court.²¹²¹ The suspension of the Tribunal was an attack on the institution instead of the government seeking legal recourse against the judgment passed by the court against it.²¹²² Mudde is of the view that the definition of populism is a thin centred "ideology that considers society to be separated into two homogenous and antagonistic groups, 'the pure people' versus 'the corrupt elites' and which argues that politics should be an expression of the 'volonte generale', meaning the general will of the people²¹²³. The thin-centered ideology creates some commonalities among populist leaders, but these leaders are diverse in their thicker ideologies.²¹²⁴ Scholars such as Hinich and Munger are of the view that political ideologies have implications for a) what is ethically good and what is bad b) how society's resources should be distributed, and c) where power appropriately resides.²¹²⁵ It is noteworthy that populism is a thin ideology that is clearest about the third part: the people should rule. Canovan states that populists claim legitimacy because they speak for the people.²¹²⁶

6.5.5.3.4 Populism and Resistance to the Authority of International Courts

It is not sufficient to point out those international courts sometimes issue controversial rulings.²¹²⁷ Voeten is of the view that governments have responded to adverse rulings through non-compliance, partial compliance, and reluctant compliance.²¹²⁸ As indicated in the above sub-paragraph, one of the reasons is that some of the rulings are simply so costly that exist or other forms of backlash become more attractive.²¹²⁹

Voeten states that populism offers an ideology that opposes the very idea that an international court should have the authority over issues of distribution, identity, or other matters that fall within the normal provenance of democratic politics.²¹³⁰ It is noteworthy that populist leaders

²¹²⁰ Canovan 1999: 12 -24

²¹²¹ *Mike Campbell and Others (Pty) Ltd v The Republic of Zimbabwe*

²¹²² *Mike Campbell and Others (Pty) Ltd v The Republic of Zimbabwe*

²¹²³ Mudde 2014: 542-563

²¹²⁴ Weyland et al (1999)

²¹²⁵ Hinich and Munger 1996, 11

²¹²⁶ Canovan 1999: 2-16

²¹²⁷ Voeten 2013:411-436

²¹²⁸ Hawkins and Jacoby 2010: 1-35

²¹²⁹ Jan-Werner Muller, 'Populist Constitution – A Contradiction in Terms'? Int'l J. Const.L.Blog, April,23,2017, available at <http://www.icconnectblog.com/2017/04/populist-constitution-a-contradiction-in-terms/>

²¹³⁰ Voeten 2013:411-436

may benefit electorally from attacking the institutional system rather than just the rulings.²¹³¹ On the other hand, Mudde described populism as an illiberal democratic response to undemocratic liberalism.²¹³² Scholar, Mudde when referring to illiberal does not mean opposition to markets or liberal values but to the non-majoritarian elements of liberalism, for example, courts, including international courts play a role in protecting individuals from 'the tyranny of the majority'.²¹³³ The commonality among populists is the politics should be an expression of the vox populi, which is not tyrannical.²¹³⁴ This allows the populist to challenge the decision of counter-majoritarian institutions not just as wrong but also as illegitimate.²¹³⁵ It is noteworthy that both left and right wing populist leaders have eroded judicial independence in Latin America.²¹³⁶ For example, the SADC Head of State and Government have signed a new Protocol (2014 SADC Protocol on Tribunal) which limited the jurisdiction of the Tribunal to preside only interstate disputes.²¹³⁷ This decision took away the individual's powers to seek legal recourse against the SADC member state to the Tribunal.²¹³⁸ A similar situation was noted when the Polish and Hungarian government reconfigured their highest courts and limited judicial independence.²¹³⁹ The international character of courts matters in two ways, namely it offers an additional ground for populist leaders to attack the authority of an institution based on sovereignty or identity.²¹⁴⁰ Secondly, in some instances, the governments do not have the same means to influence international courts as they do with domestic courts.²¹⁴¹

6.5.5.3.5 Empirical Evidence

The proposed theoretical link between populism and backlashes against international courts has a range of observable implications.²¹⁴² Governments that rely strongly on populist mobilisation should be more likely to initiate backlashes.²¹⁴³ One practical example of domestic populist narratives is the judgments that directly map over identity or the distribution of property.²¹⁴⁴ It is noteworthy that the populist backlashes should highlight that an international

²¹³¹ Mudde and Kaltwasser et al (2012)

²¹³² Mudde 2004: 542-563

²¹³³ Houle and Kenny 2018: 256-287

²¹³⁴ Canovan et al (1999)

²¹³⁵ Voeten 2013: 411-436

²¹³⁶ Houle and Kenny 2018: 256-287

²¹³⁷ De Wet 2013: 45-65

²¹³⁸ Chigara 2002: 127 -162

²¹³⁹ Huber and Ruth 2017:462-484

²¹⁴⁰ Alter and Helfer et al (2010)

²¹⁴¹ Helfer and Showalter 2017: 1-46

²¹⁴² Elster et al (1992)

²¹⁴³ Shaffer, Elsig & Pollack 2017

²¹⁴⁴ Houle and Kenny et al (2018)

court is undeserving of its authority, which properly belongs to the people.²¹⁴⁵ Voeten states that backlashes against international courts should go hand in glove with efforts to curtail domestic courts.²¹⁴⁶ On the other hand, individual-level opposition to international courts should be correlated with individual-level opposition to domestic courts.²¹⁴⁷

For example, the populist stance of Robert Mugabe played an influential role in using his stature as the leader and founder of the Front Line State to garner the support of SADC member states to suspend the Tribunal.²¹⁴⁸ In that regard, the courts in Zimbabwe failed to use their judicial independence when they presided over the *Mike Campbell* case, which was so clear that the decision of the government of Zimbabwe to amend its constitution was irrational and unconstitutional.²¹⁴⁹ Prior, the amendment of the Constitution was a strategy of the government embark on the expropriation of land without compensation.²¹⁵⁰

6.6 Dejudicialisation of International Law and Future Trajectories

International courts and tribunals (ICs) have been facing criticisms about their legitimacy, rulings or designs following the period noticeable expansion of international courts with effect of judicialisation manifested in an uncoordinated and unplanned manner.²¹⁵¹ These criticisms were triggered by various reasons or driving factors such as normative discontent, structural relationship of international courts with states, rising domestic regime costs, and the rise of populist-nationalist governments.²¹⁵² Acar posits that this resistance takes different forms that are uneven and they do not follow a linear escalation.²¹⁵³ It imperative to indicate that in some instance this resistance is limited to non-compliance to the decision of the ICs or shows an extraordinary reactions such as the withdrawing from the jurisdiction or restraining functions of ICs, for example the recent impasse in the Appellate Body of the World Trade Organisation (WTO).²¹⁵⁴ Scholars such as Alter, Emilie and Hafner-Burton raised questions whether the expansion of the judicial power of international courts has stopped and dejudicialisation has escalated which is the reverse for movement for the development of international justice.²¹⁵⁵ Historically, every new dispute resolution mechanism brings with it some criticisms, such as the fragmentation of international law; the idea of having functional peaceful

²¹⁴⁵ Alter, Gathii & Helfer 2016: 293-328

²¹⁴⁶ Bugaric and Kuhelj et al (2018)

²¹⁴⁷ Voeten 2013:256-287

²¹⁴⁸ Chigara 2003: 369-397

²¹⁴⁹ Ebobrah & Natha 2010: 81 -92

²¹⁵⁰ Magwanda 2012: 17-22

²¹⁵¹ Acar 2023:1-20

²¹⁵² Alter & Zurn 2020: 563-584

²¹⁵³ Alter, Hafner-Burton and Helfer 2019: 449-454

²¹⁵⁴ Abebe and Ginsburg 2019: 521- 522

²¹⁵⁵ Alter, Hafner-Burton and Helfner 2019: 449-454

settlement mechanisms is preferable for the development of international justice to non-functioning or destroyed courts.²¹⁵⁶ Acar state that because judicialisation is a development that is in line with fundamental principles of international law such as the rule of law, global governance and multilateralism.²¹⁵⁷

On the other hand, backlash refers to the extraordinary resistance of any international law actor to any international court that seeks to reduce the authority or jurisdiction of the court.²¹⁵⁸ Dejudicialisation refers to the process, which is mostly generated by extraordinary resistance, and its cumulative effect is relatively destructive against the judicial power of international justice regime.²¹⁵⁹

6.6.1 Judicialisation and dejudicialisation

Judicialisation refers to the proliferation of judicial activity and the continued empowerment of courts as institutions on the national and international scale.²¹⁶⁰ This term covers a process in which courts and judges gradually takes over policymaking and politics previously dominated by legislators and executives.²¹⁶¹ It is imperative to indicate that judicialisation includes activities that might diminish the sovereignty and authority of states. Briefly, it represents a significant transfer of authority from leaders and legislators to international dispute settlement systems.²¹⁶² Judicialisation plays a significant role in the sense that in certain circumstances, it reduces the control of states over political processes and outcomes, and the desirability of this impact is controversial for states.²¹⁶³ There is an assumption that a high level of judicialisation limits the regulatory spaces of states and conversely state protect their regulatory space in areas with low judicialisation.²¹⁶⁴ The significance of judicialisation is that judges can promote important decision-making, assist states in sending credible signals, and resolve collective issues, as well as expanding space for non-state actors and increasing their influence in international politics, can foster a sense of inclusion, fairness and transparency.²¹⁶⁵ The ramifications of judicialisation are that it may result in limiting the government authority and national politics and parallelly may result in reactions or criticism against the international justice regime.²¹⁶⁶

²¹⁵⁶ Basedow et al 2021

²¹⁵⁷ Ferejohn et al 2002

²¹⁵⁸ Mann et al 2018

²¹⁵⁹ Ginsburg 2008: 81-87

²¹⁶⁰ Vallinder 1995: 11-13

²¹⁶¹ Abebe and Ginsburg 2019: 449-454

²¹⁶² Ferejohn et al 2002

²¹⁶³ Romano 2013: 111-112

²¹⁶⁴ Basedow 2021:1362 - 1376

²¹⁶⁵ Kahler 2000: 549 - 565

²¹⁶⁶ Mann et al 2018

Mann defines the concept of dejudicialisation as the process of reduction or elimination of judicial power, it is the opposite course of judicialisation.²¹⁶⁷ Dejudicialisation means the return from international justice regimes to legislators and executive whilst on the other hand, judicialisation defined as the transfer of power from these actors to courts.²¹⁶⁸ It is imperative to indicate that dejudicialisation can only occur after an area of international law has become judicialised and extraordinary resistance to the authority of International Courts has increased. Abebe and Ginsburg states that another aspect of dejudicialisation is that it is generally prone to occur when there is a significant difference between the anticipated advantages from the existence of a court and the costs incurred by major states subject to the court's authority.²¹⁶⁹

It is noteworthy that the criticism against claims of legal authority is not new, and it almost simultaneously occurred with international courts, the current nationalist-populist backlash is more powerful than prior reactions, as populism drives hostile campaigns against the authority of international courts and tribunals rather than challenging or criticising individual rulings.²¹⁷⁰ The ramifications of backlashes could end up with the removal of the power of ICs, repoliticise international law and make some international courts not functional.²¹⁷¹ Voeten posits that backlash emerges when particular legal advancement collide with broader societal issues and the kind of societal, political and legal mobilisation that these issues might start.²¹⁷² It is noted that even though a judicial ruling could cause a backlash, in the end, an extraordinary resistance targets the authority or institution of the court rather than merely a decision.²¹⁷³ Acar posits that backlash could contribute to the escalation of dejudicialisation, whereas pushback is not sufficient to be part of the dejudicialisation process because it could be beneficial for the development of international law and judicial institutions.²¹⁷⁴

6.6.2 Framework of concepts

Scholars such as Alter, Hafner-Burton and Helfer articulate the judicialisation theory, which consists of four stages of judicialised politics that include Shadow politics, Adjudication politics, Compliance politics and Feedback politics.²¹⁷⁵ These concepts are helpful to clarify the

²¹⁶⁷ Acar 2023: 1-20

²¹⁶⁸ Katzenstein 2014: 158-159

²¹⁶⁹ Romano 2013: 111-112

²¹⁷⁰ Alter, Hafner-Burton and Helfer 2019: 449-454

²¹⁷¹ Alter 2000:489 - 598

²¹⁷² Madsen, Cebulak and Wiebusch 2018: 198-202

²¹⁷³ Voeten 2016: 1-39

²¹⁷⁴ Helfer 2002: 1887-1888

²¹⁷⁵ Abebe and Ginsburg et al 2016

framework of dejudicialisation, which is covered by the feedback politics category.²¹⁷⁶ It is deemed that dejudicialisation could only take place after an area of international law is judicialised and it is imperative to explain the emergence of judicialisation to build on further explanations concerning dejudicialisation.²¹⁷⁷

Acar is of the view that judicialisation begins when states take into account whether to form a judicial body to handle certain policy issues, along with the predicting cost-benefit balance of the proposed international court based on various assumptions.²¹⁷⁸ In order to explain this concept further, the litigants present their lawsuits before the court during the shadow politics and adjudication politics stages, and the court issues judgements on these cases.²¹⁷⁹ On the other hand, the compliance politics stage becomes relevant, revealing important indications about the dejudicialisation process, therefore the decision of the court may be favourable or unfavourable to states, but in either case states must comply.²¹⁸⁰ Scholars such as Alter, Hafner-Burton and Helfer posit that in case the decision is unfavourable, political resistance might arise against it.²¹⁸¹ A practical example of a member state, which was not happy about the decision of the judicial court, is the government of Zimbabwe demonstrated their dissatisfaction about SADC Tribunal's decision or ruling, which favoured the white farm owners.²¹⁸² It is imperative to indicate that there are examples where extraordinary resistance has affected ICs but has not removed their judicial power; there are several grounds and indications to be optimistic that judicialisation will continue or at least, there will not be a drastic reduction.²¹⁸³

6.6.3 Future Trajectories

Taking into account the examples of courts that encountered backlash such as the Inter-American Court of Human Rights, European Court of Human Rights, East African Court of Justice and International Court of Justice, it is clear that dejudicialisation is now a factual

²¹⁷⁶ Alter, Hafner-Burton and Helfer 2016: 454-456

²¹⁷⁷ Acar 2023: 1-20

²¹⁷⁸ Dunhoff and Pollack 2017: 225-226

²¹⁷⁹ Madsen, Cebulak and Wiebusch 2016: 215-216

²¹⁸⁰ Steinberg 2018:317 -328

²¹⁸¹ Andreas Follesdal and Geir Ulfstein, 'International Courts and Tribunals: Rise and Reactions' in Andreas Follesdal and Geir Ulfstein (eds), *The Judicialisation of International Law: Mixed Blessing?* (Oxford University Press, 2018)

²¹⁸² Mike Campbell and Other (Pty) Ltd v Republic of Zimbabwe

²¹⁸³ Abebe and Ginsburg 2023: 538-529

phenomenon.²¹⁸⁴ The dejudicialisation of ICs is no longer a theoretical possibility anymore while it has been completed in some extraordinary targeted ICs such as the SADC Tribunal.²¹⁸⁵

Acar is of the view that trends of judicialisation could continue in the form of the creation of new international judicial bodies' and changes in the policies of powerful states.²¹⁸⁶ It is vital to outlines the role and position of ICs in international relations, in the main the international courts became acknowledged as an integral aspect of international order after extensive judicialisation and they cannot be displaced uncomplicatedly.²¹⁸⁷ Scholars such as Acar and Shany concurs that extraordinary resistance against international courts are unusual occurrences, notwithstanding that they have recently intensified.²¹⁸⁸

The practice of legal diplomacy can be used by ICs to ensure a low risk of non-compliance.²¹⁸⁹ Secondly, judges could also rely on external expertise to support their claims and prevent resistance by diverting criticism to different actors.²¹⁹⁰ Other mechanism used by international courts is to seek to develop support by interacting directly with the audience, such as be seeking the support of constituencies and engaging international actors and lawyers in debates over the meaning of their decisions, press statements, conferences, thematic debates, seminars, and other forms of information sharing.²¹⁹¹

6.6 Conclusion

The chapter demonstrated a comparative analysis between African regional courts, namely the ECOWAS Community Court of Justice (ECOWAS CCJ), East African Court of Justice (EACJ), and SADC Tribunal on the establishment of this court and to determine their jurisdictional competence. In addition, a comparative analysis between the African regional courts and the European Community Court was undertaken in order to establish whether the constitutive documents that established these courts have provisions that give them jurisdiction to hear human rights disputes.

²¹⁸⁴ Acar 2023: 1-20

²¹⁸⁵ Karim A.A Khan, 'Open an Investigation into the Situation in Venezuela and Concludes Memorandum of Understanding with the Government' (International Criminal Court, 5 November 2021) <https://icc-cpi.int/news/icc-prosecutor-mr-karim-aa-khan-qc-opens-investigation-situation-venezuela-and-concludes> accessed 21 July 2022.

²¹⁸⁶ Shany 2014: 44-45

²¹⁸⁷ Hernandez 2014: 919-920

²¹⁸⁸ Kingbury 2012: 203-224

²¹⁸⁹ Caserta and Cebulak 2021:212-217

²¹⁹⁰ Madsen, Cebulak and Wiebusch 2016: 212-217

²¹⁹¹ Zhang 2020: 151-155

It is also important to highlight that this international court experienced backlashes from member states against the ruling or judgments, which were in most instances costly to the affected states. The discussion regarding the backlashes cannot be complete without establishing the root because of it, and scholars pinpointed the populist stance of some of the leaders as a contributing factor to criticisms of international court rulings or judgments.

The Chapter further demonstrated that backlashes against the regional court's ruling were successful, especially the disbandment of the SADC Tribunal in southern Africa, which in the other regions were redirected and failed, for example East African Court of Justice and ECOWAS respectively.

Scholars as one of the triggers for pushbacks against the judgment or decisions of the regional courts have highlighted the populist stance of political leaders. The implementation costs and democratisation are some of the reasons why these leaders push back against the rulings made against their countries.

CHAPTER 7

CONCLUSION, RECOMMENDATIONS AND AREAS FOR FURTHER RESEARCH

7.1 Introduction

This study examined the legal effect of the suspension of the SADC Tribunal in the Southern African region. The legal effects of dismantling the tribunal is that individuals and legal persons in the SADC region have no regional court to ventilate their complaints when they are denied access to justice by local courts in their respective countries.²¹⁹² Moreover, there is history of human rights violations in the southern African region; therefore, the dismantlement of the tribunal would exacerbate human rights violations, undermining the rule of law and democratic values.²¹⁹³ It is noteworthy to mention that the colonial rule forced the Africans out of their land, scattered all over, and placed in the area not suitable for agricultural purposes.²¹⁹⁴ The establishment of the Southern African Coordination Community (SADCC) as a measure to end the Front Line States (FLS) dependency from apartheid South Africa.²¹⁹⁵ The establishment of the Front Line States was the beginning of transformation agenda of colonial states in southern Africa.²¹⁹⁶ The FLS states wanted to free themselves from the colonial powers.²¹⁹⁷ Their main objective was to end their dependency from South Africa, therefore their second project was to transform this organization into a fully-fledged regional organization which later named the Southern African Coordinating Committee (SADCC) to ensure that that there is economic integration.²¹⁹⁸

The disbandment of the SADC tribunal has left the region without a judicial instrument, which can work as a bulwark against human rights violations. Therefore, the current state of affairs regarding the atrocities and human rights infringement by many SADC governments remains a concern.²¹⁹⁹ For example, the allegations of vote rigging during the National Elections held in Zimbabwe on 23-24 August 2023.²²⁰⁰ Additionally, other logistical nightmares such as a shortage of ballot papers in some areas of Zimbabwe resulted in people not casting their

²¹⁹² Nkatha 2018: 1-32

²¹⁹³ Achiume 2017: 1-34

²¹⁹⁴ Murithi 2023: 24-28

²¹⁹⁵ Chigara 2001: 36-65

²¹⁹⁶ Phooko 2018: 1-32

²¹⁹⁷ Magwanda 2021: 17-22

²¹⁹⁸ Ebobrah 2012: 223 - 253

²¹⁹⁹ Ebobrah and Nkatha 2010: 81-92

²²⁰⁰ Nyasha Chingono and Carien du Plessis, 'Zimbabwe President denies poll fraud as opposition rejects his re-election, 27 August 2023.

votes.²²⁰¹ These delays were triggered by the Zimbabwe Electoral Commission (ZEC) failure to provide voting materials on time. Human rights abuse followed by a political climate of fear, including arbitrary arrest, abduction, and torture of opposition party activist, Khanyo Farise.²²⁰² It was reported that President Mnangwangwa's inauguration for his second term as President has been severely blighted by reports of attacks against opposition party activists threats against those trying to organise peaceful protests and a growing crackdown on human rights, especially the right to freedom of expression, peaceful assembly, and association.²²⁰³ On 02 September 2023, Womberraishe Nhende, the elected councillor for Glen Norah Ward 27 in Harare was abducted and tortured before being dumped on the outskirts of Harare.²²⁰⁴

Importantly, the infringement of freedom of speech by the Swaziland government, and the subsequent assassination of a human rights lawyer by the same government clearly shows that there is a need to reinstate the SADC Tribunal to provide recourse against human rights violations in the region.²²⁰⁵ Other human rights violations in the Kingdom of Eswatini in terms of domestic and international law include the use of force excessive by the police and the infringement of the right to freedom of expression and access to information.²²⁰⁶ The police detained Eugene Dube, journalist and editor of Swati Newsweek for seven hours on 23 April 2020. The detention followed an article he wrote that the King's public health strategy in the face of COVID-19 was reckless because the country had no social distance measures in place.²²⁰⁷

Muchena posits that lawmakers in southern Africa must strengthen laws to respond to human rights threats, including the violations linked with Mozambique's conflict and clampdown on the rights to freedom of expression and peaceful assembly.²²⁰⁸

²²⁰¹ Nyasha Chingono and Carien du Plessis, 'Zimbabwe President denies poll fraud as opposition rejects his re-election' Reuters, 27 August 2023

²²⁰² Mgcini Nyoni, "Zimbabwe: Continued detention of former Opposition MP Job Sikhala a travesty of justice", Amnesty International, 29 November 2023

²²⁰³ Gibbs Dube, "Amnesty International: Signing of 'Patriotic Bill' into Law Grave Attack on Rights to Freedom of Expression, 16 July 2023, VOA.

²²⁰⁴ Khanyo Farise, Zimbabwe: Mnangwangwa's inauguration marred by arrest, abductions, and torture of political activists, 04 September 2023, Amnesty International Organisation Press Reader

²²⁰⁵ Heywood, Mark, 'Who killed Swazi Human Rights Lawyer Thulani Maseko', Daily Maverick, 23 January 2023.

²²⁰⁶ World Report 2022: Eswatini Human Rights Watch

²²⁰⁷ Deprose Muchena, Southern Africa: SADC lawmakers must strengthen laws to respond to human rights threats, December 7, 2020. Amnesty Organisation Press Reader.

²²⁰⁸ Fietz 2014: 193-198

It is noteworthy that in most of the southern African countries, people have been subjected to excessive use of force by the police for exercising their right to freedom and peaceful assembly.²²⁰⁹ A practical example is ensuing human rights violations in Mozambique's Cabo Delgado region, which has led to abductions, arbitrary detentions of many people²²¹⁰ As a mechanism to address governance problems in southern Africa, the policymakers must enhance the role of parliaments in the protection and promotion of human rights in SADC region²²¹¹. The right to freedom of expression, association, and peaceful assembly have increasingly come under attack in countries where people have demanded more accountability from their governments, including Eswatini, Lesotho, Mozambique, and Zimbabwe.²²¹² In addition, property rights are among an array of human rights infringements that the people of this region are being subjected.²²¹³ Other examples of human rights infringement by SADC member states are the following:

In **Zambia**: the authorities shut down the independent television news channel on 09 April 2020 after cancelling its broadcasting license. The cancellation came after the alleged refusal by the station to air the government's COVID-19 public awareness campaigns because the station was owed money for airing previous state advertisements different to public awareness.²²¹⁴

This thesis deliberated on the constitutional amendment by the government of Zimbabwe whereby the effected Amendment 17 which allowed the government to expropriate the land without compensation and denied the farm owners the competency to seek a legal recourse at the local courts.²²¹⁵ This amendment has changed the fundamental provisions of the Zimbabwean constitution and brought constitutional dismemberment into the discourse.²²¹⁶ These changes muted the voices of the voiceless and denied them a legal standing to challenge the infringement of their human rights in a court of law.²²¹⁷

²²⁰⁹ Gibson 2009: 31-32

²²¹⁰ World Report 2023: Mozambique Human Rights Watch

²²¹¹ Helfer and Showalter 2017: 1-46

²²¹² Helfer 2018: 235-253

²²¹³ Hirsch 2018: 391 - 428

²²¹⁴ Deprose Muchena, Southern Africa: SADC lawmakers must strengthen laws to respond to human rights threats, December 7, 2020. Amnesty Organisation Press Reader.

²²¹⁵ *Mike Campbell and Others (Pty) Ltd v The Republic of Zimbabwe*

²²¹⁶ *Mike Campbell and Others (Pty) Ltd v The Republic of Zimbabwe*

²²¹⁷ Jacobs 2003: 547-556

The ramifications of the disbandment of the SADC Tribunal are that ordinary citizens and legal persons within SADC countries are denied access to justice in the regional court in cases when the local court denied them a hearing.

The decision of the SADC Heads of State and Government to indorse the 2014 SADC Protocol on Tribunal was a strategy to limit its jurisdiction to preside over interstate matters and to exclude natural and legal persons from approaching the regional court to lodge human rights complaints against their government.²²¹⁸

7.2 SADC as a political governance actor and forum

7.2.1 Civil engagement in the SADC region

Scholars such as Katundu, Ronceray and Runji state that on paper, SADC recognizes the role that Civic Society Organisations (CSOs) should play in regional policymaking and implementation.²²¹⁹ The SADC Treaty, specifically Article 23 recognizes the need to consult the people of the region through various consultative processes to foster development and regional integration, and to involve civil society in decision-making.²²²⁰ Article 10 of the Organs Protocol has a provision dealing with cooperation with non-state parties and international organizations.²²²¹

Despite a clear guideline regarding the involvement of CSOs in the decision-making process by the SADC Heads of State and Government, experts have found that SADC has instruments that emphasise the importance of engaging CSOs at regional and country levels, over the years, there has been limited formal link between the SADC structures and non-state actors.²²²² In *Mike Campbell (Pty) Ltd and Others v Republic of Zimbabwe*, the decision taken by SADC Heads of State and Government to suspend the functioning of the SADC Tribunal was done without consultation of civic society organisations as required by the provisions of article 23 of the SADC Treaty.²²²³ Non-compliance with the SADC Treaty by the Summit gave the civic society organisations to challenge this decision in a court of laws of the SADC member states.

²²¹⁸ Tino 2013: 141-172

²²¹⁹ Article 9 of the SADC Treaty

²²²⁰ Article 23, SADC Treaty

²²²¹ Article 10, Organ Protocol

²²²² Regional Indicative Strategic Development Plan (RISDP 2020-2030)

²²²³ *Mike Campbell (Pty) Ltd and Others v Republic of Zimbabwe*

7.2.3 Civil Society experiences and the way forward

It was determined that consulted civil society actors testified about the difficulty of engaging SADC substantially in the area of political governance. Some of them attributed the issue to a matter of political culture and limited trust in the value of civil society as contributors to wider sustainable development when they engage in this area. However, the recurrent issue that gets raised is the lack of systematic, formal mechanisms to provide reliable entry points.

The fragility of structural links between SADC and civil society is further compounded by the difficulties of civil society in coming together and speaking with one voice to make it more audible for the REC.²²²⁴ Non-state actors from the region do not necessarily have a common agenda which they could unite around and/or task the CNGO with carrying for them.²²²⁵ In comparison to another umbrella network in some other parts of Africa, the SADC-CNGO has limited visibility.²²²⁶

As a mechanism of improving this state of affairs, SADC has developed a draft “Proposed SADC Mechanism for Engagement with Non-State Actors.”²²²⁷ The community prepared a substantial framework, of which the authors could access a draft.²²²⁸ The CNGO leadership adopting the mechanism is necessary to close the existing gaps in the engagement between the Non-State Actors and SADC at both regional and national levels.²²²⁹ It is imperative to indicate that the EU-funded SADC policy dialogue facility programme included activities seeking to operationalize the mechanism, but this initiative was terminated by the RECs leadership because of mistrust by member states when it comes to civil society.²²³⁰

7.3 Different government systems as impediments within SADC

SADC member states subscribe to different government systems, namely democratic and authoritarian. The difference in the government system impedes the member states to comply with the SADC Treaty principles and objectives which obliges them to adhere to human rights, democracy and the rule of law. Shumba posits that the SADC was formed by a grouping of Frontline states whose objective was to end their dependency on apartheid South Africa.²²³¹

²²²⁴ Magadza, M.2023.SADC wants model law on digital economy. Sychelles Nation.Accessed August 2023

²²²⁵ Mukumba C and Musiwa M.2016.Civil society role in SADC integration: A missed opportunity.In Great Insight Magazine, 5(4) July/August. Maastricht: ECDPM

²²²⁶ Songa and Ronceray et al 2023

²²²⁷ Mukumba, C.N.d. CSO Engagement in Southern Africa. Cuts International

²²²⁸ Reinold 2019:53-71

²²²⁹ Songa, A and Ronceray, M.2023. The EAC democracy agenda: Channels and digital technology for civil society engagement.Maastricht: ECDPM

²²³⁰ Nathan 2013: 870-892

²²³¹ Dube & Midgley 2008: 303-341

The organisation's objective shifted to include economic integration following the independence of the rest of the Southern African countries.²²³² SADC must achieve its economic potential, thus to achieve this, conditions conducive to trade and investment, including the protection of human rights, must be created and sustained.²²³³ It is a shame for SADC to pride itself on vast natural resources whilst almost half of the populace languishes in extreme poverty.²²³⁴

Article 5 of the SADC Treaty outlines the objectives set by SADC to achieve, namely to promote sustainable and equitable economic growth and socio-economic development that will alleviate, and ultimately eradicate poverty; to enhance the quality of life of the people of Southern Africa and support the socially disadvantaged through regional integration; to promote common political values through institutions which are democratic, peace, security, and stability, to promote sustainable development on the basis of collective self-reliance and the interdependence of member states; achieve complementarity between national and regional strategies and programmes, maximize productive employment and utilization of the region's resources; achieve sustainable utilization of natural resources and effective protection of the environment; strengthen and consolidate long standing historical, social and cultural links between the people of the region; combat HIV/AIDS and other deadly and communicable disease; ensure that poverty eradication is addressed in all SADC activities and programmes; mainstream gender issues in the process of community building.²²³⁵

It is noteworthy that even though the SADC Treaty principles and objectives are so clear the different types of government within the member states affected the smooth operations of the regional organization.²²³⁶ For example, it is known that countries such as South Africa and Botswana are democratic states subscribing to human rights protection, democracy and the rule of law.²²³⁷ On the other hand, the remaining countries within SADC subscribe to

²²³² The population as of 2018. See the SADC website available at <https://sadc.int/about-sadc/overview/sadc-facts-figures/> (accessed 26 January 2021)

²²³³ Institute for Security Studies, "Extreme poverty set to rise across Southern Africa", available at <https://issafric.org/iss-today/extreme-poverty-set-to-rise-across-southern-Africa/> (accessed 26 January 2021)

²²³⁴ Institute for Security Studies, "Extreme poverty set to rise across Southern Africa", available at <https://issafric.org/iss-today/extreme-poverty-set-to-rise-across-southern-Africa/> (accessed 26 January)

²²³⁵ Article 5 (1) of the SADC Treaty, 1992 (as amended), available at http://www.sadc.int/files/9113/5292/9434/SADC_Treaty.pdf (accessed 26 January 2021)

²²³⁶ Shumba and Midgley 2018: 303 -318

²²³⁷ Chanaka C, "Mugabe says Zimbabwe land seizure will continue", available at <https://www.reuters.com/article/us-zimbabwe-crisis-mugabe/says-zimbabwe-land-seizure-will-continue-idUSTRIES1ROVS20090228?sp=true> (accessed 17 April 2020)

authoritarianism, meaning the rule of law and democracy are the secondary fiddle, therefore the citizens are subjected to human rights infringement.²²³⁸

A case in point is *Mike Campbell (Pty) Ltd and Others v Republic of Zimbabwe*, despite the tribunal order to protect the applicant's possession, occupation and ownership of land and pay compensation to the evicted, the government of Zimbabwe ridiculed the regional court and its decisions.²²³⁹ In rubbing salt in a wound, the government of Zimbabwe decided to abandon its appearance in the court processes by instructing its lawyers to inform the Tribunal that he had no instructions from the government.²²⁴⁰ As a result, the government went on to mobilise other member states to concur with them on propaganda which sought to undermine the Tribunal because it had no jurisdiction and was not properly constituted.²²⁴¹ The merits of these arguments were considered and found to be mere politicking.²²⁴² President Mugabe on 29 February 2009, after the tribunal's decision said "*There is no going back on the land reforms....Some farmers went to the SADC Tribunal in Namibia but that's nonsense, absolute nonsense, on one will follow that...We have courts here in this country that can determine the rights of people. Our land issues are not subject to the SADC Tribunal*".²²⁴³

Shumba posits that the establishment of SADC as an all-encompassing regional grouping of countries reflects the aspirations of countries that saw themselves as partners against imperialism and foreign domination.²²⁴⁴ It is imperative to indicate that the foundation upon which SADC is built it thus a key factor enabling cooperation among member states, yet a source of impunity and lack of adherence to any rules.²²⁴⁵ There is a lack of appetite for being bound by commitments under the regional set-up.²²⁴⁶ The establishment of the Tribunal, although provided hope for democracy and human rights, was under threat from the undemocratic environment in which SADC has always operated.²²⁴⁷ Although there is a will to provide, a unified and politically strong region there is no political will to embrace regionalism to the extent that it might entail relinquishing some national authority to the regional grouping.²²⁴⁸

²²³⁸ Dube and Midgley 2008: 305-308

²²³⁹ Chanaka C, "Mugabe says Zimbabwe land seizure will continue", available at <https://www.reuters.com/article/us-zimbabwe-crisis-mugabe/-says-zimbabwe-land-seizure-will-continue-idUSTRIES1ROVS20090228?sp=true> (accessed 17 April 2020)

²²⁴⁰ Sasa M, "Zim pulls out of SADC Tribunal", Herald (2 September 2009)

²²⁴¹ Ruppel 2009: 275-319

²²⁴² Phooko 2015: 531-568

²²⁴³ Meckler 2016: 1007-1038

²²⁴⁴ Ruppel and Bangamwabo 2008: 179-221

²²⁴⁵ Naldi and Magliveras 2016: 133-159

²²⁴⁶ Ndlovu 2011: 63-79

²²⁴⁷ Scholtz 2011: 197-201

²²⁴⁸ Sarkin 2016:215-241

7.4 *The revival of the SADC Tribunal by South African Courts: Contextual Analysis of the decision of the Constitutional Court of South Africa*

Phooko posits that the SADC Tribunal having been disbanded by the Summit or Heads of State and Government of the SADC, there is now a possibility at least in theory, that the Tribunal might be revived.²²⁴⁹ The decision to disband the tribunal was taken without following the legal prescript such as the SADC Treaty and 2000 SADC Protocol on Tribunal. It is clear that some SADC Heads of State demonstrated their solidarity with the government of Zimbabwe; hence, they resorted to sacrificing the regional court. The conduct of SADC member states demonstrated their preference for solidarity among themselves, instead of holding defiant member states to account. On the other hand, there is a likelihood that SADC citizens might again have the opportunity to bring their cases, be they of commercial, human rights or any other nature, to the regional judicial institution when they believe that they have been failed by domestic courts of SADC member states.²²⁵⁰

The case *Law Society of South Africa and Others v President of the Republic of South Africa* is a landmark decision that has far-reaching implications for South African constitutional law and South Africa's international relations, the South African Constitutional Court confirmed a High Court decision, whereby it stated that the President is a public servant who should always act within the prescriptions and proscriptions of the Constitution.²²⁵¹ The court made it clear that the President's conduct has to demonstrate respect for the constitutional provisions dealing with respect for human rights, democracy and the rule of law.²²⁵² The Constitutional Court has held that in disbanding the SADC Tribunal and purporting to replace it with a weaker one and doing so contrary to the provisions of the SADC Treaty, the Summit acted unlawfully and irrationally.²²⁵³ The court has stated that the South African President's participation in the decision-making processes and his own decisions to suspend the operations of the SADC Tribunal, by appending his signature on the 2014 Protocol on the Tribunal in the Southern African Development Community (2014 SADC Protocol on Tribunal) contravened the provisions of section 7(1) and (2) and section 8(1) of the South African Constitution, therefore

²²⁴⁹ Phooko 2015: 531-568

²²⁵⁰ Ruppel 2009: 275 - 319

²²⁵¹ (20382/2015) (2018) ZAGPPHC 4; [2018] 2 All SA 806 GP; 2018 (6) BCLR 695 (GP)

²²⁵² Asmeslash, "Southern African Development Community (SADC) Tribunal" available at https://www.mpi.lu/fileadmin/mpi/medien/research/MPEiPro/2496_Southern_African_Development_Community.pdf (accessed 2019-08-19)

²²⁵³ *Law Society of South Africa and Others v President of the Republic of South Africa and others*

his conduct was declared unconstitutional, unlawful and irrational. The court ordered the President to withdraw his signature from the 2014 Tribunal Protocol.²²⁵⁴

Phooko posits that the position taken by the Constitutional Court is remarkable and refreshing and, thus is not surprising.²²⁵⁵ This decision resonates from the South African constitutional scheme, in both letter and spirit.²²⁵⁶ It is imperative to indicate that the President is considered a public servant who should always act within the parameters and proscriptions of the constitution, thus he or she cannot act into Leviathan once he or she enters in international relations arena.²²⁵⁷ The court had sent a message that the president is a torchbearer of the South African constitutional normative values both within and outside the Republic. In the apt words of the court:

*“... The President of South Africa] is never at large to do whatever leaders of other nations consider to be in the best interest of our and their nations. She is always to be guided by the Constitution and the law. For she is the nation's constitutional messenger and may only do what would benefit us and project our country in a positive light.”*²²⁵⁸

It is noteworthy that the constitutional court reasoned that the courts should be careful not to constrain the President in the exercise of her/his constitutional powers, this difference to the executive in the policymaking and implementation arena:

‘ is not to be understood as an endorsement of or solicitation for a license to exercise presidential or executive powers in an unguided or unbridled way. [as all presidential or executive powers must always be exercised in a way that is consistent with the supreme law of the Republic and its scheme, as well as the spirit, purport and objectives of the Bill of Rights, our domestic legislative and international law objectives.

Phooko provided a broader contextual, factual and legal background to the SADC Tribunal, and how the determination of its fate ended up in South Africa's domestic courts.²²⁵⁹ This broader legal-historical context focuses not just on the suspension of the SADC Tribunal but also on the subject of SADC's general relationship to the rule of law.²²⁶⁰ It is noteworthy to mention that the SADC's predecessor, the Frontline States was mainly concerned with

²²⁵⁴ *Law Society of South Africa and Others v President of the Republic of South Africa and Others*

²²⁵⁵ *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* (CCT 143/15; CCT 171/15) [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) par 20

²²⁵⁶ Preamble to the Constitution of the Republic of South Africa, 108 of 1996

²²⁵⁷ *Glenister v President of the Republic of South Africa and Others* (CCT 48/10) [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC)

²²⁵⁸ *Law Society of South Africa and Others v President of the Republic of South Africa and Others* (CC)

²²⁵⁹ De Wet et al 2013

²²⁶⁰ Nathan et al 2013

ensuring the end of colonialism and apartheid in Southern Africa.²²⁶¹ The political liberation of the whole of Southern Africa was on the horizon, the focus shifted to regional economic integration and economic independence, especially from apartheid South Africa.²²⁶² At a later stage, the South African Development Coordination Committee (SADCC) was transformed into the treaty-based organisation – South African Development Community in 1992.²²⁶³

The values of democracy, individual human rights and the rule of law were on the agenda of the Frontline State and the SADCC unless they were linked with the liberation of the people as a collective.²²⁶⁴ It is noteworthy to mention that with the winds of democratic changes blowing across the entire globe from the mid-1980s, the people of Southern Africa were also hungering for democracy, individual rights and the rule of law.²²⁶⁵ Phooko posits that the 1992 Treaty and the Declaration establishing the Southern African Development Community (1992 SADC Treaty) provided for democracy, human rights and the rule of law as part of the principles of SADC.²²⁶⁶ Subsequent amendments to the Treaty in 2001 saw the normative value of democracy becoming part of the SADC objectives as well.²²⁶⁷ The normative values of democracy, human rights and the rule of law also feature prominently in the number of SADC Protocols and policy documents.²²⁶⁸ In making the normative values of democracy, human rights and the rule of law part of the principles of SADC, and the promotion of democracy part of the objectives of SADC, the SADC Tribunal was established as part of the institutions of SADC.²²⁶⁹ It is imperative to mention that in terms of the SADC Treaty, the mandate of the SADC Tribunal is to “ensure adherence to and proper interpretation of the provisions of this Treaty and subsidiary instruments and to adjudicate upon disputes as may be referred to it”.²²⁷⁰

²²⁶¹ The historical material deliberated here is derived from <https://www.sadc.int/about-sadc/overview/history-and-treaty/#sadc> (accessed 2019-01-18)

²²⁶² Saurombe 2010: 124-134

²²⁶³ Phooko 2019: 415-432

²²⁶⁴ Viljoen 2007: 492 - 522

²²⁶⁵ Lieberman, “Organisational cloaking in Southern Africa, South Africa and SADCC after apartheid transformation, available at https://www.princeton.edu/esl/esl/papers_publications_files/Lieberman%20Organisational%20Cloaking%20in%20Southern%20Africa.pdf (accessed 2019-08-19)

²²⁶⁶ Article 4 (c) of the 1992 SADC Treaty

²²⁶⁷ Article 5 (1) (b) of the 1992 SADC Treaty as amended in 2001, available at https://www.sadc.int/files/5314/4559/5701/Consolidated_Text_of_the_SADC_Treaty_scanned_2_1_October_2015.pdf (accessed 2019-01-18)

²²⁶⁸ Paragraph 1.5.3 of the SADC Regional Indicative Strategic Development Programme (RISDP), available at <https://www.sadc.int/about-sadc/overview/strategic-pl/regional-indicative-strategic-development-plan/> (accessed 2019-08-19)

²²⁶⁹ Article 9 of the Consolidated Text of the SADC Treaty, https://www.sadc.int/files/5314/4559/5701/Consolidated_Txt_of_the_SADC_tREATY_scanned_2_1_October_2015.pdf (accessed 2019-08-19)

²²⁷⁰ Article 16(1) of the SADC Treaty

Phooko reiterated that there was an evident reluctance to operationalize the SADC Tribunal, instead of setting out the full extent of its jurisdictional competence, composition and other matters in the text of the SADC Treaty itself, these matters were deferred to a Protocol to be adopted later.²²⁷¹ In 2000, the Protocol on the Tribunal in the Southern African Development Community and Rules thereof (2000 Tribunal Protocol) was adopted, but SADC member states were reluctant to ratify it to operationalize it. Secondly, it would take some more years for the judge to be appointed the Tribunal Registry to be set up and for the Tribunal to start operating in 2007.²²⁷² It is noteworthy to mention that other SADC institutions got to work immediately; it would take a long 15 years for the SADC Tribunal to be operational.²²⁷³

Scholars such as Phooko and Nyathi were of the view that the 2000 Tribunal Protocol was very progressive, thus SADC citizens could approach the Tribunal alleging among other things, violation of the SADC Treaty by a member state, but only after exhausting local remedies or proving that local remedies were not available.²²⁷⁴

In making its determination, the SADC Tribunal had a wide pool of sources of law to refer to, for example, the SADC Treaty, the 2000 SADC Protocol on Tribunal, and subsidiary instruments adopted by the Summit and Council of Ministers or by any institution or organ of SADC under the Treaty or protocols. Additionally, the tribunal was given the powers to develop its Community jurisprudence having regard to applicable treaties, general principles and rules of international law and principles of the laws of member states.²²⁷⁵

SADC Tribunal has created several legal precedents covering a variety of legal aspects such as labour law, the law of agency, and human rights law, among other areas of law. Scholars such as Phooko reiterated that although the tribunal's progressive and well-reasoned human rights jurisprudence incensed countries with poor human rights records, particularly Zimbabwe.²²⁷⁶

In the classic case of *Mike Campbell (Pty) Ltd and Others v Republic of Zimbabwe*, the tribunal found Zimbabwe's chaotic and violent land reform programme to be contrary to several SADC Treaty provisions. The government of Zimbabwe was ordered to protect the right to property of the farm that had not been expropriated and to pay compensation to those whose farms

²²⁷¹ Phooko 2019: 415 -503

²²⁷² Ebobrah et al 2009

²²⁷³ Nyathi 2019:69 -85

²²⁷⁴ Phooko 2019:415-503

²²⁷⁵ *Mike Campbell (Pty) Ltd and Another v Republic of Zimbabwe* SADC (T) 02/2007; *Barry Gondo and Others v Republic of Zimbabwe* SADC (T) 05/2008; *Zimbabwe Human Rights NGO Forum v Republic of Zimbabwe* SADC (T) 05/2009

²²⁷⁶ Phooko 2016: 556-680

had been expropriated.²²⁷⁷ The government of Zimbabwe defied the ruling, thus the non-compliance was referred to the Summit.²²⁷⁸ It is noteworthy to indicate that compliance with the SADC Tribunal's judgement was not forthcoming on the part of Zimbabwe, even after the successful litigants sought and obtained orders from the Tribunal to enable the Summit to compel compliance by Zimbabwe.²²⁷⁹

The SADC member states have acted in solidarity with the government of Zimbabwe instead of ensuring that SADC Tribunal judgements are complied with.²²⁸⁰ The diplomatic attack on the Tribunal employed very weak legal arguments alleging that the SADC Tribunal was not lawfully established owing to the non-ratification of the 2000 Tribunal Protocol.²²⁸¹ The Government of Zimbabwe further argued that the Tribunal did not have jurisdiction to determine human rights issues.²²⁸² Other issues, which demonstrated the SADC member state's unwillingness to comply with Tribunal rulings is the decision not to reappoint those members of the tribunal (the judges) whose terms of office were ending in 2010 or replacing those whose term of office would end in 2011.²²⁸³ The Summit also directed the Tribunal not to receive any new cases pending a review of the Tribunal's terms of reference.²²⁸⁴ The decision not to renew the terms of judges meant that the SADC Tribunal was emasculated and could not operate.²²⁸⁵ It is imperative to indicate that all this- the non-renewal of the judge's term of office (and non-reappointment of their replacements) and the directive not to receive new cases, had no basis in the SADC Treaty and the 2000 SADC Protocol on Tribunal, and was therefore unlawful.²²⁸⁶

The adoption of the new SADC Protocol on the Tribunal in 2014 violates our Treaty Protocol procedures²²⁸⁷. The 2014 SADC Protocol on Tribunal no longer forms an integral part of the SADC Treaty like its predecessor and is being subjected to a ratification process, which means that it might take many years, for the Tribunal to be re-established since two-thirds of SADC Member States would need to ratify the protocol for it to come into force.²²⁸⁸ The ramifications

²²⁷⁷ *Mike Campbell (Pty) Ltd and Others v Republic of Zimbabwe*

²²⁷⁸ *Mike Campbell (Pty) Ltd and Others v Republic of Zimbabwe*

²²⁷⁹ *Mike Campbell (Pty) Ltd and Others v Republic of Zimbabwe*

²²⁸⁰ *Mike Campbell (Pty) Ltd and Others v Republic of Zimbabwe*

²²⁸¹ Ngande, "The Predicament of African regional courts: Lessons from the Southern African Development Community Tribunal" 2012 PAYL 54.

²²⁸² *Fick and Others v Republic of Zimbabwe (657/11) [2012] ZASCA 122 (20 September 2012)*

²²⁸³ SADC Summit decision of August 2010

²²⁸⁴ SADC Summit decision of August 2010

²²⁸⁵ Nathan 2013: 870- 894

²²⁸⁶ *Tanganyika Law Society and Others v Ministry of Foreign Affairs and International Cooperation of the United Republic of Tanzania*, judgement delivered on 6 June 2019.

²²⁸⁷ The SADC Treaty being the constitutive document of SADC, the Summit should have amended both the relevant provisions of the SADC Treaty and those of the 2000 SADC Protocol on Tribunal by employing the procedure requiring three-quarters of the Members of the Summit.

²²⁸⁸ Articles 52 and 53 of the 2014 Tribunal Protocol

of the new Tribunal Protocol are that it seeks to create a weaker Tribunal that would no longer accept cases from individual SADC citizens.²²⁸⁹ Additionally, its substantive jurisdiction would be very limited and its source of law reduced to just the SADC Treaty and applicable SADC Protocols.²²⁹⁰

Another challenge faced by the litigants in *Mike Campbell (Pty) Ltd and Others v Republic of Zimbabwe* is that their attempt to revive the SADC Tribunal through the African Commission on Human Rights and People Rights (African Commission) was not successful.²²⁹¹ One of the arguments raised by the litigants was that by denying SADC citizens access to the SADC Tribunal, the SADC Heads of State and Government violated binding provisions of the African Charter by interfering with the independence, competence and institutional integrity of the SADC Tribunal and terminating existing proceedings and vested remedies.²²⁹² In their assessment of the merits and demerits of the case, the ACHPR rejected the arguments and reasoned that the African Charter did not impose any obligation on SADC member states to guarantee the independence, competence and institutional integrity of the SADC Tribunal.²²⁹³ In conclusion, the ACHPR held that the African Charter does not create an obligation on the SADC Member State to ensure access to the Tribunal.²²⁹⁴ The SADC citizens after they lost a case at the African Commission, approached South African Courts for relief.²²⁹⁵

7.4.1 Constitutional Court Judgement

The central argument, which was placed before the apex court in South Africa, was that the preliminary objection raised before the court, for example, the ratification of the 2014 SADC Protocol on Tribunal was merely signed but not ratified, and therefore the applicants ought to have challenged the President's conduct after ratification.²²⁹⁶ The respondents were of the view that the President's signature on the 2014 Protocol on Tribunal had no force and effect. In its assessment of the arguments before it, the court dismissed the preliminary objection as it reasoned that the signing of a treaty by the South African President creates far-reaching possibilities that could have irreversible consequences.²²⁹⁷ The court rejected the preliminary

²²⁸⁹ Article 33 of the 2014 SADC Protocol on Tribunal.

²²⁹⁰ Article 35 of the 2014 SADC Protocol on Tribunal

²²⁹¹ *Luke Munyandu Tembani and Benjamin John Freeth v Angola and Thirteen Others* 409/2012

²²⁹² *Law Society of South Africa and Others v President of the Republic of South Africa and Others* (CC)

²²⁹³ *Law Society of South Africa and Others v President of the Republic of South Africa and Others* (CC)

²²⁹⁴ *Law Society of South Africa and Others v President of the Republic of South Africa and Others* (CC)

²²⁹⁵ Phooko 2019: 415-520

²²⁹⁶ *Law Society of South Africa and Others v President of the Republic of South Africa and Others* (CC)

²²⁹⁷ *Law Society of South Africa and Others v President of the Republic of South Africa and Others* (CC)

objection on an important principle of international law that a party, which has signed but not, yet ratified a treaty, is under an obligation not to defeat the purpose and objects of that treaty.²²⁹⁸

By implication, even if South Africa has merely signed the 2014 SADC Protocol on the Tribunal but not ratified it; it would still be obliged not to act contrary to the provisions of the 2014 Tribunal Protocol. In other words, South Africa cannot sit back and do nothing when its citizens have no access to courts at the SADC regional level or do something contrary to the principles of democracy, human rights and the rule of law.

The main argument, in this case, is centred on the applicant's arguments that the conduct of the President is irrational, violated human rights and the rule of law, denied the South African citizen access to regional justice and acted outside the parameters of the constitution.²²⁹⁹ On the other hand, the respondents argued that the President's signature did not violate the SADC Treaty or the 2000 SADC Protocol on Tribunal.²³⁰⁰ The respondents further argued that the President's reason for his signature was explained and that his signature was not purposeless, irrational and in bad faith.²³⁰¹

Constitutional court, in its assessment of the arguments placed before it, the court decided that the 2010 and 2011 SADC Summit decisions have resulted in the non-appointment of new judges, refusal to renew the contracts of other judges contributed to the demise of the SADC Tribunal. The passing of a moratorium on the referral of the dispute to the SADC Tribunal and the signing of the 2014 SADC Protocol on the Tribunal essentially destroyed the tribunal.²³⁰² The court has found that there is no legal basis for the President to have acted contrary to the provision of a binding treaty. The court was alert to the fact that the law required the President to act in line with the dictates of the rule of law as embodied in the Constitution of South Africa.

The court further emphasised that the 2000 Tribunal Protocol could only be amended through a provision of the SADC Treaty, which allows an amendment to be made.²³⁰³ According to the court, this could not be done via a protocol such as the 2014 Protocol on Tribunal but through the requirement of three-quarters of SADC Member States. In its final analysis, the court found

²²⁹⁸ Article 18 of the Vienna Convention on the Law of the Treaties 1155 UNTS 331, was adopted on 23 May 1963 and entered into force on 27 January 1980.

²²⁹⁹ *Applicants submission, Law Society of South Africa and Others v President of the Republic of South Africa.*

²³⁰⁰ *Respondents submission, Law Society of South Africa and Others v President of the Republic of South Africa*

²³⁰¹ *Respondents submission, Law Society of South Africa and Others v President of the Republic of South Africa*

²³⁰² *Law Society of South Africa and Others v President of the Republic of South Africa*

²³⁰³ *Law Society of South Africa and Others v President of the Republic of South Africa*

that the decision of SADC member states to amend the Treaty through the Protocol evidences a failure to adhere to the provisions or proper meaning of the Treaty.²³⁰⁴

In conclusion, the court found that by suspending the SADC Tribunal, the President acted in a manner that undermined our international law obligations under the treaty.²³⁰⁵ The court *inter alia* concluded that the illegality of his conduct also stems from purporting to exercise powers he does not have”.²³⁰⁶ In light of the abovementioned considerations, the Constitutional Court confirmed the order of the High Court and ruled that the President’s participation in the decision-making process and his own decision to paralyse the SADC Tribunal is unconstitutional and irrational.²³⁰⁷ Finally, the President was ordered to withdraw his signature from the 2014 Tribunal Protocol.

A lesson learned from the ruling of the Constitutional Court is that the court places a value on international law in South Africa and the former contributed to the attainment of democracy in the latter is prominent in the Constitutional Court decision. In the main, the decision falls within the realm of South African Constitutional law. The President could not act contrary to the provisions of the SADC Treaty, as it would be contrary to the principle of legality.²³⁰⁸

Secondly, the court ruling made it clear that it is the South African Constitution that burdens the office of the President with the requirement of rationality and constitutionality and the requirement does not fall away when the President acts outside the domestic sphere by remaining attached to her or him as she or he engages in international relations.²³⁰⁹ Thirdly, the normative values embodied in the South African Constitution including democracy, respect for the rule of law and respect for human rights must find expression in South Africa’s relations with foreign states.

7.4.2 *The implications of the Constitutional Court decision*

The court decision has major implications both at the domestic level in the Republic of South Africa and at the SADC regional level. Firstly, the court ruling has laid down a binding constitutional principle that in engaging in international relations, the president must always be guided by the latter and the spirit of the South African Constitution. In essence, the conduct of the executive at the international level needs to be reviewed and the standard of review is the South African Constitution.

²³⁰⁴ *Law Society of South Africa and Others v President of the Republic of South Africa*

²³⁰⁵ *Law Society of South Africa and Others v President of the Republic of South Africa*

²³⁰⁶ *Law Society of South Africa and Others v President of the Republic of South Africa*

²³⁰⁷ *Law Society of South Africa and Others v President of the Republic of South Africa*

²³⁰⁸ *Law Society of South Africa and Others v President of the Republic of South Africa*

²³⁰⁹ *Law Society of South Africa and Others v President of the Republic of South Africa*

The Constitution Court has rubber-stamped the role of South Africa within the international organisation and that international organisations seek to promote such normative values as access to justice and the rule of law, binds the president to protect those values as long as they are still part of the South African Constitutional scheme. It is imperative to mention that concerning SADC where democracy and the rule of law appear to be constant challenges, this means that not only should the President of South Africa be South Africa's constitutional messenger always exuding the South African constitutional spirit but should always act rationally and legally as if she or he exercising domestic powers.

The Constitutional Court decided to take the opportunity presented by this case to lay the foundation of future jurisprudence in the area of domestic constitutional amendment. Although the court dealt with the amendment of the SADC Treaty, appears to suggest that it would not hesitate to review an amendment of the South African Constitution and in doing so it would confine itself to the procedural aspects of the amendment but would also assess the rationality of the amendment. Phooko posits that the decision of the Constitutional Court has serious implications for the relationship of South African constitutional law to South Africa's international relations and it also promises to herald new jurisprudence in the area of constitutional amendment. In his assessment of the Constitutional Court decision, Phooko welcomed the decision and reiterated that it provided significant changes in the constitutional amendment. In adherence to the court decision President Ramaphosa, the current President of the Republic of South Africa has officially withdrawn South Africa's signature from the 2014 Tribunal Protocol. On the other hand, the Summit has noted South Africa's withdrawal of signature from the 2014 Protocol on Tribunal in compliance with a Constitutional Court ruling.²³¹⁰ Following the withdrawal of the signature of South Africa's President from the 2014 Protocol on Tribunal, it is hoped in the absence of corrective measures taken by the Summit itself, the courts of other SADC member states and Heads of State to uphold the route taken by the South African courts and its Head of State to uphold and respect the rule of law by accepting that the 2014 Tribunal Protocol was adopted outside the parameters envisaged by the 2000 Tribunal Protocol.

Since the South African Constitutional Court decision, it transpired that the winds of change have begun to flow in the right direction as the Tanzanian High Court also held that:

“The suspension of the operations of the SADC Tribunal, and failure or refusal to appoint Judges is contrary to SADC Treaty provisions, was inimical to the Rule of Law as a

²³¹⁰ Communiqué of the 39th SADC Summit Heads of State and Government.

foundational principle inherent to the legitimacy of the community, and expressly entrenched in the Treaty".²³¹¹

The High Court of Tanzania has consequently held that it will adjudicate future disputes arising from the SADC Treaty between individuals and legal persona against the government of Tanzania until the SADC Tribunal has been reinstated.²³¹²

Phooko is concerned about how the Constitutional Court judgement was crafted which portrays a few shortcomings, the most notable was its failure to properly capture the correct legal position regarding the amendment of the SADC Treaty. The decision has outlined that three-quarters of SADC member states are required to amend the SADC Treaty.²³¹³

7.5 The possibility of re-establishment of the SADC Tribunal

The subheading responds to the main research question as indicated below.

7.5.1 Is the re-establishment of the SADC Tribunal necessary?

Scholars of the world have noted a decline of democracy around the world and so is faith in domestic institutions.²³¹⁴ It is imperative that defending democracy against destruction requires a mix of proven strategies and innovative solutions to prevent the forces of authoritarianism from gaining traction in every region of the world.²³¹⁵ One fundamental idea to catch the attention of defenders of democracy is the establishment of a constitutional court for the world.²³¹⁶ The establishment of the International Constitutional Court would also bring its dynamics such as who would be the judges? and how should they be chosen? Who should file a suit? What powers would the court have? And would the court have jurisdiction over all countries?

It is imperative to mention that a motivation for the dismantlement of the Southern Africa regional court was that the SADC Heads of State perceived that the tribunal had more powers than they thought and this was realized after the ruling made against the government of Zimbabwe regarding the infringement of property rights of white farmers who were forcefully

²³¹¹ *Tanganyika Law Society and Others v Minister of Foreign Affairs and International Cooperation of the United Republic of Tanzania.*

²³¹² *Tanganyika Law Society and Others v Minister of Foreign Affairs and International Cooperation of the United Republic of Tanzania.*

²³¹³ *Law Society of South Africa and Others v President of the Republic of South Africa and Others (CC)*

²³¹⁴ Mounk and Foa, "This is how Democracy Dies, The Atlantic (January 29, 2020, available at <https://www.atlantic.com/ideas/archive/2020/01/confidence-democracy-lowest-point-record/605686>

²³¹⁵ Liet-Veaux 1943: 116-143

²³¹⁶ Ruppucci and Slipowitz et al 2021

removed from the farms without payment of compensation. The decision of the government of Zimbabwe to amend the fundamental provisions of its Constitution was meant to realise the implementation of an arbitral land reform policy. It is a trend among some of the SADC member states to disregard human rights, democratic principles and the rule of law, thus their citizens were constantly subjected to various kinds of atrocities and human rights infringements. Based on human rights abuse in southern Africa where SADC is located, thus there is a need for a regional court, which will become the mouthpiece of the affected citizens.

Marzouki posits that the alarm on what he saw around the world: authoritarian states attacking democracy, subverting the rule of law, violating human rights, holding rigged elections to give themselves a veneer of legitimacy, and reforming the constitution to consolidate their power and harm their opponents.²³¹⁷ Scholars such as Marzouki and Veaux exposed how political actors were exploiting formal institutions to achieve non-democratic ends.²³¹⁸ It is evident that in the manner in which the SADC Tribunal was disbanded, the SADC Heads of State abused their powers to subvert the legal procedures of amending certain provisions in the constitutive document or Protocols of SADC. It is imperative that all the legal professionals such as the Law Societies and Civic Society Organisations, as well as interested parties work in unison to dismantle the abuse of powers and the unending human rights abuse in southern Africa in particular and Africa in general committed by the Heads of States. These political actors manipulate their own legal rules while proclaiming a commitment to constitutionalism, democracy and the rule of law.²³¹⁹

Scholars such as Phooko and Saurombe around the globe have suggested that there should be an establishment of the International Constitutional Court, thus this court should take the form of the International Criminal Court. The primary function of the court should be to eradicate the dictatorship and to safeguard democracy from defeat.²³²⁰ Looking at the atrocities and human rights abuse subjected to the citizens of the SADC region, firstly the re-establishment of the SADC Tribunal will ensure the SADC member states adhere to Article 4 (c) which states that members should abide by the principles of human rights, democratic principles and the rule of law.²³²¹ It is documented that the tribunal has done tremendous work in holding SADC member states to account and comply with the provisions of the SADC Treaty and the 2000 SADC Protocol on Tribunal.²³²² The SADC Heads of State upon realizing that

²³¹⁷ G.A. Res.217 (III) A, Universal Declaration of Human Rights (Dec 10, 1948)

²³¹⁸ Veaux et al 1943

²³¹⁹ Mike Campbell (Pty) Ltd and Others v Republic of Zimbabwe

²³²⁰ International Covenant on Civil and Political Rights, Dec.16, 1966, 999 U.N.T.S, 171

²³²¹ SADC Treaty and Declaration

²³²² Phooko 2019: 415-520

they have to account for their human rights transgressions, resorted to suspending the tribunal from its operations pending the outcomes of the review panel led by Prof Bartels.²³²³ The outcome of the review panel exonerated the tribunal, thus stating that the regional court is properly constituted and by the provisions of Article 4 (c), the tribunal had the jurisdiction to preside over human rights complaints, the SADC Heads of State continued with the dismantlement of the regional court.²³²⁴ Furthermore, the outcomes of the apex courts in South Africa and Tanzania, as well as the outcomes of the review panel can be utilized by interest groups such as human rights organizations, Law Societies and Civic Society organisations to challenge the dismantlement of the SADC Tribunal and also seek a legal recourse for the re-establishment of this regional court.²³²⁵

The SADC Heads of State pretend to be the human rights champions on paper whilst in action they perform the opposite. The solution to this challenge is the establishment of an International Constitutional Court which would be the guardian of three major texts of higher law in global governance, namely the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.²³²⁶ These three higher laws are considered robust commitments to universal values, foundational moral principles and specific directives for state actors that would together set a standard for all states to follow. It is noteworthy that the role of the International Constitutional Court would be to defend these values, principles and directives. SADC member states are signatories of these international protocols, therefore they could be bound to observe and respect human rights, democratic principles and the rule of law.

It is imperative to indicate that failure to re-establish the SADC Tribunal means the citizens and legal persons in the SADC region will not have a regional court that they could approach to seek a legal recourse in case if their issues or complaints cannot be addressed by their respective local courts in their countries. It is well documented that in some SADC countries, there is no respect for human rights, democratic values and the rule of law.

7.5.1 *Global Trends in Democracy*

Marzouki posits that there are trends emerged whereby there has been a decline of democracy since 2006, plunging the world into a long democratic recession.²³²⁷ This trend shows no signs of reversal, on the contrary, the global decline in democracy has only grown steeper and faster. It is imperative to indicate that dictatorships are far more populous than

²³²³ Saurombe 2010: 124 -145

²³²⁴ Mike Campbell (Pty) Ltd and Others v Republic of Zimbabwe

²³²⁵ Viljoen 2007: 492 - 567

²³²⁶ International Covenant on Economic, Social, and Cultural Rights, Dec.16, 1966,993 U.N.T.S.3.

²³²⁷ Refucci and Slipowitz et al 2021

democracies, thus the former has grown by 70 percent of the world, pulling the countries back to the lowest levels of democratic governance since 1989, before the fall of the Berlin Wall.²³²⁸

Scholars such as Boese stressed that political actors have turned their attention to diagnosing the problem of constitutional fraud and brainstorming ways to rescue democracy.²³²⁹ Another trend that is a direct response to the phenomenon of abusive constitutionalism is the direct descendant of *fraud a la constitution*, as it warns us that the core problem, then is that it is fairly easy to construct a regime that looks democratic but in actuality is not fully democratic.²³³⁰ A classical example is the government of Zimbabwe which subscribed to democratic values by promulgating a constitution that guarded with jealousy human rights, democratic values and the rule of law. During the implementation of the land reform, the government decided to amend the fundamental provisions of the constitution which deals with the payment of reasonable compensation in cases where the government expropriate private land. The constitution further permitted the property owners a right to approach local courts to seek legal redress. However, Amendment 17 of the Constitution of Zimbabwe allowed the government to expropriate without compensation and also prohibited property owners from seeking legal recourse at the local court. The amendment of the fundamental provisions of the constitution by the government of Zimbabwe amounted to constitutional dismemberment.

It is noteworthy to mention that the solution to the problem is hard to find because dictators lawfully and constitutionally can use mechanisms of constitutional change to make a state significantly less democratic than it was before.²³³¹ Lopez reiterates that the constitutional changes slice deeply into the heart of the constitution that we cannot call them mere constitutional amendments, they should be called "constitutional dismemberments" because they do violence to one or more of a constitution's essential features, for instance, its fundamental rights, its basic structure, or core feature of its identity.²³³²

7.5.2 *The Architecture of the Court as compared to SADC Tribunal*

Marzouki posits that there are more technical aspects of the Committee's vision for an International Constitutional Court, including composition, function, jurisdiction and authority.²³³³ The court would have 21 judges elected by the General Assembly of the United

²³²⁸ New Report: The Global Decline in Democracy has accelerated, Freedom House (Mar.3, 2021), available at <https://www.freedomhouse.org/article/new-report-global-decline-democracy-has-accelerated>.

²³²⁹ Vanessa A Boese, Autocratization changing nature? Democracy Report 2022 6 (Vanessa A. BoESE & Staffan I Lindburg eds, 2022

²³³⁰ German Lopez, Democracy is losing, VOX (Nov. 19, 2021), <https://www.vox.com/the-weeds/22791528/biden-democracy-freedom-house-build-back-better>.

²³³¹ Landau 2013: 189-200

²³³² Albert et al 2019

²³³³ Scheppele 2018: 545-653

Nations (“UN”).²³³⁴ The Assembly would select the 21 judges from a closed list of 42 candidates chosen by a college of judges that would include representatives from the International Court of Justice and the International Criminal Court.²³³⁵ It is imperative to indicate that 42 candidates would be drawn from a list of roughly 200 nominees, one from each of the member states in the UN.²³³⁶

The International Constitutional Court will have two primary functions, namely to give advice and resolve disputes. In its advisory role, the court would issue advisory opinions at the request of the governments, political parties, professional groups, non-governmental organisations and multinational organisations at the international, regional or sub-regional level.²³³⁷ Additionally, the court would be authorized to advise on texts or draft texts related to democracy and rights.²³³⁸ In its determination given the petitioner has standing, the court would issue a declaration on whether the text is consistent with democracy and rights.²³³⁹ Considering the human rights infringements which is rife in African countries the establishment of the International Constitutional Court will address the challenges faced by the citizens of these countries. The exhaustion of local remedies as entrenched in the 2000 SADC Protocol on Tribunal is vital before the complainant can approach the tribunal. Then the International Constitutional Court was the apex court on international matters, specifically human rights and undermining the rule of law. On the other hand, the limitation of jurisdiction of the SADC Tribunal by enacting the 2014 SADC Protocol Tribunal is tantamount to denial of access to justice for individuals and legal persons. In this case, the affected parties can approach the court to seek legal recourse in the case when they have complaints against the government of their countries when the SADC Tribunal denies them access to justice. It is noteworthy to mention that before one can approach this court all the domestic avenues should be exhausted.²³⁴⁰ There are similarities between the International Constitutional Court and the SADC Tribunal in the sense that this court their judgement binds the state implicated in the dispute, thus the state would have to implement the ruling of the court.²³⁴¹

²³³⁴ Albert 2019: 84-108

²³³⁵ Ginsburg and Huq et al 2021

²³³⁶ Tushnet et al 2021

²³³⁷ Press Release, The White House, Summit for Democracy Summary of Proceedings, (Dec.23, 2021), available at <https://www.whitehouse.gov/briefing-room/statement-release/2021/12/23/summit-for-democracy-summary-of-proceedings>.

²³³⁸ Marzouki 2003: 283-304

²³³⁹ Marzouki 1997:117-138

²³⁴⁰ Burkina Dismisses Elections Candidates Linked to Ex-President, News24 (August 30, 2015), available at <https://www.news24.com/News24/Burkina-dismisses-elections-candidates-linked-to-ex-president-20150829-2>

²³⁴¹ Situation Nationale: Les Grandes Decisions De Michel Kafando, CONSULAT DU BURKINA EN ESPAGNE, available at https://www.consulat-burkinaespagne.org/51712_fr/Situation-nationale:-Les-grandes-d%C3%A9cision-de-Michel-Kafando (last visited June 3,2023)

Scholars reaffirmed that in exercising both these functions, namely advice giving and dispute resolution, the court would be guided by what the report described as “the principles and rules relating to democracy and universal and regional civil liberties.”²³⁴² The SADC Tribunal has a similar approach in that this court is guided by the provisions of the SADC Treaty as the constitutive document of the SADC, thus all SADC member states are bound by the provision of the SADC Treaty. The SADC Tribunal should retain its initial jurisdiction before the enactment of the 2024 SADC Protocol on Tribunal, which was to preside over matters brought by individuals and legal persons against SADC member states or cases brought by the officials against the SADC, as well as matters brought by SADC members against each other.²³⁴³ On the other hand, the jurisdiction of the court is to extend around the world to require the court to enforce relevant rules in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Treaty on European Union, the European Convention on Human Rights, the Charter of the Organisation of America States, the American Convention on Human Rights, the Inter-American Democratic Charter, the Constitutive Act of the African Union, as well as Harare Principles.²³⁴⁴

7.5.3 *A Constitution of the World*

Marzouki reiterates that the impetus for an International Constitutional Court is twofold, namely, states should be held accountable for how well or poorly they fulfil their obligation to respect "principles and rules relating to democracy, to the rule of law and to periodic, competitive and genuine elections.”²³⁴⁵ The second impetus derived from the first in which the regimes that violate this obligation, for example, the authoritarian state are the main culprits, and the one that blatantly breaches the basics of democracy. It is imperative to mention that states must respect democracy, but many do not fulfil that obligation. The primary objective of the creation of this court is to internationalise constitutional law, meaning to create and enforce a constitution for the entire world – a world constitution.²³⁴⁶ It is imperative to mention the establishment of the International Constitutional Court and re-establishment of the SADC Tribunal will play a role of being the mouthpiece of the victims of human rights abuse in particular the white farmers whose farms were expropriated without payment of compensation by the government of Zimbabwe.

The role of this court would be to identify what qualifies as international constitutional law and to enforce it about the claims brought to the court.

²³⁴² Uruena 2018: 398-399

²³⁴³ 2000 SADC Protocol on Tribunal

²³⁴⁴ Negishi 2018: 49-50

²³⁴⁵ Dulitzky 1999: 843-890

²³⁴⁶ Benvenisti 1999: 843-890

7.5.4 *Three Problems: Authority, Enforcement and Coordination*

Marzouki posits that the International Constitutional Court would confront several problems on the path to success.²³⁴⁷ One fundamental problem is its authority that stems from its connection to the United Nations "UN". The committee proposed that the International Constitutional Court be made an organ of the UN, created by the UN, its members would be chosen by the UN General Assembly, and it would apply texts of higher law anchored in the authority of the UN.²³⁴⁸ The SADC Heads of State have powers to appoint judges by the provisions of the 2000 SADC Protocol on Tribunal which regulates their competency, skills and experience.

Although, scholars feel that this court should be part of the UN, there are failures linked with the UN which are well-known and each with its real catastrophe, for example, Rwanda's oil for food program in Iraq, civil wars in South Sudan, Syria and Yemen, the Rohingya Crisis, Kashmir and Haiti. The most recent failure is Russia's attack on Ukraine – an attack that the UN is powerless to stop because Russia's permanent seat on the Security Council gives it veto powers over anything the UN does.²³⁴⁹ These incidents all paint a tragedy and undermine the authority of the UN as a body that can help manage global governance.²³⁵⁰

7.6 Findings

Based on assessment of this study, the following **findings** were made:

- 7.6.1 SADC Heads of State and Government failure to engage with the CSOs on proposed changes in the SADC Treaty and Declaration and the promulgation of the 2014 SADC Protocol on Tribunal have a bearing on the infringement of human rights of the citizens in the SADC region. The decision is also contrary to the provision of Article 23 of the SADC Treaty.
- 7.6.2 SADC Heads of State and Government decision to suspend the SADC Tribunal was in contravention of the SADC Treaty and 2000 SADC Protocol on Tribunal, therefore

²³⁴⁷ Vasciannie et al 2020

²³⁴⁸ Zwart 2012: 546-590

²³⁴⁹ Patrick Wintour, UK Agrees to Negotiate with Mauritius over Handover of Chagos Island, The Guardian (November 4, 2022), available at <https://www.theguardian.com/world/2022/nov/03/uk-agrees-to-negotiate-with-mauritius-over-handover-of-chagos-island>

²³⁵⁰ Contese 2021: 115-145

Law Societies and Civil Society Organisations have a winnable case against the SADC member states who participated in this illegal decision.

- 7.6.3 Lack of trust in the CSOs by SADC member states impedes these organisations from participating in the decision-making process, especially on issues affecting the citizens within SADC.
- 7.6.4 Different types of government among SADC member states impede adherence to principles of democracy, human rights and the rule of law as articulated in the SADC Treaty. This has contributed to the disbandment of the SADC Tribunal as the institution responsible for the interpretation of the SADC Treaty and Protocols and other legal instruments, as well as international law.
- 7.6.5 Land reform is a delicate issue within the SADC region and this is due to the fact most of the SADC member states still have to implement it and redistribute the land to address the land imbalance of the past due to colonialism. This kind of situation led to SADC member states finding themselves in a precarious situation, which resulted in them failing to act against the government of Zimbabwe because of fear of reprisals.
- 7.6.6 The lack of political will among SADC member states to embrace regionalism to the extent that it might entail relinquishing some national authority to the regional grouping impedes regional integration.
- 7.6.7 The decision taken by the apex court of South Africa in the case *Law Society of South Africa and Others v President of the Republic of South Africa and Others* reiterates that the President's conduct has to demonstrate respect for the constitutional provisions dealing with respect for human rights, democracy and the rule of law. This decision confirmed the ruling made by the SADC Tribunal that the government of Zimbabwe have contravened the provisions of the SADC Treaty and 2000 SADC Protocol on Tribunal.
- 7.6.8 The Constitutional Court further held that the disbandment of the SADC Tribunal and purporting to replace it with a weaker one is contrary to the provision of the SADC Treaty, thus the SADC Heads of State and Government acted unlawfully and irrationally.
- 7.6.9 The provisions of the SADC Treaty and Declaration made provision for SADC member states to adhere to the principles of democracy, human rights and the rule of law. Even

the amendment to the SADC Treaty effected in 2001 saw a normative value of democracy becoming part of the SADC Objectives.

- 7.6.10 SADC member states deliberately delayed the crafting of a Protocol on Human Rights because of their non-alignment with the human rights catalogue. The protection of human rights and the rule of law in the SADC region will not be attained.
- 7.6.11 The limitations of the jurisdiction and sources of law referred to by SADC Heads of State and Government by enacting the 2014 SADC Protocol on Tribunal without amending the SADC Treaty, as the constitutive document of the regional organisation is illegal.
- 7.6.12 The SADC member states argument that the SADC Tribunal is not properly constituted is incongruous, thus they signed the SADC Treaty and 2000 SADC Protocol on Tribunal, which are SADC documents created by the regional court. Secondly, the argument raised by the government of Zimbabwe that the SADC Tribunal does not have jurisdiction to hear human rights issues is unsound and incongruous because article 4 (c) of the SADC Treaty outlined the principles such respect for human rights, democratic values and the rule of law which, SADC member states must abide with them.
- 7.6.13 The 2014 SADC Protocol on Tribunal violates the provisions of the SADC Treaty and Procedures. This Protocol is no longer an integral part of the SADC Treaty like its predecessor (2000 SADC Protocol on Tribunal) as it is subject to a ratification process. The former still requires two-thirds of SADC member states to ratify it to come into force.
- 7.6.14 SADC member states have crafted the 2014 Protocol on Tribunal as a mechanism for weakening the SADC Tribunal so that it can no longer accept cases from individual and/or legal persons.

The ACPHR have acted cowardly by failing to enforce the role as the custodian of human rights in Africa by dismissing the case submitted by applicants in *Mike Campbell (Pty) Ltd and Others v Republic of Zimbabwe*. The Commission condoned the conduct of the SADC Heads of State and Government of weakening the SADC Tribunal by reducing its jurisdictional competence by hearing only interstate matters and incapacitating the tribunal by refusing to renew the contract of the tribunal judges.

7.7 AREAS FOR FURTHER RESEARCH

The study further has pointed to indicators of the abuse of powers by SADC Heads of State and Government. Due to their complexity, these issues require more research to find mechanisms which can be employed to control the authority bestowed to the Heads of State within the regional organisation. This abuse of powers was noted when the SADC Heads of State rejected the outcomes of the review panel led by Prof Bartels which confirmed that the SADC Tribunal is properly constituted and it also has jurisdiction to hear or preside over human rights. Secondly, the decision of the SADC Heads of State not to renew or appoint new judges was another form of abuse of power, thus by so doing they indirectly disbanded the tribunal, thus by so doing they knew that it could not form the quorum to hear cases. Thirdly, a moratorium that was passed by SADC Heads of State that the tribunal should not hear new cases was their intention to end the existence of the regional court. Instead of the above, the question is how can this irregular conduct of the SADC Heads of State be ended. With the current state of affairs, is there a way to ensure that should the tribunal be re-established, will it enjoy its independence as a court and what can be done to ensure that this regional court performs its functions without the interference of the SADC Heads of State and Government?

Another issue, which requires further research, is Article 16 (5) of the SADC Treaty which states "*the decision of the Tribunal shall be final and binding*". In *Mike Campbell (Pty) Ltd and Others v Republic of Zimbabwe*, the tribunal issued three judgements in 2007, 2009 and 2010 and they were submitted to SADC Heads of State and Government after the government of Zimbabwe refused to comply with them. A loophole or lacuna identified is that this provision does not outline which specific action should be taken against non-compliant member states. This loophole is being exploited by SADC Heads of State and Government to enable them to make decisions that suit them. Different scholars have articulated the solidarity and sovereignty principles applied by SADC Heads of State and Government, which enables them not to take action against each other or interfere in the domestic affairs of another member state.

Another strategy used by the SADC Heads of State and Government when they enact SADC Protocols, they write provisions in such a way that it they become vague so that they can manipulate the interpretation thereof. A contradiction between Articles 16 (5) and 19 of the SADC Treaty in which the former states, "*The decisions of the tribunal are final and binding*" whilst the latter states "*Except as otherwise provided in this Treaty, decisions of the SADC institutions shall be taken by consensus*". The words "final" and "binding" in Article 16 (5) are just on paper, which means the decisions of the tribunal are subject to scrutiny by SADC

Heads of State and Government. It is noteworthy that more research is required to determine the best practice model from other regional courts around the globe on how they enforce their decisions on member states.

7.9 CONCLUSION REMARKS

The study examines the legal effect of the suspension of the SADC Tribunal and its legal implications to access to justice by individuals and legal persons of SADC member states.²³⁵¹ Furthermore, the study has identified the procedural irregularities in suspending the tribunal by SADC Heads of State and Government. In the main, the non-compliance with the SADC Tribunal decisions by the government of Zimbabwe, which later, resulted in the dismantlement of the regional court by the SADC Heads of State and Government due to their solidarity with President Robert Mugabe.²³⁵²

The dismantlement of the SADC tribunal was done in contravention of the SADC Treaty and the 2000 SADC Protocol on Tribunal. The argument raised by the government of Zimbabwe that the tribunal was not properly constituted and that it does not have jurisdiction over human rights matters is unfounded.²³⁵³ Even though the government of Zimbabwe did not ratify the 2000 SADC Protocol on the Tribunal they have signed it and assigned a judge to the tribunal.

Based on procedural irregularities during the dismantlement of the tribunal by SADC Heads of State and Government, on paper, this regional court is still in existence. This state of affairs gives the citizens in the SADC region to use legal mechanisms and procedures to ensure that this court is re-established. Two court judgements in *Law Society of South Africa and Others v President of the Republic of South Africa and Others*²³⁵⁴, the court dismissed the preliminary objection on an important principle of international law that a party that has signed but to not yet ratified a treaty, is under obligation not to defeat the purpose and object of that treaty. In practice, if South Africa has merely signed the 2014 Tribunal Protocol but not ratified it, it would still be obliged not to act contrary to the provisions of the 2014 Tribunal Protocol. It is also argued that the same principle applies to the government of Zimbabwe whose President was present when he declared the 2000 SADC Protocol on Tribunal operational, despite the ratification of the legal instrument. The government of Zimbabwe cannot make a turn that the SADC Tribunal was not properly constituted because the Protocol on Tribunal was not ratified. Based on the argument in the *Law Society of South Africa and Others v President of the*

²³⁵¹ *Mike Campbell (Pty) Ltd and Others v Government of the Republic of Zimbabwe*

²³⁵² *Mike Campbell (Pty) Ltd and Others v Government of the Republic of Zimbabwe*

²³⁵³ *Mike Campbell (Pty) Ltd and Others v Government of the Republic of Zimbabwe*

²³⁵⁴ [20382/2015] [2018] ZAGPPHC 4; [2018] 2 All SA 806 (GP)

*Republic of South Africa and Others*²³⁵⁵, the government of Zimbabwe is bound to comply with the decision of the tribunal. This argument also decides the SADC Heads of State and Government to dismantle the SADC Tribunal more political than legal.²³⁵⁶ The tribunal was properly constituted, thus the decision to disband it was illegal, hence in the *Tanganyika Law Society and Others v Minister of Foreign Affairs and International Cooperation of the United Republic of Tanzania*²³⁵⁷, the applicants were aggrieved by the suspension of the SADC Tribunal. They approached the court on the basis that their government was responsible for their conduct for the conduct which resulted in the suspension of the operation of the SADC Tribunal.²³⁵⁸ They requested the court to hold their government accountable under the Tanzanian Constitution, the SADC Treaty, and other international law, and human rights norms because their act violated the SADC Treaty, the guaranteed right to access to justice and the principles of democracy, human rights and the rule of law as articulated in Article 4 (c) of the SADC Treaty.²³⁵⁹ In light of these circumstances, the applicant sought the court to order the government to "withdraw its signature and to denounce" the 2014 Tribunal Protocol because it conflicted with the provisions of the Constitution of Tanzania.²³⁶⁰ The actions of the Tanzania Law Society made a plea to the court to order the government "to put in place mechanisms to ensure that Tanzania have access to the SADC Tribunal in compliance with the provisions of the Constitution."²³⁶¹ These court cases point to the abuse of powers by SADC Heads of State and Government by dismantling the tribunal without adhering to legal prescripts, namely the SADC Treaty and 2000 SADC Protocol on Tribunal

The re-establishment of the SADC Tribunal can be attained if the Law Societies within the SADC region follow the example done by the Law Societies in South Africa and Tanzania of approaching courts of law in the respective countries to challenge to conduct of their heads of state in participating in an illegal dismantling of the Tribunal.

²³⁵⁵ [20382/2015] [2018] ZAGPPHC 4; [2018] 2 All SA 806 (GP)

²³⁵⁶ *Law Society of South Africa and Others v President of the Republic of South Africa and Others*

²³⁵⁷ No. 20282 of 2015

²³⁵⁸ *Tanganyika Law Society and Others v Ministry of Foreign Affairs and International Cooperation of the United Republic of Tanzania*

²³⁵⁹ *Tanganyika Law Society and Others v Ministry of Foreign Affairs and International Cooperation of the United Republic of Tanzania*

²³⁶⁰ *Tanganyika Law Society and Others v Ministry of Foreign Affairs and International Cooperation of the United Republic of Tanzania*

²³⁶¹ *Tanganyika Law Society and Others v Ministry of Foreign Affairs and International Cooperation of the United Republic of Tanzania*

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